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

Judgement reserved on **05.08.2021**
Judgement pronounced on **26.10.2021**

+ **W.P.(C) 5029/2012**

RAJENDER MOHAN SAXENA AND ORSPetitioners

Through: Ms Harvinder Kaur Oberoi,
Adv.

versus

UNION OF INDIA AND ANRRespondents

Through: Mr R.V. Sinha, Senior Central
Government Counsel with Amit
Sinha, Junior Central
Government Counsel

+ **W.P.(C) 6422/2020 & CM APPL. 22724/2020**

UNION OF INDIA AND ANOTHERPetitioners

Through: Mr R.V. Sinha, Senior Central
Government Counsel with Mr
Amit Sinha, Junior Central
Government Counsel

versus

B.S. MADHAV RAO AND OTHERSRespondents

Through: Ms Harvinder Kaur Oberoi,
Adv.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J:

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Preface:

1. Although the above-captioned writ petitions are directed against two separate judgements of the Central Administrative Tribunal [in short 'the Tribunal'], they concern the same issue. W.P.(C.) 6422/2020 has been preferred by the Union of India (UOI) along with the Department of Personnel & Training (DoPT) against the judgement dated 30.04.2019 rendered by a Full Bench of the Tribunal, in O.A. No.4320/2012. Insofar as W.P.(C.) 5029/2012 is concerned, this is being instituted to assail the judgement dated 31.05.2012 rendered by the Division Bench, comprising the then Acting Chairperson and Member, in O.A. No.3984/2011.

2. In effect, the respondents in W.P.(C.) 6422/2020 and the petitioners in W.P.(C.) 5029/2012 are employees of the Indian Statistical Service (ISS)[hereafter, collectively referred to as 'employees'], who contend that the vacancies in the grade of Junior Time Scale (JTS) and Senior Time Scale (STS) for the period spanning between 1997-98 and 2004-05 should be filled up, as per the

Indian Statistical Service Rules, 1961 [in short “1961 Service Rules”] prevalent on the date, when the vacancies arose. In other words, the 1961 Service Rules, which were amended on 14.09.2005, should not be applied to vacancies arising in the grade of JTS and STS before 14.09.2005.

3. As indicated above, the employees contend that the unamended 1961 Service Rules should apply for vacancies, which arose between 1997-98 and 2004-05.

3.1. This contention of the employees did not find favour with the Division Bench of the Tribunal that rendered the judgement dated 31.05.2012, and hence, came to be assailed by the employees, via W.P.(C.) 5029/2012.

3.2. It is only because another set of employees approached the Tribunal, a Bench of the Tribunal, which disagreed with its judgement dated 31.05.2012 in O.A. No.3984/2011, delivered by another Bench, referred the matter to a larger Bench, vide order dated 18.12.2018. It is because of this reference that, the then Chairperson of the Tribunal constituted a Full Bench, which resulted in the passing of the judgement dated 30.04.2019. Since the UOI and DoPT are aggrieved by the judgement dated 30.04.2019, they have assailed the same, via W.P.(C.) 6422/2020.

3.3. Thus, the two judgements of the Tribunal, which relate to the same issue, have reached a different conclusion.

4. The Full Bench of the Tribunal, vide judgement dated 30.04.2019, has, *inter alia*, held that the unamended 1961 Service Rules would apply qua allocation of vacancies arising between 1997-98 and 2004-05, between direct recruits and promotees, while an earlier Division Bench of the Tribunal comprising of the then Acting Chairperson and the Member have ruled to the contrary. In reaching this conclusion, the Division Bench of the Tribunal has relied upon the judgement of the Supreme Court rendered in ***R.K. Sabharwal &Ors. v. State of Punjab &Ors.*** (1995) 2 SCC 745¹.

4.1. The Full Bench, on the other hand, has relied upon the later judgement of the Supreme Court rendered in ***the State of Punjab &Ors. v. Dr R.N. Bhatnagar &Anr.*** (1999) 2 SCC 330², which distinguished the judgement of the Supreme Court rendered in the ***R.K. Sabharwal*** case.

4.2. According to the Full Bench of the Tribunal, the Division Bench, which rendered the judgement dated 31.05.2012, committed an error in allocating the vacancies for the period in issue i.e., between 1997-98 and 2004-05, as the judgement of the Supreme Court in ***Dr R.N. Bhatnagar*** case was not noticed. In a nutshell, the Full Bench of the Tribunal was of the view that the ratio of the Supreme Court judgement in ***R.K Sabharwal*** case was wrongly deduced, as, nowhere in the said judgement, there was any discussion about the allocation of

¹In short “***R.K. Sabharwal*** case”

²In short “***Dr R.N. Bhatnagar*** case”

the posts, between promotees, on the one hand, and direct recruits, on the other.

Background:

5. Before we proceed further, it would be relevant to give the background in which the above-captioned petitions came to be instituted.

6. The employees were initially inducted, via the direct recruitment route, against the statistical functional post (Group-B) in various participating ministries and departments of the Government of India. These posts were recognised as feeder posts for promotion to Grade-IV in ISS. The employees, having worked for the periods ranging between 12 to 17 years in Group-B posts, were promoted to the JTS/STS between 2004 and 2011; although MOSPI/DoPT claim that promotions took place between 2006 and 2011.

6.1. Up until 14.09.2005, the promotion to JTS/STS i.e., Grade-IV in ISS was governed by the unamended 1961 Service Rules.

6.2. As per the unamended 1961 Service Rules, the vacancies arising in Grade-IV were allocated in 60:40 ratio i.e., 60% were required to be filled up via direct recruitment, while the remaining 40% had to be filled up through promotion, based on selection, from amongst officers serving in various participating ministries and government departments in the statistical functional post (Group-B).

6.3. The unamended 1961 Service Rules were notified for the first time, on 01.11.1961. The judgement in the **R.K. Sabharwal** case was rendered on 10.02.1995.

6.4. The pitch was queered with the issuance of the Office Memorandum (OM) dated 02.07.1997, by the DoPT. This was followed by, as noticed above, an amendment being brought to the 1961 Service Rules, on 14.09.2005. With this amendment, *inter alia*, it was provided that, wherever the expression "vacancies" occurs, the expression "posts" will be substituted. The amendment brought about in Rule 8(1) of the 1961 Service Rules reads, as follows:

“(2) In the said rules, in rule 8, -

(a) in sub-rule (1) and sub-clause (i) of clause (a), for the word **“vacancies”**, wherever they occur, the word **“posts”** shall be substituted.

(b) in sub-rule (1), -

(i) In clause (a), for sub-clause (ii), the following sub-clause shall be ‘substituted, namely;

(ii) 40 percent of the **posts** in the Junior Time Scale shall be filled by selection from amongst officers belonging to the Subordinate Statistical Service in the pay scale of Rs.6500-200-10500. The promotion shall be made by selection from amongst those who have completed at least five years of service on a regular basis in these posts including service rendered, if any, in the Non-Functional scale of Rs.7450-225-11500, by the Controlling Authority on the recommendations of Departmental Promotion Committee headed by Chairman/Member, Union Public Service Commission:

Provided that if any junior who has completed five years eligibility service is being considered for selection for

appointment against these vacancies all persons senior to him in that office would also be considered provided they are not short of the requisite eligibility service by more than half of such eligibility service or two years, whichever is less, and have successfully completed their probation period on promotion to next higher grade along with their juniors who have already completed such eligibility service."

(Emp
hasis is ours)

6.5. It is the employees' case that, the promotee quota of vacancies in JTS Grade-IV of ISS for 1993-1994, 1994-1995, 1995-1996 and 1996-1997 was calculated, as per the unamended 1961 Recruitment Rules.

6.6. It is pertinent to note that, in the interregnum, the Ministry of Planning and Programme Implementation (Department of Statistics) [now, known as Ministry of Statistics & Programme Implementation (MOSPI)], in exercise of its powers under Article 309 of the Constitution, issued a gazette notification dated 23.12.1997, whereby it amended sub-clause (ii) in clause (a) in sub-rule (1) of Rule 8 of the 1961 Service Rules. The amendment in the said rule was brought about to the extent that, the residency period in the feeder post was scaled up from four years to seven years.

6.6(a) This limited amendment was made, despite the OM dated 02.07.1997, issued by the DoPT, in the wake of the judgment rendered by the Supreme Court in ***R.K. Sabharwal*** case, as noticed above. *Via* this OM, an attempt was moved to move from "vacancy" based roster to "post" driven rosters.

7. It appears, in the intervening period, some other employees approached the Tribunal for issuance of directions to the MOSPI/DoPT for preparation of yearly select panels in Grade IV of ISS for the period spanning between 1996-97 and 2002-03, keeping in view the 1961 Service Rules [as obtaining on that date], and the ratio of the judgment of the Supreme Court rendered in ***Union of India & Ors vs N.R. Banerjee & Ors.*** [(1997) 9 SCC 287], ***Union of India and Ors. vs. Vipinchandra Hiralal Shah*** [(1996) 6 SCC 721] and ***Nirmal Chandra Bhattacharjee and Ors. vs. Union of India and Ors.*** [1991 Supp (2) SCC 363]. This action was registered as O.A. No.3346/2002.

7.1. The aforesaid original application was disposed of by the Tribunal, vide order dated 02.02.2006, whereby MOSPI/DoPT was directed to convene a review Departmental Promotion Committee (DPC) with the mandate to prepare year-wise select panel qua the vacancies, arising in the aforementioned period, and to also consider, the employees involved in the said action, for promotion to Grade III, albeit, from an anterior date, along with all the consequential benefits.

7.2. The aforementioned direction of the Tribunal in O.A No.3346/2002, resulted in the MOSPI responding, by issuing an OM dated 12.05.2006. The said OM changed the manner of allocation of vacancies since the allocation of vacancies against the promotee quota would be made only against vacancies that arose upon promotion of a promotee officer from Grade IV to Grade III. According to MOSPI,

the change was brought about with the issuance of the OM dated 02.07.1997.

8. Interestingly, the DoPT, in its OM dated 17.04.2009, articulated the position [which according to the employees is well-established in law] that the 1961 Service Rules, had a statutory flavor, and hence, would prevail over administrative instructions.

9. Given this flux and/or lack of clarity as to, how vacancies had to be allocated between promotees and direct recruits in JTS/Grade IV in the ISS, the MOSPI approached DoPT for clarification, via communication dated 31.03.2010.

9.1. It is important to note that, the aforementioned clarification was sought in the background of the fact that, between 1997-98 and 2004-05 i.e., before the amendment of the 1961 Service Rules, on the back of DoPT's OM dated 02.07.1997, vacancies had been allocated based on post-driven reservation roster as against the provision embedded in the unamended 1961 Service Rules, which required allocation of vacancies between direct recruits and promotees in the ratio of 60:40.

9.2. The DOPT, in response to the clarification sought by the MOSPI, wrote back, once again, on 21.04.2010, and stated in no uncertain terms that, since 1961 Service Rules are statutory in nature, they would prevail over administrative instructions.

10. The position, that the employees had taken, vis-à-vis the allocation of vacancies in JTS/Grade-IV of ISS, having been bolstered by the response given by DOPT, via communication dated

21.04.2010, encouraged them to make representation(s)³ to MOSPI qua implementation of the 1961 Service Rules [as obtaining on the date when the vacancies arose], and thus, allocate vacancies between direct recruits and promotees, accordingly. Interestingly, in one of the representation dated 17.02.2011, there is a reference to the Minutes of the meeting held in the office of the Union Public Services Commission (UPSC) with the representatives of the Department of Statistics, dated 28.11.1997, wherein UPSC opined as follows:

"It was observed that in this case the rectt. rules had been amended wherein the eligibility service for promotion had been enhanced from 4 years to 7 years. However, since the vacancies pertained to a period prior to the amendment of RRs, the DPC will have to be held on the basis of the original RR's.

The representatives of the Deptt. then informed that there had been a judgement of CAT which is based on the Supreme Court judgement in the case of Indira Sawhney which has been referred to DOP&T & Ministry of Law.

It was further clarified by the representatives of the Commission that the number of vacancies pertaining to promotion quota have to be determined w.r.t. the number of vacancies and not to the number of posts."

10.1. However, MOSPI did not oblige, and summarily rejected the representation(s) of the employees, via OM dated 13.10.2011. This OM was based on another communication issued by the DoPT on 31.08.2010, wherein the position taken was that vacancies that arose after the issuance of OM dated 02.07.1997 were to be allocated, as per

³Representations dated 12.05.2009, 26.08.2010, 17.02.2011,, 03.06.2011, 26.09.2011.

the "post-based" reservation roster, irrespective of the date when the vacancies arose i.e., before or after 02.07.1997.

11. Being aggrieved, one set of the employees approached the Tribunal seeking a direction for filling up/allocating the vacancies in JTS/Grade-IV, which arose before 14.09.2005, as per the 1961 Service Rules then obtaining [i.e., on the date when the vacancies arose]. In this context, a reference was made to paragraph 6 of OM dated 31.03.2010, issued by MOSPI. Besides this, a prayer was made to set aside the O.M. dated 13.10.2011. The other reliefs sought were usual in nature i.e., holding of DPC/review DPC, grant of consequential reliefs, including according, further promotion to a higher grade on completion of the requisite period of service; calculated with effect from the date, when vacancies arose in the feeder grade. This action was registered as O.A. No.3984/2011 and was filed in and around 02.11.2011.

11.1. The Tribunal, as indicated above, dismissed O.A.No.3984/2011, vide its judgment dated 31.05.2012. The dismissal of the said O.A. led to the institution of W.P.(C.) 5029/2012.

12. The other set of employees also approached the Tribunal and filed their action, on 11.10.2012, which directly impugned the MOSPI's OM dated 13.10.2011, whereby their representation was rejected, disregarding the DOPT's communication dated 21.04.2010. In other words, this set of the employees sought, in effect, the same relief, which was, that promotions to JTS/STS in Grade IV of ISS

should be made, in line with the 1961 Service Rules, prevailing before 14.09.2005. This action was registered as O.A. No.4320/2012.

12.1. As noticed hereinabove, the Bench, which heard the O.A., indicated above, was not convinced that the decision rendered in O.A. No.3984/2011, vide judgement dated 31.05.2012, reflected the correct position in law, and hence, chose to refer the matter to a larger Bench, via order dated 18.12.2018. Accordingly, the then Chairperson constituted a Full Bench, which rendered the judgement dated 30.04.2019.

12.2. Via judgement dated 30.04.2019, the Full Bench declared that the decision taken in O.A. No.3984/2011 was contrary to the law laid by the Supreme Court in **Dr R.N. Bhatnagar** case, and therefore, to that extent, the decision taken was not correct. The Full Bench, thus, allowed O.A. No.4320/2012, and consequently, set aside the MOSPI's OM, dated 13.10.2011. The Full Bench of the Tribunal also issued a direction to MOSPI and DoPT, via judgement dated 30.04.2019, to allocate vacancies in the promotional posts in the category of JTS, for the period spanning between 1997-98 and 2004-05, in consonance with the unamended 1961 Service Rules. It is this decision, which is assailed by MOSPI and DoPT, in effect, UOI in W.P.(C.) 6422/2020.

13. The foregoing provides the setting in which submissions on behalf of MOSPI and DoPT were advanced by Mr. R.V. Sinha, Advocate, while those on behalf of the employees were put forth by Ms. Harvinder Kaur Oberoi, Advocate.

Submissions on behalf of MOSPI and DoPT:

14. Mr. Sinha, apart from highlighting the background of the case [to which we have made a reference above], made the following submissions on law, insofar as the judgement of the Full Bench of the Tribunal is concerned, and reiterated, in effect, the conclusion reached by the Division Bench of the Tribunal, vide judgement dated 31.05.2012 in O.A. No.3984/2011.

(i) The judgement of the Full Bench was flawed, as it comprised the Chairperson and two administrative members. The number of administrative members cannot exceed the number of judicial members on the Bench. In the instant case, the Chairperson was the only judicial member, while the other two were administrative members. [See *S. Manoharan v. The Deputy Registrar, Central Administrative Tribunal, New Delhi & Ors.*, 2015 SCC OnLine Mad 4785.]

(ii) The Full Bench in rendering its decision committed a jurisdictional error, inasmuch as, instead of adjudicating upon the issues referred to it, it proceeded to decide the matter on merits. [See *T.A. Hameed v. M. Viswanathan* (2008) 3 SCC 243, *Kerela State Science & Technology Museum v. Rambal Co. and Ors.* (2006) 6 SCC 258 and *Ashok Kumar Sharma and Anr. v. State of Rajasthan and Anr.* (2009) SCC OnLine Raj 5303.]

(iii) The issue raised in the instant petition also came up before the Tribunal in O.A. No.3346/2002. The Tribunal, vide judgement dated 02.02.2006, had directed the MOSPI/DoPT to examine the grievances

of the promotees, which, upon examination, resulted in the issuance of the OM dated 12.05.2006. The matter, therefore, stood settled. The representations made, thereafter, although, entertained and dealt with, via order dated 13.10.2011, would not give rise to a fresh cause of action. [See *D.C.S. Negi v. Union of India and Ors.* (2018) 16 SCC 721, *Union of India & Ors. v. M.K. Sarkar* (2010) 2 SCC 59 and *Union of India v C. Girija and Ors.* (2019) 15 SCC 633.]

(iv) The Full Bench failed to appreciate that, promotions were made, according to the assessment made by the DPCs convened on 05.09.2001 and 23.09.2003, and that the resultant seniority list was issued, as far back as on 07.11.2006. Therefore, the Full Bench lost sight of the fact that, entertaining the grievance(s) articulated by the employees, at this juncture, would unsettle the issue of seniority, which was settled way back in 2006. [See *B.S. Bajwa and Anr. v. State of Punjab and Ors.* (1998) 2 SCC 523, *K.R. Mudgal & Ors. v. R.P. Singh & Ors.* (1986) 4 SCC 531 and *Shiba Shankar Mohapatra and Ors. v. State of Orissa and Ors* (2010) 12 SCC 471.]

(v) Furthermore, the original application filed with the Tribunal i.e., O.A. No.4320/2012, which was dealt with by the Full Bench, was not maintainable, as the persons, who were likely to be affected, were not arrayed, as parties in O.A. No.4320/2012. [See *Ranjan Kumar & Ors. v. State of Bihar & Ors.* (2014) 16 SCC 187 and *Union of India and Anr. v. Indian Railways Civil Engineering Office Association* (2011) SCC OnLine Del 2473.].

(vi) Neither the Division Bench of the Tribunal nor the Full Bench ought to have decided the O.A. No.4320/2012 placed before them, given the position that, at the relevant point in time, this court was seized of the same issue. The approach of the Tribunal qua the said OA was contrary to the principle of propriety. The Tribunal's approach led to the wastage of judicial time. The Tribunal ought to have waited for the decision of this court, to avoid multiplicity of litigation.

(vii) The Tribunal failed to appreciate the effect of Rule 13 of the 1961 Service Rules. Rule 8 of the 1961 Service Rules had to be read along with Rule 13 of the unamended 1961 Service Rules. The instructions/OMs, which were issued by the DoPT, in particular, the OM dated 02.07.1997 had to be viewed, in light of Rule 13 of the unamended 1961 Service Rules. Rule 13 provided leeway for appointment in the service subject to orders relating to reservations for Scheduled Castes (SC) and Scheduled Tribe (ST), issued by the Central Government from time to time. Given this position, the OM dated 02.07.1997 was valid, as it was issued, having regard to the judgement of the Supreme Court rendered in the ***R.K. Sabharwal*** case. The said judgement was binding on MOSPI and DoPT, under Article 141 of the Constitution of India.

(viii) The Full Bench of the Tribunal failed to appreciate the ratio of the judgement rendered by the Supreme court in the ***Dr R.N. Bhatnagar*** case. [See ***Bharat Petroleum Corporation Ltd. and Anr. v. N.R. Varmani and Anr.*** (2004) 8 SCC 749.]

(ix) The Full Bench failed to appreciate that after an employee is promoted to JTS, no birthmark is left, and therefore, promotion to the next higher grade i.e., STS and above are not relatable to the feeder grade. Therefore, there is no dissonance between the approach adopted by MOSPI/DoPT and the directions contained in the ***Dr R.N. Bhatnagar*** case.

(x) The Full Bench failed to appreciate that the Supreme Court in ***Dr R.N. Bhatnagar*** case was dealing with a specific rule i.e., Rule 9(1)(d) of the Punjab Medical College Service (Class I) Rules, 1978 [in short "1978 Service Rules"], which did not provide for reservation, *vis-a-vis* SC/ST/OBC.

(xi) The Full Bench failed to appreciate that an employee's right to be considered for promotion accrues on the date he is eligible, as per the extant rule, and therefore, nobody has the right to claim retrospective promotion i.e., from the date when the vacancy arises. [See ***Union of India &Ors. v. Vijender Singh &Ors.*** (2010) SCC OnLine Del 4189 and ***State of Orissa and Anr. v. Dhirendra Sundar Das and Ors.*** (2019) 6 SCC 270.]

Submissions on behalf of the employees:

15. On the other hand, Ms. Oberoi made the following broad submissions.

(i) The allocations of vacancies for the post of JTS/Grade-IV for the period spanning between 1997-98 and 2004-05 had to be worked out, based on the unamended 1961 Service Rules. The MOSPI and

DoPT's stand that, post-based reservation's approach should be adopted is an erroneous approach, which is founded on a misreading of the ratio of the judgement of the Supreme Court rendered in the ***R.K. Sabharwal*** case.

(ii) The allocation of vacancies between direct recruits and promotees, at least between 1997-98 and 2004-05 should have been made in 60:40 ratio, which could then have been followed by making a provision for reservation for SC/ST/OBC. In other words, once vacant posts for the two quotas were allocated, then, provision could be made for reservation.

(iii) The OM dated 02.07.1997 was only an executive instruction. The said OM could not have overridden the 1961 Service Rules, and therefore, the allocation of vacancies between direct recruits and promotees had to be made, in terms of Rule 8(1)(a) of 1961 Service Rules, which stood incorporated therein, before its amendment on 14.09.2005.

(iv) The contention raised on behalf of MOSPI/DoPT that any order passed by this Court would unsettle the seniority list [which has been settled way back] and therefore, failure to implead those persons who would be affected, would render the decision of the Full Bench of the Tribunal untenable, is erroneous. The employees, who were part of the O.A.No.3984/2011 and O.A. No. 4320/2012, were not claiming seniority over any particular individual. Their grievance was directed towards MOSPI/DoPT, since they had failed to calculate the vacancies in the year in which they arose, as per the 1961 Service Rules

obtaining on that date i.e., the unamended 1961 Service Rules. Thus, there was no fact adverted to in the actions instituted before the Tribunal, which was required to be dealt with or controverted by another individual.

(v) The employees in the aforementioned OAs, which were dealt with by the concerned Benches of the Tribunal, had articulated a grievance qua the actions of the MOSPI and DoPT, and not vis-a-vis any particular individual. Since the relief sought was directed only against the decisions taken by MOSPI and DoPT [as regards the application of 1961 Service Rules qua vacancies in JTS/Grade-IV of ISS for the period spanning between 1997-08 and 2004-05], the actions instituted by the employees cannot fail on this ground.

(vi) In a nutshell, the issue, which arises for consideration before the court, concerns the executive instructions issued by MOSPI/DoPT, and the interpretation of the decisions rendered by the Supreme Court in the *R.K. Sabharwal* case and the *Dr R.N. Bhatnagar* case. Therefore, the argument that, since other individuals are not arrayed as parties, it non-suits the employees', is flawed. In support of this plea, reliance is placed on the judgements of the Supreme Court rendered in *A. Janardhana vs. Union of India and Ors.* (1983) 3 SCC 601⁴ and *D.D. Joshi (Col.) and Ors. vs. Union of India and Ors.* (1983) 2 SCC 235⁵. In this context, it was pointed out that, although this objection

⁴In short "*A. Janardhana* case"

⁵In short "*D.D. Joshi* case"

was raised before the Division Bench of the Tribunal, which rendered the decision in O.A.No.3984/2011, it was repelled by the Tribunal.

(vii) Insofar as the objection raised on behalf of MOSPI/DoPT about delay and laches was concerned, it was contended that there has been little clarity about what approach should be adopted, qua application of post-based reservation roster for allocation of vacancies in JTS/Grade-IV of ISS for the period spanning between 1997-98 and 2004-05. This is evident from the fact that, despite OM dated 02.07.1997 being issued, pursuant to the judgement rendered by the Supreme Court in the ***R.K. Sabharwal*** case, the cause of action arose, when DPCs were convened in 2001 by the MOSPI/DoPT.

(viii) It is because MOSPI and DoPT were not preparing yearly select panels for JTS/Grade IV for the period spanning between 1996-97 and 2002-03, that a certain set of employees approached the Tribunal in 2002. This action was registered as O.A. No.3346/2002. This OA was disposed of, vide order dated 02.02.2002, whereby the Tribunal directed MOSPI and DoPT to re-examine the matter, in light of the observations made therein, and thereafter, hold a review DPC to prepare year-wise select panels for the period in issue. This led to the issuance of OM dated 12.05.2006 by the MOSPI.

(ix) Since several representations were made, MOSPI sought clarification from DoPT, which resulted in the DoPT issuing OM dated 17.04.2009. This OM clearly stated in as many words that, the provisions of the applicable recruitment rules/ service rules would prevail over administrative instructions.

(x) Despite DoPT expressing the aforesaid view, MOSPI vide OM dated 31.03.2010 sought clarification from DoPT about proper calculation of year-wise vacancies qua direct recruits and promotees in JTS/Grade IV in ISS. The DoPT in no uncertain terms, via communication dated 21.04.2010, once again, emphasized that the recruitment rules/ service rules, being statutory in nature, would prevail over administrative instructions.

(xi) It is, thereafter, that, the MOSPI vide yet another OM dated 30.07.2010 sought clarification, *vis-a-vis* applicability of DoPT's OM dated 02.07.1997. This led to the issuance of OM dated 31.08.2010 by the DoPT, whereby it is indicated that all posts after 02.07.1997 were required to be filled up by following the post-based roster approach, irrespective of the period to which the vacancy related. In other words, the said OM stated that, whether the vacancy related to a period, before or after 02.07.1997, it had to be filled up, as per the post-based roster. The grievance, thus, in effect, reemerged on this date, which led to fresh representation being made by employees, which were ultimately rejected by MOSPI, via the impugned OM dated 13.10.2011.

(xii) Therefore, the argument raised on behalf of MOSPI and DoPT that, there was delay and laches on the part of the employees, ought not to be countenanced, given the fact that there was a complete lack of clarity as to how vacancies had to be allocated for the period, before the amendment of the 1961 Service Rules i.e., before 14.09.2005.

Analysis and reasons:

16. We have heard the learned counsel for the parties and have perused the record.

17. According to us, the issue, which arose for consideration both before the Division Bench of the Tribunal in O.A. No. 3984/2011 and the Full Bench in OA No. 4320/2012, on merits, was simply this—how should the vacancies arising in JTS/Grade IV, be filled up? Before we go into this question, certain admitted facts [to which we have made a broad reference to hereinabove] are required to be noticed.

17.1. As indicated hereinabove, the employees were initially appointed in the statistical functional post (Group-B), available in various participating ministries and departments of the Govt. of India.

17.2. The channel of promotion for such employees was JTS/STS which fell in Grade IV of the ISS.

17.3. Before the amendment of the 1961 Service Rules, the allocation of the vacancies between direct recruits and promotees was governed by Rule 8(1)(a) of the unamended 1961 Service Rules. The unamended Rule 8(1)(a) reads as follows:

"8(1) Future maintenance of the Service: After the initial constitution of the Service has been completed by appointment of departmental candidates or otherwise and after promotions in accordance with sub-Rule 2A of Rule 7 have taken place, vacancies shall be filled in the manner as hereinafter provided:

- (a) Grade IV-
- (i) *60 percent of the vacancies in this grade shall be filled by direct recruitment through an open competitive examination to be held by the Commission in the manner prescribed in Schedule II.
- (ii) 40 percent of the vacancies in this Grade shall be filled by Selection from among officers serving in offices under the Government in Statistical posts recognised for this purpose by the Controlling Authority who shall prepare a list of such posts in consultation with the Commission. The Controlling Authority may in consultation with the Commission add to modify the list from time to time. The selection will be made from amongst those who have completed at least 4 years of service on a regular basis in these posts on the basis of merit with due regard to the seniority by the Controlling Authority on the advice of the Commission.

Provided that if any junior person in an office under the Government is eligible and is considered for selection for appointment against these vacancies, all persons senior to him in that office shall also be so considered notwithstanding that they may not have rendered 4 years of service on a regular basis in their posts."

17.4. Therefore, the unamended Rule 8(1)(a), broadly, provided that, vacancies in Grade IV would be filled up, through a mix of direct recruits and promotees in the ratio of 60:40. In other words, 60% of the vacancies in Grade IV were to be filled up by direct recruitment, through an open competitive examination held by the Union Public Services Commission (UPSC), in the manner prescribed, while 40% of the vacancies in Grade IV were to be filled up by 'selection' from

among officers, who were working in statistical posts, recognised for this purpose by the controlling authority. Importantly, only those officers were eligible for selection, who had completed at least four [4] years of service on regular basis. The selection was to be made by the controlling authority, albeit, on the advice of the UPSC, based on merit, with due regard to seniority.

17.5. This position changed, with the amendment brought about in the 1961 Service Rules, on 14.09.2005. The change brought about, in effect, was that the expression "vacancies" was substituted by the expression "posts" and the qualifying period for selectees/promotees was altered to five [5] years of service, albeit, on regular basis. The amendment, as brought about in sub-clause (ii) of clause (a) of Rule 8(1) reads as follows:

"(ii) 40 percent of the posts in the Junior Time Scale shall be filled by selection from amongst officers belonging to the Subordinate Statistical Service in the pay scale of Rs.6500-200-10500. The promotion shall be made by selection from amongst those who have completed at least five years of service on a regular basis in these posts including service rendered, if any, in the Non-Functional scale of Rs.7450-225-11500, by the Controlling Authority on the recommendations of Departmental Promotion Committee headed by Chairman/Member, Union Public Service Commission:

Provided that if any junior who has completed five years eligibility service is being considered for selection for appointment against these vacancies all persons senior to him in that office would also be considered provided they are not short of the requisite eligibility service by more than half of such eligibility service or two years, whichever is less, and have successfully completed their probation period on promotion to

next higher grade along with their juniors who have already completed such eligibility service.”

18. Therefore, this being the lay of land [so to speak], one would have to ascertain two things, to answer the poser framed by us.

19. Firstly, what exactly was the ratio of the judgement rendered by the Supreme Court in the ***R.K. Sabharwal*** case. A perusal of the said judgement shows that the court was dealing with the provisions of the Punjab Service of Engineers Class I PWD (IB) Rules, 1964 and the instructions issued by the Punjab Government dated 04.05.1974. These instructions provided for reservations for SC and backward classes (BCs) in promotions to and within Class I and Class II services, constituted under the State Government. The instructions provided for reserving 16% of the posts, to be filled by promotion, for SCs and BCs (14% for SCs and 2% for BCs), subject to the concerned person possessing the minimum necessary qualifications and having a satisfactory service record. Importantly, the very same instructions provided for a hundred-point roster, in which 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87, 91 and so on posts were required to be preserved for SCs, whereas 26 and 76 had to be reserved for BCs. The said instructions further provided that, the roster would be implemented in the form of a running account from year to year. Thus, before the court, there were two sets of employees—one set belonged to the general category while the other belonged to the SC category.

19.1. In this context, the following observations were made in paragraph 5 of the judgement:

"5. We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts ..." are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the

“running account” must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation."

19.2. A close scrutiny of the aforesaid extract would show that the Constitution Bench in the ***R.K. Sabharwal*** case was concerned with, how a hundred-point promotion roster should work, wherein reservation had been made for SCs and BCs at points given in the instructions framed by the Punjab Government.

19.3. On the other hand, in the instant case, what the Division Bench of the Tribunal in O.A. No.3984/2011 or the Full Bench in O.A.No.4320/2012 was called upon to decide was—whether the allocation of available vacancies, had to be made, as per the unamended 1961 Service Rules, between two sources i.e., direct recruits and promotees, for filling up the promotion posts, i.e., JTS/Grade IV, in the period spanning between 1997-98 and 2004-05.

19.4. As per the unamended 1961 Service Rules, 60% of the vacancies had to be allocated for direct recruits and the remaining 40% were required to be allocated for promotees. The reservation of posts, which fell within the ambit of Article 16(4) of the Constitution,

would have come about only after the available vacancies had been allocated. It is relevant to note that, the Supreme Court in the ***Dr R.N. Bhatnagar*** case brought out this difference, quite clearly. The observations made in the following paragraphs of the judgement rendered in the ***Dr R.N. Bhatnagar*** case, being apposite, are culled out hereafter.

19.5. But before we do so, it may be relevant to also set forth the rule, which was being considered by the Supreme Court in the ***Dr R.N. Bhatnagar*** case. This was a case where the court was called upon to decide, as to, how a vacancy in the post of Professor was to be filled up in the Department of Ophthalmology in Government Medical College, Patiala. The State of Punjab took the position, albeit, based on the operation of the quota rule and roster cycle of 3:1 [whereby right from inception, in every batch three vacancies of professors in the given cadre were filled up by the departmental promotees], that the fourth vacancy was to be filled by direct recruitment. The State of Punjab, thus, took the stand that, the vacancy in question, which was the 16th vacancy, if the afore-stated roster cycle was to be applied, would be available to a direct recruit, and not to the departmental promotee; a stand which was contrary what was contended by the respondent i.e., Dr R.N. Bhatnagar before the Punjab and Haryana High Court.

19.6. Interestingly, the Punjab and Haryana High Court, while ruling in the favour of the respondent, had taken recourse to the judgement of the Constitution Bench in the ***R.K. Sabharwal*** case, and granted him

relief. It was the State of Punjab and an intervenor, who contended to the contrary in the Supreme Court, i.e., that the Punjab and Haryana High Court had misinterpreted the ratio of the judgement of the Constitution Bench in ***R.K. Sabharwal*** case. According to the State of Punjab and the intervenor, the said judgement concerned a scheme of reservation for SCs and BCs under Article 16(4) of the Constitution, while the Rule under consideration i.e., Rule 9(1)(d) of the 1978 Service Rules concerned a scheme for regulating recruitment from two sources, and thus, fell within the ambit of Article 16(1) of the Constitution.

19.7. It is in this context that, the Supreme Court framed amongst others, the following question for consideration in the ***Dr R.N. Bhatnagar*** case:

"Whether the interpretation of Rule 9(i)(d) [sic Rule 9(1)(d)], which appealed to the High Court, is a correct one;"

19.8. The relevant Rule, which the court was called upon to rule on i.e., Rule 9(1)(d) of the 1978 service Rules reads as follows:

“(9) Method of appointment.—

(d) In the case of Professors:

(i) 75 per cent posts by promotion from amongst the Additional Professors, or where Additional Professors are not available, from amongst the Associate Professors, or, where Associate Professors are not available, from amongst the Assistant Professors, or by transfer of officials already in the service of the Government of India, or the State Government;

(ii) 25 per cent posts by direct recruitment;”

20. Thus, the observations of the Supreme Court, which are extracted below, are to be seen in the context of the above-mentioned Rule.

"Point 1

9. So far as the first point is concerned, the High Court in the impugned judgment, has heavily relied upon the Constitution Bench decision of this Court in the case of *R.K. Sabharwal* [(1995) 2 SCC 745: 1995 SCC (L&S) 548: (1995) 29 ATC 481]. Now it has to be kept in view that the Constitution Bench of this Court in the aforesaid decision was concerned with entirely a different question, namely, as to how the roster indicating reserved points in connection with reservation of posts in a cadre to be filled in by Scheduled Caste (for short "SC"), Scheduled Tribe (for short "ST") and Backward Class (for short "BC") candidates could be operated. Para 4 of the Report lays down that: (SCC p. 750)

"4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts."

In this connection, reliance was placed by the Constitution Bench on Article 16(4) of the Constitution of India which permits the State Government to make any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, was not adequately represented in the services under the State. In the light of the aforesaid scheme of the Constitution, the Bench had to consider whether reservation of posts for SCs, STs and BCs when sought to be secured by way of operation of the roster could permit the operation of the roster qua the posts or vacancies in the cadre. It was noted in this connection that if the roster operated on vacancies, then it may happen that at a given point of time, the percentage of reservation of posts

`for SCs, STs and BCs may exceed the permissible percentage of reservation. In para 5 of the Report, it was observed that reservations provided under the impugned government instructions permitted 16% of the posts to be reserved for members of SCs and BCs and it could be achieved by the roster to be maintained in each Department. The roster had to be implemented in the form of running account from year to year. In connection with “16% of the posts...” to be reserved for members of SCs and BCs in promotional posts, it was held as under: (SCC p. 751, para 5)

“[W]hen recruitment to a cadre starts then 14 posts earmarked in the (100 points) roster are to be filled from amongst the members of the Scheduled Castes. ... When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The ‘running account’ is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive.”

The aforesaid observations which were heavily relied on by the High Court and are also relied upon by the respondent's (writ petitioner's) counsel before us, cannot be of any assistance to the appellant-State on the facts of the present case. The result is obvious. As per Article 16(4) which carves out a separate field for itself from the general sweep of Article 16(1) which guarantees equality of opportunity in matters of appointments in government services to all citizens of India, the reservation for these categories in employment has to be achieved by earmarking the requisite percentage of posts for the reserved category of candidates and by pitchforking these posts on roster points on requisite points' roster and when such a

roster takes a full cycle, posts earmarked on reserved points will enable the requisite reserved category of candidates to fill up these posts. After that is done, the roster would be treated to have achieved its purpose. Whenever a reserved candidate vacated a reserved post, the said post was liable to be filled only by a candidate belonging to the reserved category. If after the roster is first operated and thereafter it is again operated on future vacancies also, a situation may arise wherein a cadre may get reserved category exceeding the permitted quota of reservation. It is to avoid this contingency that the Constitution Bench laid down in the aforesaid decision as indicated therein. So far as Rule 9 of the Rules in the present case is concerned, it has nothing to do with reservation of posts in the cadre of Professors. It is not a rule of reservation envisaged for a specified category of persons as permitted by Article 16(4) of the Constitution. On the contrary, it is a rule of recruitment from two different sources, namely, in case of Professor's cadre, 75% of the posts has to be filled in by promotion while 25% by direct recruitment. These two sources of recruitment permit departmental promotees and direct recruits from the open market to get absorbed in the cadre. They merely serve as two entry points for the cadre. Rule 9 deals with reservation of appointment to the posts of Professor and does not deal with reservation of posts of Professor for any special class or category of candidates. It is well settled that once recruitment is made from two sources, i.e., departmental promotees and direct recruitment from the open market and once the candidates concerned enter into any cadre through entry point reserved for them, they get fused and blended into one single cadre and their birthmarks get obliterated. In this connection, we may usefully refer to a Constitution Bench decision of this Court in *State of J&K v. Triloki Nath Khosa* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49]. Chandrachud, J. (as he then was), speaking for the Constitution Bench while dealing with recruitment to a cadre from two sources, namely, direct recruits and promotees in the light of an earlier judgment of this Court in *Roshan Lal Tandon v.*

Union of India [AIR 1967 SC 1889 : (1968) 1 SCR 185] made the following pertinent observations: (SCC p. 38, paras 44-45)

“44. The key words of the judgment are: ‘The recruits from both the *sources* to Grade ‘D’ were integrated into one class and no discrimination could thereafter be made in favour of recruits from one *source* as against the recruits from the other *source* in the matter of promotion to Grade ‘C’.’

(emphasis supplied)

By this was meant that in the matter of promotional opportunities to Grade ‘C’, no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn. That is to say, if apprentice Train Examiners who were recruited directly to Grade ‘D’ as Train Examiners formed one common class with skilled artisans who were promoted to Grade ‘D’ as Train Examiners, no favoured treatment could be given to the former merely because they were directly recruited as Train Examiners and no discrimination could be made as against the latter merely because they were promotees. This is the true meaning of the observation extracted above and no more than this can be read into the sentence next following: ‘To put it differently, once the direct recruits and promotees are absorbed into one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade ‘C’.’ In terms, this was just a different way of putting what had preceded.

45. Thus, all that *Roshan Lal case* [AIR 1967 SC 1889 : (1968) 1 SCR 185] lays down is that direct recruits and promotees lose their birthmarks on fusion into a common stream of service and they cannot thereafter be treated differently by reference to the consideration that they were recruited from different sources. Their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequals once again.”

It has, therefore, to be appreciated that when posts in a cadre are to be filled in from two sources, whether the candidate comes from the source of departmental promotees or by way of direct recruitment, once both of them enter a common cadre, their birthmarks disappear and they get completely integrated in the

common cadre. This would be in consonance with the thrust of Article 16(1) of the Constitution of India. No question of exception to the said general thrust of the constitutional provision would survive as Article 16(4) would be out of the picture in such a case. Consequently, the decision rendered by the Constitution Bench in *R.K. Sabharwal case* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] in connection with Article 16(4) and the operation of roster for achieving the reservation of posts for SCs, STs, and BCs as per the scheme of reservation cannot be pressed into service for the present scheme of Rule 9(1) is not as per Article 16(4) but is governed by the general sweep of Article 16(1). The attempt of learned counsel for the respondent to treat a quota rule as a reservation rule would result in requiring the State authorities to continue the birthmarks of direct recruits and promotees even after they enter the common cadre through two separate entry points regulating their induction to the cadre. Therefore, the roster for 3 promotees and one direct recruit is to be continued every time a vacancy arises and there is no question of filling up a vacancy arising out of a retirement of a direct recruit by a direct recruit or on the retirement vacancy of a promotee by a promotee. Consequently, the question of rotating the vacancies as posts or for treating the posts mentioned in the rules of recruitment as necessarily referable to total posts in the cadre at a given point of time in the light of *R.K. Sabharwal* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] judgment, therefore, cannot survive for in the case of a quota rule between direct recruits and promotees, the same is to be judged on the touchstone of Article 16(1) and the statutory rules governing the recruitment to the posts of Professor constituting the Punjab Medical Education Service (Class I) and not on the basis of Article 16(4). The Division Bench in the impugned judgment with respect wrongly applied the ratio of *R.K. Sabharwal case* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] governing Article 16(4) to the facts of the present case which are governed by Article 16(1).

10. We may also mention that in brief written submissions filed on behalf of the respondent, an attempt is made to show that the word “reserve” means to appropriate or to set aside. The dictionary meaning found in *The Law Lexicon*, 1997 Edition of P. Ramanatha

Aiyar is pressed into service in this connection. It is stated therein that reserve would mean “to set apart” but as we have already discussed, Rule 9 is concerned with reservation of appointments from two sources of recruitment. It does not envisage a scheme of reservation of posts. Consequently, as aforesaid, the dictionary meaning of the term “reserve” cannot advance the case of the respondent.

11. On the other hand, the situation which has fallen for our consideration in the present case in the light of Article 16(1) is squarely covered by a decision of this Court in *Paramjit Singh case* [(1979) 3 SCC 478 : 1979 SCC (L&S) 309] as clarified by a latter decision in the very same case reported in *Paramjit Singh* [(1982) 3 SCC 191 : 1982 SCC (L&S) 266] . In the aforesaid main case, D.A. Desai, J., speaking for a Bench of two learned Judges of this Court, had to consider in para 11 of the Report a recruitment rule which permitted fixed percentage of posts to be filled up in the given cadre from two different sources, namely, promotees and direct recruits. Rule 6 of the Punjab Police Service Rules, 1959 which came up for consideration in that case provided for a method of recruitment from two different sources, i.e., 80% by promotion from the rank of Inspectors and 20% by direct recruitment. Examining the working of the aforesaid quota rule for recruitment in the light of the relevant rotational scheme of vacancies in the cadre to which such recruitment was to be made, the following pertinent observations were made in para 11 of the Report: (SCC p. 485)

“11. Where recruitment to a cadre is from two sources and the Service Rules prescribe quota for recruitment for both sources a question would always arise whether the quota rule would apply at the initial stage of recruitment or also at the stage of confirmation. Ordinarily, if quota is prescribed for recruitment to a cadre, the quota rule will have to be observed at the recruitment stage. The quota would then be correlated to vacancies to be filled in by recruitment but after recruitment is made from two different sources they will have to be integrated into a common cadre and while so doing, the question of their inter se seniority would surface.”

As there was some doubt about the observations found in the aforesaid para 11 and as to how the recruitment rule in question was to be operated in the light of the quota prescribed therein and the rotational method of achieving the said quota of recruitment from two sources, a latter Bench clarified the position in the subsequent judgment in the case of *Paramjit Singh* (supra). Another Bench of two learned Judges, wherein D.A. Desai, J., was common, clarified the observations in para 11 of the earlier Report as under [(1982) 3 SCC 191 : 1982 SCC (L&S) 266] : (SCC pp. 195-96, paras 6 and 7)

“6. In our opinion there is no ambiguity in the judgment. Ordinarily speaking, where recruitment is from two sources with a view to integrating recruits from both sources after the recruitment seniority is determined from the date of entry into the cadre except where there has been a substantial violation of the quota giving undeserved advantage to one or the other source. Seniority ordinarily speaking is determined with reference to the date of entry into the cadre which in service jurisprudence is styled as the date of continuous officiation. These notions of service jurisprudence may have to yield place to the specific rules and the fact situation with reference to Rule 10 did compel this Court to depart from the normal concept in service jurisprudence. However, introduction of a roster system is very well known in service jurisprudence. What this Court meant while saying that when a quota rule is prescribed for recruitment to a cadre it meant that quota should be correlated to the vacancies which are to be filled in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule. Promotees who came to the service at an advanced age may retire early and direct recruits who enter the service at a comparatively young age may continue for a long time. If, therefore, in a given year larger number of promotees retire and every time the vacancy is filled in by referring to the source from which the retiring person was recruited it would substantially disturb the quota rule itself. Therefore, while making recruitment quota rule is required to be strictly adhered to. That was what was meant by this Court when it said: [SCC p. 486, para 14 : SCC (L&S) p. 318]

‘The quota rule would apply to vacancies and recruitment has to be made keeping in view the vacancies available to the two sources according to the quota.’

The quota in the present case is 4:1, that is, four promotees to one direct recruit. Therefore, whenever vacancies occur in the service the appointing authority has to go on recruiting according to quota. In other words, whenever vacancies occur, first recruit four promotees irrespective of the factors or circumstances causing the vacancies and as soon as four promotees are recruited bring in a direct recruit. That was what was meant by this Court when it said that a roster has to be introduced and this roster must continue while giving confirmation. The sentence which seems to have created a difference of opinion reads as under: [SCC p. 486, para 14 : SCC (L&S) p. 318]

‘A roster is introduced while giving confirmation ascertaining every time which post has fallen vacant and recruit from that source has to be confirmed in the post available to the source.’

7. The sentence cannot be read in isolation. It has to be read with the earlier sentence that the quota rule would apply to the vacancies and recruitment has to be made keeping in view the vacancies available to the two sources according to the quota. The Court then proceeded to say that if the quota rule is strictly adhered to there will be no difficulty in giving confirmation keeping in view the quota rule even at the time of confirmation.”

The aforesaid decision which squarely applies to the facts of the present case, therefore, leaves no room for doubt that when under the Recruitment Rule 9 in question, there is no reservation of any given category of candidates like SCs, STs or BCs to the posts in the cadre of Professors, appointments to the posts in the cadre have to be made in the light of the percentage of vacancies in the posts to be filled in by promotees or direct recruits. The quota of percentage of departmental promotees and direct recruits has to be worked out on the basis of the roster points taking into consideration vacancies that fall due at a given point of time. As stated earlier, as the roster for 3 promotees and one direct recruit moves forward, there is no question of filling up the vacancy created by the retirement of a direct recruit by a direct recruit or

the vacancy created by a promotee by a promotee. Irrespective of the identity of the person retiring, the post is to be filled by the onward motion of 3 promotees and one direct recruit. Consequently, learned counsel for the appellant and learned Senior Counsel for the intervenor were right when they contended that the High Court in its impugned judgment had patently erred in invoking the ratio of the decision of this Court in *R.K. Sabharwal case* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] which was rendered in an entirely different context for resolving an entirely different controversy which did not arise on the facts of the present case. They were also right in contending that the ratio of the decision of this Court in *Paramjit Singh case* [(1979) 3 SCC 478 : 1979 SCC (L&S) 309] read with the decision of this Court in the same case reported in *Paramjit Singh* [(1982) 3 SCC 191 : 1982 SCC (L&S) 266] would get squarely attracted in the facts of the present case. Once that conclusion is reached, the result becomes obvious. Whenever in the cadre of Professors of Ophthalmology, vacancies arise for being filled in at any given point of time, those vacancies in the posts have to be filled in by operating the roster in such a way that available vacancies get filled up by allotting 75% of them to departmental promotees and 25% to direct recruits. Exactly in this way, the roster in the present case was operated by the appellant-State to regulate entry in the cadre of Professors.

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As laid down by this Court in the aforesaid two decisions rendered by the Division Benches of two learned Judges, speaking through D.A. Desai, J., it has to be held that for working out the rule of recruitment envisaging appointments from two sources of promotees and direct recruit vacancies in the cadre of Professors had to be kept in view and not the posts themselves. Learned counsel for the appellant and learned Senior Counsel for the intervenor were right when they contended that if the view which appealed to the High Court is to be accepted, the very Rule 9 and the scheme envisaged by it for effecting appointments to the cadre in the ratio of 75% for promotees and 25% for direct recruits would get stultified and frustrated. It was rightly submitted that if

four vacancies are filled in from promotees and only one vacancy is to be kept for a direct recruit on the basis that there are total five posts in the cadre, then 75% of five posts would work out at 3.75 and have to be rounded up as four for the promotees and the remaining 1.25 posts have to be rounded up as only one post being less than 1.50. Thus, in substance, the source of recruitment for promotees would get enhanced to 80% and that of direct recruits would be reduced to 20%. That would fly in the face of the statutory rule which does not envisage such percentage of reservation for promotees and direct recruits.

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It must, therefore, be held that Rule 9 which regulates appointments to the posts in the Punjab Medical Education Service (Class I) has to be applied uniformly for recruitment of Professors in all the cadres of disciplines. In such cases, the method followed by the appellant-State for recruitment of Professors in diverse cadres of disciplines as shown in Appendix 'B' to the Rules remains the only workable one. It is to the effect that as and when vacancy arises in the cadre of posts concerned in any of the disciplines, the first three future vacancies would go to departmental promotees and the fourth future vacancy would go to a direct recruit. Meaning thereby, even in the cadre of Professor of Forensic Medicine where only one post of Professor is for the first time to be filled in, it will go to a promotee and as and when such promotee retires or resigns or unfortunately dies in harness, the second vacancy would also go to a promotee, similarly, the third one but the fourth vacancy would go to a direct recruit. That is how Rule 9 laying down quota and rota for monitoring recruitment from two sources of departmental promotees and direct recruits can work uniformly in all the departments for recruitment of Professors where the posts of Professor in the cadres of departments concerned may consist of a solitary post or two posts or more than two posts or may be five posts, as in the present case. This would result in a harmonious operation of Rule 4 and Rule 9 and no part of Rule 9 will be rendered otiose or truncated in such a case. It must, therefore, be held that the reasoning adopted by the High Court in connection with the working of the aforesaid Rule

falls foul on the touchstone of Article 16(1) read with the statutory scheme as envisaged by these Rules. In the light of our aforesaid conclusion, it becomes obvious that the disputed 16th vacancy in the cadre of Professors of Ophthalmology consisting of five posts would necessarily go to a direct recruit and not to a departmental promotee as wrongly assumed by the High Court while allowing the writ petition.

12.We are not concerned with any scheme of reservation under Article 16(4). Therefore, *R.K. Sabharwal case* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] cannot be pressed into service, as seen earlier. If that is so, on the same lines the ratio of the decision of this Court in the *Postgraduate Institute of Medical Education & Research case* [(1998) 4 SCC 1 : 1998 SCC (L&S) 961] would also not apply. While deciding the question of working out the Recruitment Rule for appointment from two sources of promotees and direct recruits wherein only Article 16(1) would hold the field, uninhibited by the exceptional category carved out from the said sub-article (1) by sub-article (4) thereof. The first point for determination is, therefore, answered in favour of the appellants and against the respondent."

20.1. Therefore, in our view, apart from anything else, the MOSPI and DoPT, having misinterpreted the judgement of the Supreme Court rendered in the *R.K. Sabharwal* case, have gone wrong in issuing executive instructions, and thus, clearly erred in not calculating/allocating vacancies between direct recruits and promotees.

21. It must be borne in mind that the employees have taken an unambiguous position that, they are not advocating that no reservations should be made or that no scheme on those lines should be framed. It is their contention, which was articulated both before the Division Bench [in O.A. No.3984/2011] and the Full Bench [in O.A.

No.4320/2012] of the Tribunal as also the Bench, which referred the matter to the Full Bench, vide order dated 18.12.2018, that, the reservation scheme should kick in, after available vacancies were duly allocated, as per the extant rules.

22. This brings us to the next question as to whether executive instructions can override the 1961 Service Rules. In our view, the position taken by the DoPT, via OMs dated 17.04.2009 and 21.04.2010, was the correct position in law, which is, that, since recruitment rules/service rules have a statutory flavour, they would prevail over the executive instructions. In this behalf, the observations made by the Supreme Court in the case of **K. Kuppusamy and Another v. State of Tamil Nadu and Others**, (1998) 8 SCC 469, being apposite, are extracted hereafter:

“3.The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a decision to amend the rules does not mean that the rule stood obliterated. Till the rule is amended, the rule applies....”

22.1. This is not to say that, in the absence of statutory rules, the State cannot make provisions for promotions, through executive instructions. However, if executive instructions are framed, they cannot be in derogation of or inconsistent with the statutory rules. In case of inconsistency, the statutory rules would override the executive instructions. The following observations were made by the five-judge

bench of the Supreme Court in the judgement rendered in *Sant Ram Sharma vs. State of Rajasthan and Ors.*, (1968) 1 SCR 111:

“7.It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.”

22.2. In this particular case, since the unamended Rule 8(1)(a) of the 1961 Service Rules occupied the field, till, at least, 14.09.2005, the MOSPI could not have acted contrary to the said Rule. This is besides the point that, the MOSPI and DoPT, based on a misinterpretation of the judgement of the Supreme Court in the *R.K. Sabharwal* case, ended up taking steps, which were not in line with the ratio of said judgement.

22.3. Therefore, in our view, both the DoPT clarification dated 31.08.2010 [which was contrary to its earlier clarification(s), dated 17.04.2009 and 21.04.2010] and the impugned OM dated 13.10.2011, issued by MOSPI, were not aligned to the ratio of the judgement of the Supreme Court in the *R.K. Sabharwal* case.

22.4. At this juncture, it is important to deal with the argument advanced by Mr. Sinha that, since *R.K. Sabharwal* case is a judgment

rendered by a Constitution Bench of the Supreme Court, it is binding under Article 141 of the Constitution, and therefore, the decision rendered, albeit, also by the Supreme Court in the ***Dr. R.N. Bhatnagar*** case, should be ignored.

(i) As to the first limb of this contention, one can have no cavil. Every judgement of the Supreme Court [more so a judgment delivered by the Constitution Bench], is binding on all, including this Court; Article 141 of the Constitution states that, in no uncertain terms.

(ii) That being said, where a Bench of the Supreme Court interprets the judgment of another Bench including the judgment of the Constitution Bench, that interpretation is binding on this court. [See ***Commissioner of Income-tax, West Bengal-III versus M/s. Oberoi Hotels (P) Ltd.***, 2011 SCC OnLine Cal 718⁶; Also see ***Vishwa***

⁶ “Therefore, the first question that arises for determination in this appeal is whether we should follow the decision of the Supreme Court in the case of *McDowell & Company Ltd.* (supra) and ignore the subsequent decision of the Supreme Court explaining the said decision on the ground that the latter ones were delivered by a Bench consisting of two Judges.

There is no dispute with the proposition of law that if there are conflict of opinions between the two Benches of the Supreme Court on a question of law, the one declared by the larger Bench would prevail over the one pronounced by the other Bench. But if a Bench consisting of a smaller number of judges interprets a decision of a larger Bench of the Supreme Court in a different way which may be apparently opposed to the one taken by the larger Bench, a subsequent co-ordinate Bench of the Supreme Court may refuse to follow the interpretation of the latter one on the ground that it proposed to follow the earlier view expressed by a larger Bench. But if the subsequent decision of the smaller Bench explaining the larger Bench is placed before a High Court, the latter is bound to follow the subsequent one by the smaller one which interprets the decisions of the larger Bench because that is the interpretation of the larger Bench by a Bench of Supreme Court and the High Court cannot make a different interpretation than the one made by the subsequent decision of the Supreme Court which is binding upon it. The position,

Chandubhai Patel and Others versus Union of India and Others,
2021 SCC OnLine Bom 1173, paragraph 13]

(iii) This is apart from our understanding of the ratio of the judgment rendered by the Supreme Court in ***R.K. Sabharwal*** case, which has been enunciated hereinabove.

22.5. Furthermore, the judgment of the Supreme Court in ***Dr. R.N. Bhatnagar*** case was cited with approval by a three-judge Bench of the Supreme Court in ***All India Federation of Central Excise v. Union of India***, (1999) 3 SCC 384. Thus, the observations made therein, for the sake of convenience, are extracted hereafter:

“13. Reliance by the petitioners is placed upon *R.K. Sabharwal case* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] . That case deals with the principle that the posts vacated by an officer recruited from the SC/ST category must be filled in only by the same reserved category. This is because of the special provision in Article 335 of the Constitution of India relating to adequate representation of the SCs/STs in the services. The birthmarks there remain even on promotion inasmuch as a particular number of posts in the promotional category are reserved to be filled in only from among SCs/STs. On the other hand, so far as a normal quota rule between two feeder channels for recruitment

however, would be different if the subsequent smaller Bench of the Supreme Court in ignorance of the earlier larger Bench takes a contrary view from the one taken by the earlier larger Bench. In that situation, the High Court is entitled to reject the view of the latter smaller Bench of the Supreme Court as per incuriam.

In the case before us, the subsequent decision of a Smaller Bench in the case of *Ajadi Bacho Andolon* (supra), has taken note of the earlier decision in the case of *M/s. McDowell & Company Ltd.* (supra), and has interpreted the same and thus, it is not a case of passing decision in ignorance of a binding decision. Therefore, in this case, the view taken by the Tribunal cannot be said to be wrong and is consistent with the one taken in the case of *AjadiBachoAndolon* (supra).”

or promotion is concerned, be it between direct recruits and promotees or promotion by a quota between different feeder groups (as in the case before us), the relevant precedents are *Paramjit Singh Sandhu v. Ram Rakha Mal* [(1982) 3 SCC 191 : 1982 SCC (L&S) 266] and *State of Punjab v. Dr R.N. Bhatnagar* [(1999) 2 SCC 330 : 1999 SCC (L&S) 513 : (1998) 6 Scale 642] . In *Paramjit Singh case* [(1982) 3 SCC 191 : 1982 SCC (L&S) 266] which related to recruitment from among promotees and direct recruits, D.A. Desai, J. pointed out that if a quota rule between direct recruits and promotees were treated as a rule of reservation, then because of the frequent retirements of the promotees who were generally closer to retirement, most vacancies in the promotional posts would repeatedly go to the aged promotees leaving little scope for direct recruitment. At p. 196, the learned Judge clarified as follows: (SCC para 6)

“What this Court meant while saying that when a quota rule is prescribed for recruitment to a cadre, it meant that quota should be co-related to the vacancies which are to be filled in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule.”

The learned Judge further pointed out: (SCC p. 196, para 6)

“Promotees who come to the service at an advanced age may retire early and direct recruits who enter the service at a comparatively young age may continue for a long time. If, therefore, in a given year larger number of promotees retire and every time the vacancy is filled in by referring to the source from which the retiring person was recruited, it would substantially disturb the quota rule itself. Therefore, while making recruitment quota rule is required to be strictly adhered to.”

14. On the facts of that case, it was pointed out (at SCC p. 196, para 6) that the quota there for recruitment was 4:1 between promotees and direct recruits and that therefore,

“whenever vacancies occur in the service, the appointing authority has to go on recruiting according to quota. In other words, whenever vacancies occur, first recruit four

promotees *irrespective of the factors or circumstances causing the vacancies* and as soon as four promotees are recruited bring in a direct recruit”.

(emphasis
supplied)

15. A like situation arose in *State of Punjab v. Dr R.N. Bhatnagar* [(1999) 2 SCC 330 : 1999 SCC (L&S) 513 : (1998) 6 Scale 642] . That was again a case of recruitment by promotion to the posts of Professors from the category of Additional Professors and also by way of direct recruitment, in the ratio of 3:1. The Additional Professors who represented the promotee feeder group having a quota of 3 vacancies in the cadre of Professors contended that whenever a Professor retired, one has to find out whether he was a promotee or a direct recruit. If the vacancy was created by retirement of a promotee, then the said vacancy in the promotional cadre had to be filled only by a promotee from the lower cadre and not by way of direct recruitment. Reliance for the said contention was placed by the promotees on *Sabharwal case* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] . This Court distinguished *Sabharwal case* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] as relating to a scheme of reservation and observed that in a system of quota between promotees and direct recruits, once the posts in the higher cadre were filled, thereafter if vacancies arose (say) by retirements, then it was not permissible to treat the vacancy as a vacancy earmarked for the category to which the retiree belonged before being promoted or recruited. Once the recruitment was made from two channels, the birthmarks got erased as stated in *State of J&K v. Triloki Nath Khosa* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771] . In *Dr Bhatnagar case* [(1999) 2 SCC 330 : 1999 SCC (L&S) 513 : (1998) 6 Scale 642] Majmudar, J. observed (at p. 652) as follows:

“The quota of percentage of departmental promotees and direct recruits has to be worked out on the basis of the roster points taking into consideration vacancies that fall due at a given point of time. As stated earlier, as the roster for 3 promotees and one direct recruit moves

forward, there is no question of filling up the vacancy created by the retirement of a direct recruit by a direct recruit or the vacancy created by a promotee by a promotee. Irrespective of the identity of the person retiring, the post is to be filled by the onward motion of 3 promotees and one direct recruit.”

The position in regard to the quota of 6:1:2 in the case before us is no different.”

22.6. This was also a view expressed by another Bench of the Supreme Court in *Akhilesh Kumar Singh v. Ram Dawan & Ors.*, (2015) 16 SCC 619. The following observations were made by the Supreme Court in paragraphs 9 to 12 of the said judgment:

“9. From the aforesaid enunciation of law, it is eminently explicit that reservation for a single post in a cadre will keep the general members of the public in total exclusion and the question of reservation will arise when there is plurality of post in the cadre. Needless to say that the Constitution Bench has been stating about the reservation with regard to the Scheduled Castes, Scheduled Tribes and Other Backward Classes. It does not lay down that if a post is meant to be filled up by promotion from amongst the employees working in the feeder cadre, it would tantamount to reservation. Reservation is only restricted to the Scheduled Castes, Scheduled Tribes and Other Backward Classes. It does not relate to the persons serving in the feeder cadre.

10. In *State of Punjab v. R.N. Bhatnagar* [*State of Punjab v. R.N. Bhatnagar*, (1999) 2 SCC 330 : 1999 SCC (L&S) 513], it has been laid down (SCC p. 341, para 9) that when posts in a cadre are to be filled in from two sources, whether the candidate comes from the source of departmental promotees or by way of direct recruitment, once both of them enter a common cadre, their birthmarks disappear and they get completely integrated in the common cadre and it is in consonance with the thrust of Article 16(1) of the Constitution

of India. The Court further observed that no question of exception to the said general thrust of the constitutional provision would survive as Article 16(4) would be out of the picture in such a case.

11. In this context, a reference to a two-Judge Bench decision in *Kuldeep Kumar Gupta v. H.P. SEB* [*Kuldeep Kumar Gupta v. H.P. SEB*, (2001) 1 SCC 475 : 2001 SCC (L&S) 253] is apposite. In the said case, a contention was advanced that providing a quota tantamounts to reservation. Repelling the said submission, it was ruled: (SCC pp. 484-85, para 6)

“6. ... Article 16 deals with equality of opportunity in matters of public employment and Article 16(4) enables the State in making any provision for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. This Court in *Indra Sawhney case* [*Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] has held that no such reservation is permissible in the promotional posts and to get over the said decision Article 16(4-A) has been inserted by the Constitution (Seventy-seventh Amendment) Act. But we fail to understand as to how providing a quota for a specified category of personnel in the promotional post can be held to be a reservation within the ambit of Article 16(4). Providing a quota is not new in the service jurisprudence and whenever the feeder category itself consists of different category of persons and when they are considered for any promotion, the employer fixes a quota for each category so that the promotional cadre would be equibalanced and at the same time each category of persons in the feeder category would get the opportunity of being considered for promotion. This is also in a sense in the larger interest of the administration when it is the employer, who is best suited to decide the percentage of posts in the promotional cadre, which can be earmarked for different category of persons. In other words this provision actually effectuates the constitutional mandate engrafted in Article 16(1), as it would offer equality of

opportunity in the matters relating to employment and it would not be the monopoly of a specified category of persons in the feeder category to get promotions. We, therefore, do not find any infraction of the constitutional provision engrafted in Article 16(4) while providing a quota in the promotional cadre, as in our view it does not tantamount to reservation.”

23. We are also not impressed with the submission made on behalf of MOSPI and DoPT by Mr Sinha that, if the judgement of the Full Bench is sustained, it will upset the seniority list, and therefore, not having arrayed parties which could get impacted, would render the follow-up action untenable in law. According to us, Ms Oberoi is right in her contention that, the grievance of the employees in O.A. Nos.3984/2011 and 4320/2012 was directed against unsustainable direction(s) of the MOSPI/DoPT, and not against any particular individual.

23.1. As was submitted by Ms Oberoi in the course of the hearing, since the employees before us were not laying a challenge to the seniority of any particular individual, the contention put forth by Mr Sinha was, completely, without merit. In this context, the observations made by the Supreme Court in *A. Janardhana* case, being relevant, are extracted herein below:

"36. It was contended that those members who have scored a march over the appellant in 1974 seniority list having not been impleaded as respondents, no relief can be given to the appellant. In the writ petition filed in the High Court, there were in all 418 respondents. Amongst them, first two were Union of India and Engineer-in-Chief, Army Headquarters, and the rest presumably must be those shown senior to the appellant. By an order made by the High Court,

the names of Respondents 3 to 418 were deleted since notices could not be served on them on account of the difficulty in ascertaining their present addresses on their transfers subsequent to the filing of these petitions. However, it clearly appears that some direct recruits led by Mr Chitkara appeared through counsel Shri Murlidhar Rao and had made the submissions on behalf of the direct recruits. Further an application was made to this court by nine direct recruits led by Shri T. Sudhakar for being impleaded as parties, which application was granted and Mr P.R. Mridul, learned Senior Counsel appeared for them. Therefore, the case of direct recruits has not gone unrepresented and the contention can be negatived on this short ground. However, **there is a more cogent reason why we would not countenance this contention. In this case, appellant does not claim seniority over any particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing up the impugned seniority list are invalid and illegal and the relief is claimed against the Union Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents.** We may in this connection refer to *G.M., South Central Railway, Secundrabad v. A.V.R. Siddhanti* [(1974) 4 SCC 335 : 1974 SCC (L&S) 290 : AIR 1974 SC 1755 : (1974) 3 SCR 207, 212 : 1974 Lab IC 587 : (1974) 1 LLJ 312] . **Repelling a contention on behalf of the appellant that the writ petitioners did not implead about 120 employees** who were likely to be affected by the decision in the case, this court observed that [SCC para 15, p. 341 : SCC (L&S) p. 296] the respondents (original petitioners) are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. **The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of government servants is assailed. In such proceedings, the necessary parties to be impleaded are those against whom the**

relief is sought, and in whose absence no effective decision can be rendered by the court. Approaching the matter from this angle, it may be noticed that relief is sought only against the Union of India and the concerned Ministry and not against any individual nor any seniority is claimed by anyone individual against another particular individual and therefore, even if technically the direct recruits were not before the court, the petition is not likely to fail on that ground. The contention of the respondents for this additional reason must also be negated."

(emph
asis is
ours)

23.2. Similarly, the observations of the Supreme Court in the *D.D. Joshi* case, being apposite, are also extracted hereafter:

"23. On behalf of the respondents, it was urged that if the contention of the petitioners is accepted which could compel the 1st respondent to resettle the seniority list, those over whom petitioners and those similarly situated would score a march should have been impleaded as respondents and in their absence, no relief can be given to them. We would not accept this contention for two reasons: (i) that the decision in *G.M., South Central Railway, Secunderabad* [(1974) 4 SCC 335 : 1974 SCC (L&S) 290 : AIR 1974 SC 1755 : (1974) 3 SCR 207 : (1974) 1 LLJ 312] would permit us to negative the contention, this being not a case of individual claim or claim of seniority by one person against specified others, but a question of interpretation of a provision and which interpretation could be given because it would be binding on the Union of India, the presence of others is unnecessary. Union of India would have merely to give effect to the decision of this Court. Therefore, the absence of those who may by our interpretation be adversely affected in the facts and circumstances of the case need not be necessarily here and if the relief could have been granted, the same would not have been denied on the ground that proper parties were not before the court...."

(emphasis is ours)

23.3. Although, the Division Bench of the Tribunal in O.A. No.3984/2011 ruled in favour of the MOSPI and DoPT, however, the objection taken, concerning failure to implead individuals, who, according to them, were likely to be impacted, was repelled. On this issue, the Tribunal agreed with the employees. Pertinently, no counter-affidavit was filed on behalf of the MOSPI and DoPT in W.P.(C.) 5029/2012 whereby the decision rendered by the Division Bench of the Tribunal was assailed. Although, the MOSPI and DoPT had the option to file the counter-affidavit, and demonstrate that the Tribunal had reached an erroneous conclusion on this aspect, they did not avail of this opportunity. [See orders dated 21.08.2012 and 25.02.2013, passed in W.P.(C.) 5029/2012]. In this context, principles analogous to Order XLI Rule 22 of the Civil Procedure Code, 1908 can be applied. MOSPI and DoPT could have stated that, even though, they agree with the conclusion reached by the Division Bench, qua the aforesaid issue, the Division Bench of the Tribunal should have rendered a decision in their favour. Had this been said by way of a counter-affidavit, the same could have been treated, perhaps, as a cross-objection by this Court.

23.4 We must indicate that, in the counter-affidavit filed in O.A. No.3948/2011, the MOSPI and DOPT did attempt to show that relief, if any, granted to the employees would involve unsettling the position, which stood settled since 02.07.1997; and would

involve disturbing the seniority of officers, which were fixed way back between 2003 and 2008.

23.5. As indicated above, this aspect of the matter did not impress the Division Bench of the Tribunal, which decided the O.A. No.3948/2011. As noted hereinabove, in the writ petition filed by the employees i.e. W.P.(C) 5029/2012, whereby the decision rendered in O.A. No.3948/2011 was assailed, no counter-affidavit was filed, even though that option was available to MOSPI and DOPT, and thereby, take the opportunity to demonstrate as to how the conclusion reached by the Tribunal qua this aspect of the matter was erroneous.

23.6 Be that as it may, we had, vide order dated 16.07.2021, called upon the counsel for the employees to file a chart supported by an affidavit to demonstrate that, there will be no demotion if relief is granted to the employees, and the only benefit that they will get, would be in the form of the enhancement of pension.

23.7 We may record that, pursuant to the abovementioned order, Ms. Oberoi filed an additional-affidavit, which shows that, in the above-captioned writ petitions, 105 individuals are involved [83 in W.P.(C) No.5029/2012 and 22 in W.P.(C) No.6422/2020]. Furthermore, according to this affidavit, only 19 individuals are presently in service. Thus, the remaining 86 individuals would

only be entitled to monetary benefit. Besides this, it is also averred that most individuals, out of 19, who are in service would retire in 2022 and 2023. According to this affidavit, there are huge number of vacancies in the ISS cadre at every level, and therefore, the promotee employees could be accorded relief without impacting the rights of direct recruits.

23.8 On the other hand, in the affidavit-in-reply filed on behalf of the MOSPI and DOPT, *inter alia*, the position broadly taken was that, if the view of the Full Bench is sustained, it would involve a herculean effort. Pertinently, there is no refutation of the fact that, most of the employees have retired and that there are, at present, only 19 employees, who are in service; who, as indicated by Ms. Oberoi, are only seeking benefits which would get factored in their retiral dues.

24. As far as Mr Sinha's contention that the aspect concerning limitation, including delay and laches, was not considered by the Full Bench of the Tribunal; in our view, is without basis, in the facts and circumstances obtaining in said cases.

24.1. As pointed out in the earlier part of our discussion, there was a complete lack of clarity, even in the minds of the officers, who were to fill up the promotion post of JTS/STS in Grade-IV of ISS. Even according to Mr Sinha, the DPC for filling up the promotion post(s) were convened on 05.09.2001 and 23.09.2003. In the interregnum, a set of employees had approached the Tribunal, via O.A.No.3364/2002.

This OA was disposed of, vide order dated 02.02.2006, whereby the following observations were made by the Tribunal:

"26. In our considered view, while the DPC may be delayed due to the intricacies of judicial system whereby right from Narender Chadha's case (supra), the issue was settled only after holding DPC in 2001, i.e., for the yester years and also for the year 2003 yet the respondents, while calculating the vacancies, have not adhered to the resultant chain vacancies on account of retirement and promotion to higher grades, which had certainly prejudiced applicants claim to be considered from the date of the accrual of vacancies in the year-wise panel on attainment of eligibility and by not extending the panel as per the procedure laid down ibid, their right for consideration has been affected. Though it is settled law that mere chances of promotion does not constitute a right but one has a right being fundamental to be considered for promotion.

27. In the matter of the policy of the Government and the administrative action, though statutory rules and supplementary Govt. instructions, which do not override the statutory rules framed under Article 309 hold the field and should be in consonance with the requirement of the Articles 14 & 16 of the Constitution as has been held by the Apex Court in State of Haryana & others v. Piara Singh, 1992 SCC (L&S) 825 and also in Kailash Chand Sharma v. State of Rajasthan & others, 2002 AIR 2877.

28. The other contentions raised are not adjudicated for the present. Only on the above score, we find it difficult to reconcile with the justification and explanation tendered by the respondents as to calculation of vacancies in their two DPCs held in 2001 and 2003 pertaining to the vacancies for the years 1996 till 2003 though many of the applicants are promoted but still they have a right to be considered on re-calculation of vacancies in accordance with procedure and guidelines from retrospective date, which would also give them an opportunity to be further considered for higher post and in the wake of their approaching retirement on superannuation.

29. It is trite law that when a decision of the Government is not inconsonance with law, rules and instructions, the only direction can be issued is for re-consideration.

30. In the result, for the foregoing reasons, the OA stands disposed of with a direction to the respondents to re-examine the entire matter in the light of our observations and in furtherance to that, prepare year-wise select panel for the vacancies pertaining to the years 1996 to 2003 by holding review DPC, except those 28 vacancies filled up by an order dated 7.10.2003 and in that event, the claim of the applicants be also considered for promotion from an anterior date and in case of their fitness, they may be accorded all the consequential benefits. The applicants promotion in the event is antedated would require consideration for further promotion to Grade III. The above-said exercise shall be completed within a period of three months from the date of receipt of a copy of this order. No costs."

24.2. As would be evident, the Tribunal asked the MOSPI to re-examine the matter. Unfortunately, the re-examination, which was done and resulted in OM dated 12.05.2006, being issued by MOSPI, did not address the concerns of the employees. It is, however, apparent from the record that MOSPI was not clear, as to what approach ought to be adopted for the period, before the amendment of the 1961 Service Rules, as that had taken place only, on 14.09.2005.

24.3. This is evident from the fact, that there was a flip-flop, even in 2007, when notification dated 19.01.2007 was issued by the DoPT, in light of the judgment of the Supreme Court rendered in **Dr. R.N. Bhatnagar** case.

24.4. Given this position, MOSPI sought clarification from DoPT, which was clarified by DoPT on 17.04.2009, and was reiterated, on

21.04.2010, when clarification was sought once again by the DoPT, via communication dated 31.03.2010. Had MOSPI adopted the advice given by the DoPT, at that juncture, no further grievance would have survived, *vis-à-vis* the period spanning between 1997-98 and 2004-05.

24.5. It is only after MOSPI approached the DoPT, once again, and addressed the communication dated 30.07.2010, in that regard, that, once again, confusion prevailed, as this time around, the DoPT changed its position, which got reflected in its OM dated 31.08.2010. Consequent thereto, the impugned OM dated 13.10.2011 was issued.

24.6. The employees immediately, thereafter, approached the MOSPI for redressal, and because their pleas were not entertained, that the actions [i.e., OA Nos. 3984/2011 and 4320/2012] which are the subject matter of the present petitions, came to be filed.

24.7. This is, therefore, not a case, where representations were being repeatedly made, although, the position, as regards how available vacancies had to be allocated between direct recruits and promotees, stood settled.

24.8. Therefore, while one cannot quibble with the proposition that a mere representation would not enable a litigant to extend limitation, the facts obtaining in the present case, to our minds, are different. We are of the view that the employees cannot be non-suited on this ground. The judgements cited by Mr Sinha, qua this issue, are distinguishable on facts.

24.9. In the counter-affidavit filed in the OA, the ground of limitation/delay and laches was not taken. It was taken for the first time before this Court. It appears on account of facts and circumstances, as stated above, MOSPI and DoPT, wisely, did not raise any objection to the maintainability of the OA 3984/2011 and 4320/2012 on the ground of limitation/delay and laches; this assertion has been made for the first time in this Court. Limitation being a mixed question of law and fact had to be tested in the Tribunal, which would have given an opportunity to employees to deal with the same. It needs to be emphasised that employees are not seeking to disturb settled seniority, they are today confining their claim to monetary benefits that would have accrued to them, had MOSPI/DOPT not resorted to the impugned action(s). The impugned action(s) caused injury and/or wrong to the employees in continuum. In such a scenario, actions cannot be dismissed on the ground of limitation/delay and laches, as they affect none (i.e., third parties) except those who are deprived of their monetary claims.

25. The other issue that was raised by Mr Sinha, which is, that the Full Bench was not appropriately constituted is also not a contention, that impresses us. It is required to be noticed that, no such objection was raised in the reply filed, on behalf of the MOSPI/DoPT, before the Tribunal. Having failed before the Full Bench, the MOSPI/DoPT has chosen to raise this contention for the first time before this court. This practice has been repelled by the Supreme Court. [See *Municipal*

Commissioner vs. Salil Kumar Banerjee & Ors. (2000) 4 SCC 108⁷;
Also see *Krishna Packers vs. Lt. Governor* MANU/DE/1673/2013⁸]

26. The last contention advanced by Mr Sinha that the Full Bench should have only dealt with the issues referred to it, and not decided the matter on merits, is completely untenable. The reason we say so is that a perusal of the order of reference, which is dated 18.12.2018 and is passed in O.A. No.4320/2012, shows that, after discussing the pros

⁷"4. In the first place, by reason of Section 631(3), the Tribunal that heard the first respondent's appeal was properly constituted. That sub-section expressly made provision that the procedure of the 1980 Act would be followed in respect of proceedings that related to contraventions of the 1951 Act. This provision was overlooked by the High Court. The High Court also overlooked the fact that it was the first respondent, the writ petitioner before it, who had filed the appeal under the 1980 Act before the Tribunal and had at no stage before the Tribunal ever contended that it was improperly constituted. Even assuming that it ought to have consisted of three or more Members, had that objection been taken at the initial stage of the hearing of the appeal before the Tribunal, that position could have been rectified. Certainly, in circumstances such as these, the High Court ought not to have exercised its discretion in favour of the first respondent."

⁸"10.5...Even though the petitioner was well aware that it had preferred an appeal with the Lt. Governor, no objection was taken before the Deputy Secretary 26-09-2021 (Page 3 of 5) www.manupatra.com Jamia Millia Islamia that he ought not to hear the appeal. This objection is sought only after the impugned order raising the demand was passed. Therefore, this argument of the petitioner does not impress me. See following observations of the Supreme Court in *Municipal Commissioner, Calcutta & Ors. vs. Salil Kumar Banerjee & Ors.* MANU/SC/2758/2000 : (2000) 4 SCC 108:

"...The High Court also overlooked the fact that it was the first respondent, the writ petitioner before it, who had filed the appeal under the 1980 Act before the Tribunal and had at no stage before the Tribunal ever contended that it was improperly constituted. Even assuming that it ought to have consisted of three or more Members, had that objection been taken at the initial stage of the hearing of the appeal before the Tribunal, that position could have been rectified. Certainly, in circumstances such as these, the High Court ought not to have exercised its discretion in favour of the first respondent....""

and cons of the matter in issue, the Bench culled out in paragraph 18 of its decision, not only the issues qua which reference was made but also went on to give its view in the matter.

"18. It is in view of the foregoing that following issues needed to be considered by the Tribunal:

(a) Given the RRs of ISS dated 01.11.1961 and amended on 14.09.2005 where annual allocation of the DR quota and Promotee quota have remained unchanged to the extent of 60% of the annual vacancies for DR and remaining 40% of the vacancies are to be filled up by promotions for the years 1997-98 and onwards, whether this annual allocation to these two streams is to be made first before any caste based allocation as per Post based roster.

(b) Whether post based roster as per DOP&T OM dated 02.07.1997 is to be applied separately to the 60% DR quota and the 40% promotee quota for the respective allocation of vacancies starting from the year 1997-98.

As already brought out above, it is the considered view of this Bench that the answer to both these issues is in the affirmative and accordingly it is the table in para 6 of OM dated 31.03.2010 which is to be followed and not the table in para 7 (para 17 supra). The Om dated 13.10.2011, will also need to be set aside to this extent. However, since this is contrary to what the earlier bench had decided in OA No.3984/2011, Hon'ble Chairman, CAT may kindly consider constituting a Full Bench for consideration of the issue."

(emphasis is ours)

26.1. As would be evident, the Bench had, in fact, already given its mind as to its view in the matter, however, having regard to the judgement dated 31.05.2012, which was rendered by a co-equal Bench

in O.A.No.3984/2011, the concerned Bench referred the matter to the Full Bench. Therefore, in our opinion, in this case, it was necessary for the Full Bench to give its view not only qua the issues referred to it, but also render its decision on the merits of the matter.

Conclusion:

27. Therefore, for the foregoing reasons, we are inclined to set aside the judgement of the Division Bench of the Tribunal rendered in O.A.No.3984/2011, and sustain the judgement dated 30.04.2019, which is rendered by the Full Bench, in O.A.No.4320/2012. However, the relief will be restricted to the employees involved in the instant proceedings, and more particularly, to the grant of monetary benefits.

27.1. The above-captioned petitions are disposed of in the aforesaid terms. Consequently, pending application in W.P.(C.) 6422/2020 shall also stand closed.

28. The parties will, however, bear their respective costs.

RAJIV SHAKDHER, J.

TALWANT SINGH, J.

OCTOBER 26, 2021/pmc