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

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NEUTRAL CITATION NO: 2022/DHC/002866



Judgment reserved on: 18.02.2022

Judgment pronounced on: 28.07.2022

+ **W.P.(C) 11673/2016**

UNION OF INDIA & ANR.

.....Petitioners

Through: Mr Rajesh Gogna with Mr Arihant Jain,
Mr Rahul Verma and Mr Aishwarya Raj
Singh, Advs. for UOI.

versus

SANDEEP SINGH & ORS.

.....Respondents

Through: Mr A.K. Behera, Sr. Advocate with Mr
Piyush Sharma, Advocate for
Respondents

+ **W.P.(C) 2374/2017**

K.K. TIWARI & ANR.

.....Petitioners

Through: Mr L.R. Khatana, Adv.

versus

UNION OF INDIA & ORS.

.....Respondents

Through: Mr A.K. Behera, Sr. Advocate with Mr
Piyush Sharma, Advocate for
Respondents

+ **W.P.(C) 4911/2017 & CM No.21931/2021**

SAROJ BALA & ANR.

.....Petitioners

Through: Mr L.R. Khatana, Adv.

versus

UNION OF INDIA & ORS.

.....Respondents

Through: Mr A.K. Behera, Sr. Advocate
with Mr Piyush Sharma, Advocate for
Respondents
Mr Prafulla Kumar Behera, Advocate.

+ **W.P.(C) 6184/2017, CM Nos.13160/2021 & 13165/2021**

RAJINDRA KUMAR LAL & ORS

.....Petitioners

Through: Mr Shanker Raju and Mr Nilansh
Gaur, Advocates.

versus

UNION OF INDIA & ORS

.....Respondents

Through: Mr A.K. Behera, Sr. Advocate with Mr
Piyush Sharma, Advocate for
Respondents



CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE TALWANT SINGH

[Physical Court Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

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**Preface:**

1. The central issue which arises for consideration in the above-captioned matters concerns the following i.e., the starting point for the commencement of “approved service” *vis-à-vis* persons who entered the Assistant Civil Staff Officer Grade *via* the Limited Departmental Competitive Examination [in short “LDCE”] route.

1.1. It is important to note at the outset that the post of Assistant Civil Staff Officer was renamed as Section Officer and, therefore, hereafter will be referred to as “SO” for the sake of brevity.

2. It is in this context that challenge is laid to the order dated 18.02.2014 passed in O.A.No.1288/2009 and order dated 10.08.2016 passed in Review App. Nos.76/2014 and 61/2014 by the Central Administrative Tribunal [in short “the Tribunal”]. These orders in review have been assailed in W.P.(C) Nos.11673/2016 and 2374/2017, respectively.

2.1. Besides this, a challenge is laid to order dated 13.01.2017, passed in O.A.No.2145/2011 and order dated 11.04.2017, passed in R.A.No.80/2017 by the Tribunal. These orders are substantially founded on the order dated 18.02.2014 [referred to in paragraph 2 above] passed by the Tribunal. These orders are assailed in W.P.(C)No.4911/2017. Insofar as W.P.(C)No.6184/2017 is concerned, it not only assails the order dated 13.01.2017, passed in O.A.No.2145/2011 but also seeks issuance of a direction to the official respondents to maintain status-quo *vis-à-vis* seniority encapsulated in the select list dated 07.04.2011.

3. It is important to note that the orders dated 18.02.2014 [O.A.No.1288/2009] and 10.08.2016 [R.A.Nos.76/2014 & 61/2014] and orders dated 13.01.2017 [O.A.No.2145/2011] and 11.04.2017 [R.A.No.80/2017], were passed by two different benches of the Tribunal.

4. For the sake of convenience, the private respondents W.P.(C)No.11673/2016, who are beneficiaries of the order dated 18.02.2014 will be referred to as the “successful party” while the petitioners in W.P.(C) No. 11673/2016, represented by the Union of India (i.e., the official respondents in the remaining writ petitions) will be referred to as “UOI”. Likewise, the petitioners, who, *via* W.P.(C) No. 2374/2017, W.P.(C) No. 4911/2017 and W.P.(C) No. 6184/2017, assail the orders dated 18.02.2014, 10.08.2016, 14.01.2017 and 11.04.2017 and seek retention of the select list dated 07.04.2011 will be collectively referred to as the “opposite party”.



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5. Before proceeding further, it would be relevant to, broadly, set out the backdrop in which the instant writ actions had been filed in this Court.

Background:

6. To begin with, it would be relevant to advert to the genesis of appointments to the post of SO. The genesis is found in Armed Forces Headquarters Civil Service Rules, 1968 [hereafter referred to as “1968 Rules”]. These rules were notified on 01.04.1968. Under the 1968 Rules, the modes of appointment were promotion and direct recruitment. 75% of the vacancies were required to be filled *via* promotion while the remaining 25% had to be filled through direct recruitment based on the results obtained in the Civil Services Examinations.

7. It appears that the dispute involving *inter se* seniority of promotees and direct recruits to the post of SO got resolved by a judgment delivered by the Supreme Court in ***AFHQ/ISOs SOs (DP) Association & Ors. v. Union of India & Ors.***, (2008) 3 SCC 331 [hereafter referred to as the “AFHQ case”]. This judgment, which was rendered on 19.02.2008, enunciated the following broad principles in respect of *inter se* seniority concerning promotees’ and direct recruits *qua* the post of SO:

7.1. First, the seniority of promotees’ would be accounted for from the date of allocation of substantive vacancy in their own quota.

7.2. Second, vacancies concerning one quota could not be utilized for the c
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quota.



8. In 2001, UOI superseded the 1968 Rules. The supersession was brought about w.e.f. 26.05.2001. This led to the framing of AFHQCS Rules, 2001 [in short “2001 Rules”]. The said rules, for the first time, *vis-à-vis* the post of SO introduced the LDCE quota. Resultantly, three sources for filling up the post of SOs were created, albeit in the following ratio:

- (i) departmental promotion 40%
- (ii) LDCE 40 %, failing which, *via* departmental promotion
- (iii) direct recruitment 20%.

9. Although vacancies in the LDCE quota were available in 2001, they were not disclosed to the Union Public Service Commission (UPSC) in time and, therefore, while appointments were triggered for other services in 2001 such as CSS, CSSS and IFS ‘B’, no recruitments were made in AFHQCS. This is evident upon perusal of a communication dated 12.06.2001 addressed by UOI [through the Ministry of Defence (MOD)] to UPSC and UPSC’s response *via* written communication dated 26.06.2001. Pertinently, AFHQ’s Stenographers’ Association had made a similar plea to the Department of Personnel and Training (DoPT) *via* their letter dated 30.05.2001, for the inclusion of SOs post in the LCDE 2001 to be conducted by UPSC.

9.1. DoPT’s response dated 12.06.2001 was on the same lines as the one UPSC had sent on 26.06.2001 which was that, at that point in time, it was not possible to include the SOs post in the 2001 examination to be conducted by UPSC. This aspect was reiterated by UPSC in its communication dated 23.10.2001 addressed to UOI, through MOD.

9.2. Thus, for the first time, appointments to the post of SOs *via* the LDCE route were made in December 2002, under UPSC’s notification dated 29.06.2002.

10. Importantly, in response to information sought under the Right to Information Act, 2005 [hereafter “RTI Act”] by, one, Mr Raghbir Singh, a constituent of the successful party, the CPIO, MOD stated the following *via* letter dated 23.05.2006, with regard to what, according to him, would be the starting date from which approved service would reckon *vis-à-vis* SOs appointed based on LDCE 2002:

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(a) **Para (a)** *As per Rule 2(b)(ii) of the AFHQ Civil Service Rules 2001, approved service in relation to any grade means in respect of an officer recruited to that grade through Departmental Examination, period or periods of regular service rendered in that grade, including period or periods of absence during which he would have held a post on regular basis in that grade but for his being on leave or otherwise not being available to hold such post, from the first day of January of the year for which such examination was held. As such, a Section Officer appointed on basis of qualifying LDCE, 2002, will reckon his approved service w.e.f. 01.01.2002.*

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[Emphasis is ours.]

11. It appears that in and about October 2007, two persons from amongst the constituents of the successful party moved the Tribunal with the grievance that they had not been granted the Non-Functional Scale Grade [in short “NFSG”] of Rs. 8000-13500, which was attached to the post of SO. The Tribunal *via* order dated 26.10.2007, passed in O.A. No. 766/2007, directed UOI to take a final decision, concerning the plea made for grant of NFSG in the pay scale of Rs.8000-13500. For the sake of convenience, the order dated 26.10.2007 is extracted below:

“After hearing the parties’ counsel, it is no more res integra that parity in pay has no linkage with the cadre review and parity in pay scale had been maintained between AFHQ CS and CSS, yet the decision to grant non-functional grade of Rs 8000-13500 to the Section Officers, AFHQ CS on competition of four years’ approved service w.e.f. 1.1.1996 has neither been considered nor has any final decision been taken by the respondents, rather the

respondents' plea that cadre review is clubbed with grant of non-functional grade is not the correct approach.

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2. In the result, for the foregoing reasons, OA stands disposed of with a direction to the respondents to take a final decision as to grant of non-functional grade to the applicants within a period of three months from the date of receipt of a copy of this order. A detailed and speaking order in this regard shall be passed by the respondents treating the erstwhile pay parity. It is also made clear that in the event of grant of such grade consequences would ensue, which would relate back to 1.1.1996. No costs.

[Emphasis is ours.]

12. This resulted in the UOI/MOD preparing a note dated 11.09.2008. Consequently, SOs' pay was fixed in Pay Band-3 (Rs.15600-39100) provided the concerned persons had completed four years of approved service.

12.1. Insofar as approved service for LDCE officers was concerned, as per order dated 11.09.2008, it was to be reckoned from January 01 of the year 'for which' examination was held. It is important to record that with the note dated 11.09.2008, a list of names SOs who were to be appointed *via* the LDCE mode, was appended, which revealed that in these cases, approved service was reckoned from the year in which the examination was held. Thus, insofar as the officer, who had qualified LDCE 2002, was concerned, his/her approved service was reckoned from 01.01.2002.

13. On 22.09.2008, UOI/MOD announced that, in compliance with the Tribunal's order dated 26.10.2007, it had decided to grant NFSG pay scale of Rs.8000-13500 to SOs of AFHQCS on the same lines as had been granted to SOs of CSS/CSSS. It is in this context that on 25.09.2008 UOI/MOD made an official communication to introduce NFSG of Rs.8000-13500 *qua* SOs in AFHQCS.

14. The record, however, shows that on 30.09.2008, UOI/MOD decided to keep its earlier order dated 11.09.2008 in abeyance till further communication.

14.1. This was followed by UOI/MOD issuing an order dated 15.12.2008 wherein the period of the commencement of approved service concerning the constituents

of the successful party was shifted by a year, contrary to what was indicated in the list appended to the order dated 11.09.2008. In other words, the earlier decision taken by UOI/MOD on 11.09.2008 was superseded.



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15. It appears that another constituent of the successful party, namely, Sandeep Singh filed an application dated 27.11.2008 under the RTI Act with UPSC. The UPSC, *via* communication dated 22.12.2008, provided information concerning vacancies which were available in the AFHQSO Grade at the point in time LDCE 2002 and 2003 were held.

16. Because UOI/MOD had superseded its earlier decision which was apparently taken on 11.09.2008 *via* its order dated 15.12.2008, the first foray was made by the successful party before the Tribunal *via* O.A.No.1288/2009. The principal plea articulated in this OA, in effect, was that approved service should be reckoned from the year in which the applicants i.e., the successful party had sat for the LDCE.

16.1. However, the Tribunal *via* order dated 23.12.2009 repelled this plea. The Tribunal took the view that approved service would reckon from the first day of January of the year “for which” the examination was held. The rationale provided by the Tribunal is contained in paragraphs 19, 20 and 22 of the order dated 23.12.2009:

“19. However, there is a portion of the definition which requires consideration in this context. This is at the conclusion and reads ‘from the first day of January of the year for which such examination was held’. These words have been interpreted by the parties before us in various ways. The applicants have said that this means from the first day of January of the year in which the applicants participated and succeeded for their appointment as SO. Therefore, in respect of LDCE, 2002 it would mean approved service from 01.01.2002. A question therefore arose during the hearing whether the definition should not have been worded differently, in keeping with such interpretation, replacing the words ‘for’ by ‘in’ or replacing the words ‘for which’ by ‘when’ thereby leaving no ‘doubt that it



would be the year in which or when such examination was held. The respondents have argued that these words mean from the first day of January of the year of vacancies against which the appointment of the applicants was made. It is clarified that the exam is held in respect of vacancies occurring in the following year and meant to fill the same. As such the words 'year for which such examination was held' means the following year.

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20. It is well settled that only when a statute is capable of two interpretations that the rules of construction would need to be considered but where the language is clear and the meaning is plain effect must be given to it. The applicants have not challenged the vires of the statutory definition or sought change in it as it exists. But they seek the interpretation favourable to them. However, the above contradictory interpretations seem to also imply addition or substitution or rejection of words in the statutory definition. Language is important to gauge the legislative intent. But if the language is not plain and unambiguous, some imagination may need to be used to appreciate the object and purpose behind it without interfering with the words already employed to express the same, or insisting upon an unnatural meaning. No words could be read into the Rule, unless absolutely necessary to do so and only if the provision in it is of doubtful meaning, What has been said and also that which has not been said would require to be kept in view.

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22. An examination could not be of use unless it is known in advance that vacant posts exist which need to be filled up. There may be vacancies which are carried forward because they could not be filled up after an earlier examination due to any reason or there may be vacancies which it is known would definitely arise or again there may be vacancies that it may be possible to anticipate. These vacancies may undergo some change for various reasons and also depending upon exigencies of administration. The vacant posts are usually filled up from those on the select panel which would be prepared out of candidates found successful in the examination. No appointment is possible against a post that is not vacant. Besides, the life of a panel is normally 1 to 1 ½ years. Therefore appointments would follow the holding of an examination and during currency of the panel. It is not inconceivable that there may be an interval of time between the holding of the departmental exam and the actual recruitment by appointment to a post. The Departmental Exam

*is only the mode through which the recruitment is facilitated,
just like DPC or Direct Recruitment.*

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17. The decision of the Tribunal dated 23.12.2009 was assailed by way of a writ petition instituted in this Court i.e., W.P.(C)No.7538/2010. A Division Bench of this Court, *via* a speaking order dated 10.11.2010, dismissed the writ petition on the very first date of hearing. The dismissal of the writ petition was founded on the belief that the constituents of the successful party i.e., the applicants in O.A.No.1288/2009 had not pressed the issue concerning the aspect that the notification for the said examination did not state that the examination was being held only for anticipated vacancies.

17.1 However, the Division Bench *via* order dated 04.08.2011 passed in Rev.P.No.246/2011, recalled its order dated 10.11.2010. The Division Bench, thus, permitted the constituents of the successful party to file a review application before the Tribunal to articulate their point of view that the LDCE 2002 was held bearing in mind, both, the then subsisting vacancies as well as anticipated vacancies. The relevant parts of the order dated 04.08.2011 are extracted hereafter:

“R.P.No.246/2011

1. Review of the order dated 10.11.2010 is being sought with reference to the documents and the pleadings before the Central Administrative Tribunal wherefrom it is sought to be projected that the Limited Departmental Competitive Examination was not only for the anticipated/ensuing but even for the existing vacancies.

2. Learned counsel concedes that in para 16 of the order sought to be reviewed, it is correctly recorded that this argument does not find a mention in the impugned decision of the Tribunal.

3. However, counsel states that as a matter of fact, the pleadings in the Original Application were not abandoned and an argument was advanced before the Tribunal on the ground that the examination in question was not limited for the ensuing/anticipated vacancies but embraced the existing vacancies as well.

4. Settled position of law is that where an argument is advanced before a Fora and is not dealt with by the Fora, an application needs to be moved before the Fora drawing attention of the

members of the Fora that an argument advanced has not been dealt with.

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5. The reason for law so requiring is that many a times arguments are taken up by way of pleadings but abandoned during hearing.

6. To resolve the dilemma, learned counsel for the petitioner states that if this Court were to recall the order dated 10.11.2010, petitioners would be willing to make a statement that they do not press the writ petition so that they can move an application before the Tribunal pointing out to the Tribunal that arguments were advanced with reference to the pleadings and the documents annexed, that the examination in question was not restricted to the ensuing/anticipated vacancies but embraced the existing vacancies as well.

7. Accordingly we dispose of R.P.No.246/2011 by recalling the order dated 10.11.2010, by which order the writ petition was dismissed in limine.

W.P.(C) No. 7538/2010

1. Having recalled the order dated 10.11.2020 dismissing the writ petition, we highlight that the principle of merger of the impugned order in the order dated 10.11.2020 would not be applicable.

2. We take on record the statement made by learned counsel for the petitioners on instructions from the briefing counsel that the writ petition may be permitted to be withdrawn with right reserved for the petitioners to move an application before the Tribunal pointing out that a submission pleaded and urged at the oral hearing has not been dealt with by the Tribunal.

3. The writ petition is dismissed as not pressed.

4. Needless to state, if an application is filed before the Tribunal, the same would be decided in accordance with law and for the purposes of limitation the Tribunal would take cognizance of the fact that the instant writ petition was dismissed in limine on 10.11.2010. Review of the said order was sought vide R.P. No. 246/2011, which review application has been disposed of today.

5. No costs.

6. Dasti.”

[Emphasis is ours.]

18. Upon the constituents of the successful party filing a review application i.e., R.A.No.314/2011, the aforementioned aspect was considered by the Tribunal whereupon, by an order dated 05.12.2012, it allowed the said application and recalled its earlier order dated 23.12.2009.

19. Thus, pursuant to a *de novo* consideration of O.A.No.1288/2009, Tribunal *via* its order dated 18.02.2014, in a nutshell, concluded that the approved service, concerning officers who had been declared successful in the LDCE 2002, 2003 and 2004 held for the post of SO, would commence from the first day of January in which the examination was held by UOI. The rationale provided by the Tribunal is that UOI could not have held back the 2002 vacancies [save and except for cogent reasons] and having done so, had diverted the vacancies available under the LDCE quota in favour of departmental promotees, which was not permissible in law. Resultantly, according to the Tribunal, the quota fixed under the rules *qua* the two sources was altered without any such discretion being vested in the UOI in that regard. Consequentially, directions were issued by the Tribunal to redraw 2002, 2003 and 2004 select lists. The relevant observations made by the Tribunal in its order dated 18.02.2014 are extracted hereafter for the sake of convenience:



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15. We have gone through the pleadings on record and the oral submissions made by the learned counsels from both the sides. The applicants have sought to establish that the LDCE 2002, notwithstanding the averment of the respondents that it was meant for the vacancies for 2003-2004, could not have excluded the vacancies for 2002. Once the statutory rules came into force in 2001, it was the duty of the respondents to fill up LDCE quota vacancies in accordance with the statutory provisions. The applicants' case is primarily based on three grounds:

i) Since the LDCE was held in 2002, the selectees of that examination are entitled to their service being counted from 01.01.2002.

ii) Since the respondents or the UPSC in their communication had not explicitly communicated as to which year the vacancies pertained to, it was obvious that the 2002 vacancies were included in the LDCE for which the LDCE, 2002 was held.

iii) The respondents had no authority to withhold the LDCE vacancies of 2002 from the LDCE, 2002.

16. On the first issue this Tribunal has already come to the conclusion that there were no ambiguities as far as the provisions of the recruitment rules are concerned. The approved service of a selectee will have to be counted from the 1st day of January of the year for which such examination was held and this position was also



accepted by the Hon'ble High Court in Writ Petition (Civil) no.7538/2010 (supra). We will, therefore, deal with the remaining two issues, which is also the term of remand in Hon'ble High Court's order in R.P. no.246/2011. The respondents have produced copies of original record where the decision was taken by the respondents to communicate the vacancies for the LDCE, 2002. From the discussion in the notings it is clear that it was a conscious decision of the respondents to restrict to the anticipated vacancies for 2003.-04 and not to communicate the vacancies of 2002 or earlier. Once we accept this position, most of the arguments of the applicants become irrelevant because it automatically implies that the approved service will have to be counted from 1.1.2003 since the recruitment was done for the vacancies "for the year 2003-04." Even the judgments of the Hon'ble Apex Court cited by the learned counsel for the applicants would not apply, as they refer to the approved service being counted from the vacancy year and that is being done in this case. **Therefore, the only issue that needs to be explored further is whether the respondents had the discretion of withholding existing vacancies from LDCE, 2002?**

17. It is an admitted fact that the vacancies did exist in the year 2002 while notifying to the UPSC the vacancies for LDCE, 2002. Now the question is as to why the same were not communicated. Here neither the extracts of the notings annexed by the respondents with their reply nor any averments throw any light except the statement that it was an 'administrative' matter. **During oral arguments the learned counsel for the respondents even submitted that it was the prerogative of the respondents to fill up or not to fill up the vacancies occurring in any grade. We accept this argument provided the decision taken by the respondents not to fill up the vacancies is based on some reasoning and it is consistent over a period of time. In the present case we do not find these conditions to be fulfilled. No reason has been given as to why the respondents decided not to notify the existing vacancies for the LDCE 2002 and if the same were not to be filled up for some cogent and logical reasons, then they also did not have the liberty to divert the same to the promotion quota and fill it up by promotion in the year 2011. The administrative discretion cannot be exercised arbitrarily to promote discrimination or to favour one group or other. In this regard we draw upon the Hon'ble Apex Court judgment in M. Subba Reddy (supra) where the Hon'ble Court held that having fixed the quota between the two sources of recruitment, there is no discretion with the corporation to alter the quota or to deviate from the quota and another judgment of the Hon'ble Apex Court in S.G. Jaisinghani (supra) where the Hon'ble Court reiterated the above**



proposition and held that having fixed the quota between the two sources of recruitment, there is no discretion left with the Government of India to alter that quota according to the exigencies of the situation or to deviate from the quota, in any particular year, at its own will and pleasure. We, therefore, hold that the respondents erred in not communicating the existing vacancies at the time of notifying the vacancies for LDCE, 2002. Had they notified the existing vacancies to LDCE being held in the same calendar year, i.e., 2002 the selectees of the LDCE, 2002 would become entitled for counting approved service w.e.f. 1.1.2002 in accordance with the settled position with regard to the rules, as mentioned above. Thus, in respect of applicant no.2, who is a selectee of LDCE, 2002, the panel will have to be redrawn with reference to the existing vacancies for the year 2002 and if he gets selected on the basis of his position in the merit list of LDCE, 2002, the date for counting approved service will be fixed as 1.1.2002.

18. The case of applicants no.1 and 3 is based on interpretation of the rules to the effect that the seniority of a selectee of LDCE of a particular year will be counted from the 1st January of that year. This issue has already been settled (supra). Once we accept the principle that the respondents have no discretion to withhold any LDCE vacancies and are bound to notify the same for the LDCE of the year, there will be cascading effect of redrawing the panel for the vacancies of 2002 and there will be unfilled vacancies available in the years 2003 and 2004 also which should have been notified to the LDCE of those years (2003 & 2004), had the respondents not withheld the existing vacancies of 2002 from being notified. As a result, the panels for LDCE of 2003 and 2004 will also have to be redrawn and the positions of applicant nos. 1 and 3 decided based on their respective merit position in those examinations.

19. In view of the aforementioned facts and reasons we quash the letter dated 30.09.2008 issued by the respondents and order that the panels for the LDCE held in the years 2002, 2003 and 2004 will be redrawn, taking into account the vacancies existing in each of those years along with the anticipated vacancies for the next year. If the applicants on the basis of their position in the merit list for the respective years get selected for that year, their seniority will count from the, 1st January of the vacancy year and they will be entitled to Non-Functional Grade after completion of four years from that date. They will, however, be entitled for arrears for two years preceding the date of this order. Considering the circumstances in this case, the applicants will not be entitled to any interest. This exercise shall be completed by the respondents within a period 03 months from the date of receipt of a copy of this order and NFSG of Rs.8000-13500



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20.1. These review applications were dismissed by the Tribunal *via* order dated 10.08.2016. The Tribunal, *inter alia*, stated in no uncertain terms that in its order dated 18.02.2014, it had dealt with only inter se seniority amongst LDCE candidates and not touched upon aspects concerning seniority obtaining between departmental promotees and LDCE candidates. The Tribunal, thus, ruled that it had, therefore, not transgressed the directions contained in this Court's order dated 04.08.2011. Once again, for the sake of convenience, the relevant portions of the Tribunal's order dated 10.08.2016 are extracted hereafter:

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(g) He also made a reference to the practical difficulty in implementing the order dated 18.02.2014 as it may lead to conducting of fresh LDCE for 12 years starting 2002-03.

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12. According to the review applicant the use of word "seniority" in the order was an error as the seniority of the review applicants will be affected by the order dated 18.02.2014 but they were not a party in the case. That was also not the prayer in the OA. A perusal of the order dated 18.02.2014 would reveal that the dispute raised in OA No. 1288/2009 was with regard to the year from which the approved service of the applicants would be counted. The applicants were LDCE appointees against the statutory quota reserved for them under the Rules of 2001. There was no reference anywhere in that order to the appointees under the promotion or direct recruitment quotas. The scope of word "seniority" in this background would obviously be confined to inter se seniority of the LDCE appointees and cannot be applied to the inter se seniority with reference to the appointees of other modes. By giving it a wider connotation, the review applicants are trying to find an artificial error to justify a review of that order. The grounds (a) and (b) therefore have no merit.

13. Again the submission that the question of approved service for the purpose of NFS has been adjudicated in the order dated 23.12.2009 and hence the Tribunal could not have reopened it, is absolutely illogical. In effect the proposition is that the Tribunal has to consider the "submission pleaded and urged at the oral hearing" by the applicants, as ordered by the High Court in the judgment dated 04.08.2011, but it cannot deviate from the findings already arrived at by it in the order dated 23.12.2009. Obviously, such an interpretation will lead to absurd consequences making the review permitted by the High Court an infructuous exercise. It may be added that this Tribunal following the order in review petition no.246/2011 in WP (C) No.7538/2010, allowed the RA and directed it to be listed under "Ready for hearing matters" for final arguments without any restriction on the scope. The parties were also allowed to file additional documents in support of their arguments, if they so liked. The arguments in the OA covered the entire gamut of grounds taken by the applicants and there was no objection from the respondents. We do not, therefore, subscribe to the view that the order dated 18.02.2014 has gone beyond the mandate of the Hon'ble High Court of Delhi in RA No.246/2011. The grounds (c) and (d) also have no force.

14. The argument that the review applicants were necessary parties in the OA is also without substance since, as pointed out by the learned



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counsel for the respondents in the RA 61/2014, the review applicants do not have any locus standi in the matter. It is not in dispute that the review applicant no.1 was promoted as SO by order dated 06.08.2009 against the vacancy year 2006-07 and the name of review applicant no.2 did not figure in the seniority lists drawn upto the year 2007-08. Their claim for seniority emanates from the seniority list drawn in 2012 on the basis of their retrospective promotion in 2011 against diverted vacancies of the years 2002-03 and 2003-04. When the OA was filed in 2009 the review applicants were indisputably junior to the applicants and not even remotely connected with the question of ante-dating of approved service or seniority of the applicants. The review applicants, therefore, have no locus standi in the OA. Further, the matter of seniority between the seniority mode promotes and LDCE promotees is stated to be the subject matter of Mohinder Singh (supra), but the order under review nowhere touches on the issue. Consequently, the ground (e) also has to be rejected.

15. In the ground (f) the reliance on **Dinesh Kumar** (supra) at this stage is misplaced as the Tribunal cannot consider the matter on merits having become functus officio after delivering the order dated 18.02.2014. We also do not want to venture into the speculative Stand of the review applicants in RA No.76/2014 taken in ground (g) that "it would be highly improbable for the UPSC to re-conduct the LDCEs for the last 12 years". It is for the respondents to decide the course of action for implementing the order of this Tribunal whether by conducting fresh LDCE for 12 years or by redrawing the year-wise panels on the basis of existing merit list available with the UPSC or any other option available to the official respondents. In any case it cannot be a ground for review. The remaining grounds of the review applicants are nothing but supporting arguments of the stand taken by the official respondents in the OA and an effort to re-argue the case. From the above discussion, it can be seen that the review applicants in RAs have not been able to establish any error apparent on the face of the record.

16. Both the RAs are, therefore, found to be devoid of merit and are dismissed as such.”
[Emphasis is ours.]

21. Since UOI/MOD, on 07.04.2011, had redrawn the seniority quota select list of Assistants who were to be granted regular promotion to the grade of SO for the period spanning between 2001- 2002 to 2007-2008, yet another Original Application (O.A. No.2145/2011) was filed in the Tribunal.

21.1. The Tribunal via order dated 13.01.2017 quashed the seniority quota list and/or promotion order dated 07.04.2011 and directed the UOI/MOD to prepare a fresh seniority select list as per the 2001 Rules, without taking recourse to the

LDCE quota for 2001-2002 to 2005-2006. The relevant parts of the order extracted hereafter:

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“ xxx

xxx

xxx

16. To summarize, two things emerge:

i) The panel of LDCE will take into account the vacancies existing in each year and their seniority counted from the first day of the vacancy year i.e., 1.01.2002 onwards in the case of the applicants; ii) The "diversion of quota between LDCE and selection quota candidates undertaken by the respondents is impermissible in law and has to be reversed.

17. In view of the above findings, we partly allow this OA quashing the seniority quota select lists, promotion order dated 7.04.2011 and draft seniority list of SOs dated 7.04.2011 and direct the respondents to prepare a fresh select list of seniority strictly in accordance with AFHQCS Rules, 2001, without diverting LDCE quota for the years 2001-2002 to 2005-2006 to seniority promotion quota while redrawing fresh select lists of seniority mode. Needless to say, any promotion to the post of Deputy Director would be in accordance with this revised seniority list. We fix a time frame of 90 days from the date of receipt of a copy of this order for implementation of our directions above. No costs.”

[Emphasis is ours.]

22. Qua the order dated 13.01.2017, a review application i.e., R.A.No.80/2017 was preferred. The Tribunal vide order dated 11.04.2017 dismissed the said review application.

23. It is in this context that the above-captioned writ petitions have been preferred. Importantly, W.P.(C)No.4911/2017 has been instituted by Saroj Bala Dalal and Bijai Pratap Singh i.e., respondent nos. 215 and 548 in O.A.No.2145/2011. As noticed above, in W.P.(C)No.4911/2017, a challenge has been laid to the Tribunal's order dated 13.01.2017 principally on the ground that ante-dating of seniority qua the applicants involved in O.A.No.2145/2011 has impacted their seniority i.e., the seniority of Saroj Bala Dalal and Bijai Pratap Singh. Likewise, Rajindra Kumar Lal, Ravinder Nath Das, Shalok and Bhagwan Sahai i.e., respondent nos.344, 362, 363 and 367 respectively in

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24.2. Significantly, on 13.11.2017, the Court modified its earlier order dated 24.07.2017 and, thus, permitted UOI to prepare a fresh seniority list in consonance with the directions contained in the Tribunal's order dated 13.01.2017. The relevant extracts of the order are extracted below:

[Emphasis is ours.]

24.3. The record shows that on 20.03.2018, the then learned ASG appearing 
the UOI i.e., Ms Maninder Acharya, informed the Court that a fresh seniority list,
in terms of its earlier directions issued on 13.11.2017, had been prepared. The
Court, however, ordered that the said list will not be operated till the final disposal
of the above-captioned writ petitions. The relevant extract from the order dated
20.03.2018 is as follows:

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“xxx xxx xxx

W.P.(C) 11673/2016, W.P.(C) 2374/2017, W.P.(C) 4911/2017 and W.P.(C) 6184/2017

1. Ms Acharya, learned ASG states that in compliance of[sic: with] the order dated 13.11.2017, a Select List on merits has been prepared in terms of the impugned judgment and is kept available. The said list shall not be operated till the disposal of the present petitions.

xxx xxx xxx"

25. However, before we proceed further, it is relevant to reiterate that the reliefs sought in two out of the four writ petitions [W.P.(C)Nos.11673/2016 and 23741/2017] which are adverted to hereinabove, are directed against the orders dated 18.02.2014 and 10.08.2016 passed in O.A.No.1288/2009 and in R.A. Nos. 61/2014 and 76/2014, respectively. The UOI, as noticed above, on its part has implemented the decision of the Tribunal dated 13.01.2017 passed in O.A.No.2145/2011 which, however, has been assailed by the petitioners in the remaining two writ petitions i.e., W.P.(C)No.4911/2017 [Saroj Bala & Anr. v. UOI & Ors.] and W.P.(C)No.6184/2017 [Rajindra Kumar Lal & Ors. v. UOI & Ors.]. Besides this, other reliefs are also claimed in these writ petitions, to which we have already referred.

Submissions of the Counsels:

26. On behalf of UOI, submissions were advanced by Mr Rajesh Gogna, which can, broadly, be paraphrased as follows.

26.1. The approved service had commenced only from the first day of January “for which” examination was held for LDCE quota.

26.1. (a) On this score, reliance was placed by Mr Gogna on Rule 2(b)(ii) of 2001 Rules.

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26.2. Therefore, insofar as the candidates who qualified LDCE 2002 held for SOs; they could only be appointed against the vacancies of 2003-2004. Consequently, the approved service in their case would commence from 01.01.2003. Likewise, for candidates qualifying in LDCE 2003, the allocated vacancies were relatable to 2004-2005 and in their case, the approved service would commence from 01.01.2004. In other words, while holding examinations, the anticipated vacancies were kept in mind.

26.3. Thus, the argument advanced on behalf of the successful candidates that the approved service would commence for candidates who qualified for LDCE 2002 from 01.01.2002 because the exam was held in December 2002 is contrary to the provisions of Rule 2(b)(ii) of the 2001 Rules.

26.4. It is also important to highlight [contrary to what was portrayed by the successful candidates before the Tribunal], that UOI did not hold back the fact that vacancies did exist in the LDCE quota, both, in 2001 and 2002. In this context, it is relevant to note that LDCE was introduced as a source of appointment [for eligible candidates] in the SO grade only when the 2001 Rules were framed, which came into effect on 26.05.2001. The correspondence placed on record would show that UOI had made serious attempts to persuade UPSC to hold the examination for the LDCE quota in 2001 itself. [See communications dated 12.06.2001 and 31.08.2001 addressed by UOI to UPSC and the response of UPSC dated 26.06.2001 and 23.10.2001.] A perusal of this correspondence would show that UOI not only requested the UPSC to include AFHQCS candidates in the LDCE 2001 examination which was being held for other services, but to also explore the possibility of holding a separate examination. The UPSC on its part declined both suggestions because the paperwork concerning the LDCE 2001 examination had already been completed.

26.5. Since the examinations for the LDCE quota were invariably held

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December of the concerned year, the successful candidates invariably were not available in the same year as the process could not be completed in the year in which examinations were held. Thus, successful candidates of LDCE 2002, 2003 and 2004 became available only in 2004, 2005 and 2006 respectively. Because there was a time lag in filling-up vacancies for SO grade, the UOI in public and organizational interest filled up the vacancies with departmental promotees' in accordance with the provisions of Rule 7(5) read with Schedule IV of the 2001 Rules.

26.6. The order dated 11.09.2008 relied upon by the successful candidates for seeking grant of NFSG scale of Rs.8000-13500 (pre-revised) is, in fact, an internal note which contained an error and, therefore, was directed to be kept in abeyance *via* another note i.e., note dated 30.09.2008. This error was corrected, ultimately, *via* order dated 15.12.2008. This note is aligned to the provisions of Rule 2(b)(ii) of the 2001 Rules and therefore, as indicated earlier, the approved service of four years for grant of the aforementioned NFSG scale would commence from the first day of January for which LDCE 2002 examination was held. In other words, the four-year period would reckon/commence from 01.01.2003 as the LDCE 2002 examination concerned vacancies of 2003-2004. In projecting vacancies for LDCE 2002 examination, UOI had relied upon the Ministry of Home Affairs (MHA) OM No.23/11/67-Esst.(B) dated 14.07.1967. *Inter alia*, this OM required the appointing authorities to plan their manpower needs well in advance bearing in mind various considerations including the period of their training before they become available for the actual posting. If this Court were to uphold the view of the Tribunal, as reflected in its order dated 18.02.2014, it would cause discrimination *vis-à-vis* the other two streams, as their approved service is reckoned from the first day of January of the year for which examination was held. The select list for the other two streams was drawn-up accordingly. The implementation of the Tribunal's

order would upset the seniority which stands settled as amongst departmental promotees, direct recruits and those who were sourced through LDCE.

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27. Mr L.R. Khatana, who appeared for the petitioners in W.P.(C)Nos.4911/2017 and 2374/2017, supported Mr Gogna's submissions to the extent that the orders dated 18.02.2014 and 10.08.2016 were flawed as they had resulted in granting reliefs which were not sought by the applicants i.e., the successful candidates who had preferred O.A.No.1288/2009 and against the persons who were not a party to the said OA.

27.1. Mr Khatana's submissions, broadly, ran as follows:

(i) The issue concerning seniority between promotees and direct recruits at all levels i.e., Lower Division Clerk, Assistant and SO had remained embroiled in litigation between 1978 and 2008. Petitioner no.1 i.e., K.K. Tiwari, who had preferred W.P.(C) No.2374/2017 and petitioner no.1 i.e., Saroj Bala who had instituted W.P.(C) No.4911/2017, were appointed as SOs upon recommendations made by a regular DPC in 1998 and 1997 respectively, pursuant to the judgment of the Supreme Court rendered in **AFHQ** case. Accordingly, these petitioners [K.K. Tiwari and Saroj Bala] were assigned seniority on account of DPC convened in 2002-2003 and 2001-2002.

(ii) Importantly, petitioner no.2 in both writ petitions i.e., Bijai Pratap Singh was promoted on 28.04.2003 in consonance with the provisions of Rule 7(8) of the 2001 Rules and was assigned seniority as per the DPC convened in 2003-2004. Ordinarily, regular promotion orders are issued only when seniority issues are settled by the courts and, in this case, the Supreme Court settled the issue *via* the aforementioned judgment on 19.02.2008 i.e., the **AFHQ** case.

(iii) A large number of officers were, thus, promoted temporarily in consonance with Rule 10(2) of the 1968 Rules and Rule 7(8) of the 2001 Rules. These rules provide for the temporary promotion of eligible officers in case the regular list was not available for any reason. Thus, once seniority disputes in the grade of

LDC/Assistant were settled, all select lists from 1968 onwards were to be re-drawn year-wise and, therefore, these promotions cannot be termed as retrospective promotions. Since revised deemed promotion/seniority occurred only after the judgment in the *AFHQ* case was rendered on 19.02.2008, the aforementioned petitioners did not get an opportunity to appear in the LDCE 2002 examination held for SO grade. Thus, ante-dating approved service i.e., the date from which approved service would commence *vis-à-vis* candidates, who sat for the LDCE 2002 examination held for SO grade, would infringe the rights of the aforementioned petitioners concerned with W.P.(C)Nos.2374/2017 and 4911/2017. These petitioners had a fundamental right to be considered for promotion in consonance with the provisions of Article 16 of the Constitution. The successful candidates of LDCE 2002 [which was held *qua* 2003-2004 vacancies], if adjusted against 2002 vacancies and granted seniority from 01.01.2002, even though they had joined only on 30.04.2004, would impact the rights of the aforementioned petitioners. The vacancies of 2001-2002 and 2002-2003 can, thus, only be filled by UPSC holding a fresh written examination and, in that context, inter alia, regard will have to be had to aspects concerning eligibility, APARs, vigilance/penalty status of the concerned candidates.



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(iv) The fact that UOI considered vacancies of 2003-2004 while holding LDCE 2002 was in line with its past practice.

27.2 It is to be borne in mind that not only unfilled vacancies available under the 1968 Rules were required to be filled, but also those which arose under the 2001 Rules. Insofar as the unfilled vacancies that were available when the 1968 Rules were in vogue, they had to be filled as per the provisions of Rule 6(3) and 7(1) of the 2001 Rules. As regards unfilled vacancies under the LDCE quota were concerned, they were required to be filled in as per Rule 7(4) and 7(5) of the 2001 Rules i.e., in terms of the provisions of Schedule IV of the 2001 Rules. In other words, since LDCE quota candidates were not available in 2001 and 2002, they were correctly filled by taking recourse to the promotion route. It is in this context

that in 2011, a direction was issued for redrawing the select list from 2001-2 onwards. Accordingly, 320 posts were reapportioned in the ratio of 40:40:20 amongst departmental promotees', LDCE candidates and direct recruits in terms of the Fourth Schedule appended to the 2001 Rules.



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27.2.(a) In all this, what is lost sight of is that the aforementioned petitioners i.e., petitioners in W.P.(C)Nos.2374/2017 and 4911/2017 were senior to the successful candidates in the feeder grade and had already been promoted as SOs at which juncture they were working as Assistants/PAs.

27.2.(b) Thus, as adverted to above, the Tribunal in passing the order dated 18.02.2014 in O.A.No.1288/2009, while dealing with the issue concerning approved service, also dealt with the aspect of seniority and, thus, impacted the promotion of the aforementioned petitioners although they were not a party to the said OA and O.A.No.2145/2011 was still pending adjudication. The Tribunal in the earlier round, when O.A.No.1288/2009 was disposed of *via* order dated 23.12.2009, had reached the correct conclusion. This view had received the imprimatur of the High Court with the dismissal of W.P.(C)No.7538/2010. On remand by the High Court and recall of the order dated 23.12.2009 pursuant to a review application, the Tribunal reached an erroneous conclusion by disregarding the scope of the OA and the reliefs sought therein. The Tribunal was not required to venture into an area i.e., whether or not the UOI had correctly triggered the provisions of Rule 7(4) and 7(5) of the 2001 Rules to fill up vacancies of earlier years. Since UPSC had declined to include AFHQCS in the LDCE 2001 examination, vacant posts could have been filled-up through the promotion route. [See *G.S. Lamba v. Union of India & Ors.*, (1985) 2 SCC 604; paragraphs 23 to 28.]

27.2.(c) Clearly, the issue concerning promotion and seniority had not been raised in O.A.No.1288/2009. Furthermore, granting reliefs *qua* these aspects without joining parties had rendered the order dated 18.02.2014 untenable in law.

27.2.(d) The Tribunal misconstrued the expression “existing” and “anticip
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vacancies” and thus, ultimately reached an erroneous conclusion.



27.3. The Tribunal committed an error in allowing O.A.No.2145/2011 and, thus, quashed the aforementioned petitioners’ promotion/seniority by relying upon the order passed in O.A.No.1288/2009 and the interim order of this Court dated 16.12.2016 passed in W.P.(C)No.11673/2016 which was only a *prima facie* view. This Court, while passing the order dated 16.12.2016, had restricted the implementation of the order dated 18.02.2014 only *qua* grant of NFSG. The Tribunal, while granting the relief in O.A.No.2145/2011, had committed an error since it assumed that the aforementioned petitioners [K.K. Tiwari and Saroj Bala] were appointed as SOs in 2009 whereas they were appointed *via* regular DPCs held in 1998 and 1997. Furthermore, as indicated above, pursuant to the directions contained in the judgment of the Supreme Court dated 19.02.2008, the said petitioners were granted promotions having regard to DPCs convened for 2002-2003 and 2001-2002. Likewise, petitioner no.2 in the said writ petitions i.e., Bijai Pratap Singh was promoted on 28.04.2003.

27.3.(a) Thus, these persons i.e., K.K. Tiwari, Saroj Bala and Bijai Pratap Singh are now placed in the select list of 2002-2003, 2001-2002 and 2003-2004 in consonance with the judgment rendered in the ***AFHQ*** case. These petitioners are entitled in law to count their seniority from the year they figured in the revised select list prepared in pursuance of the aforementioned judgment of the Supreme Court in ***the AFHQ*** case, which was notified on 07.04.2011. Notably, these petitioners are not claiming seniority based on their original promotions but based on their position, post-implementation of the aforementioned judgment of the Supreme Court and the notification issued thereto on 07.04.2011. [Also see ***P.N. Premchandran v. State of Kerala and Ors.***, (2004) 1 SCC 245, ***T. Vijayan & Ors. v. Divisional Railway Manager & Ors.***, (2000) 4 SCC 20 and ***Sunaina Sharma v. State of J&K*** dated 26.10.2017 passed in Civil Appeal No.4594-4595/2017.]

30.04.2004, they neither had any locus nor could they have any grievance *vis-à-vis* the promotion accorded to the aforementioned petitioners who were senior to them in the feeder grade as well as in the grade in issue i.e., the SO grade. As a matter of fact, at least two persons amongst the successful candidates were those who had worked under Saroj Bala i.e., petitioner no.1 in W.P.(C)No.4911/2017 and, hence, had their ACRs written by her.

27.4. The contention of the intervenor [who has preferred CM No.40909/2017 in W.P.(C)No.6184/2017], that all vacancies which remained unfilled on 26.05.2001 belong to the direct recruit stream is contrary to the provisions of Rules 6(3) and 7(1) of the 2001 Rules. In this context, reference may also be had to the assertions made on behalf of UOI in paragraph 12 of its counter-affidavit filed on 12.07.2017 in W.P.(C)No.4911/2017. For the sake of convenience, the same is extracted hereafter:

“xxx xxx xxx

That the advice of DOP&T and the Ministry of Law was obtained on this issue.

Both were of the view that the vacant posts may be distributed as per the ratio provided in the AFHQ Civil Service Rules 2001 i.e. in the ratio of 40:40:20 amongst DP, LDCE and DR respectively. Retaining the share of DR quota i.e. 64 vacancies (20% of 320), remaining 256 vacancies were utilized for preparing the Select List of DP quota for the year 2001-02 and remaining panels were drawn.

Based on the Select Lists, promotion orders and seniority list were issued vide order dated 07.04.2011.

xxx xxx xxx”

27.5. Likewise, the submissions made on behalf of the intervenors [who have filed CM No.5586/2019 in W.P.(C)No.4911/2017] are not tenable as a select list prepared for the specific period/vacancies cannot be utilized as the select list for filling up a larger number of vacancies concerning previous years. To do that, a fresh examination would have to be conducted taking into account relevant aspects concerning, *inter alia*, eligibility, APARs and vigilance reports.

27.6. In sum, the Tribunal has committed an error in allow

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O.A.Nos.1288/2009 and 2145/2011. The action taken by UOI of convening DPCs from 1968 onwards *vis-à-vis* all vacancies and, thus, granting promotions from due dates pursuant to the judgment in the ***AFHQ*** case is neither arbitrary nor illegal.

28. Mr Nilansh Gaur, who appeared on behalf of the petitioner in W.P.(C)No.6184/2017, advanced the following contentions.

28.1. The order passed by the Tribunal dated 18.02.2014 in O.A.No.1288/2019 concerned only approved service for grant of NFSG and had nothing to do with seniority. Therefore, successful candidates could not have been granted seniority w.e.f. 01.01.2002 when they had neither qualified LDCE 2002 nor had they been borne in the cadre. Since the proposal for promotion, after the LDCE 2002 was held in December 2002, and was received by UPSC in 2003, the promotions were affected only in 2004. The successful candidates joined on 30.04.2004 against vacancies of 2003-2004 and, hence, could not claim seniority from 01.01.2002. [See OM dated 04.03.2014 and the judgment of the Supreme Court rendered in ***K. Meghachandra Singh & Ors. v. Ningam Siro & Ors.***, (2020) 5 SCC 689.

28.2. Seniority list which was prepared on 07.04.2011 and has been set aside by the Tribunal *via* its judgment dated 13.01.2017 passed in O.A.No.2145/2011 will have to be prepared afresh in consonance with the dicta of the judgment of the Supreme Court in ***K. Megha Chandra Singh*** (supra); which clearly states, as noted above, that seniority cannot be claimed by an incumbent who is not yet borne in the cadre. This judgment of the Supreme Court which was rendered on 19.11.2019 overruled its' earlier judgment dated 27.11.2012, passed in ***UOI v. N.R. Parmar*** (2012) 13 SCC 340.

28.3. Rule 7(8) allows officiating promotions in the cadre. Therefore, the petitioners concerned with W.P.(C) No.6184/2017, who were appointed on an *ad hoc* basis, *albeit*, as per rules, and continued to hold their posts uninterruptedly would have their seniority counted from 2001. In other words, these petitioners

would remain senior to the successful candidates. [See **Rudra Kumar Sain & v. UOI & Ors.**, (2000) 8 SCC 25.]

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28.4. It is important to note that the said petitioners were appointed as Assistants in 1989 and were eligible for promotion in 1997 after the completion of eight years in service. Since DPC was not convened, *ad hoc* promotions were granted to the said petitioners in 2001.

28.5. After the 2001 Rules were brought into force, i.e., w.e.f. 01.05.2001, the LDCE quota examination was conducted for the first time in December 2002. Given this position, UOI, having regard to the provisions of Rules 7(4) and 7(5) regularized the *ad hoc* promotion granted to the petitioners concerned with W.P.(C) No.6184/2017.

28.6. The 2001 Rules make a distinction between approved service and seniority. Approved service was required to be ascertained only for the purposes of grant of NFSG. The successful candidates, who were promoted to the SOs grade and have had their approved service reckoned from the first day of January in which the LDCE 2002 examination was held, would only impact the grant of NFSG and not seniority.

29. Insofar as successful candidates are concerned, submissions were advanced by Mr A.K. Behera, Senior Advocate. Mr Behera's submissions, broadly, ran along the following lines.

29.1. According to Mr Behera, the record would show that vacancies concerning the LDCE quota existed in 2002. It was, therefore, Mr Behera's contention that the Tribunal's order dated 18.02.2014 needed to be sustained as the successful candidates would be entitled in law to have their approved service reckoned from 01.01.2002. Furthermore, Mr Behera submitted that grant of seniority was the logical consequence of the determination made by the Tribunal concerning the date from which approved service would have to be reckoned *vis-à-vis* successful

candidates who took part in LDCE 2002 and those examinations that were thereafter.

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29.2. Therefore, according to him, the determination of vacancies against which examinations are held and seniority was to be accorded is provided under the 2001 Rules. In this context, reference was made to Rule 2(o) which according to him exhorted UOI to draw up a select list for filling-up existing and anticipated vacancies in the post of SOs. In particular, emphasis was laid by him on Rule 7(4) which, *inter alia*, stated that the select list will include vacancies i.e., existing and anticipated vacancies available in the given year, in equal proportion, from promotee and LDCE quota. Therefore, according to him, once UOI admitted to the subsistence of vacancies in 2002, in the LDCE quota, the successful candidates (i.e., the applicants in O.A.No.1288/2009) had to be included in the 2002 select list and granted the reliefs concerning the period from which approved service would reckon as also *vis-à-vis* seniority.

29.3. It was contended that the argument advanced on behalf of the UOI and the petitioners [in the remaining three writ petitions (i.e., W.P.(C)Nos.2374/2017, 4911/2017 and 6184/2017)], that reliefs were granted concerning aspects that were neither pleaded nor prayed for was untenable for the following reasons.

29.3.(a) First, the notification dated 29.06.2002 issued by UPSC concerning AFHQ Civil Service made no mention of the vacancy year.

29.3.(b) Second, the LDCE 2002 conducted by UPSC was common to both AFHQ Civil Service and other services such as CSS, CSSS, IFS 'B' and IFS Steno Cadre with the purpose of appointing SOs for select list 2002-2003. The aforementioned notification provided that the eligibility of the candidates for LDCE 2002 would be determined as on 01.07.2002. Therefore, the candidates who were eligible for 2003-2004 vacancies were not allowed to take the LDCE 2002 by the UPSC. By way of illustration, reference was made to the case of one Mr Rajay Kumar Dubey, who is arrayed as respondent no.19 in W.P.(C)Nos.4911/2017 and 6184/2017. It

was emphasized that Mr Dubey was not allowed to sit for LDCE 2002 as he fulfilled the eligibility criteria only on 27.07.2002 and not on the date provided in the notification issued by UPSC i.e., 01.07.2002.



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29.3.(c) Third, because the approved service of successful candidates was not reckoned from 01.01.2002 as per Rule 2(b)(ii) of 2001 Rules a decision was taken to institute O.A.No.1288/2009 as this directly impacted their right to obtain NFSG. At that juncture, the successful candidates verily believed that since they were eligible as on the date notified by the UPSC i.e., 01.07.2002, they ought to be granted NFSG. Given this context, the successful candidates did not need to aver in the first instance in the OA that LDCE 2002 concerned existing vacancies as well. The emphasis was that it was only after UOI averred in its counter-affidavit that the LDCE 2002 was held against anticipated vacancies of 2003-2004 that the successful candidates asserted that vacancies in the LDCE quota existed both in 2001 and 2002.

29.3.(d) The Tribunal, thus, identified the aforesaid aspect as an issue which required determination. Parties were aware of this issue and accordingly, had full opportunity to place their respective contentions before the Tribunal. It is in this context, that the Tribunal ruled that UOI had no discretion to withhold the LDCE vacancies which existed in 2002. Furthermore, this Court in its interim order dated 16.12.2016 passed in W.P.(C) No.11673/2016 expressed a prima facie view that the vacancies which existed in the LDCE quota in 2002 could not be excluded from the examination held in the same year i.e., 2002. That an application was filed for the recall and modification of the order dated 16.12.2016, which was dismissed on 25.01.2017, which only helps in fortifying the stand taken by the successful candidates before this Court.

29.3.(e) Therefore, once the Tribunal concluded that the UOI could not have withheld the LDCE quota vacancies of 2002, the successful candidates had to be included in the select list of 2002-2003 and consequently, the select list was

required to be drawn up by picking alternatively candidates from the prescribed streams i.e., the promotee quota and the LDCE quota.

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29.4. A perusal of Rules 2(e), 2(o), 7(4) and 7(5) of the 2001 Rules would show that facets concerning eligibility to sit in the exam, inclusion in the select list/vacancy year, approved service and seniority are inextricably linked. A harmonious reading of the rules would show that the aforesaid facets had to be taken into account in the same year. Thus, once the Tribunal returned a finding of fact that LDCE quota vacancies existed in 2002 and that UOI could not withhold the same, the grant of seniority was only a consequential relief. The denial of consequential relief concerning seniority, in the given circumstances, by diverting the vacancies to the promotee quota would be contrary to the statutory scheme engrafted in the 2001 Rules. [See *Union of India & Anr. v. Hemraj Singh Chauhan & Ors.* (2010) 4 SCC 290.]

29.5. That the LDCE 2002 was held against subsisting/current vacancies and not prospective vacancies is an aspect which can be ascertained from the following:

- (i) Affidavit dated 17.08.2016 filed by UPSC in O.A.No.317/2014, titled *Rajesh Kumar Gupta v. Union of India & Ors.*
- (ii) Document dated 21.05.2002 [appended on PDF pages 325-326 in Vol. III of W.P.(C)No.11673/2016].

29.6. Besides this, as indicated above, the other sister services which had their candidates sit for LDCE 2002 and LDCE 2003 counted their approved service/seniority from 2002 and 2003, respectively. [See PDF page 330 in Vol-III of W.P.(C) No. 11673/2016 and S.S. seniority list appended on PDF pages 12-14 Vol-V of W.P.(C) No.4911/02017 and PDF page 35 of Vol-III of W.P.(C)No.11673/2016.]

29.6. (a) There was, therefore, no error in the note dated 11.09.2008 prepared by UOI since the AFHQ CS candidates were also entitled to parity with other sister services. It was the subsequent note dated 15.12.2008, whereby the approved

service, with respect to LDCE 2002 candidates was reckoned from 01.01.2002 which was contrary to the statutory scheme captured in the 2001 Rules.

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29.7. As regards the argument that Mr K.K. Tiwari and Mr B.P. Singh [petitioners in W.P.(C)No.2374/2017] were not made parties to O.A.No.1288/2009- is an argument which is misconceived, both on facts and in law. It is required to be kept in mind that O.A.No.1288/2009 was instituted in the Tribunal on 04.05.2009, at which point in time, neither Mr K.K. Tiwari nor Mr B.P. Singh had been promoted as SOs in AFHQ Civil Services in a substantive or regular capacity. Mr K.K. Tiwari had been accorded temporary promotion *albeit* beyond the quota prescribed for promotees under Note 2 appended to the Third Schedule of the 1968 Rules. Mr Tiwari completed his period of probation only on 05.07.2000 and hence, could have been considered for promotion against a substantive vacancy within the promotee quota, as and when such a vacancy arose in consonance with the Third Schedule of the 1968 Rules. Admittedly, Mr K.K. Tiwari was never promoted against a substantive vacancy in the post of SO available in the promotee quota under the 1968 Rules. Paragraphs 24, 35 and 36 of the judgment rendered in the **AFHQ** case establish this aspect quite clearly.

29.7.(a) Notably, Mr K.K. Tiwari's regular promotion to the grade of SO took place only on 06.08.2009 after he was empanelled in the select list of 2006-2007 *via* select list issued on 11.06.2009. Mr K.K. Tiwari for good reason has not challenged the select list dated 11.06.2009.

29.7.(b) Likewise, Mr B.P. Singh [i.e., petitioner no.2 in W.P.(C)Nos.2374/2017 and 4911/2017] was promoted purely on a stop-gap basis on 28.04.2003. Consequently, he had no claim to regular promotion and seniority in the SO grade. Mr B.P. Singh's name did not find a mention in the select list issued for 2001-2002 to 2007-2008. Mr Singh, concededly, has not laid a challenge to these select lists.

29.7.(c) The aforesaid facts would show that at the relevant time when O.A.No.1288/2009 was instituted i.e., on 04.05.2009, both petitioners i.e., Mr K.K.

Tiwari and Mr B.P. Singh, were not holding the SOs grade in substantive/reg capacity. On that date, Mr K.K. Tiwari and Mr B.P. Singh only held in substantive capacity the post of Assistants.

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29.7.(d) Pertinently, the names of Mr K.K. Tiwari and Mr B.P. Singh were also not mentioned in the order issued by UOI on 15.12.2008.

29.7.(e) Therefore, the argument that they were not arrayed as parties in O.A.No.1288/2009 is unmerited. Mr K.K. Tiwari and Mr B.P. Singh and those similarly circumstanced had no locus and hence were not arrayed as parties in O.A.No.1288/2009; an aspect which was dealt with extensively by the Tribunal in its order dated 10.08.2016 passed in Review Application No.61/2014.

29.7.(f) It requires to be appreciated that it is when vacancies for 2001-2002 and 2002-2003 were diverted from the LDCE quota to the promotee quota, in 2011, that Mr K.K. Tiwari and Mr B.P. Singh were promoted against the select list of 2002-2003 and 2003-2004 respectively. Since the diversion of vacancies was contrary to the provisions of Rule 7(1) read with Schedule IV, Rule 7(4) and 7(5) of 2001 Rules, upon a challenge being laid to the same in O.A.No.2145/2011, the Tribunal quashed UOI's order dated 07.04.2011 *via* its order dated 13.01.2017. UOI realising that such diversion of vacancies was contrary to the 2001 Rules, as alluded to above, has accepted this position, as articulated in the Tribunal's order dated 13.01.2017. It is the acceptance of the order dated 13.01.2017 which has led to the institution of the other two writ petitions i.e., W.P.(C)Nos.4911/2017 and 6184/2017.

29.8. As regards the submission advanced on behalf of Mr K.K. Tiwari, Mr B.P. Singh and Saroj Bala [petitioners in W.P.(C)No.2374/2017 and 4911/2017], Mr Rajindra Kumar Lal, Mr Ravinder Nath Das, Shalok and Mr Bhagwan Sahai [petitioners in W.P.(C)No.6184/2017] that they could have sat for LDCE 2002, had they been made aware of the factual and legal position which has emerged with the

passing of the orders by the Tribunal in the aforementioned OAs [which
impugned in the above-captioned writ petitions], is factually erroneous.

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29.8.(a) This is demonstrable from the following dates and events.

29.8.(b) On 29.06.2002, when UPSC issued the notification for convening LDCE 2002, the aforementioned persons were holding a substantive post of Assistant in AFHQ CS and, thus, were eligible to take part in the said exam. Many persons who were either senior or junior to the aforementioned petitioners had taken the LDCE 2002 because they did not hold the SOs post in a substantive/regular capacity. This position also emerges on a perusal of UOI's order dated 21.08.2002 issued in response to a query raised by some of the promotees. In this order, UOI in no uncertain terms indicated that those SOs who had been temporarily promoted were eligible to take the LDCE 2002. It is relevant to note that the last date for making an application to sit for LDCE 2002 was 26.08.2002 and, therefore, if the aforementioned petitioners chose not to apply and take the examination, they have no one to blame but themselves.

29.8.(c) More particularly, insofar as Mr K.K. Tiwari and Saroj Bala were concerned [i.e., petitioner no.1 in W.P.(C)Nos.2374/2017 and 4911/2017, respectively], the orders issued *vis-à-vis* them clearly stated that their promotion was temporary and subject to the provisions of Note 2 of Third Schedule of the 1968 Rules as well as the order dated 20.11.1992, passed by the Tribunal in the case titled: ***M.G. Bansal v. Union of India***. The Special Leave Petition [SLP] against the said order was dismissed on 20.01.1995. The operative direction in ***M.G. Bansal*** (supra) was that the length of continuous officiation for a promotee ACSO (now known as SO) would be reckoned from the date when the concerned candidate was promoted against a substantive vacancy arising in the promotee quota. In other words, although, the aforementioned persons were aware of the fact that they were eligible for LDCE 2002, they chose not to take the LDCE 2002 exam.

29.8.(d) Importantly, the Tribunal in a subsequent matter in OA No. 1356 of 1
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titled *Ammini Rajan v. Union of India*, via order dated 01.04.2002 reiterated the directions issued by it in *M.G. Bansal* (supra) which was ultimately upheld by the Supreme Court in the *AFHQ* case.



29.8.(e) Therefore, the contention advanced on behalf of the aforementioned petitioners that they were holding the SOs posts in substantive capacity on the date when UPSC issued the notification dated 29.06.2002 concerning the LDCE 2002 or that they were unfairly relegated to their earlier position is not based on facts as set forth hereinabove.

29.9. The argument advanced on behalf of Rajendra Kumar Lal *et al* [i.e., the petitioners in W.P.(C)No.6184/2017], that they were entitled to count their period of continuous officiation from 2001 when they were appointed on a stop-gap basis in consonance with the ratio of the judgment rendered by the Supreme Court in *Rudra Kumar Sain* (supra) is misconceived for the following reasons:

- (i) None of the aforementioned petitioners were promoted in substantive capacity against their quota in the SO grade.
- (ii) To successfully apply the ratio enunciated in *Rudra Kumar Sain*, the aforementioned petitioners were required to demonstrate that at the time of their promotion, substantive vacancies were available within their quota apart from having to establish that they were eligible and within the zone of consideration against substantive vacancies. Further, the said petitioners were also required to prove that, instead of giving them regular promotions, temporary promotions had to be given due to technical reasons.
- (iii) However, at the relevant point in time, there was no substantive vacancy available for the said petitioners for them within their own quota. Importantly, there had been no assessment of their suitability by a DPC when they were granted stop-gap promotions.

(iv) These petitioners had been put to notice that they would have no claim

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regular appointment in the SO grade and the period spent in the said grade would not count towards seniority in the said grade. This aspect finds a mention in their promotion orders.

(v) The aforementioned petitioners were issued promotion orders to the grade of SO *albeit* in substantive/regular capacity only on 06.08.2009 after the said petitioners were empanelled in the select list of 2005-2006 on 11.06.2009. None of the petitioners has assailed the said select list/promotion order. Importantly, even though the said petitioners were arrayed as parties in O.A.No. 2145/2011, they did not assail and/or rebut the aforementioned position.

29.10. The submission advanced, both, on behalf of UOI and petitioners in the remaining three writ petitions that they were granted promotions on 07.04.2011 against vacancies available in LDCE quota for 2001-2002 to 2005-2006 as LDCE quota could not be filled-up due to non-availability of quota candidates is flawed for the following reasons.

29.10.(a) The quota-rota provisions are mentioned in Rule 7(1) read with Schedule IV and Rules 7(4) and 7(5) of 2001 Rules. In effect, these provisions provide that 40% of the vacancies in the SO grade have to be filled up *via* the LDCE route and only if the required number of selected candidates are not available upon examinations being notified and held, can the LDCE quota vacancies be filled-up with departmental promotees. In other words, diversion of LDCE quota vacancies by taking recourse to Rule 7(5) is not permitted when eligible candidates i.e., selected candidates, are available and examinations are not held. If the 'failing which' provision incorporated in Rule 7(5) is allowed to be taken recourse to even where the prerequisites for triggering the clause do not obtain, then, the LDCE quota fixed under the 2001 Rules will be rendered redundant.

29.10.(b) Since examination was not held in 2001 when LDCE quota vacancies were available, the LDCE 2002 selectees were rightly directed to be adjusted against vacancies of 2001-2002 and 2002-2003.

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29.10.(c) Thus, the diversion of the entire LDCE quota of 2001-2002 and 2002-2003 and a part of the vacancies available in 2003-2004, 2004-2005 and 2005-2006 to the promotee quota on 07.04.2011, *albeit* with retrospective effect, was unsustainable in law.

29.10.(d) Besides this, it needs to be emphasised that UOI had finalised the draft seniority list dated 07.04.2011 concerning SOs on 14.05.2012 without considering the objections submitted by LDCE officers. This representation was filed on 21.04.2021. There was, thus, a breach of principles of natural justice. The injury caused to those whose representation was pending consideration was compounded upon promotion being made to the next higher grade on 19.04.2011 without ruling on the representation.

29.11. The argument advanced on behalf of the petitioners, who were impleaded under a without prejudice order passed by this Court on 11.10.2019 in CM No.5586/2019 preferred in W.P.(C)No.4911/2017, that a supplementary list should be issued by UPSC for LDCE 2002 against unutilized vacancies of 2001 and 2002 is unmerited for the following reasons.

29.11.(a) The said petitioners comprising petitioners nos.1 to 7, were promoted to the grade of SO upon qualification of LDCE held in the years set forth hereafter.

- (a) Petitioner no.6 – LDCE 2003
- (b) Petitioner nos. 2, 3 and 7 – LDCE 2004
- (c) Petitioner no.5 – LDCE 2005
- (d) Petitioner no.4 – LDCE 2007
- (e) Petitioner no.1 – LDCE 2008



29.11.(b) The prayer of these petitioners that a supplementary list should be is:

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by UPSC, in effect, seeks retrospective promotion by them by having themselves included in the 2002-2003 select list although, each one of them sat and qualified in the examination which followed the LDCE 2002. They, consequently, seek to unsettle the seniority of SOs/Deputy Directors belonging to both LDCE and other streams by having such a relief accorded to them.

29.11.(c) Noticeably, no such relief was sought even in O.A.No.2145/2011, nor was this issue raised before the Tribunal. These petitioners by seeking impleadment, directly, in the pending writ petitions cannot raise the aforementioned issue which, if at all, in the first instance, ought to have been raised before the Tribunal. [See **Hemraj Singh Chauhan & Ors.** (supra).]

29.12. The petitioners, who were also impleaded, by virtue of a without prejudice order dated 11.10.2019 in CM No. 40909/2017 in W.P.(C) No. 6184/2017, passed by this Court, erroneously, contend that all substantive vacancies available on 26.05.2001 when the 2001 Rules came into force should have been allocated to the direct recruit quota. The submission is untenable for the following reasons.

29.12.(a) These petitioners had moved a miscellaneous application i.e., M.A.No.3395/2016 in O.A.No.2145/2011. This MA was dismissed by the Tribunal *via* order dated 13.01.2017. In paragraph 13 of the said order, the Tribunal rejected the claim of these petitioners by holding that the issue involved in O.A.No.2145/2011 concerned the sharing of vacancies between LDCE and promotees and therefore, in no way affected the direct recruitment quota.

29.12.(b) More importantly, these petitioners had filed a separate O.A. before the Tribunal [i.e., O.A.No. 1744/2013] wherein a claim was made to all 320 substantive vacancies said to be available on 26.05.2001. This O.A. was disposed of by the Tribunal *via* order dated 03.02.2017 whereby a direction was issued for drawing up a fresh select list detailing the seniority of concerned officers albeit without diverting vacancies from the direct recruit quota and without giving retrospective promotions to departmental promotees'. The said order i.e., order dated 03.02.2017 has not been assailed till now and has consequently been

accepted by all concerned. Thus, the contention of these petitioners that all vacancies that were available on 26.05.2001 fell, in the lot of, direct recruits is liable to be rejected.



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29.13. The petitioner i.e., one Mr Jai Prakash Xalxo who filed the application i.e., CM No.21930/2021 in W.P.(C)No.4911/2017 stands on the same footing as Mr K.K. Tiwari and Saroj Bala i.e., first petitioners in W.P.(C)Nos. 2374/2017 and 4911/2017 respectively.

29.13.(a) It is required to be noticed that Mr Jai Prakash Xalxo was arrayed as respondent no.301 in O.A.No.2145/2011. In the seniority list issued concerning SOs, he was shown as being 86 points below Saroj Bala. At no given point in time, did he challenge the assertions made by the applicants in O.A.No.2145/2011.

29.13.(b) Mr Xalxo has also not assailed the order dated 13.01.2017, passed by the Tribunal in O.A.No.2145/2011.

29.13.(c) Thus, as adverted to hereinabove, Mr Jai Prakash Xalxo is in no better position than Mr K.K. Tiwari and Saroj Bala who have filed independent writ petitions to assail the order dated 13.01.2017.

Analysis and Reasons:

30. What has emerged from the record, *vis-à-vis* which there is no dispute, is the following:

(i) LDCE quota for recruitment of SOs in AFHQCS was introduced with the framing of 2001 Rules which came into effect on 26.05.2001.

(ii) Despite the UOI interfacing with UPSC to include AFHQCS in the examination conducted by them for the LDCE quota in 2001, this endeavour failed as the examination process had already been triggered.

(iii) Examinations for LDCE quota, inter alia, concerning AFHQCS was held in December 2002 pursuant to the UPSC notification issued on 29.06.2002.

(v) The notification dated 29.06.2002 issued by the UPSC did not allude to the vacancy year against which LDCE 2002 examination was held insofar as AFHQ Civil Services were concerned.

(vi) Admittedly, LDCE quota vacancies in the SO grade in AFHQCS v
available in 2001 and 2002.

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(vii) In the internal note dated 11.09.2008, UOI did indicate that the approved service for the purposes of NFSG should commence or be reckoned from 01.01.2002 i.e., the year in which LDCE 2002 was held.

(viii) The internal note dated 11.09.2008 was superseded *via* the order dated 15.12.2008 whereby approved service, in the case of candidates who sat for the LDCE 2002 was reckoned from 01.01.2003 based on the rationale that LDCE 2002 was held keeping in mind the anticipated vacancies of 2003-2004.

departmental promotees' were allocated the vacancies by triggering the 'failing which' condition embedded in Rule 7(5) of the 2001 Rules.

30.1. The principal issue, which, therefore, arises for consideration is: whether the Tribunal was right in concluding that UOI could not have withheld LDCE vacancies for 2001-2002 (without cogent reasons) and thus go on to divert the LDCE quota to departmental promotees', contrary to quota rules, although eligible candidates were available for taking the LDCE?

30.2. The other issue which requires consideration is: whether the direction to re-draw the select list bearing in mind the quotas fixed for departmental promotees, LDCE route candidates and direct recruits is sustainable in law?

30.3. The answer to the first issue lies in the provisions engrafted in the following Rules which form part of the 2001 Rules:

"2. Definitions. –

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(b) "**approved service**" in relation to any grade means:

xxx

xxx

xxx

ii) *in respect of an officer recruited to that grade through Departmental Examination, period or periods of regular service rendered in that grade, including period or periods of absence during which he would have held a post on regular basis in that grade but for his being on leave or otherwise not being available to hold such post, from the first day of January of the year **for which** such examination was held:*

xxx

xxx

xxx



e) **“eligible officer”** means an officer eligible to be considered for promotion to these posts of Senior Administrative Grade, Director, Senior Civilian Staff Officer/Joint Director, Civilian Staff Officer, Assistant Civilian Staff Officer or Assistants, as the case may be, in accordance with Rules 6 and 7 of these Rules, as on the 1st January of the year for which the Select List is to be prepared:

xxx xxx xxx

o) **“Select List”** in relation to the grades of Senior Administrative Grade, Director, Senior Civilian Staff Officer/Joint Director, Civilian Staff Officer, Assistant Civilian Staff Officer or Assistant means the Select List prepared every year for promotion to the respective grades to fill the existing and anticipated vacancies likely to occur during the year and are decided to be filled by promotion:

xxx xxx xxx

6. **Initial Constitution of Service. –**

(1) **All existing officers holding Group ‘A’ and ‘B’ duty posts on regular basis in the AFHQ Civil Service on the date of commencement of these rules shall be members of the Service in the respective grades.**

(2) **The regular continuous service of officers referred to in sub-rule (i) before the commencement of these rules shall count for the purpose of probation, qualifying service for promotion, confirmation and pension in the service.**

(3) **To the extent the cadre controlling authority is not able to fill authorized strength of various grades in accordance with the provisions of this rule, the same shall be filled in accordance with the provisions of rule 7 of these rules.**

7. **Future Maintenance of the Service. -**

(1) **The vacant duty posts in any of the grades referred to in Schedule I after initial constitution under Rule 6, shall be filled in the manner provided in Schedule IV.**

xxx xxx xxx

(4) **For the purpose of promotion to posts in the grade of Assistant Civilian Staff Officers a select list shall be made in such number as the Government may determine, from time to time, keeping in view the existing and anticipated vacancies, and in equal proportion from;**

(a) **Assistants of the service who have rendered not less than eight years’ approved service in the grade in the order of their seniority in that grade; and**

(b) **Assistants of the service and Stenographers Grade-II/Stenographers Grade ‘C’ of Armed Forces Headquarters Stenographers Service selected on the results of the Limited Departmental Competitive Examination held by the Commission for this purpose from time to time, in the order of their merit;**



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(5) *Persons of the two categories being included in the select list taking alternately one person from category (a) and other from category (b) and so on in that order. In case required number of selected persons are not available in category (b) above, to fill up the quota as prescribed in column-3 of Schedule-IV related to Assistant Civilian Staff Officer, the deficiency shall be made up from the persons falling in category (a).*

(6) *Every officer shall, unless he is on leave or otherwise not available for holding a duty post or for any other reason to be recorded in writing, be posted against a duty post of the appropriate Grade of the Service.*

(7) *Every duty post, unless declared to be excluded from the service or held in abeyance for any reason, shall ordinarily be held by an officer of the appropriate grade.*

(8) *An officer employed in any office of Armed Forces Headquarters and Inter Service Organisations specified in Schedule II, and eligible to be considered for promotion to any of the grades of the Service may be appointed to officiate in a temporary vacancy of specified or unspecified duration in that office, for a period not exceeding six months in the concerned grade if the select list for promotion to that grade is not available or an officer is not available for appointment to that grade or cannot, for any reason be appointed in such vacancy:*

Provided that the aforesaid period of six months may, in exceptional cases and with the approval of the appointing authority, be extended for a specified period in the public interest.

Note: Officiating Promotions under sub-rule (8) shall be made on a centralized basis, or on the basis of grouping of offices in Armed Forces Headquarters and Inter Service Organisations, as may be decided by the Appointing Authority from time to time."

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SCHEDULE-IV

See Rule 7(1)

Method of recruitment, field of promotion and minimum qualifying service in the next lower grade for appointment of officers by promotion to duty posts included in various grades of the AFHQ Civil Service.

<i>Sl No</i>	<i>Grade/Scale of Pay</i>	<i>Method of Recruitment and Percentage of posts to be filled by various methods</i>	<i>Feeder Grade/Field of selection and minimum Qualifying service for Promotion.</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>
<i>1.</i>	<i>Senior Administrative Grade (Rs 18400-500-22400)</i>	<i>Promotion (Selection by Merit)</i>	<i>Director with 3 years approved service in the grade.</i>



2.	<i>Director (Rs 14300-400-18300)</i>	<i>Promotion (Selection by Merit)</i>	<i>Senior Civilian Officer/Joint Director with 5 years approved service in the grade including service, if any, in the erstwhile Selection Grade.</i>
3.	<i>Senior Civilian Staff Officer/Joint Director (Rs 12000-375-16500)</i>	<i>Promotion (Selection by Merit)</i>	<i>Civilian Staff Officer with 5 years approved service in the grade.</i>
4.	<i>Civilian Staff Officer (Rs 10000-325-15200)</i>	<i>Promotion (Selection-cum-Seniority)</i>	<i>Assistant Civilian Staff Officers with 8 years approved service in the grade.</i> <i>Note 1: The vacancies in the grade of Civilian Staff Officer decided to be filled by members of the Scheduled Castes and the Scheduled Tribes for which eligible officers are not available shall be filled on the results of a Limited Departmental Competitive Examination held by the Union Public Service Commission from time to time. The officers recommended by the Commission for appointment to the grade of Civilian Staff Officer shall be included in the select list referred to in sub-rule (3) of Rule 7 in the order of their merit.</i>
5.	<i>Assistant Civilian Staff Officer (Rs. 6500-200-10500)</i>	<i>(i) 40% by Promotion (Selection-cum-Seniority)</i> <i>(ii) 40% on the basis of a Limited Departmental Competitive</i>	<i>(i) Assistants with 8 years approved service in the grade.</i> <i>(ii) Not less than 5 years approved and continuous service in the Assistant Grade of the Armed Forces</i>



	<i>Examination for Section Officers grade held by the Union Public Service Commission from time to time. The officers recommended by the Commission for appointment to the grade of Assistant Civilian Staff Officer shall be included in the select list referred to in sub-rule (4) of Rule 7 in the order of their merit.</i> <i>Provided that in case sufficient number of candidates are not available in a year to fill vacancies through Limited Departmental Competitive Examination, the deficiency in Select List shall be made up by including eligible candidates from amongst Assistants.</i> <i>(iii) 20% by direct recruitment on the basis of Civil Service Examination conducted by Union Public Service Commission.</i> <i>Provided that in case sufficient number of candidates are not available in a year to fill vacancies through direct recruitment the deficiency shall be</i>	<i>Headquarters Service Grade-II/Grade 'C' of the Armed Forces Headquarters Stenographers Service or in both as the case may be.</i> <i>Provided that in the case of a candidate who had been appointed to the Grades mentioned above on the Result of a Competitive Examination, such an Examination should have been held not less than 5 years before the crucial date and he should have rendered not less than 4 years approved service in that grade.</i>
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		<i>carried forward to the subsequent year(s) and added to the vacancies falling to the quota of direct recruitment of that year.</i>	NEUTRAL CITATION NO: 2022/DHC/002866
6.	Assistant (Rs 5500-175-9000)	<i>(i) 50% by Promotion (Selection-cum-Seniority) (ii) 50% by direct recruitment on the basis of the competitive examination conducted by Staff Selection Commission; Provided that in case sufficient number of candidates are not available in a year to fill vacancies through direct recruitment, the deficiency shall be made up by promotion.</i>	<i>Upper Division Clerks of Armed Forces Headquarters Clerical Service with 5 years approved service in the grade on seniority cum fitness basis.</i>

Note 1: Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors shall also be considered provided they are not short of the requisite qualifying/eligibility service by more than half of such qualifying/eligibility service or two years whichever is less and have successfully completed their probation period if prescribed.

Note 2: The procedure and conditions including Educational Qualifications for the competitive examinations including Limited Departmental Competitive Examination referred to in Note 1 under Column 4 relating to the grade of Civilian Staff Officer and under Column 3 clause (ii) and (iii) relating to the grade of Assistant Civilian Staff Officer and under column 3 clause (ii) relating to the grade of Assistant shall be as per the rules notified by the Government for the purpose from time to time.”



30.4. A perusal of the aforesaid rules would show that the expression “approved service” in respect of an officer recruited through a departmental examination shall reckon from the first day of January “for which” the examination was held. This expression is required to be read alongside the definition of the expression “select list”, which, insofar as Assistant Civilian Staff Officer i.e., SO is concerned is meant to include a select list prepared for promotion to respective grades to fill “existing” and “anticipated vacancies” that are likely to occur during the year and are decided to be filled by promotion. Sub-Rule (1) of Rule 6 provides that all existing officers holding Group A and B duty posts on regular basis in AFHQCS on the date of commencement of these rules shall be members of the service in the respective grades. Importantly, Sub-Rule (3) of Rule 6 provides that to the extent the cadre controlling authority is not able to fill authorized strength of various grades under the provisions of this rule, the vacant posts are required to be filled in accordance with Rule 7.

30.5. Besides this, the word “for”, which appears as part of the sentence “from the first date of January *for which* such examination was held” could only be indicative of the fact that the examination was held “for the purpose of”¹ filling up vacancies. The word “for” incorporated in Rule 2(b)(ii) of the 2001 Rules is suggestive of the fact that the availability of vacant posts was, perhaps, a condition precedent² for holding the examination. The word “for” when read alongside the word “which” would indicate the purpose or reason why the decision to hold LDCE 2002 exam was taken. Thus, the difference between the position adopted by the successful parties, on the one hand, and the others, including the petitioners, pivots around the right asserted by UOI

¹ See judgment of *Westbury C ; Attorney General v. Sillem*, 11 E.R. 1200 (15 April 1864); *Patrick Harrison and Company Limited v. Attorney-General for Manitoba* 1967 SCR 274.

² See *Thorpe v. Thorpe* 91 E.R. 157

to exclude existing vacancies [i.e., the vacancies concerning 2001], *albe* without a cogent and justifiable reason. The stand of UOI that LDCE 2002 could only relate to the anticipated vacancies of 2003 and 2004, is, in our view, untenable.



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30.6. Serial No.5 of Schedule IV provides the eligibility criteria and also the streams/source and the ratio in which vacant posts of ACSO/SO can be filled. The feeder post for being appointed to the post of ACSO/SO is Assistant. The three sources that have been provided for appointment to the post of ACSO/SO are departmental promotees', candidates who pass the LDCE and direct recruits. Insofar as the departmental promotees' are concerned, they are required to have clocked a minimum of eight (8) years of approved service in the post of Assistant while LDCE candidates are required to have to their credit a minimum of five (5) years of approved service. The vacant post of ACSO/SO is divided amongst the three sources in the following ratio, i.e., 40: 40: 20.

30.7. Importantly, Sub-Rule (1) of Rule 7 of the 2001 Rules provides that vacant duty posts in any of the grades referred to in Schedule I after the initial constitution under Rule 6 shall be filled up in the manner provided in Schedule IV. It is to be borne in mind that insofar as the departmental candidates who take recourse to the LDCE route are concerned, Schedule IV prescribes that the examination will be conducted by UPSC. Crucially, Sub-Rule (4) of Rule 7 provides that for the purposes of promotion to the post in the grade of ACSO/SO, a select list shall be made in such a manner as the government may determine from time to time keeping in view **“existing” and “anticipated vacancies”** and that too in **“equal proportion”** from the two sources provided in clause (a) and (b) of Sub-Rule (4) of Rule 7. Clause (a) concerns departmental promotees while Clause (b) pertains to candidates who may take recourse to the LDCE route for being promoted to the post of ACSO/SO.

30.8. The Sub-Rule (5) of Rule 7 of the 2001 Rules, in no uncertain terms provides that the aforementioned two categories of appointees to the post of

ACSO/SO shall be included in the select list by taking alternatively one person

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from the departmental promotee category and the other from the LDCE route category and that this exercise would go on till the vacant posts are filled. This Sub-Rule, however, also provides for an eventuality where the required number of LDCE candidates are not available to fill up the LDCE quota. Regarding this circumstance, the sub-rule provides that the "deficiency" shall be made up by sourcing persons falling in the category of departmental promotees.

30.9. Sub-rule (7) of Rule 7 of the 2001 Rules states that every duty post, unless excluded from the service or held in abeyance for any reason shall ordinarily be held by an officer of the appropriate grade. Sub-Rule (8) of Rule 7 *inter alia* states that an officer employed in any office of Armed Forces Headquarters who is eligible to be considered for promotion to any of the grades of the service may be appointed to officiate in a temporary vacancy for a specified or unspecified duration in that office for a period not exceeding six months in the concerned grade if the select list to promotion in that grade is not available or an officer is not available for appointment to that grade or cannot for any reason be appointed in such vacancy. This is a provision which enables appointment in a temporary vacancy, albeit in the circumstances indicated in the said sub-rule.

30.10. A conjoint reading of the aforementioned rules would, to our minds, indicate that approved service is inextricably linked to the drawing-up of the select list for each year concerning persons who are to be promoted to a given grade and that while doing so, both existing and anticipated vacancies which are likely to arise are to be borne in mind. Concededly, UOI had indicated to the UPSC that 320 vacancies in the post of ACSO/SO were available. Therefore, as per the provisions of Sub-Rule (4) of Rule 7 read with provisions of Sr.No.5 of Schedule IV (Column 3), these posts had to be filled up keeping in mind both the existing and anticipated vacancies and that too in equal proportion for the

purposes of promotion of candidates based on seniority [i.e., departmental promotees] and those who took recourse to the LDCE route.

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30.10.(a) Thus, as per the ratio indicated in Schedule IV, once 20% of the vacant posts were kept aside for the direct recruit category, the remaining posts were to be distributed in equal proportion based on seniority and the results of the LDCE. Sub-Rule (5) of Rule 7, as alluded to above, provided for the appointment of candidates alternatively from amongst departmental promotees and those who adopted the LDCE route with the stipulation that the first candidate in the select list would be the departmental promotee [who had taken recourse to the seniority mode] followed by the candidate who came through the LDCE route.

30.11. Therefore, the argument advanced on behalf of the UOI that the expression “for which such examination was held” mentioned in Rule 2(b)(ii) would determine the date from which approved service would reckon misses the point that the definition provision has to be read in the consonance with the remaining provisions, which concern promotion and/or appointment through various sources and the drawing-up of the select list. Since, concededly, LDCE quota vacancies were available in 2001 and 2002 and the UPSC notification dated 29.06.2002 did not advert to the vacancy year for which applications were called to fill up the SO grade *via* the LDCE 2002, in consonance with the rule position, it would have to be held that the existing vacancies under the LDCE quota were also to be made available apart from the anticipated vacancies. Rule 7(4) clearly mandates that promotion to the grade of ACSO/SO required UOI to bear in mind existing and anticipated vacancies. In our opinion, the Tribunal was right in concluding that the UOI did not have any discretion [save and except for cogent reason] not to include existing vacancies under the LDCE quota while holding LDCE 2002.

30.12. Furthermore, as correctly argued on behalf of the successful candidate:

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the drawing-up of the select list was governed by Sub-Rule (5) of Rule 7 which, as indicated above, required the UOI to take one candidate from each stream, albeit on an alternate basis, beginning with the departmental promotee who had taken recourse to the seniority mode followed by a candidate who had taken recourse to the LDCE route. Sub-rule (5) of Rule 7 once again, in no uncertain terms, provides that only if LDCE quota candidates are not available in sufficient numbers, could such deficiency be filled-up by taking recourse to the seniority mode.

30.12.(a) In other words, departmental promotees' could fill up the LDCE quota only if a sufficient number of eligible candidates who, as in the instant matters, had gone through the rigour of an LDCE held by UPSC were not available in sufficient numbers. The record shows that in 2001, UPSC was unable to include AFHQCS for filling up SO grade because of the delay on the part of UOI. The record shows that, although in the following year (i.e., 2002), UPSC included AFHQCS to fill up the SO grade *via* the LDCE route, UOI took a curious stand that the said exam was held only for anticipated vacancies of 2003-2004. This resulted in several complications including the delay in triggering the NFSG and relegating the successful candidates of LDCE 2002 to the select list of 2003-2004.

30.12.(b) Since the LDCE 2002 was held in December 2002 and vacancies of 2001 and 2002 existed under the LDCE quota apart from anticipated vacancies of 2003-2004, the Tribunal, in our view, correctly held that approved service, insofar as LDCE 2002 would commence from the first day of January of 2002 and not from the first day of January 2003, as was sought to be argued on behalf of UOI.

31. Resultantly, the successful candidates, in our view, are entitled to the grant of NFSG upon completion of the prescribed approved service commencing

from the first day of January concerning the year in which LDCE

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conducted *vis-à-vis* each of them. Consequentially, UOI would be required to draw up the select list bearing in mind the said date and the provisions of Sub-Rule (4) & (5) of Rule 7 of 2001 Rules. The argument advanced on behalf of the petitioners in W.P.(C)Nos.2374/2017, 4911/2017 & 6184/2017, in our opinion, cannot be sustained once we have held that UOI did not have the discretion, in the given facts, to exclude the existing vacancies in the LDCE quota in respect of LDCE 2002 and logically for LDCE 2003 and 2004 as well.

32. The counsel who argued for the petitioners in W.P.(C)Nos.2374/2017, 4911/2017 & 6184/2017 were not able to demonstrate that they were promoted in regular capacity to the post of SO. Temporary appointment to the post of SO would not confer any rights on the petitioners, especially when, the promotion was not in their quota i.e., the promotee quota. We are also in agreement with the contentions advanced by Mr Behera that the seniority accorded to the successful candidates i.e., applicants in O.A.No.1288/2009, was the consequence of the finding returned by the Tribunal that UOI could not have diverted the vacant posts allocated to the LDCE quota to the promotee quota in the circumstances which obtained in the instant case i.e., when eligible candidates were available to sit for the LDCE 2002. Therefore, the submissions advanced by Mr Khatana and other counsels who appeared for the petitioners that the Tribunal granted relief concerning redrawing of seniority list when there were no pleadings made in that behalf in O.A.No.1288/2009 is, to our minds, completely misconceived.

32.1. Likewise, the argument advanced that the direction issued to redraw the seniority list, affected the petitioners who had instituted the remaining three petitions [i.e., W.P.(C)Nos.2374/2017, 4911/2017 & 6184/2017], is also without merit as on the date on which O.A.No.1288/2009 was filed i.e., on 04.05.2009, none of them held the post of SO in substantive capacity.

32.2. Similarly, the argument advanced on behalf of the petitioners, formed part of W.P.(C)No.6184/2017, that since they had been promoted *albeit* on a stop-gap basis in 2001, their continuous officiation in the post of SO should be taken into account for the purposes of seniority, has no merit as apart from anything else, none of these petitioners had been promoted in substantive capacity within their quota available for the post of SO. Importantly, the promotion orders issued in favour of these petitioners made it clear that the promotion was temporary and that they would lay no claim to a regular appointment in the post of SO.



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33. We may also note that Mr Khatana's argument that the petitioners who formed part of W.P.(C)Nos.2374/2017 and 4911/2017 were seeking to protect promotions obtained by them pursuant to the judgment rendered by the Supreme Court in the *AFHQ* case and in accordance with the 1968 Rules, would not help the cause of these petitioners, as they were not promoted in a substantive capacity as SOs against the promotee quota available under the 1968 Rules. The benefit of continuous officiation in the said post would have been available to these petitioners only when they were appointed from the date of their substantive appointment to the post of SO available in the promotee quota. These petitioners seek to take advantage of the diverted vacant posts of SOs allocated to the LDCE quota.

34. We may point out that Mr Khatana had laid enormous emphasis on the judgment rendered in the *AFHQ* case. Briefly, this was a case where the Supreme Court was considering broadly two issues. First, whether seniority between direct recruits and promotees regularly appointed/promoted within their respective quota should be determined by the length of continuous officiation in the grade of ACSO (now, SO) from their date of appointment in the substantive vacancy.

34.1. Second, whether the incumbents belonging to one source, in excess

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their quota and having utilized the quota of the other source will be treated as having only officiated in the promoted post. The Supreme Court, *inter alia*, observed that the relative seniority between direct recruits and regularly appointed/promoted candidates within their respective quota would have to be determined based on the length of continuous officiation in the grade of ACSO from the date of appointment to a substantive vacancy within the given quota. [See paragraph 45.]

34.2. The Supreme Court also cited with approval its judgment in *Gonal Bihimappa v State of Karnataka & Ors.* 1987 Supp SCC 207 which held that **“quota rule had to be strictly enforced”** and it was **“not open to the authorities to meddle with it on the ground of administrative exigencies.”** In this case, the scheme in force provided for filling up vacancies from two sources based on quota and fixation of *inter se* seniority in the gradation list based on quota. The Court went on to hold that there could be no “doubt or quarrel” to the well-settled law that *inter se* seniority between direct recruits and promotees should be fixed based on quota and rota rules and instructions governing the service conditions of the employees.

34.3. In the instant case, the Tribunal appears to have done just that. It has directed UOI to stick to the quota provided for three sources through which appointment to the post of SO was required to take place and thereafter initiate the next steps of preparation of select list for 2002, 2003 and 2004.

34.4. Therefore, in our view, the Tribunal has correctly quashed the draft seniority select list/promotion order dated 07.04.2011 and directed the UOI/MOD to prepare a fresh seniority select list as per the 2001 Rules without diverting the LDCE quota for the period spanning between 2001-2002 and 2005-2006 to the departmental promotion quota. This direction, to our minds, aligns with the rule position reflected in Sub-Rules (4) & (5) of Rule 7 of 2001 Rules.

35. The petitioners, who were impleaded *via* order dated 11.10.2019 ^{NEUTRAL CITATION NO: 2022/DHC/002866}  passed CM No.5586/2019 preferred in W.P.(C)No.4911/2017, were, in our opinion, not justified in seeking a direction for issuance of a supplementary list by the UPSC for LDCE 2002 concerning unutilized vacancies under the LDCE quota for 2001 and 2002. As they did not get themselves arrayed as parties before the Tribunal in O.A. No. 2145/2011, their impleadment as parties by this Court *via* order dated 11.10.2019, was subject to the rights and contentions of other parties. Furthermore, they were promoted to the grade of SO only on the basis of qualifying LDCEs held after 2002. Thus, they cannot claim seniority over those who were appointed to the SO post as a result of having passed the LDCE 2002. If the relief sought by these applicants is allowed at this stage, it would upset the apple cart i.e., settled seniority.

35.1. Likewise, the petitioner who had filed CM No.40909/2017 in W.P.(C)No.6184/2017 cannot seek a direction that all 320 substantive vacancies in the SO post should be allocated to the direct recruit quota. As correctly pointed out by Mr Behera; an assertion which has not been contradicted by this petitioner that a substantive application i.e., O.A. No.1744/2013 was filed by this petitioner, which was disposed of by the Tribunal *via* order dated 03.02.2017. The Tribunal, in the operative part of its order, has directed that the said 320 vacancies should be filled up in the prescribed ratio i.e., 40:40:20 amongst the departmental promotees', the candidates taking recourse to LDCE route and direct recruits respectively. The issue appears to have been settled with the said order of the Tribunal, as nothing has been shown to us which would demonstrate that the contrary was true.

36. Insofar as the petitioner, who filed CM No.21930/2021 in W.P.(C)No.4911/2017 was concerned, he evidently did not file a counter-affidavit in the Tribunal in O.A.No.2145/2011, although, he was arrayed as a respondent. Consequently, the assertions made by the applicants *qua* the draft seniority list dated 07.04.2011 lay unchallenged insofar as this petitioner was concerned. As correctly pointed out, the said petitioner has not, unlike others,

challenged the order dated 13.01.2017 passed by the Tribunal
O.A.No.2145/2011.

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Conclusion:

37. Therefore, for the foregoing reasons, we are not inclined to entertain the writ petitions against the orders passed by the Tribunal, both, in O.A.No.1288/2009 and O.A. No. 2145/2011, as also in R.A.No.76/2014 and R.A. No. 61/2014 preferred in O.A.No.1288/2009 and R.A.No.80/2017 preferred in O.A.No.2145/2011.

37.1. Resultantly, all four writ petitions i.e., W.P.(C)No.11673/2016, W.P.(C) No. 2374/2017, W.P.(C) No.4911/2017 and W.P.(C)No.6184/2017 are dismissed.

38. There shall, however, be no order as to costs.

39. Consequently, pending applications shall stand closed.

**(RAJIV SHAKDHER)
JUDGE**

**(TALWANT SINGH)
JUDGE**

JULY 28, 2022/aj

Click here to check corrigendum, if any