

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

% **Judgment reserved on: 27.02.2019**
Judgment delivered on: 01.07.2019

+ **W.P.(C) 1738/2017**

UNION OF INDIA & ANR

..... Petitioners

Through: Mr. Ravi Prakash, CGSC and
Mr. Farman Ali, Mr. Kunal Bhargava
and Mr. Akash Mohan, Advocates.

versus

HIMANSHU PRABHAKAR & ORS

..... Respondents

Through: Mr. V.S.R. Krishna, Advocate for the
respondents No.1, 11, 12, 40, 57 &
61.

+ **W.P.(C) 4711/ 2017**

HARVESH KUMAR & ORS

..... Petitioners

Through: Mr. Ankur Chhibber, Advocate

versus

HIMANSHU PRABHAKAR & ORS

..... Respondents

Through: Mr. V.S.R. Krishna, Advocate for
respondent No.1.
Mr. Prashanta Verma, Senior Central
Govt. Counsel and Ms. Shalu
Goswami, Advocate for respondent
No.100/ UOI.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

VIPIN SANGHI, J.

1. The aforesaid writ petitions have been preferred by the petitioners to assail the common order dated 16.09.2016 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in O.A. No. 2883/ 2015 and O.A. No. 2891/ 2015 respectively, preferred by the respondents/ original applicants. The Tribunal has allowed the said Original Application and directed the petitioner- UOI to declare the LDCE results of the applicants within 90 days from the date of receipt of the certified copy of the order.

2. The respondents/ original applicants are arrayed as respondents in both these writ petitions. The respondents/ original applicants as well as the petitioners in **W.P. (C) 4711/ 2017**, on the date of filing of the O.A., were holding the substantive post of Assistants, or a post in the equivalent grade, in the Central Secretariat Service (CSS). The respondents/ original applicants became Assistants as direct recruits through Combined Graduate Level Examination, 2010 result of which were declared on 07.01.2011. They shall be referred to as the Direct Recruits. They joined the services thereafter, from 30.05.2011 onwards. The petitioners in **W.P.(C.) No.4711/2017**, on the other hand, were Upper Division Clerks (UDC's) who came to be promoted as Assistants in the CSS vide DoP&T O.M. dated 05.08.2010 on *ad-hoc* basis, & were brought in select list 2010 of Assistant's vide O.M. dated 10.09.2013. They shall be referred to as the Promotees. The Direct Recruits were shown above the Promotees in the seniority list of the Assistants Grade of the CSS.

3. The CSS is governed by the Central Secretariat Service Rules, 2009, (hereinafter referred to as the '**CSS Rules, 2009**'). The CSS Rules, 2009 have been framed by the President in exercise of the powers contained in proviso to Article 309 of the Constitution. Some of the relevant provisions contained in these Rules are the following:

"2. Definitions-

- (a)
- (b)
- (c) **"approved service "** in relation to any grade means;
 - (i) **in respect of an officer recruited directly to that grade, period or periods of regular service rendered in that grade, including period or periods of absence during which he would have held a post on regular basis in that grade but for his being on leave or otherwise not being available to hold such post, from the first day of July of the year, following the year in which the examination for direct recruitment was held;**
 - (ii).....

x x x x x x x x x

12. Recruitment to the Section Officers' and the Assistants' Grade.-

(1) SECTION OFFICERS GRADE

- (a) **The regular vacancies in the Section Officers' Grade shall be filled fifty percent through Limited Departmental Competitive Examination and fifty percent by appointment of persons included in the select list for the Section officers' Grade.**
- (b) **The rules for the Limited Departmental Competitive Examination referred to above shall be determined by regulations made by the Department of Personnel and Training and the allotment of candidates from the result of this**

examination to the various cadre units shall also be made by that department.

x x x x x x x x x

23. Power to relax- *Where the Central Government is satisfied that the operation of any of these rules causes undue hardship in any class or category of persons or posts, it may dispense with or relax the requirement of the rule to such extent and subject to such conditions, as it may consider necessary.*

24. Repeal and savings- *(1) The Central Secretariat Service Rules, 1962 and regulations framed there under, as amended from time to time, in force before the commencement of these rules are hereby repealed subject to any notification, rule, regulation, order or notice issued, or any appointment or declaration made, or exemption granted or any penalty or fine imposed or any other thing done or any other action taken under the previous rules or regulations and in force immediately before such commencement shall so far as it is not inconsistent with the provisions of these rules, be deemed to have been issued, made, granted, done or taken under the corresponding provisions of these rules". (emphasis supplied)*

4. In view of Rule 12(1)(b) of the CSS Rules, 2009, for appointment to the post of Section Officers through LDCE, the DoP&T framed the *Central Secretariat Service Section Officers' Grade (Limited Departmental Competitive Examination) Regulations, 2010* (hereinafter referred to as the '**LDCE Regulations, 2010**').

5. The UPSC published the Rules for holding the examination for promotion of Assistants to the post of Section Officers through a Limited Departmental Competitive Examination in the CSS on 21.07.2015 (hereinafter referred to as the '**LDCE Examination, 2015**'), wherein, the eligibility criteria to participate in LDCE Examination, 2015 was stipulated, *inter alia*, as: (i) not less than 5 years approved service, and; (ii) shall also

have earned at least four Annual Performance Appraisal Reports in the Assistants Grade of the CSS.

6. The Direct Recruits, admittedly, did not fulfill the criteria which required them to mandatorily have 5 years of approved service in the Assistants Grade of CSS. Thus, they were debarred from participating in the aforementioned LDCE Examination, 2015. The Promotees, however, who were junior to the Direct Recruits in the Assistants Grade, had the requisite approved service of 5 years and were, thus, allowed to participate in the LDCE Examination, 2015. The Direct Recruits made several representations seeking relaxation of the eligibility criteria to participate in the LDCE Examination, 2015 for the reason that that their juniors were eligible to participate. However, the petitioner- UOI took the stand that the Direct Recruits are not entitled to seek relaxation of having 5 years approved service, as a matter of right. The petitioner-UOI refused to grant the said relaxation.

7. Being aggrieved by the stand taken by the petitioner-UOI – on the ground that promotion of their juniors in the Assistant grade i.e., the Promotees would create an anomalous situation and, in turn, make the senior Direct Recruit Assistants junior to the Promotees in the next promotional grade of Section Officers, the Direct Recruits preferred the Original Applications i.e. O.A. Nos. 2883/2015 and 2891/2015 before the Tribunal. By an interim order, the Tribunal allowed the Direct Recruits to provisionally participate in the LDCE. As aforesaid, the Tribunal has finally allowed the aforesaid O.A.'s preferred by the Direct Recruits and directed

the declaration of their results in the LDCE, wherein they participated under the orders of the Tribunal.

8. The Direct Recruits primarily relied upon the DoP&T O.M. dated 25.03.1996, which provided for *“Revision of guidelines for framing/ amendment/ relaxation of recruitment rules- consideration of seniors in cases where juniors are being considered”* to contend that they should be given relaxation of the criteria of having approved service of 5 years, considering the fact that their juniors in the feeder grade of Assistants are eligible to participate in the LDCE for promotion to the posts of Section Officers. The said O.M., in so far as it is relevant, reads as follows:

“The undersigned is directed to refer to para 3.1.2 of part.III in this Department in OM No.AB/14017/12/87-Estt(RR) dated 18th March, 1988 wherein it was suggested that a suitable “Note” may be inserted in the Recruitment Rules to the effect that seniors who have completed the probation period may also be considered for promotion when their juniors who have completed the requisite service are being considered.

2. In the light of the Supreme Court judgement in R.Prabha Devi and Ors. versus Government of India and Ors. in Civil Appeals No.2040-42 of 1987 decided on March 08, 1988 on the judgment and order dated February 11, 1986 of the Central Administrative Tribunal, New Delhi and in continuation of OM of even number dated 23.10.1989 Government have decided to amend Para 3.1.2 of Part-3 in this Department’s OM No. AB-14017/12/87-Estt(RR) dated 18th March, 1988. Accordingly, the last sentence of para 3.1.2 will stand amended to read as under:-

“To avoid such a situation the following note may be inserted below the relevant service rules/column in the schedule to the Recruitment Rules:-

“Where juniors who have completed their qualifying/ eligibility service are being considered for promotion, their

seniors would also be considered provided they are not short of the requisite qualifying/ eligibility service by more than half of such qualifying/ eligibility service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade alongwith their juniors who have already completed such qualifying/ eligibility service”.

3. Consequently Para 3.1.2 of this Department’s O.M. No. AB-14017/12/87- Estt.(RR) dated 18th March, 1988 will also be amended with the addition of the following sentence after third sentence of para 3.1.2 ibid.

“The administrative Ministries/ Departments are also empowered to amend all the service rules/recruitment rules to incorporate the “Note” as amended above.”

Sd/-

(T.O.Thomas)

Under Secretary to the Government of India”

(emphasis supplied)

9. The Direct Recruits further argued that the CSS Rules, 2009 empowers the competent authority to relax the eligibility criteria of having 5 years approved service, and that relaxation has been granted several times in the past. In this regard, they placed reliance on the DoP&T order dated 22.11.2013, whereby the DoP&T had granted relaxation of the eligibility criteria i.e., 3 years approved service to the Private Secretaries, who had participated in LDCE for promotion to the post of Personal Assistant. The relevant extract of the order dated 22.11.2013 reads as follows:

“

ORDER

Whereas the Central Secretariat Stenographers’ Service Private Secretary Grade (Limited Departmental Competitive Examination) Regulations, 2010 provide that for being eligible

to appear in the Private Secretary Grade (Limited Departmental Competitive Examination) any regular Personal Assistant of the Central Secretariat Stenographers' Service (CSSS) possessing a Bachelor's Degree from a recognized University, on the crucial date, inter-alia, should satisfy the following condition :-

"He/She should have rendered not less than three years' of approved and continuous service in the grade.

Provided that if he/she had been appointed to the Personal Assistant of the Central Secretariat Stenographers' Service on the results of the competitive examination, including a Limited Departmental Competitive Examination, such an examination should have been held not Less than three years before the crucial date and he/she should have rendered not less than two years approved and continuous service in that grade".

2. And whereas, in pursuance to the notice for the Combined Section Officers/Stenographers' (Grade- B/Grade-I) Limited Departmental Competitive Examination (LDCE) 2012 & 2013, representations from PAs of CSSS appointed to the grade through LDCE mode were received in this Department seeking relaxation in the eligibility criteria to appear in the Private Secretary Grade Limited Departmental Competitive Examination, 2012 and 2013.

3. And whereas, on examination of the representations it was observed that the LDC Examination 2009 and 2010 for promotion to the grade of PAs were conducted by the Staff Selection Commission on 5th July, 2009 and 4th July, 2010 respectively. The crucial date for counting of three years of length of service for eligibility criterion for PS Grade LDCE, 2012 and 2013 being 1st July, 2012 and 1st July, 2013 respectively, the PAs appointed through LDCE mode on the basis of the said examinations are thus not eligible for appearing in the PS Grade LDCE 2012 and 2013.

4. And whereas, it was further observed that the PAs appointed to the Grade through Seniority Quota for SL Years 2009 and 2010 are eligible as per the provision for appearing in the PS grade LDC Examination 2012 and 2013 whereas the

PAs of 2009 and 2010 appointed through LDCE mode do not fulfill the said eligibility criteria despite some of them being placed higher in the ranking in the Select Lists, 2009 and 2010 of PA Grade. It was noted that the said provision in eligibility criterion of the said examination unduly places the PAs who have been appointed as regular PAs through the mode of LDC Examination of 2009 and 2010 at disadvantage.

5. And Now, therefore, it has been decided in consultation with the UPSC, as provided under Rule 23 of the Central Secretariat Stenographers' Service Rules 2010, to give one time relaxation in the condition relating to the eligibility criterion of regular Personal Assistants appointed through LDCE, contained in the Regulation 4 (i) of Central Secretariat Stenographers' Service Private Secretary Grade (Limited Departmental Competitive Examination) Regulation, 2010, for appearing in the Private Secretary Grade LDCE, 2012 and 2013 of CSSS. Consequently regular PAs of CSSS appointed through the results of LDCE for the years 2009 and 2010 will be eligible to appear in the Combined Section Officers/Stenographers' (Grade-B/Grade-I) Limited Departmental Competitive Examination 2012 & 2013 (Category —IV, PS Grade of CSSS) respectively to be conducted by UPSC."

10. On the other hand, the petitioner- UOI and the Promotees contended that the O.M. dated 25.03.1996 is inapplicable to the present case, since it pertains to the case of 'promotion', whereas, the present case relates to holding of a LDCE. They contended that the said O.M. will not apply in the present case, as LDCE is not promotion. They further argued that the relaxations given in the past – vide order dated 22.11.2013, was a one-time measure taken by the government in the special facts of that case, and cannot be taken as a precedent in every future case. The government would have to take a conscious decision on each occasion, when relaxation of the Recruitment Rules is sought – whether, or not, to grant it. They further

argued that there was no challenge to the LDCE Regulations, 2010, which do not contain the power of relaxation. Thus, the Direct Recruits are not entitled to the said relaxation as a matter of right. The jurisdiction of the Tribunal to interfere with the administrative decision taken by the government – not to relax the Recruitment Rules, was also challenged.

11. The Tribunal while allowing the Original Application held that the claim of the Direct Recruits was fair and justified. It held that seniors should be given a chance to appear in the LDCE, even if they do not possess the required approved service, provided they have completed a minimum period of service. The Tribunal further held that the Direct Recruits should not be deprived of the opportunity of participating in the LDCE Examination, 2015 merely because they came as Direct Recruits, and not as Promotees. The relevant extract from the impugned order reads as follows:

“11. The fundamental issue before us is that both the applicants and the private respondents are Assistants or in the equivalent grade. The applicants are above the private respondents being Direct Recruits and the private respondents being Promotees. The Regulations ibid laid down the minimum eligibility criteria of five years ‘approved service’ in the Assistant Grade and, therefore, while the juniors qualified having more than five years, the seniors do not qualify because their ‘approved service’ in the grade of Assistant is less than five years. From the DoP&T Circular of 1996, it becomes clear that in case of promotion the provisions have been made by the Government for relaxation of eligibility criteria of five years ‘approved service’ in case the juniors are eligible and the seniors are not eligible for promotion. The contention of the learned counsel for the respondents is that since the word used is ‘promotion’ clearly it does not include LDCE.

12. On the contrary, the learned counsel for the applicants states that whether it is by means of seniority or senioritycum-

merit or LDCE, the movement of an employee from the level of Assistant to the level of Section Officer would indeed be a 'promotion' as opposed to 'direct recruitment'.

13. We are of the view that the word 'promotion', as mentioned, should be interpreted exactly as intended in the Circular of 1996 i.e. promotion whether on seniority basis or LDCE or otherwise as opposed to direct recruitment. Therefore, we reject this contention of the respondents.

14. As regards the DoP&T order dated 22.11.2013 whereby relaxation has been granted by the Government in the case of CSSS Private Secretary Grade (Limited Departmental Competitive Examination) Regulation, 2010, mere reading of that order would make it clear that the principle on which such relaxation was given (may be as a one-time measure) is the same that the seniors should get chance to appear in the examination even if they do not have the required approved service, provided they have completed a minimum period of service. It is quite clear that the Government while issuing these orders had kept in mind the fact that the seniors should not be deprived of the opportunity merely because they came as Direct Recruits later and the opportunity be given only to Promotees.

15. (sic 16.) We are convinced that the claim of the applicants is quite fair and justified. The OA is, therefore, allowed and the respondents are directed to declare the results of the applicants within a period of 90 days from the date of receipt of a certified copy of the order. No costs."

12. The relevant provisions, contained in the **LDCE Regulations, 2010** notified vide Gazette of India Notification G.S.R.852 (E) dated 21st October, 2010, providing the conditions of eligibility for promotion to the post of Section Officers read as follows:

"2. Definitions:- (1) *In these regulations, unless the context otherwise requires,-*

(a) "crucial date" means the 1st day of July of the year in which the examination is held;

(b) “examination” means a limited departmental competitive examination held by the Commission for making additions to the Select List for the Section Officers’ Grade;

x x x x x x x x x

4. Conditions of eligibility.- *Any officer of the Assistants’ Grade of the Central Secretariat Service, or of Personal Assistants Grade (Stenographer Grade ‘C’) of the Central Secretariat Stenographers Service possessing a Bachelor’s Degree of a recognized university or equivalent, who, on the crucial date, satisfies the following conditions, shall be eligible to appear at the examination:-*

(1) He shall have rendered not less than five years approved service and shall also have earned at least four Annual Performance Appraisal Reports in the Assistants Grade of the Central Secretariat Service or Personal Assistants’ Grade of Central Secretariat Stenographers’ Service.

2.

"

(emphasis supplied)

13. The submission of Mr. Ravi Prakash, learned counsel for the petitioner-UOI is that the Tribunal has not applied its mind to the Statutory Rules and Regulations placed before it while passing the impugned order. The Tribunal has, by stepping into the shoes of the Central Government, itself granted relaxation of the Recruitment Rules. He submits that as per Rule 4 of LDCE Regulations, 2010, the eligibility criteria laid down for an officer of the Assistant Grade to be eligible to participate in the LDCE Examination for promotion as Section Officer is of having approved service of not less than 5 years, which the Direct Recruits did not have.

14. Mr. Ravi Prakash further submits that the power of granting relaxation of the aforesaid Rule/ Regulations is vested in the Central

Government by virtue of Rule 23 of CSS Rules, 2009. He submits that as per Rule 23 of CSS Rules, 2009, the Central Government may relax the rules, the operation of which causes any undue hardships to any class or category of persons or posts. He submits that it is for the Central Government to assess the hardship, and the Tribunal could not have interfered with the subjective assessment made on objective considerations by the Central Government. He submits that the LDCE Examination, 2015 was being held for nine different services, and granting age relaxation to the Direct Recruits was unfair to others. He further submits that Rule 4 of the LDCE Regulations, 2010, does not cause any undue hardship to the Direct Recruits, in the light of the decision of the Supreme Court in ***R. Prabha Devi v. Government of India***, (1988) 2 SCC 233; and ***Palure Bhaskar Rao Etc. Etc v P. Ramaseshaiah & Ors. Etc.***, (2017) 5 SCC 783.

15. Mr. Ravi Prakash submits that the Central Government had taken a conscious decision that the Direct Recruits do not deserve any relaxation and its decision should not have been interfered with by the Tribunal, unless the Tribunal came to a finding that the said refusal was arbitrary or whimsical. Even if the Tribunal was of the view that the matter required reconsideration, the Tribunal should have directed the petitioner U.O.I to reconsider the same. He places reliance on ***Government of Orissa & Anr. V. Hanichal Roy & Anr.***, (1998) 6 SCC 626, in this regard. The laying down of qualification and eligibility service falls within the government's prerogative, and the power of judicial review should not be exercised in such cases. On this aspect, reliance is placed upon ***P.U. Joshi and Ors. v. Accountant General, Ahmedabad and Ors.***, (2003) 2 SCC 632.

16. Mr. Chhibber while adopting these submissions, also argued that the power of relaxation is contained in the CSS Rules, 2009 and not in the LDCE Regulations, 2010 which are not under challenge. He submits that reliance placed by the Tribunal on the DoP&T O.M. dated 25.03.1996 is incorrect in as much, as, the said circular is not applicable to the Direct Recruits. He submits that the said O.M. was issued prior to the framing of the CSS Rules, 2009 and LDCE Regulations, 2010. Yet the framers of the Recruitment Rules did not consider it appropriate to incorporate the 'note' as suggested by the O.M. dated 25.03.1996 while framing the Recruitment Rules. The O.M. cannot alter the subsequently framed statutory rules and regulations. On the contrary, he submits, by virtue of Rule 24 of the CSS Rules, 2009, the O.M. dated 25.03.1996 is deemed to have been repelled.

17. Our attention has also been drawn to the O.M. dated 24.09.1997 issued by the DOP&T, wherein the DOP&T once again requested the Ministries *"to take a conscious decision to amend the relevant Recruitment Rules/ Service Rules where such a provision has not been incorporated in the light of the foregoing clarification(s). This would help in the maintenance of proper cadre management and obviate the need for seeking relaxation of Recruitment Rules/ Service Rules"*. However, in the CSS Rules 2009, or in the LDCE Regulation, 2010, no such provision for relaxation was consciously inserted. He submits that the conscious decision of the framers of the Rules/ Regulation while framing Recruitment Rules should be respected, and an O.M. cannot whittle down the Recruitment Rules. In this regard, he places heavy reliance upon the decision in ***Union of India & Ors. v. Shyam Sunder Sharma & Ors.***, 2017 SCC OnLine Del 10677.

18. He further submits that reliance placed by the Tribunal on the DoP&T order dated 22.11.2013 is misplaced, as the same cannot be cited as a precedent. The relaxation granted vide this order pertained to a peculiar situation of hardship, and the same is not applicable to the present case.

19. On the other hand, Mr. Krishna, learned counsel for the Direct Recruits supports the view of the Tribunal in the impugned order. He submits that the Direct Recruits were entitled to grant of relaxation in the prescription of minimum approved service for the LDCE, since it would be unjust and unfair to them as their juniors i.e., the Promotees would be considered for promotion to the next promotional post, while they were sought to be excluded.

20. Mr. Krishna submits that the power vested in the Central Government under Rule 23 of CCS Rules, 2009, is a power coupled with the duty to act in a way to ensure fairness. He submits that the failure of the Central Government to grant relaxation to the respondents/ Direct Recruits was unfair, and the Tribunal has only removed that unfairness.

21. He submits that the DoP&T OM's dated 25.03.1996 and 24.09.1997 show that the Central Government realized the injustice that would be caused to the seniors in the cadre who, under the Recruitment Rules, are not qualified for consideration for promotion/ LDCE while their juniors are, and with a view to tide over the same, after the decision of the Supreme Court in ***R Prabha Devi*** (supra), “to avoid such a situation”, the OM dated 25.03.1996 virtually directed the insertion of the appropriate clause in the Recruitment Rules. This insertion reads:

“Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying/eligibility service by more than half of such qualifying/eligibility service or two years, whichever is less, and have successfully completed probation period for promotion to the next higher grade along with their juniors who have already completed such qualifying/eligibility service”

22. Similarly, the OM dated 24.09.1997 shows that for purpose of *“maintaining the seniority in an organized service/ post as far as possible”* and to tide over the judgment of the Supreme Court in **R. Prabha Devi** (supra), the Ministries were requested to take a conscious decision to amend the relevant recruitment rules/ service rules since that would *“help in the maintenance of proper cadre management and obviate the need for seeking relaxation of recruitment rules/ service rules”*.

23. Mr. Krishna submits that the petitioner–UOI did not urge any of the pleas, as urged by them before this Court, and the only plea canvassed before the Tribunal was that LDCE does not tantamount to promotion. He submits that this plea has been rightly rejected by the Tribunal.

24. He further submits that the reliance placed by the petitioner on **Shyam Sundar Sharma** (supra) is misplaced, in as much, as, in that case, the issue before the court was completely different than the issue raised in the present case. He submits that in **Shyam Sundar Sharma** (supra), the court was considering para 3.1.3 of the DoP&T order dated 25.03.1996, which deals with the situation where the eligibility conditions for promotion, prescribed in the existing rules, are enhanced. He submits that the same is not the issue under consideration in these present writ petitions. Thus, this decision is not applicable in the present case.

25. Mr. Krishna further submits that a bizarre and incongruous situation would arise, if juniors will be considered for promotion but the seniors will not be. He submits that the seniors have to be mandatorily considered for promotion when their juniors are considered. Reliance is placed upon the decision of the Supreme Court in *Union of India v. Sadhana Khanna*, (2008) 1 SCC 720.

26. He submits that the power to give relaxation must be construed liberally. Relaxation must be given in cases like the present, so as to mitigate hardship and to meet special and deserving situations. He further submits that a narrow construction of Rule 23 would unjustly deny the seniors a fair chance of being considered for promotion through the LDCE, with their juniors. Reliance is placed upon *Ashok Kumar Uppal & Ors. State of J & K*, (1998) 4 SCC 179.

27. Mr. Krishna has placed heavy reliance on the decision of the Full Bench of the Tribunal in *Mrs. Garima Singh Vs. Union of India & Others*, O.A. No.3278/2010, decided along with several other Original Applications on 09.05.2011. Mr. Krishna submits that in this case as well, the Union of India had refused to grant relaxation under Rule 25(a) of the Central Secretariat Service Rules 1962 for the same purpose, namely, to enable the seniors in the cadre to participate in the process for promotion, as they were short of qualifying service for periods upto two years, when their juniors – who had the qualifying service, were being considered for promotion. Rule 25(a) contained the power to relax the 1962 Rules. The power of relaxation could be exercised wherever the Central Government was of the opinion that it is necessary or expedient to do so in respect of any class or category

of persons or posts. The said Rule 25(a) of the 1962 Rules is similar to Rule 23 of the CSS Rules, 2009, with the difference that Rule 23 introduces the guideline for the exercise of the power of relaxation, i.e. to mitigate undue hardship to any class or category of persons or posts.

28. The Full Bench of the Tribunal placed reliance, *inter alia*, on the OM's dated 25.03.1996 and 24.09.1997 and observed as follows:

*“20. What clearly emerges is that if the OM's are not to be read as exemption under rule 25(a) of the Rules of 1962, although not so specifically stated, as surely they are applicable to all services under the Central Government, **the fundamental right of a senior for even consideration for promotion would be thwarted. It would be a case of complete discrimination between Central Government employees of different departments.** Note as regards consideration of seniors without their even having the eligibility period, has been inserted in number of services, including the Indian Revenue Service and the Indian Ordnance Factories Service. The exemptions have been granted to members of the Central government services in other departments. **If, therefore, the OM's are not treated as exemptions to the limited period mentioned therein, which would be, as per the OM dated 25.3.1996, only two years, which is also subject to the incumbent having completed the probation successfully, it would be discrimination which is frowned upon by Article 14 of the Constitution of India.** Thirdly, OM dated 25.3.1996 clearly states that if the note is not inserted, the matter may have to be taken up for exemption each time. Fourthly, as regards other services and in particular, the Indian Statistical Service, exemption has indeed been granted. Lastly, the circulars having been issued more than two decades ago, which are in nature of directives and cannot be treated as a dead inert affair or a waste paper. The Government, in any case, cannot be permitted to turn around and say that simply because its slackness, it has been unable to carry out the necessary amendments in the rules, and, therefore, the OM's shall not be binding upon it. Such a stand,*

particularly when the note envisaged under the OMs for amendment has been added in other services of the Government, cannot be countenanced. On one hand, the OMs having not been inserted in the rules, it may legally be submitted that the same would be of no use and consequence, whereas, on the other hand, the Government cannot be permitted to deny their existence, nor backtrack from it, particularly in the manner as mentioned above, when such note has been inserted in other service rules, and where not so inserted, the relaxation has been granted. **The only harmonious way to reconcile this situation is to treat the OMs as relaxation. The OMs being directions across the board relating to all services under the Government of India, have to be treated as general directions and not as if orders passed under the rules relating to relaxation.** Incidentally, in the present case, all parameters as contained in rule 25(a) of the Rules of 1962 dealing with relaxation in the Rules are met. The rule aforesaid empowers the Government to relax the provisions of the Rules in consultation with UPSC. We reserved these matters for judgment and while preparing the same, vide order dated 26.4.2011 we required the parties to clarify as to whether the OMs referred to above came into being in consultation with UPSC. In that regard, it is urged by the learned counsel representing the applicant that even though, copies of all OMs were sent to UPSC, but insofar as the OM dated 24.9.1997 is concerned, same came into being in consultation with UPSC, as is clearly recorded therein. This argument is not controverted during the course of arguments. The learned counsel would also contend that the word used in rule 25(a) is 'consultation' and not 'concurrence'. It is urged that consultation with UPSC, in any case, would not be mandatory, and for the contention aforesaid reliance has been placed upon the judgment of the Hon'ble Supreme Court in *State of Uttar Pradesh v Manbodhan Lal Srivastava* [AIR 1957 SC 912], wherein it has been held that the provisions of Article 320 (3) (c) of the Constitution are not mandatory and non-compliance with those provisions would not afford cause of

action to a civil servant in the court of law.” (emphasis supplied)

29. Mr. Krishna submits that the said decision of the Full Bench of the Tribunal was assailed before this Court in W.P.(C.) Nos.7619/2011 & 2176/2012 by the Union of India. However, the Union of India unconditionally withdrew the said writ petitions on 29.05.2015, which means that the Union of India has accepted the principles laid down by the Tribunal in ***Mrs. Garima Singh*** (supra).

30. Mr. Krishna, therefore, submits that it is not open to the Union of India to now take a different stand. He submits that several other writ petitions preferred by the Union of India have been dismissed by this Court on the premise that the writ petition preferred in the case of ***Mrs. Garima Singh*** (supra) had been withdrawn. Reference is made to the order passed by this Court on 29.10.2018 in ***Union of India & Others Vs. Rajeev Kumar & Others***, W.P.(C.) No. 7743/2018.

31. We have heard learned counsels for the parties, perused the impugned order, and the record. We have given our thoughtful consideration to the matter.

32. The Direct Recruits had preferred the O.A. to seek a direction to the petitioner, i.e. Union of India to relax the rules framed for the Combined Section Officer/Stenographer (Grade-B) LDCE for the year 2015, to the extent of considering the “approved service” of the applicants/ Direct Recruits from the year of their direct recruitment examination, instead of subsequent year. Thus, the relief sought by the Direct Recruits was to seek a direction to the petitioner/U.O.I. to grant relaxation in terms of Rule 23 of

CSS Rules, 2009. The relevant extract from the relief clause contained in O.A. No.2891/2015 reads as follows:

“a) direct the Respondents to reckon the approved service of the Applicants from 1st July of the year of examination i.e., 01.07.2010;

b) direct the Respondents to grant relaxation in terms of approved service for making them eligible for the Combined Section Officers/ Stenographers’ (Grade- ‘B’/ Grade-I) Limited Departmental Competitive Examination, 2015;...”

33. The Direct Recruits did not seek a direction from the Tribunal to grant age relaxation to them, on its own, as actually directed by the Tribunal vide the impugned order.

34. Grant of relaxation of the Recruitment Rules is a matter which falls squarely within the domain of the executive to consider and decide upon in the given facts and circumstances of the case under consideration. Grant of relaxation – in exercise of power to relax, in one situation, cannot be treated as a binding precedent, and does not estopp the government from denying the prayer for relaxation of the rules at any subsequent stage. The grant of relaxation – or refusal thereof, is not a matter which the Tribunal, or the Court, would itself take a decision on. Neither the Tribunal, nor the Court, can step into the shoes of the competent/ executive authority and, of itself, grant relaxation of the Recruitment Rules by recording its conclusion that it is satisfied that such relaxation is justified.

35. If a person is aggrieved by the exercise of its discretion by the executive, in refusing to grant relaxation of the Recruitment Rules, he may assail the same before the Tribunal, or the Court, and the limited

examination that the Tribunal, or the Court, may undertake would be in judicial review of the decision making process, and not the decision itself. The wisdom of the decision making authority/ competent authority in the matter of exercise of the discretionary power of relaxation, would not be substituted by the Tribunal, or the Court, with its own wisdom. In **P.U. Joshi** (supra), the Supreme Court observed that:

10. “.....Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and **it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State**.....” (emphasis supplied)

36. In **Hanichal Roy** (supra), the Tribunal had allowed the Original Applications of the Respondents and directed the government to grant relaxation of the Recruitment Rules and regularize the services of the Respondents. The Supreme Court did not agree with this approach of the Tribunal. It observed:

“2. The Rule that is relevant reads thus:

“14. Relaxation.—When the Government are of opinion that it is necessary or expedient so to do, it may by order, for reasons to be recorded in writing, relax any of the provisions of these Rules in respect of any class or category of persons in public interest.”

3. The Rule requires the Government to form the opinion, for reasons to be recorded in writing, that it is necessary or expedient to relax any of the provisions of the Rules in public interest in respect of any class or category of persons. We assume for the purposes of this appeal that the case of the respondents herein falls within a “class or category or persons”, but we do not think that the Tribunal was right in, in effect, relaxing the appropriate rule itself. Having set out the facts, it should have left it to the Government to take the decision under the rule.”

37. A perusal of the impugned decision of the Tribunal shows that the Tribunal has not bestowed its consideration to the issue whether it could, of its own, grant relaxation of the Recruitment Rules to the Direct Recruits, when the petitioner/ Union of India had refused to grant the said relaxation, and the petitioner/ Union of India had taken a stand justifying its refusal to relax the Recruitment Rules for promotion through LDCE to the post of Section Officer in the CSS. The Tribunal proceeds on the basis that the DOP&T OM dated 25.03.1996 mandatorily lays down that, in all cases where juniors are eligible under the Recruitment Rules and seniors are not so eligible for promotion, the Recruitment Rules would stand relaxed, so that the seniors could be considered for promotion.

38. When we read the OM dated 25.03.1996, and also the OM dated 24.09.1997, we do not find a definite and binding direction in the above terms issued by the Central Government, as contended by the Direct Recruits.

39. The OM dated 25.03.1996 was issued in pursuance of the earlier OM dated 18.03.1988. In respect of the OM dated 18.03.1988, it states that Para

3.2.1 of the said OM “*suggested that a suitable ‘Note’ may be inserted in the recruitment rules to the effect that seniors who have completed the probation period may also be considered for promotion when their juniors who have completed the requisite service are being considered*” (emphasis supplied). Thus, from a reading of the O.M. dated 25.03.1996 it appears that so far as the OM dated 18.03.1988 is concerned, the DOP&T, itself understood the same as merely giving a “suggestion” for insertion of a suitable ‘Note’. The OM dated 25.03.1996 then proceeds to notice the decision of the Supreme Court in **R. Prabha Devi** (supra). In the light of the said decision, it states that the Government has decided to amend Para 3.1.2 of Part III of the OM dated 18.03.1988. Para 3.1.2 of the OM dated 18.03.1988 was amended to read:

*“To avoid such a situation the following note **may be inserted below the relevant service rules/column in the schedule to the Recruitment Rules:-***

“Where juniors who have completed their qualifying/ eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying/ eligibility service by more than half of such qualifying/ eligibility service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade alongwith their juniors who have already completed such qualifying/ eligibility service”.

(emphasis supplied)

Thus, once again, we find that even the amended Para 3.1.2 of the OM dated 18.03.1988 only *enabled* the insertion of the relevant clause in the relevant service rules, to permit the seniors – who are short of requisite qualifying/ eligibility service, to participate in the promotion/ selection process along with their juniors who are eligible for such consideration for

promotion, where the shortfall of qualifying/ eligibility service is two years or less. The amended Para 3.1.2 of the O.M. dated 18.03.1988 did not purport to say that the insertion of the aforesaid clause is mandatory; or automatic; or that it shall be deemed to be inserted in the relevant Recruitment Rules.

40. Para 3.1.2 of the OM dated 18.03.1988 was further amended with insertion of the clause, which read:

*“The administrative Ministries/ Departments **are also empowered to amend all the service rules/recruitment rules to incorporate the “Note” as amended above.**”*
(emphasis supplied)

Thus, the administrative ministries/ departments were “*empowered to amend all the service rules/ recruitment rules to incorporate the ‘note’ as amended above*”, and it was left to the concerned administrative Ministries/ Departments to take a decision in that regard, after considering the situation prevailing in the concerned Ministry/ Department.

41. The amended para 3.1.2 of the OM dated 18.03.1988 does not *ipso facto* have the effect of amendment of the service rules/ recruitment rules even without the intervention of the administrative ministries/ departments.

42. Even the OM dated 24.09.1997 directed the ministries “***to take a conscious decision to amend the relevant recruitment rules/ service rules***” (emphasis supplied), where the provision as contained in the ‘Note’, as aforesaid, had not been incorporated. Thus, the OM dated 24.09.1997 fell short of conveying a direction to the ministries/ departments to, peremptorily, incorporate the clause making the otherwise ineligible seniors

in the cadre, eligible for consideration for promotion, when juniors are considered for promotion on account of their being eligible.

43. Aforesaid being the position, the Tribunal, in our view, could not have assumed that the effect of OM's dated 25.03.1996 and 24.09.1997 was to *ipso facto* amend the recruitment rules, which existed when the said OM's were issued.

44. For the sake of argument, even if one were to assume that the then existing Recruitment Rules to the Central Government services stood automatically amended vide OM's dated 18.03.1988, 25.03.1996 and 24.09.1997, the situation in the present case is markedly different, and does not admit of any such assumption. The CSS Rules, 2009 came to be framed much after the Supreme Court rendered its decision in **R. Prabha Devi** (supra); issuance of the OM dated 08.03.1988; issuance of the OM dated 25.03.1996 and; issuance of the OM dated 24.09.1997. Despite the aforesaid legal position being well within the knowledge of the President – who framed the CSS Rules, 2009 in exercise of his powers under proviso to Article 309 of the Constitution, he did not incorporate a clause/ rule providing for consideration of the candidature of any of the seniors in a cadre for promotion – despite them not having the eligibility/ approved service, whenever their juniors in the cadre are considered for promotion on account of their having such qualifying/ eligibility service.

45. We agree with the finding returned by the Tribunal that the recruitment made in the promotional posts in the hierarchy of posts through LDCE is also promotion. It is accelerated promotion. We may refer to the decision of this Court in **Union Of India v. Ravi Kant Sharma & ors.**, 2017

SCC OnLine Del 8563, in this regard. However, that by itself, does not mean that the OMs dated 25.03.1996 and 24.09.1997 vested a right in the Direct Recruits to claim relaxation of Recruitment Rules as a matter of right.

46. In ***R. Prabha Devi*** (supra), the Supreme Court rejected the submission of the Direct Recruits that they being seniors are entitled to be considered for promotion along with their juniors – who had the qualifying services for such consideration, while they did not. The Supreme Court observed:

“15. The rule-making authority is competent to frame rules laying down eligibility condition for promotion to a higher post. When such an eligibility condition has been laid down by service rules, it cannot be said that a direct recruit who is senior to the Promotees is not required to comply with the eligibility condition and he is entitled to be considered for promotion to the higher post merely on the basis of his seniority. The amended rule in question has specified a period of eight years' approved service in the grade of Section Officer as a condition of eligibility for being considered for promotion to Grade I post of CSS. This rule is equally applicable to both the direct recruit Section Officers as well as the promotee Section Officers. The submission that a senior Section Officer has a right to be considered for promotion to Grade I post when his juniors who have fulfilled the eligibility condition are being considered for promotion to the higher post, Grade I, is wholly unsustainable. The prescribing of an eligibility condition for entitlement for consideration for promotion is within the competence of the rule-making authority. This eligibility condition has to be fulfilled by the Section Officers including senior Direct Recruits in order to be eligible for being considered for promotion. When qualifications for appointment to a post in a particular cadre are prescribed, the same have to be satisfied before a person can be considered for appointment. Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfils the eligibility condition prescribed by the relevant rules. A person must be

eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion. Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor it can override it in the matter of promotion to the next higher post. The rule in question which prescribes an uniform period of qualified service cannot be said to be arbitrary or unjust violative of Article 14 or 16 of the Constitution.....” (emphasis supplied)

47. Similarly, in **Palure Bhaskar Rao** (supra), the Supreme Court reiterated its earlier view in **R. Prabha Devi** (supra) in the following words:

“17. Merely because a person is senior, if the senior is not otherwise eligible for consideration as per the rules for promotion, the senior will have to give way to the eligible juniors. The instant case is a classic example for the said principle. The Reserve Sub-Inspectors selected and appointed on transfer as Sub-Inspectors (Civil) carry seniority from the date of appointment as Reserve Sub-Inspectors. But the eligibility for appointment by way of a transfer to the post of Inspector under the A.P. Police Service requires 6 completed years of service after being recruited to the category of Sub-Inspector of Police (Civil). In other words, though the Reserve Sub-Inspector selected and appointed on transfer as Sub-Inspector (Civil) may be seniormost in the category of Sub-Inspector of Police, but still he will be ineligible for consideration of appointment as Inspector in case he does not have 6 years of service as Sub-Inspector of Police (Civil). All his juniors who have 6 years of service as Sub-Inspector of Police and having been recruited to that post from different categories are entitled to steal a march over him as the rule now stands. The rule-making authority in its wisdom has provided such a classification and we do not find any material on record to upset the said wisdom.” (emphasis supplied)

48. Pertinently, it was on account of the decision in **R. Prabha Devi** (supra) that the DOP&T issued the OMs dated 18.03.1988, 25.03.1996 and 24.09.1997, so that, wherever considered necessary, the concerned

ministries/ departments may amend the Recruitment Rules to enable consideration of the candidature of the seniors in the cadre – who did not have the qualifying service, for promotion along with their juniors who had such qualifying service. While issuing the aforesaid OMs, the DOP&T left it to the concerned ministries/ departments to take a conscious decision – whether, or not, to amend the Recruitment Rules. Clearly, the endeavor of the government was not to grant a blanket relaxation of the Recruitment Rules in such like situations, and to always enable the seniors in the cadre to become eligible for consideration for promotion along with their juniors who, under the Recruitment Rules, were eligible. The intent of these O.M.s was only to enable and empower the concerned Ministries/ Departments to amend their Recruitment Rules, as a conscious decision.

49. In *Shyam Sunder Sharma* (supra), we were confronted with a somewhat similar situation. In that case, the original applicants were serving as Deputy Central Intelligence Officers (DCIO/Tech-WT) in the Intelligence Bureau. The next promotional post was that of Asst. Director (Technical) (AD Tech). Under the Recruitment Rules framed on 14.12.2010, promotion to the post of AD Tech could be made from amongst DCIO/Tech-WT with five years service in the grade, *failing which* DCIO (Tech.) from the streams of Wireless Telegraphy, or Technical, or Workshop, or Draftsman, or Overseer with combined service of eight years in the grades of DCIO (Technical) and Assistant Central Intelligence Officer Grade- I (in the streams of Wireless Telegraphy, or Technical, or Workshop, or Draftsman, or Overseer), and possessing two years regular service as DCIO (Tech.). Before the original applicants became eligible for consideration for promotion to the post of AD Tech., the Recruitment Rule

was amended and the “*failing which*” clause was omitted. The original applicants approached the Tribunal and contended that they were entitled to be considered for promotion as AD Tech despite the aforesaid amendment. They claimed eligibility by placing reliance on clause 3.1.3 of the OM dated 25.03.1996 issued by the DOP&T. Clause 3.1.3 of the OM dated 25.03.1996 relied upon by the original applicants in that case, reads as follows:

“3.1.3 Where the eligibility service for promotion prescribed in the existing rules is being enhanced (to be in conformity with the guidelines issues by this Department) and the change is likely to affect adversely some persons holding the feeder grade posts on regular basis, a note to the effect that the eligibility service shall continue to be the same for persons holding the feeder posts on regular basis on the date of notification of the revised rules, could be included in the revised rules.”
(emphasis supplied)

50. The Tribunal allowed the OA and the Union of India assailed the said decision before this court. It was argued on behalf of the Union of India that a conscious decision had been taken by it to amend the Recruitment Rule for the post of AD Tech without granting any protection to the original applicants for consideration of their cases under the pre-existing Recruitment Rules, which contained the “*failing which*” clause. It was also argued that para 3.1.3 of the OM dated 25.03.1996 was only an enabling provision, and it was for the Government to take a call whether, or not, to amend the Recruitment Rules by inserting the “Note”, as aforesaid, in the amended Recruitment Rules, depending on the facts situation of each case. This Court agreed with the aforesaid submissions of the petitioner Union of India. This Court also did not approve of the manner in which the Tribunal

had proceeded to disregard the plain language used in Para 3.1.3 of the O.M. dated 25.03.1993, which was only an enabling provision (since it used the words “*could be included*”). This Court, *inter alia*, observed:

“38. The only short issue which, thus, needs our attention is, as to whether in view of clause 3.1.3 of the OM dated 25.03.1996, it was mandatory for the petitioner to insert the note in the amended RRs, to the effect that eligibility service shall continue to be the same for persons holding feeder post on regular basis on the date of notification of the amended/revised rules, or whether the same was discretionary. The real issue, in our view, is whether the Cadre Controlling Authority has any discretion to examine the desirability of putting such a note in the amended Rules.

*39. The answer to this simple, yet an issue of importance, can be found from the language of clause 3.1.3 of the OM dated 25.03.1996 itself. We find that the clause as noted herein above after laying down the situation in which the ‘note’ can come into play, carefully uses the words ‘**could be** included in the revised rules’ (emphasis supplied). The language is plain and simple, it means only one thing that the ‘note could be included’ and not that the ‘note should be included’. On a plain grammatical interpretation, it is abundantly clear that the phrase ‘could be included’, gives a discretion to the Cadre Controlling Authority to consider-whether, or not, there is any necessity of incorporating the note. This discretion, like any other administrative discretion, has to necessarily be exercised only upon examination of all relevant factors, including the cadre strength, stagnation being faced by the employees, and the availability of eligible employees in the feeder cadre, etc. The expression “could be” does not connote a mandatory obligation. It only enables the Competent Authority and gives him the flexibility to include the note in a deserving situation. There is no reason why we should not apply the first principle of statutory interpretation and adopt the grammatical interpretation of the expression “could be included in the revised Rules”.*

40. We are of the view that once a discretion was vested in the Cadre Controlling Authority, i.e. the petitioner, to decide whether there was any requirement of inserting such a clause in the revised RRs, any considered decision taken by the authority-whether to insert, or not to insert the clause, ought to be respected and should not be lightly interfered with by the courts.

41. Having said so, we proceed to examine as to how the tribunal has dealt with clause 3.1.3 of the OM. On perusal of the same, we are pained to note that such a simple phrase-or if we may say, a word, "could" has been read by the Tribunal to mean "should" and, that too, without any reasoning or justification. Vide the impugned order, the tribunal has replaced the phrase "could be included" by "should invariably be included". This certainly was not permissible. The premise on which the tribunal allowed the OA is not borne out from the clause 3.1.3 and, if we may say so, the tribunal has completely overlooked the provision and proceeded on a factually incorrect premise to hold that as per the OM, the petitioner should have invariably inserted the note. In our view, once the petitioner, as the Cadre Controlling Authority, had exercised its discretion by not including the note in the revised RRs-and that too by giving valid justification for the same, it was not open for the tribunal to have given such a direction to the petitioner to include the note in the revised RRs. The respondents have not even ventured to attack the reasons given by the petitioner for its decision to amend the RRs. The whole purpose would have been defeated if the note-as desired by the respondents, were to be inserted. In any event, the same would have been of no avail for the year 2013-14, as they were not eligible as on 01.01.2013. Even before the commencement of the subsequent year, i.e. 2014-15, the RRs stood amended and the said note, in any event, could not have been inserted for 2014-15 or thereafter. The impugned order passed by the tribunal is, therefore, wholly unsustainable." (underlining ours)

51. We find that the decision in **Shyam Sunder Sharma** (supra) is clearly attracted in the present context, since, like in the case of **Shyam Sunder**

Sharma (supra), in the present case as well, the Tribunal has failed to appreciate the true meaning and purport of the OM's dated 25.03.1996 (whereby clause 3.1.2 of the OM dated 18.03.1988 was amended), as also the OM dated 24.09.1997. The Tribunal has also interfered with the exercise of executive discretion by itself stepping into the shoes of the executive, forgetting its limited role while undertaking judicial review of administrative decision.

52. We have already analyzed these office memoranda in the earlier part of our decision. In our view, the said office memoranda only enable and empower the concerned Ministry/ Department to amend the Recruitment Rules – if it considers it proper to do so, so as to enable the participation of the ineligible seniors in the promotion process, when the juniors who are eligible, are being considered. There is no binding and enforceable rule, or consequent vested right, in the seniors to seek enforcement of the said OM's. Much less is the right of such ineligible seniors to demand relaxation of the Recruitment Rules as a matter of right. The fact that the seniors in the cadre – who do not have the approved service for consideration for promotion, do not have any such vested right is clear from **R. Prabha Devi** (supra) and **Palure Bhaskar Rao** (supra). In the light of the decisions, it cannot be claimed that their exclusion from consideration in the promotion process – since they are not eligible under the Recruitment Rules, leads to undue hardship or unfairness *per se*.

53. Reliance placed by Mr. Krishna on **Garima Singh** (supra) – the decision of the Full Bench of the Tribunal is also misplaced. Firstly, a decision of the Tribunal – even of the Full Bench, does not constitute a

binding precedent for this Court. The writ petition preferred before this court to assail the decision in **Garima Singh** (supra) was dismissed as withdrawn and, therefore, the said decision has not been tested before this court.

54. As noticed hereinabove, the issue of grant of relaxation in the Recruitment Rules in a given case is to be examined on the facts & circumstances of that case, and the grant of such relaxation in a particular case can neither be considered as a binding precedent on the Government, or create an estoppel against the Government. The Government/ concerned Ministry/ Department may grant relaxation in the Recruitment Rules at a given point of time looking to the circumstances then prevailing. However, at a subsequent stage, keeping in view the then prevailing circumstances, it may choose not to grant the same, or some other relaxation, of the Recruitment Rules that may be sought by a group of employees. The fact that the Union of India withdrew its challenge to **Garima Singh** (supra) does not mean that the Union of India is bound to grant relaxation of the eligibility criteria in all such like situations, or that its decision – not to grant relaxation in a given case, would amount to discrimination and violate Article 14 of the Constitution of India. It could well be that even though the Union of India did not, in-principle, agree with the view taken by the Full Bench of the Tribunal in **Garima Singh** (supra), on a further consideration of the facts situation prevailing in that batch of cases, the Union of India relented and in its wisdom decided to accept relaxation of the Recruitment Rules ordered to be granted by the Full Bench of the Tribunal. That does not mean that the Union of India has universally accepted the principle that, in all such cases, relaxation of Recruitment Rules would necessarily have to

be granted – to enable the ineligible seniors to participate in the promotion process when the eligible juniors are being considered. It also does not mean that the Union of India has accepted the finding returned by the Tribunal in **Garima Singh** (supra) that the OMs dated 18.03.1988, 25.03.1996 and 24.09.1997 tantamount to a universal relaxation of all the relevant Recruitment Rules, prevailing in all the Ministries/ Departments of the Central Government. The effect of the withdrawal of the writ petitions preferred from **Garima Singh** (supra) and other connected writ petitions is only that the Union of India may be precluded from denying the relief granted by **Garima Singh** (supra) and the connected writ petitions to the original applicants in those cases. However, the withdrawal of the writ petitions in the case of **Garima Singh** (supra) and other connected writ petition does not mean that the Union of India would not be entitled to assail any other decision rendered by the Tribunal by placing reliance on **Garima Singh** (supra) before this Court. It is not precluded from advancing its submission that **Garima Singh** (supra) has not correctly interpreted the OMs dated 18.03.1988, 25.03.1996 and 24.09.1997.

55. We may also observe that it is only the writ petitions preferred by the Union of India which were dismissed as withdrawn and, premised on the said withdrawal, this Court did not permit the Union of India to pursue W.P.(C.) No.7743/2018 titled **Union of India & Others Vs. Rajeev Kumar & Others**. However, the said withdrawal of the writ petitions in **Garima Singh** (supra) and other related writ petitions, as well as the order passed by this Court in **Rajeev Kumar** (supra) on 29.10.2018 do not bind the Promotees, who have independently assailed the impugned order passed by the Tribunal, since they are adversely affected thereby. Thus, even if, for

the sake of arguments it were to be assumed that the Union of India is precluded from contending contrary to the decision in ***Garima Singh*** (supra) before this Court (which submission we have already rejected), the Promotees are not shut-out or barred from contending so. Thus, the submission that ***Garima Singh*** (supra) has not been correctly decided is open to consideration before this Court, at least, at the instance of the Promotees.

56. Now, coming to the merits of the decision in ***Garima Singh*** (supra), we find that the observations made by the Full Bench of the Tribunal in paragraph 20 of its decision are in the teeth of the decision of the Supreme Court in ***R. Prabha Devi*** (supra) and ***Palure Bhaskar Rao*** (supra). The interpretation of the OMs dated 18.03.1988, 25.03.1996 and 24.09.1997 adopted by the Full Bench of the Tribunal in ***Garima Singh*** (supra) is also contrary to the plain meaning of the words used in these OMs. The interpretation adopted by the Full Bench of the Tribunal in ***Garima Singh*** (supra) also falls foul of our decision in ***Shyam Sunder Sharma*** (supra). We are, thus, of the view that the said decision of the Full Bench of the Tribunal in ***Garima Singh*** (supra) is of no avail to the Direct Recruits.

57. We may now deal with the reliance placed by Mr. Krishna on the decision in ***Sadhana Khanna*** (supra). In ***Sadhana Khanna*** (supra), she was not eligible for inclusion in the select list of 1991 for promotion to the Section Officers Grade since, as on 01.07.1991, she was short of the minimum eligibility service requirement of eight years by 12 days. However, her juniors in the seniority list of Assistants Grade – which was issued on 01.10.1990, were promoted as Section Officers on the basis of the

select list of 1991. These promotions were based on seniority alone. Sadhana Khanna had assailed her supersession before the Tribunal. The Tribunal allowed the Original Application. In paragraph 9 of the decision of the Supreme Court, the Supreme Court noticed the order passed by the Tribunal. The said paragraph 9 reads as follows:

“9. The Tribunal allowed the OA by its order dated 24-9-1999. In the said OA it was held that the Department of Personnel and Training had issued an office memorandum dated 19-7-1989 soon after the decision of this Court in R. Prabha Devi v. Govt. of India [(1988) 2 SCC 233 : 1988 SCC (L&S) 475 : (1988) 7 ATC 63] stating that where the juniors had completed the eligibility requirement of promotion then their seniors will also be considered even if they have not completed the eligibility period.”

58. The writ petition preferred by the Union of India before this Court was dismissed on 21.03.2000. The reasoning given by the Supreme Court to dismiss the Civil Appeal No.8208/2001 preferred by the Union of India is contained in paragraph 11, which reads as follows:

“11. It may be noted that the respondent was offered appointment vide letter dated 5-7-1983 which is after 1-7-1983 from which the eligibility was to be counted. Hence, it is the department which is to be blamed for sending the letter offering appointment after 1-7-1983. In fact, some of the candidates who were junior to the respondent were issued letters offering appointment prior to 1-7-1983. Hence it was the department which is to be blamed for this. Moreover, in view of the office memorandums of the Department of Personnel and Training dated 18-3-1988 and 19-7-1989 the respondent was also to be considered, otherwise a very incongruous situation would arise, namely, that the junior will be considered for promotion but the senior will not.” (emphasis supplied)

59. A perusal of the aforesaid reasoning would show that, firstly, the respondent Sadhana Khanna suffered for no fault of hers, since her letter of appointment was issued belatedly after 01.07.1983, while her juniors had been issued letter of appointment earlier in point of time, i.e. before 01.07.1983. Obviously, Sadhana Khanna could not be non-suited and considered as ineligible on account of belated issuance of the appointment letter, i.e. after 01.07.1983. The Supreme Court thereafter proceeded to give an additional reasoning premised upon the OMs dated 18.03.1988 and 19.07.1989 and observed:

“... .. the respondent was also to be considered, otherwise a very incongruous situation would arise, namely, that the junior will be considered for promotion but the senior will not.”

60. Firstly, we may observe that the Tribunal in that case proceeded on the premise that the OM dated 19.07.1989 lay down, as a matter of policy, that where the junior had completed the eligibility requirement of promotion then their seniors should also be considered, even if they have not completed the eligibility period. The OM dated 19.07.1989 reads as follows:

“DPT OFFICE MEMORANDUM No.22011/7/86-Estt. (D) dt. 19-7-1989.

Subject:- Eligibility of officers to be considered for promotion by DPC – fixing of crucial date of –

The undersigned is directed to say that where the recruitment rules lay down promotion as one of the methods of recruitment, some period of service in the feeder grade is generally prescribed as one of the conditions of eligibility for the purpose of promotion. There are, however, no instructions about the crucial date with reference to which eligibility of Government servants in the feeder cadre should be determined for the purpose of promotion through Departmental Promotion Committees. The matter has been under consideration in this

Department and it has now been decided that while holding DPCs during a year, the crucial dates for determining the eligibility of Officers for promotion would be prescribed as under:-

- (i) Ist July of the year in cases where ACRs are written calendar yearwise; and*
- (ii) Ist October of the year where ACRs are written financial year-wise.*

2. The crucial dates indicated above would be applicable to only such services and posts for which Statutory Service Rules detention order not prescribe a crucial date.

3. These instructions will come into force with immediate effect.

4. In this connection, attention is also invited to para 3.1.2 of this Department's O.M. No. AB-14017/12/87-Estt (RR) dated 18th March, 1988 in which all Ministries/ Departments etc. had been requested to insert a note in the recruitment rules for various posts to the effect that when juniors who have completed the eligibility period are considered for promotion, that seniors would also be considered irrespective of whether they have completed the requisite service provided they have completed the probation period. In order to ensure that seniors who might have joined later due to various reasons are not overlooked for promotion, necessary action for amendment of recruitment rules may please be taken urgently wherever this has not been done by now.

5. These instructions may please be brought to the notice of all concerned including attached and subordinate offices for guidance and compliance." (emphasis supplied)

61. The said OM, firstly, fixes the crucial dates for determining the eligibility of officers for promotion. Paragraph 4 of the said OM sought to remind the Ministries/ Departments to take steps in terms of OM dated 18.03.1988. It did not lay down, as a matter of rule or policy, that all Ministries/ Departments should mandatorily amend their Recruitment Rules.

The interpretation of the OM dated 19.07.1989 was, evidently, not undertaken by the Supreme Court in *Sadhana Khanna* (supra), and it merely proceeded on the basis of the interpretation adopted by the Tribunal. *Sadhana Khanna* (supra) also shows that even though *R. Prabha Devi* (supra) was noticed by it in paragraph 9 of its decision, there was no discussion with regard to the law laid down in *R. Prabha Devi* (supra). The decision in *Sadhana Khanna* (supra) proceeded on the assumption that the OM dated 19.07.1989 mandatorily required the Ministries/ Departments to amend their Recruitment Rules to enable the seniors to be considered for promotion – when they have not completed the approved service, whenever their juniors – who are eligible, are considered. The decision in *Sadhana Khanna* (supra) would be a binding precedent only in that fact situation, and cannot be cited as a precedent in a fact situation where the OMs issued by the Government, from time to time, beginning 18.03.1988, do not mandatorily lay down that all the Ministries/ Departments of the Central Government should necessarily amend their Recruitment Rules so as to render the ineligible seniors as qualified to participate in the promotion process whenever their juniors – who are eligible, are considered. Thus, in our view, the decision in *Sadhana Khanna* (supra) is of no avail to the Direct Recruits.

62. We have already taken note of the principles laid down in *Ashok Kumar Uppal* (supra) with regard to the power to relax the Recruitment Rules and the same, therefore, does not need any specific comment.

63. A perusal of the reply filed by the petitioner Union of India in the Original Application shows that on the basis of the same Recruitment Rules,

namely, the CSS Rules, 2009 the LDCE for promotion to the grade of Section Officer had been conducted from 2009 onwards. The stand of the Union of India was that there was no sudden change in the circumstances warranting any relaxation in the Rules. The Union of India also stated that the *Combined Section Officers/ Stenographers (Grade- 'B'/ Grade-I) Limited Departmental Competitive Examination* was for 9 different services and CSS was only one amongst them. That was also given as a reason for not relaxing the eligibility criteria as desired by the Direct Recruits. In paragraph 11 of the reply under the heading "BRIEF FACTS", the Union of India, *inter alia*, stated:

"11. That the Government had rightfully taken a conscious decision to decide the eligibility for the Section Officers' (Limited Departmental Competitive Examination) and in exercise of the powers conferred on it had notified the statutory Rules and Regulations under Article 309."

64. Thus, it is clear to us that the decision taken by the Union of India not to exercise their power of relaxation contained in Rule 23 of the CSS Rules, 2009 was not arbitrary or illegal. The decision of the Union of India in that regard should not have been lightly interfered with by the Tribunal while passing the impugned order.

65. There is one other aspect which we wish to observe and state at this stage. We find that the Direct Recruits have come into the CSS as Direct Recruit Assistants, whereas the Promotees came into the CSS after rendering service in the Central Secretariat Clerical Service (CSCS). Thus, the age band in which they fall is in the range of 45-55 years. However, the Direct Recruits are still very young and their age band is between 25-35 years. Thus, the "grave injustice" that the Direct Recruits are crying about,

in any event, is not something that would last during the lifetime of their service. Since the Promotees would be phased out of service much earlier in point of time on account of their superannuation, when compared to the Direct Recruits, the Direct Recruits would not, in any event, suffer a lasting disadvantage.

66. For all the aforesaid reasons, we allow the writ petitions and quash the impugned common order passed by the Tribunal in the aforesaid Original Applications leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(A.K. CHAWLA)
JUDGE

JULY 01, 2019

सत्यमेव जयते