
(2017) 09 DEL CK 0131

In the Delhi High Court

Case No : Civil Writ Petition No. 2482 Of 2016, Civil Miscellaneous No. 10670 Of 2016

Union Of India & Ors

APPELLANT

Vs

Shyam Sunder Sharma & Ors

RESPONDENT

Date of Decision : 25-09-2017

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 73

Citation : (2017) 09 DEL CK 0131

Hon'ble Judges : Vipin Sanghi, J; Rekha Palli, J

Bench : Division Bench

Advocate : Arun Bhardwaj, Nikhil Bhardwaj, Neeraj Gautam, Madhumita Kothari

Final Decision : Allowed

Judgement

Vipin Sanghi, J

1. The petitioner-Union of India assails the order dated 27.11.2015 passed by the Central Administrative Tribunal (CAT/ Tribunal) in O.A.

No.860/2014. The Tribunal has allowed the said Original Application and directed the petitioner to consider promoting the respondent/applicants â?

serving as Deputy Central Intelligence Officers (DCIO/Tech-WT) (hereinafter referred to as DCIO) since 01.11.2011, to the post of AD/Tech. for

the vacancy year 2014-15, and later years, after taking into account the DoP&T instructions contained in O.M. No.AB-14017/12/88-Estt.(RR) dated

25.03.1996 along with the Recruitment Rules (RRs) for the post of AD/Tech. of the year 2013.

2. The respondents were promoted as Deputy Central Intelligence Officer (DCIO/ Tech-WT) in the Intelligence Bureau with effect from 01.07.2011

from the post of Assistant Central Intelligence Officer (ACIO/Tech-WT)

(hereinafter referred to as ACIO). The next promotional post is that of Assistant Director/ Technical (hereinafter referred to as AD/Tech). The post of AD/Tech. " under the RRs framed vide notification dated 14.12.2010, could be filled by promotion, failing which by deputation (including short-term contract). For promotion to the post of AD/Tech., the RRs, insofar as they are relevant, lay down the following eligibility criteria:

Promotion:

Deputy Central Intelligence Officer (Tech Wireless Telegraphy or Tech-Technical or Tech-Workshop or Tech-Draftsman or Tech-Overseer)

in the Pay Band Rs.15600-39100 with grade pay Rs.5400 with five years regular service in the grade failing which Deputy Central

Intelligence Officer (Tech) from the streams of Wireless Telegraphy or Technical or Workshop or Draftsman or Overseer with combined

regular service of eight years in the grades of Deputy Central Intelligence Officer (Technical) and Assistant Central Intelligence Officer

Grade-I (in the streams of Wireless Telegraphy or Technical or Workshop or Draftsman or Overseer) and possessing two years regular

service as Deputy Central Intelligence Officer (Tech.).

Note 1: Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors shall also

be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility

service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade

alongwith their juniors who have completed such qualifying or eligibility service." (emphasis supplied)

3. From the above, it would be seen that for promotion to the post of AD/Tech., a DCIOs with 5 years regular service in the grade is considered

eligible. However, if the DCIO does not have 5 years regular service in the grade, he could still be considered eligible for consideration for promotion

as AD/Tech., if he has rendered 2 years regular service as DCIO, and has a combined regular service of 8 years in the grades of DCIO and ACIO

" which is the feeder grade for the post of DCIO. This alternate eligibility clause is hereinafter referred to as the "failing which" clause.

4. The respondents having been promoted as DCIO on 01.07.2011, acquired 2

years experience in the grade of DCIO on 01.07.2013. Thus, under the
â??failing whichâ? clause, they claim to have become eligible for promotion as
AD/Tech. on 01.07.2013, since they had a combined 8 years service
in the grade of ACIO and DCIO on the said date, in the next promotion process.

5. The petitioners amended the RRs for the post of AD/Tech., vide memorandum dated 09.12.2013. The post of AD/Tech. even under the amended

RRs could be filled by â??promotion failing which by deputation (including short-term contract)â?. The eligibility for promotion was, however,

modified. The relevant eligibility condition for promotion reads as follows:

â??Promotion:

Deputy Central Intelligence Officer (Technical), Deputy Central Intelligence Officer (Tech-Wireless Telegraphy or Tech-Technical or Tech-

Workshop or Tech-Draftsman or Tech-Overseer) in the pay band Rs.15600-39100 with grade pay of Rs.5400 with five years regular service

in the grade.â??

6. Thus, it would be seen that the amended RRs, as introduced on 09.12.2013, removed the â??failing whichâ? clause. Consequently, the promoted

DCIO â?" like the respondents â?" who were promotee DCIOs, lost the advantage of being eligible to be considered for promotion to the post of

AD/Tech. with 2 years regular service as DCIO, on the basis of their past regular service in the grade of ACIO.

7. In the aforesaid background, the respondents preferred the aforesaid Original Application before the Tribunal. In the Original Application, the

respondents sought several reliefs, including the relief that they be treated as promoted to the grade of AD/Tech. from 01.04.2012. This relief was

sought on the premise that their juniors in the technical cadre had been promoted as AD/Tech. w.e.f. 01.04.2012. Several pleas, including the plea of

highly belated promotions from the grade of ACIO to DCIO, and the bunching of the vacancies for different years by the DPC were raised by the

respondents. However, during the course of arguments in the OA, the respondents pressed for only one relief, namely, for promotion as AD/Tech.

under the RRs of 2010, which contained the â??failing whichâ? clause. This relief was sought in prayer â??(a)â?? made in the Original Application,

which reads as follows:

â??(a) That the applicants be considered for promotion immediately As a Fundamental Right. Vacancies which have arisen till 9.12.2013 be

filled as per RR 2010 under Failing Which Clause as per DOPT calendar for Financial Year, ratio of Y.V. Rangaiah judgment of

Honâ??ble Supreme Court, ratio of Dr. Sahadeva of Delhi High Court and H.M. Singh of SC which is applicable in the case of the present

Applicants.â?? (emphasis supplied)

8. The petitioner filed its counter-reply to the Original Application. The petitioner responded to the pleas of the respondents/ applicants in respect of

the treatment meted out to the ACIOs and DCIOs, and the justification thereof. Since the same are not relevant â?" in view of the restricted relief

pressed by the respondents before the Tribunal, which alone has been considered in the impugned order, we do not consider it necessary to take note

of the stand of the petitioner on those aspects which were not eventually agitated before the Tribunal.

9. The Tribunal granted the aforesaid relief to the respondents by accepting the submission of the respondents that the RRs for the post of AD/Tech.

had been amended on 09.12.2013, i.e. just a few days before 01.01.2014 â?" on which date the respondents would have become eligible for promotion

under the â??failing whichâ? clause. The Tribunal held that the amendment in the RRs was carried out by the petitioner in complete disregard of the

DoP&T circular dated 25.03.1996, and in particular, Clause 3.1.3 thereof. The Tribunal held that the said clause provides â??that whenever eligibility

service for promotion prescribed in the existing Rules was being enhanced, a note should invariably be inserted in the Recruitment Rules to the effect

that eligibility service shall continue to be the same for persons holding feeder post on regular basis on the date of Notification of the revised Rules.â?

(emphasis supplied).

10. The Tribunal held that since the respondents were holding the post of DCIO â?" which is the feeder post for AD/Tech. when the RRs were

revised on 09.12.2013 while deleting the â??failing whichâ? clause, the petitioners should have inserted a note to the effect that the amendment

carried out on 09.12.2013 shall not apply to the respondent-applicants. The Tribunal held that this was a lapse committed by the petitioners, which

could not act to the detriment of the respondents.

11. The Tribunal also relied upon its order in Garima Singh Vs. Union of India & Others, O.A. No.3278/2010 decided on 09.05.2011, where it had

been held that instructions issued by DoP&T may be regarded as those issued by the Executive under Article 73 of the Constitution, and such

instructions should be read along with the Rules. The Tribunal, thus, directed that the petitioner should read the 2013 amended rules along with the

DoP&T instructions dated 25.03.1996 " providing for insertion of the note, as aforesaid.

12. At this stage, it would be appropriate to reproduce the DoP&T instructions contained in OM dated 25.03.1996, which forms part of the

"Guidelines on preparing schedule & notification". Clause 3.1.3 of the OM dated 25.03.1996 reads as follows:

"3.1.3 Where the eligibility service for promotion prescribed in the existing rules is being enhanced (to be in conformity with the

guidelines issues by this Department) and the change is likely to affect adversely some persons holding the feeder grade posts on regular

basis, a note to the effect that the eligibility service shall continue to be the same for persons holding the feeder posts on regular basis on

the date of notification of the revised rules, could be included in the revised rules." (emphasis supplied)

13. The submission of Mr. Arun Bhardwaj, the learned CGSC, firstly, is that on the strength of Clause 3.1.3 of the OM dated 25.03.1996, the Tribunal

could not have directed insertion of the note " to the effect, that the eligibility service shall continue to be the same for persons holding the feeder

post on regular basis on the date of the notification of the revised Rules as it was prescribed in the pre-revised Rules. He submits that the Tribunal, at

the highest, could have directed the petitioners to consider incorporating the said note in the RRs since it is the petitioners, who were the author of the

RRs.

14. Mr. Bhardwaj further submits that, the crucial date for determination of eligibility of the officers to be considered for promotion by the DPC is the

1st January of the year immediately preceding such vacancy year where the vacancy year is financial year based, and in case of calendar year based

vacancy year, the first day of the vacancy year, i.e. January 01, would be taken as the crucial date. In this regard, he has placed reliance on the

Office Memorandum dated 17.09.1988 issued by the DoP&T bearing No.22011/3/98-Estt(D). The said Office Memorandum contains the following illustration to explain its application:

For the sake of illustration, for the panel year 2000-2001 (financial year), which covers the period from April 1, 2000 to March 31,

2001, and the panel year 2000 (calendar year), which covers the period from January 1, 2000 to December 31, 2000, the crucial date for

the purpose of eligibility of the officer would be January 1, 2000 irrespective of whether ACRs are written financial year-wise or calendar

year-wise.

15. Mr. Bhardwaj submits that the respondents completed the 2-year residency period on 01.07.2013 in the grade of DCIO. Thus, by application of

the aforesaid Office Memorandum, for the vacancy year 2013-14, the crucial date for determination of eligibility would be 01.01.2013. As on that date

the respondents, admittedly, did not have the qualifying service of 2 years regular service in the grade of DCIO, since this experience was gained only

on 01.07.2013. Consequently, the respondents were not eligible to be considered for promotion to the post of AD/Tech. for the vacancy year 2013-14.

16. Mr. Bhardwaj submits that for the next vacancy year, i.e. 2014-15, the crucial date for determination of eligibility would be 01.01.2014. On that

date, the amended RRs, as amended on 09.12.2013, had come into force. Thus, the eligibility of the respondents had to be determined on the basis of

the rule position as prevailing on 01.01.2014.

17. Mr. Bhardwaj submits that, in the aforesaid circumstances, reliance placed by the respondents on the decision of the Supreme Court in Y.V.

Rangaiah Vs. J. Srinivasa Rao, (1983) 3 SCC 284, was misplaced, since it could not be said that the respondents were eligible even under the

unamended Rules, i.e. the Rules of 2010, as on 01.01.2013 for being considered for vacancies of the year 2013-14. He points out that in paragraph 9

of the impugned order, the Tribunal has itself recognized and accepted the position that even under the unamended RRs of the year 2010, the

respondents were not eligible for consideration for promotion against vacancies arising prior to 09.02.2013 as they acquired eligibility only on

01.01.2014. The Tribunal in the said paragraph, inter alia, observed:

9. Moreover, since eligibility for promotion is reckoned from Ist

January of the year in which promotions are to be made, the applicants would be eligible for promotion only on 01.01.2014 even under the old Rules. Thus, even if the vacancies arising prior to amendment of Rules on 09.12.2013 are filled by old Rules, i.e. Recruitment Rules, 2010, the applicants would not be eligible for the same as they acquire eligibility only on 01.01.2014. This is because eligibility for such vacancies will have to be reckoned from the Ist January of vacancy year in which such vacancies arose.â??(emphasis supplied)

18. Mr. Bhardwaj submits that it was a conscious decision taken by the petitioners to amend the RRs for the post of AD/Tech. on 09.12.2013, without granting any protection to the respondents with regard to consideration of their cases under the pre-existing RRs of 2010. In this regard, he has explained that the pre-existing RRs of 2010, which contained the â??failing whichâ? clause, gave an unfair advantage to the respondents, who were promotees in the grade of DCIO vis-Ã -vis the directly recruited DCIO. The directly recruited DCIO of the same year 2011 â? in which the respondents were promoted as DCIO under the pre-existing RRs of 2010, would become eligible only in the year 2016, whereas the respondents would have become eligible on 01.01.2014, giving undue advantage to the respondents promotees. In fact, even the earlier directly recruited DCIOs of the year 2009 and 2010 would suffer the same disadvantage vis-Ã -vis the promotee DCIOs of the year 2011, like the respondents. This anomaly was unfair and would have created bad-blood in a disciplined organization like the Intelligence Bureau. He submits that this lacuna was under examination, and process for amendment of the RRs was initiated in the year 2010, which culminated only on 09.12.2013.

19. Mr. Bhardwaj has drawn our attention to the petitionersâ?? averments made in the counter-reply filed before the Tribunal which, inter alia, reads as follows:

â??As regards deletion of â??failing whichâ? clause from the RRs, it is stated that after induction of first batch of direct recruit

DCIOs/Tech in IB in 2009, it was observed that if â??failing whichâ? clause is allowed to be operational, it would provide two residency

periods for officers appointed in the same rank through two different modes i.e. Direct Recruits and Promotees. Under this provision, a

direct recruit Officer would have to complete 5 years for being eligible for promotion whereas a Promotee would become eligible after

rendering only 2 years in the rank of DCIO/Tech subject to the condition that they have rendered at least 8 years combined services in the

grades of ACIO-I(WT) and DCIO/Tech(WT). Therefore, to provide level playing field to both Direct Recruit and Promotee DCIOs/Tech, the

failing which clause was deleted in the RRs 2013. Besides, DCIO/Tech was also added as feeder post to AD/Tech alongwith DCIOs of 5

different streams (WT/Tech/WS/OS/DM) in the RRs 2013 which was not reflected in RRs 2010.â??

20. A similar averment has been made by the petitioners in the present writ petition which, inter alia, reads as follows:

â??2.19 If the unamended (sic) recruitment rules were to be used for effecting promotions to the post of AD (Tech) then the senior direct

recruits DCIOs, who were seniors to the promote/DCIOs would have become junior to the promote/DCIOs resulting in a very ambiguous

situation. Every Department has a right to amend the recruitment rules, whenever the recruitment rules are amended they would be for

certain officers in the feeder cadre whose promotional chances would get delayed. The interest of the Department is best known to it and

hence it has a right to amend the recruitment rules as per its requirement. The fitness and dates of various posts is kept in mind while

recommending amendments in the recruitment rules. Amendments can also be made to prevent the juniors gaining any seniority over the

erstwhile seniors resulting in the erstwhile seniors becoming juniors to their erstwhile juniors. This is not in the interest of any Department

as it creates bad blood for various reasons in any Department. The amendment carried out in the recruitment rules of AD (Tech) in

December 2013 is thus appropriate, fair and does not require insertion of any clarificatory note under it.â??

21. Mr. Bhardwaj submits that the petitioner is obliged to keep in view the ground realities, while taking decisions with regard to amendment of the

RRs so as to provide fair treatment to all its employees so that there is no heart-burning amongst the cadres.

22. Mr. Bhardwaj submits that, thus, there was sufficient justification for a conscious decision of the petitioners to amend the RRs on 09.12.2013

without inserting the note in terms of the OM dated 25.03.1996. He submits that since there was complete justification available for the said conscious

decision of the petitioner, the same could not have been interfered with. In support of his submission, Mr. Bhardwaj has placed reliance on two

decisions. The first decision is Dr. K. Ramulu & Another Vs. Dr. S. Suryaprakash Rao & Others, (1997) 3 SCC 59, wherein the Supreme Court

upheld the conscious decision taken by the Government not to fill up any of the pending vacancies until the process of amendment of the Rules/

recasting of Rules afresh is completed, which had been started on administrative grounds. The Supreme Court in this decision, inter alia, held:

“As rightly pointed out by Shri L. Nageswara Rao, the decision not to prepare the panel should be on valid and relevant considerations

and it should not be an arbitrary decision taken by the Government. The object of Rule 4 is that all eligible candidates should be considered

in accordance with the Rules. Panel should be finalised and operated so as to give an opportunity to the approved candidates to scale

higher echelons of service which would augment the efficacy of service, inculcate discipline and enthuse officers to assiduously work hard

and exhibit honesty and integrity in the discharge of their duties. Nonetheless, it is seen that clause (ii) of the second proviso gives power to

the State Government not to prepare the panel and to consider the cases though the vacancies are available, as stated earlier, pending

amendment of the Rules or recasting the Rules afresh. The Government have taken conscious decision not to fill up any of the pending

vacancies until the process is completed which they had started on administrative grounds. As seen, the process was completed and

the Rules have come into force w.e.f. 12-6-1996.” (emphasis supplied)

23. The Supreme Court further observed in Dr. K. Ramulu (supra) in paragraph 13, inter alia, as follows:

“13. It is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the Rules,

Rule 3 of the General Rules is not of any help to the respondent. The ratio in the case of Ramesh Kumar Choudha v. State of M.P. [(1996)

11 SCC 242 : (1996) 7 Scale 619] is also not of any help to the respondent. Therein, this Court had pointed out that the panel requires to

be made in accordance with the existing Rules and operated upon. There cannot be any dispute on that proposition or direction issued by

this Court. As stated earlier, the Government was right in taking a decision not to operate Rule 4 of the General Rules due to their policy

decision to amend the Rules.â?? (emphasis supplied)

24. Mr. Bhardwaj points out that the case of the petitioners herein stands on an even better footing, since the respondents were not even eligible for

consideration for promotion as AD/Tech. for the vacancy year 2013-14 during the currency of which, the RRs were amended on 09.12.2013.

25. The next decision relied upon by Mr. Bhardwaj is a Constitution Bench decision of the Supreme Court in Shankarsan Dash Vs. Union of India,

(1991) 3 SCC 47. In this case, the Supreme Court upheld the decision of the Government to adopt a different policy with respect to filling up of

reserved vacancies, which was justified on account of the special circumstances explained before the Court in the Governmentâ??s affidavit. The

Supreme Court observed that the said decision â?? to depart from the confirmed policy, was taken after consideration by the authorities of the position

in regard to unavailability of qualified candidates from year to year, adversely affecting the desired strength of the reserved candidates in the services.

The Supreme Court held that the said decision could not be condemned on the ground of arbitrariness and illegal discrimination.

26. Mr. Bhardwaj further submits that the Tribunalâ??s reading of the Office Memorandum dated 25.03.1996 is also flawed. He points out that

paragraph 3.1.3 of the said OM does not, in imperative terms, provide that a note â?? to the effect that the eligibility service shall continue to be the

same for persons holding the feeder post on regular basis on the date of notification of the revised Rules, should imperatively or invariably be included

in the revised Rules, whenever the amendment in the RRs is made which has the effect of enhancing the eligibility service for consideration for

promotion to the high grade. He points out that the said OM uses the expression â??could be included in the revised rulesâ? and not â??should be

included in the revised rulesâ?. He points out that the Tribunal in the impugned order has, without any basis, read the said OM to mean â??that

whenever eligibility service for promotion prescribed in the existing Rules was being enhanced, a note should invariably be inserted in the Recruitment

Rules to the effect that eligibility service shall continue to be the same for persons holding feeder post on regular basis on the date of Notification of the revised Rules.â?? (emphasis supplied).

27. Mr. Bhardwaj submits that para 3.1.3 of the said OM dated 25.03.1996 is only an enabling provision, and it is for the Government to take a call

whether, or not, to append the note, as aforesaid, in the amended RRs depending on the fact situation of each case. He submits that in the facts of the

present case, the purpose of the amendment itself would have been defeated if such a note â?" as provided in Clause 3.1.3 of OM dated 25.03.1996,

were to be included in the amended RRs of 09.12.2013 for the post of AD/Tech.

28. Mr. Bhardwaj submits that reliance placed on Garima Singh (supra) â?" a Full Bench decision of the Tribunal dated 09.05.2011 is also of no avail,

firstly, for the reason that the said decision has not been tested before this Court since the writ petition preferred against the said decision had been

dismissed as withdrawn, and secondly, as the said decision was not dealing with the OM in question. He submits that the OM dated 24.09.1997, which

was in issue in the case of Garima Singh (supra) clearly provided that a note be incorporated in the relevant Recruitment Rules/ Service Rules,

whereas, in the present OM uses an entirely different expression â??could be included in the revised rulesâ??. In these circumstances, Mr. Bhardwaj

submits that the impugned decision cannot be sustained and has to be set aside.

29. On the other hand, learned counsel for the respondents has supported the impugned order. She submits that the respondents have historically been

discriminated. Their promotions to the grade of DCIO were delayed for long years, and the DPC bunched the vacancies for different years, as

admitted by the petitioners themselves in their counter-affidavit before the Tribunal. She submits that had the petitioners made the promotions to the

grade of DCIO from year to year, as and when the vacancies arose, and not delayed the said promotions and bunched the same, the respondents

would have earned promotions as DCIO many years earlier, and would have also had the qualifying service of 5 years in the grade of DCIO for

consideration for further promotion as AD/Tech.

30. She further submits that all the directly recruited DCIOs were impleaded as party respondents before the Tribunal in terms of the order dated

22.05.2015 passed by the Tribunal and, thus, the direct recruits were duly

represented before the Tribunal.

31. She further submits that the Tribunal has erroneously proceeded on the basis that the respondents had not pressed their Original Application in

respect of other reliefs. In this regard, she submits that on 16.04.2015, the applicants had taken time before the Tribunal to file their affidavits to the

effect that they are not pressing their Original Application for the other reliefs. However, no such affidavits were filed. In spite of the same, the

Tribunal proceeded on the basis that the respondent/ applicants had limited their prayer for promotion as AD/Tech. under the RRs of 2010, which

contained the "failing which" clause.

32. The last submission of the learned counsel for the respondents, on which great emphasis has been laid, is that the Tribunal had, after considering

the effects of O.M. dated 25.03.1996, rightly come to the conclusion that the petitioners were enjoined to incorporate the note in accordance with

Clause 3.1.3 of the O.M. She submits that the Tribunal has correctly appreciated the scope of the O.M. and found that the failure on the part of the

petitioner to include the note envisaged in para 3.1.3 of the O.M. in the amended RRs of 2013, could not be allowed to act to the detriment of the

respondents. The learned counsel submits that the insertion of the note in the amended RRs was mandatory, and contends that the DoP&T had

consciously provided for the mandatory insertion of this note to protect the interest of employees holding the feeder post on the date of amendment of

the RRs. She, thus, prays for dismissal of the writ petition.

33. We have heard learned counsel for the parties and perused the impugned order as well as the record including the OM dated 25.03.1996, which is

the basis of the impugned order.

34. Though the learned counsel for the respondent has raised various contentions before us, we find that the only prayer pressed by them before the

tribunal for consideration was for grant of promotion with reference to the RR 2010, which contained the "failing which" clause. The said clause

was rendered in operative by the amendment of the RRs on 09.12.2013, making the respondents ineligible for promotion as per amended RRs of 2013.

In these circumstances, we are not inclined to examine the other contentions raised by learned counsel for the respondent.

35. We do not find any merit in the respondents submission that they had not

given up their other submissions/ prayers before the Tribunal. Merely because the affidavits may not have been filed in terms of the order dated 16.04.2015, it does not mean that the respondents pressed their other submissions & prayers. If that were so, the impugned order would have recorded those submissions and dealt with them. In fact, the Tribunal has not only recorded that the other submissions were not pressed it has, even otherwise, rejected the same.

36. The Tribunal, even otherwise, held that the consideration of the other prayers at this belated stage would amount to unsettling the long standing position, and would also involve third party rights. The Tribunal also observed that promotion could be counted from the date of actual promotion, and not from the date of eligibility or occurrence of the vacancy, as service jurisprudence does not recognize retrospective promotion until and unless there is a statutory rule or power under which retrospective promotion could be granted. In this regard, the Tribunal referred to several decisions, including the decision in Nirmal Chandra Singh Vs. Union of India, (2008) 14 SCC 29. Pertinently, there is no challenge to the impugned order by the respondents on account of their other submissions not being considered. The respondents could, and ought to have moved the Tribunal in review if, according to them, the Tribunal wrongly recorded that they had not pressed other submissions. This submission of the respondents is, therefore, rejected.

37. The admitted case of the parties is that the respondents were promoted as DCIO/Tech-WT on 01.07.2011 and thus completed two years of service in that post only on 01.07.2013. It is also an undisputed fact that in accordance with the DOPT's OM dated 17.09.1998, the crucial date for determining eligibility for promotion in case of financial year based vacancy year was 1st January immediately preceding such vacancy year. In view of this position, the respondents who had completed two years of service as DCIO/Tech-WT only on 01.07.2013, were not fulfilling the eligibility as on 01.01.2013, which was the crucial date for determining their eligibility for vacancies for the year 2013-14. The respondents could thus stake their claim for promotion only against the vacancies for the year 2014-15, for which the crucial date was 01.01.2014. Unfortunately for the respondents, the RRs were amended before 01.01.2014. The respondents, admittedly, did not

fulfill the eligibility criteria in the amended RR. Thus, the ratio of the decision in Y.V. Rangaiah (supra) was clearly not attracted in the facts of this case.

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

39. The answer to this simple, yet an issue of importance, can be found from the language of clause 3.1.3 of the OM dated 25.03.1996 itself. We find that the clause as noted herein above after laying down the situation in which the "note" can come into play, carefully uses the words "could be included in the revised rules" (emphasis supplied). The language is plain and simple, it means only one thing that the "note" could be included and not that the "note" should be included. On a plain grammatical interpretation, it is abundantly clear that the phrase "could be included", gives a discretion to the Cadre Controlling Authority to consider "whether, or not, there is any necessity of incorporating the note.

This discretion, like any other administrative discretion, has to necessarily be exercised only upon examination of all relevant factors, including the cadre strength, stagnation being faced by the employees, and the availability of eligible employees in the feeder cadre, etc. The expression "could be" does not connote a mandatory obligation. It only enables the Competent Authority and gives him the flexibility to include the note in a deserving situation. There is no reason why we should not apply the first principle of statutory interpretation and adopt the grammatical interpretation of the expression "could be included in the revised Rules".

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

courts.

41. Having said so, we proceed to examine as to how the tribunal has dealt with clause 3.1.3 of the OM. On perusal of the same, we are pained to

note that such a simple phrase "or if we may say, a word, "could" has been read by the Tribunal to mean "should" and, that too, without

any reasoning or justification. Vide the impugned order, the tribunal has replaced the phrase "could be included" by "should invariably be

included". This certainly was not permissible. The premise on which the tribunal allowed the OA is not borne out from the clause 3.1.3 and, if we

may say so, the tribunal has completely overlooked the provision and proceeded on a factually incorrect premise to hold that as per the OM, the

petitioner should have invariably inserted the note. In our view, once the petitioner, as the Cadre Controlling Authority, had exercised its discretion by

not including the note in the revised RRs "and that too by giving valid justification for the same, it was not open for the tribunal to have given such a

direction to the petitioner to include the note in the revised RRs. The respondents have not even ventured to attack the reasons given by the petitioner

for its decision to amend the RRs. The whole purpose would have been defeated if the note "as desired by the respondents, were to be inserted. In

any event, the same would have been of no avail for the year 2013-14, as they were not eligible as on 01.01.2013. Even before the commencement of

the subsequent year, i.e. 2014-15, the RRs stood amended and the said note, in any event, could not have been inserted for 2014-15 or thereafter. The

impugned order passed by the tribunal is, therefore, wholly unsustainable.

42. Before we conclude, it would also be apt to notice that though the learned counsel for the respondent has placed on record a compilation of 23

judgments running into over 270 pages, but during the course of her submissions she has relied only on the decision of the Supreme Court in R. Prabha

Devi & Ors. v. Union of India & Ors., AIR 1988 SC 902. By referring to para 15 of this decision, she has contended that the seniority and experience

of the respondents ought to have been considered before declaring them ineligible for promotion. We deem it appropriate to reproduce para 15 of the

judgment in extenso:

"15. The rule-making authority is competent to frame rules laying down

eligibility condition for promotion to a higher post. When such an eligibility condition has been laid down by service rules, it cannot be said that a direct recruit who is senior to the promotees is not required to comply with the eligibility condition and he is entitled to be considered for promotion to the higher post merely on the basis of his seniority. The amended rule in question has specified a period of eight years' approved service in the grade of Section Officer as a condition of eligibility for being considered for promotion to Grade I post of CSS. This rule is equally applicable to both the direct recruit Section Officers as well as the promotee Section Officers. The submission that a senior Section Officer has a right to be considered for promotion to Grade I post when his juniors who have fulfilled the eligibility condition are being considered for promotion to the higher post, Grade I, is wholly unsustainable. The prescribing of an eligibility condition for entitlement for consideration for promotion is within the competence of the rule-making authority. This eligibility condition has to be fulfilled by the Section Officers including senior direct recruits in order to be eligible for being considered for promotion. When qualifications for appointment to a post in a particular cadre are prescribed, the same have to be satisfied before a person can be considered for appointment. Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfils the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion. Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor it can override it in the matter of promotion to the next higher post. The rule in question which prescribes an uniform period of qualified service cannot be said to be arbitrary or unjust violative of Article 14 or 16 of the Constitution. It has been rightly held by the Tribunal:

â??When certain length of service in a particular cadre can validly be prescribed and is so prescribed, unless a person possesses that qualification, he cannot be considered eligible for appointment. There is no law which lays down that a senior in service would

automatically be eligible for promotion. Seniority by itself does not outweigh experience.â??

43. We are unable to appreciate how this judgment supports the case of the respondents. In fact, para 15 of the judgment in the aforesaid case of R.

Prabha Devi (supra) supports the plea raised by the petitioner, as it reiterates the position that the eligibility for promotion has to be examined as per

the existing Recruitment Rules. The respondents were, admittedly, not fulfilling the eligibility criteria for promotion as per RRs 2013 and were not

entitled to seek a direction that their case for promotion for the vacancy year 2014-15 should be considered by applying the earlier RRs which stood

superseded on 09.12.2013.

44. In these circumstances, the impugned order is unsustainable and the same is set aside. The writ petition is allowed with no order as to costs.