

(2006) 04 GAU CK 0074
In the Gauhati High Court
Case No : Writ Appeal No. 166 of 2004

Usharanjanbh Attacharjee and Others	APPELLANT
Vs	
State of Tripura and Others	RESPONDENT

Date of Decision : 05-04-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1), 309
Tripura Civil Services Rules, 1967 — Rule 17, 2, 25, 26, 28

Citation : (2006) GLT 802 Supp

Hon'ble Judges : R.B. Misra, J; I.A. Nsarj, J

Bench : Division Bench

Advocate : A.M. Mazumdar, for the Appellant; U.B. Saha, for the Respondent

Judgement

I.A. Ansari, J.—Is it an invariable principle of service jurisprudence that a person, who has been promoted into a cadre of a service, subsequent to the making of a direct recruitment thereto, must necessarily be treated junior to the direct recruit, for, the promotee cannot be made, or be treated as, senior to the direct recruit from a date, when the promotee was not even born into the cadre of the service concerned? This is the principal question, which the present writ appeal has raised.

2. This writ appeal has been heard on two different dates, namely, on 28.1.2005 and 24.2.2006.

3. We have heard Mr. A.M. Mazumdar, learned Senior counsel, for the Appellants, and Mr. U. B. Saha, learned Senior Government Advocate, Tripura, appearing on behalf of the State Respondents. While we have also heard Mr. A. K. Bhowmik, learned Senior counsel, appearing on behalf of the private respondents, on 28.1.2005, none has, however, appeared on behalf of the private Respondents on 24.2.2006.

4. The Appellants, in the present writ appeal, question, in his appeal, the correctness of impugned judgment and order, dated 23.4.2004, passed in WP (C)

Nos. 293/ 2000 and 294/2000, upholding the impugned order, dated 25.5.2000, which, seeks to explain the contents of Rule 28 (iii) of the Tripura Civil Service Rules, 1968, and clarify and lay down thereby the principles, which, according to the Government, shall govern the determination of inter-se-seniority between the direct recruits and promotees of the Tripura Civil Service Grade-II. The Appellants also challenge the correctness of the impugned judgment and order, dated 23.4.2004, aforementioned, whereby the learned single Judge has upheld the Office Memorandum, dated 9.6.2000, issued by the Government of Tripura, whereunder the direct recruits of the Tripura Civil Service Grade-II have been placed en block senior to the Appellants, who are all promotees from various feeder posts to Grade-II of the Tripura Civil Service.

5. Though a number of reliefs had been sought for by the writ Petitioners, the grievances raised, on behalf of the Appellants, at the time of hearing of the present appeal, has remained confined to the two questions, which we have indicated hereinbelow. To put it differently, what we have to determine, in the present appeal, is as to whether the explanation given and the clarification offered by the impugned order, dated 25.5.2000, aforementioned with regard to the meaning and import of Rule 28(iii) of the Tripura Civil Service Rules, 1967, can be upheld and whether the inter se seniority between the direct recruits and the promotees fixed by the impugned order, dated 9.6.2000, which, in turn, rests on the impugned order, dated 25.5.2000, aforementioned, can be sustained.

6. In order to make clear the real controversy involved in the present appeal, it is necessary to take note of, and bear in mind, the material facts and various stages, which have led to the issuance of the order, dated 25.5.2000, aforementioned, which were under challenge, in the writ petitions aforementioned, by the Appellants as writ Petitioners. Background facts:

7. The fixation of the inter se seniority of the members of the Tripura Civil Service (in short, "the TCS") is governed by Rule 28 of the Tripura Civil Service Rule, 1967 (in short, "the TCS Rules"). Sub-rule (iii) of Rules 28, which had been the subject of repeated controversy, read as under:

The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion under Rules 5.

8. The Government of Tripura had earlier issued a notification, dated 25.5.81, enunciating the principles governing the inter se seniority between the direct recruits and promotees purportedly consistent with Rule 28(iii). The notification, dated 25.5.81, aforementioned, is reproduced hereinbelow:

Government have observed that certain difficulties have arisen in the implementation of the general principles of determining seniority of various categories of persons employed under the Tripura Government, as incorporated in Tripura Administrator's order No. F1. (16)-GA/ 59, dated 12.7.1960 (copy

enclosed).

2. It is clarified that the rotation and the fixation of relative seniority of direct recruits and regular promotees shall be done taking into account only such officers as are appointed from either sources to the same grade and the same cadre within any single calendar year.

3. Any final seniority list already notified by the Government shall not be liable to revision merely because of the issue of the present order.

By order & in the name of the Governor.

Sd/- S. R. Sankaran Chief Secretary to the Govt. of Tripura.

9. The notification, dated 25.5.1981, aforementioned, came to be challenged, in Civil Rule No. 204/83, by the promotees of Grade-II of the TCS, who had formed an association under the name and style of the Association of Civil Service Officers, Tripura, Agartala. By judgment and order, dated 27.7.92, a Division Bench of this Court allowed the Civil Rule and quashed the impugned notification, dated 25.5.81, aforementioned.

10. While quashing the Notification, dated 25.5.1981, aforementioned, the Division Bench observed and held, inter alia, as follows:

10. It is well settled in a catena of decision by the Hon"ble Supreme Court that when there are two sources of recruitments to a service with a fixed quota, the quota rule has to be followed and there should not be any deviation in following the quota rules. It has also been well settled by the catena of decision by the Hon"ble Supreme Court that if the promotees happen to occupy the vacancies within their quota and the promotees who are occupying the vacancies within the quota of direct recruits will either be reverted or be absorbed in the vacancies within their quota. So also when direct recruits appointed in the vacancies which are within the quota of promotees after the recruitment by promotion taken place the promotees will occupy the vacant post within their quota.

11. It is apparent that by the impugned notification rotation and fixation of relative seniority of direct recruits and promotees has been confined to the recruits of a calendar year, even if in a calendar year recruitment is made from only one source or from a source in excess of the fixed quota. Thus, the impugned notification confining the fixation of relative seniority between the direct recruits and promotees to the recruits of a calendar year purports to frustrate and override the very tenet of quota rules and the well settled principles of fixation of relative seniority between the direct recruits and promotees when the recruitment to the service is made against the quota vacancies reserve for the direct recruitment and promotion.

12. On a bare reading of the provision of Rules 28 of the Tripura Civil Service Rules, 1967, and the impugned instruction, it becomes apparent that the impugned order, dated 28.5.81 is inconsistent with and violative of the provision

of Rule 28 of the TCS Rules. It is well settled that provisions of statutory rules cannot be overridden or violated by administrative instruction and that administrative instruction which is inconsistent with and violative of the Rules, is illegal and void. For the reason stated above, we have no hesitation to hold that the impugned order dated 28.5.81 (Annexure A-1 to this petition) is being ex-facie inconsistent with and/or violative of the provisions of Rules 28 of the Tripura Civil Service Rules, 1967, as illegal and void. The petition is, therefore, allowed and the impugned notification dated 28.5.81 is quashed. We make no order as to costs." 11. The decision rendered by the Division Bench in Civil Rule No. 204/1981 remained unchallenged and accordingly attained finality. Following this decision, the Government of Tripura prepared and published, vide Office Memorandum, dated 25.7.97, a draft seniority list by placing, in terms of the decision in Civil Rule No. 204/81, the promotees, irrespective of their individual date of recruitment, to their respective slots in the gradation list on the basis of Quota Rota Rule. Subsequent thereto, however, on 25.5.2000, a notification was issued, as indicated hereinabove, clarifying the general principles for determination of seniority between the direct recruits and the promotees and acting upon this Office Memorandum, the State Government published afresh, vide order, dated 9.6.2000, a seniority list of the officers of the Tripura Civil Service Grade-II, whereby the direct recruits were placed enblock over the promotees. The order, dated 25.5.2000, aforementioned as well as the seniority list, dated 9.6.2000, aforementioned came to be challenged in the two writ petitions, namely, Writ Petition Nos. 293/2000 and 294/2000.

12. While dismissing the two writ petitions, on 23.4.2004, the learned single Judge concluded to the effect that since the direct recruits had been recruited to Grade-II of the TCS prior to the promotion of the writ Petitioners thereto and that the direct recruitment had remained confined within the quota meant for being filled up by direct recruitment, the writ Petitioners, on being subsequently promoted to the Grade-II of the TCS, cannot be granted seniority over the direct recruits, for, the promotees were not even born in the cadre of the TCS on the date (s), when the private Respondents were directly recruited to Grade-II of the TCS. It is really the correctness of this conclusion, which comes under challenge in the present appeal.

13. Presenting the case on behalf of the Appellants, Mr. A. M. Mazumdar, learned Senior counsel, has submitted that the impugned seniority list, dated 9.6.2000, is based on the clarificatory order, dated 25.5.2000, and this clarificatory order, dated 25.5.2000, is, according to Mr. Mazumdar, in contemptuous disregard of the judgment and order, dated 27.7.1992, rendered in Civil Rule No. 204/81, and also in violation of the very provisions of Rule 28(iii) of the TCS Rules, which the order, dated 25.5.2000, aforementioned, under the garb of seeking to clarify, actually alters and, in effect, destroys and sets at naught. The impugned order, dated 25.5.2000, contends Mr. Mazumdar, changes the entire principle of Quota Rota Rule envisaged by Rule 28(iii) and since Rule 28(iii) stands framed in the exercise of powers under Article 309 of the Constitution of India, the same could

not have been overridden by means of a mere clarificatory order, dated 25.5.2000, which was, at best, an executive instruction. It is, thus clear, submits Mr. Mazumdar, that the impugned order, dated 25.5.2000, is not sustainable in law, the same being contrary to Rule 28(iii) framed under Article 309, and since the seniority list, dated 9.6.2000, aforementioned has been published on the basis of the impugned clarificatory order, dated 25.5.2000, aforementioned, the seniority list too needs to be set aside and quashed.

14. For a better understanding of the controversy, raised in this appeal, a close reading of the impugned order, dated 25.5.2000, aforementioned, is necessary. The impugned order, dated 25.5.2000, is, therefore, reproduced hereinbelow:

No. F. 23(9)-GA (P&T)/2000 Government of Tripura GENERAL ADMINISTRATION (P&T) DEPARTMENT ORDER Subject: General Principles for determination seniority The State Govt., observed that certain difficulties had arisen in the implementation of the general principles of determining seniority of various categories of persons employed under the State Govt. as incorporate in Tripura Administration's Order No. F. 1 (16)-GA/59 dated 12.7.1960.

2. To over come the difficulties a clarification was issued vide order No. F. 1(1 I)-GA/59 dated 28.5.1981. According to that clarification rotation and fixation of relative seniority of direct recruits and promotees was to be done taking into account only such officers as were appointed from either source to the same grade and the same cadre within any single calendar year.

3. The Hon''ble Gauhati High Court in CR 204 of 1981 quashed the aforesaid order on the ground that it confined rotation and fixation of relative seniority even if in a calendar year recruitment from one source is made in excess of the quota. Accordingly, a formal order was issued vide No. F. 23 (47)-GA/81 dated 3.7.1993 for not giving effect to the former order.

4. However, the difficulties as aforesaid, persist and to over come the same it is clarified again, in modified form in the light of the decision of the Hon''ble High Court, that the rotation and fixation of relative seniority of direct recruits and the promotees shall be done taking into account only such officers as are appointed from either source to the same grade and the same cadre within any single calendar year if the recruitment are made within the respective quota. Persons recruited in excess of the quota from any source shall not get rotational seniority in the same calendar year but shall be reverted to the year where they can be accommodated in the respective quota of that year.

5. Any final seniority list already notified by the Govt. shall not be liable to revision merely because of the issue of the present order.

By order of the Governor Sd/- (S.K. Roy) Secretary to the Govt. of Tripura.

15. The learned single Judge, further contends Mr. Mazumdar, failed to take note of the fact that Rule 28(iii) is based on quota rota rule and it is because of the omission to note and take care of the meaning and import of the concept of

quota rota rule, embodied in Rule 28(iii), that the learned single Judge, relying on the decision in Jagdish Ch. Patnaik and Others Vs. State of Orissa and Others, and Ajit Kumar Rath Vs. State of Orissa and Others, came to hold to the effect, inter alia, that the promotees, having not been born in the cadre of Grade-II of the TCS on the date, when the direct recruits stood already recruited to Grade-II of the TCS, the question of according seniority to the Petitioner over the direct recruits did not arise at all, particularly, when the direct recruitment had remained confined to the quota meant for being filled up by direct recruitment. While applying the decisions in Jagdish Chandra Patnaik (supra) and Ajit Kumar Rath (supra) to the facts of the present case, the learned single Judge, submits Mr. Mazumdar, failed to note that the decisions in Jagdish Chandra Patnaik (supra) and Ajit Kumar Rath (supra) were wholly inapplicable to the facts of the present case.

16. While placing reliance on the cases of Jagdish Chandra Patnaik (supra) and Ajit Kumar Rath (supra), the learned single Judge, points out Mr. Mazumdar, inadvertently failed to note that these two decisions rested on their own respective recruitment rules, which were quite different from the one that we have at hand, for, further points out Mr. Mazumdar, Rule 28(iii) of the TCS Rules envisages not only the quota for direct recruits, on the one hand, and the promotees, on the other, but also rotational system of seniority between the direct recruits and the promotees. In the rotational system of seniority, submits Mr. Mazumdar, the direct recruit or the promotee, as the case may be, would acquire his own slot in the cadre as well as in the gradation list. Viewed from this angle, it is clear, according to Mr. Mazumdar, that under the rotational system of seniority, the inter se seniority between the direct recruits and promotees would not depend on their respective dates of recruitment, but on the position of the slot reserved in the gradation list for each mode of the appointee. This aspect of the case was, according to Mr. Mazumdar, not taken note of, at all, by the learned single Judge and this error, contends Mr. Mazumdar, resulted into dismissal of the writ petitions.

17. It is also submitted by Mr. Mazumdar that the impugned order, dated 25.5.2000, aforementioned introduces the year of recruitment as the basis for fixing inter se seniority between the direct recruits and the promotees, which is, according to Mr. Mazumdar, against the provisions contained in Rule 28(iii) of the TCS Rules and, hence, the impugned order, dated 25.5.2000, cannot survive and in consequence thereof, the seniority list published by order, dated 9.6.2000, too must fail. In support of his above submissions, Mr. Mazumdar places reliance on The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, , P.N. Premachandran Vs. The State of Kerala and Others, , Ajit Kumar Rath Vs. State of Orissa and Others, , Jagdish Ch. Patnaik and Others Vs. State of Orissa and Others, , Devendra Prasad Sharma Vs. State of Mizoram and others, , Union of India and others etc. Vs. S.D. Gupta and others, , S.G. Jaisinghani Vs. Union of India (UOI) and Others, , D. Ganesh Rao Patnaik and Others Vs. State of Jharkhand and Others, and Mervyn Coutindo and

Others Vs. Collector of Customs, Bombay and Others,

18. It is further submitted by Mr. Mazumdar that in view of the fact that similar attempt, as has been made, now, with the help of the impugned order, dated 25.5.2000, was nullified by a Division Bench of this Court in Civil Rule No. 204/1981, the present impugned order, dated 25.5.2000, could not have been, without amending the Rule 28 (iii), issued by the Respondents/authorities concerned, for, the effect of the impugned order, dated 25.5.2000, is to set at naught, contends Mr. Mazumdar, the decision of this Court in Civil Rule No. 204/81, which, according to Mr. Mazumdar, is wholly impermissible in law.

19. Controverting the submissions made on behalf of the Appellants, Mr. U. B. Saha, learned Senior Government Advocate, appearing on behalf of the State Respondents, drawing our attention to various provisions of the TCS Rules, submits that a person becomes a member of the Tripura Civil Service on being recruited in terms of Rule 5 read with Part-V of the TCS Rules. Unless a person, according to Mr. Saha, becomes a member of the Tripura Civil Service, the question of his obtaining seniority does not arise. In the case at hand, points out by Mr. Saha, while the direct recruits were recruited on various dates in the year 1990, the Appellants came to be promoted to Grade-II from various feeder posts in the year 1992. It is, thus, clear, submits Mr. Saha, that the Appellants were promoted to Grade-II of the TCS after the private Respondents had already stood recruited. In such a situation, when the promotees were not even born, in the cadre of Grade-II of the TCS, on the date (s), when the direct recruits stood already recruited to Grade-II of the TCS, the question of giving seniority to the Appellants, as promotees, over the direct recruits did not arise at all and it is this position of law, which the impugned order, dated 25.5.2000, seeks to explain and clarify. Hence, the seniority list, dated 9.6.2000, which has been prepared on the basis of the said clarificatory order, dated 25.5.2000, is, according to Mr. Saha, valid in law and was rightly not interfered with by the learned single Judge. Mr. Saha seeks to derive support, for the submissions so made by him, from the decisions in *A. Janardhana Vs. Union of India (UOI) and Others*, , AIR 1977 251 (SC) , *Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others*, , *A.N. Pathak and Others Vs. Secretary to the Government, Ministry of Defence and Another*, , *Devendra Prasad Sharma Vs. State of Mizoram and others*, , and *M. Subba Reddy and Another Vs. A.P. State Road Transport Corporation and Others*,

20. Before coming to the correctness of the impugned judgment and order dated 23.4.2004, it may be noted that Rule 2(c) of the TCS Rules defines a "member of the service" to mean a person appointed in substantive capacity to either Grade of the Service and includes a person appointed on probation to Grade-II of the service. The word "service" is defined by Rule 2(e) to mean the Tripura Civil Service. Rule 3 embodies the schemes for constitution of the Tripura Civil Service. While Rule 3(1) provides for constitution of the Tripura Civil Service, Rule 3(2) provides that the service shall have two Grades, namely, (i) Grade-I

(Selection Grade) and (ii) Grade-II. Since the State Respondents seek to derive some support from Rule 5, it is appropriate that we take special note of Rule 5. The relevant provisions of Rule 5 read as follows:

5. Method of Recruitment: (1) Save as provided in Rule 17, appointment to the service shall be made by the following methods, namely,

(a) Not more than 50 per cent of the substantive vacancy which occur from time to time in the authorized permanent strength of the service shall be filled by direct recruitment in the manner specified in Part-IV of these rules, and

(b) the remaining such substantive vacancies shall be filled by selection in the manner specified in Part-V of these Rules from amongst the officers specified in Schedule-A.

21. That Rule 5, which prescribes the mode of recruitment, warrants filling up of 50% of the vacancies, in the permanent strength of the service, by direct recruitment and the remaining 50% of the vacancies, in the permanent strength of the service, by promotion cannot be disputed and has not been, in fact, disputed before the learned single Judge, Rule 5, as the Division Bench, in Civil Rule No. 204/81 noted, provides that recruitment to the authorized permanent strength of the Tripura Civil Service shall be filled up from two sources, namely, (i) by direct recruitment in the manner specified in Part-IV of the Rules and (ii) by selection/promotion in the manner specified in Part-V of the Rules with quotas of vacancies reserved for direct recruits and promotees.

22. As correctly noted by the learned single Judge, we are not really concerned with Rule 28(i), which pertains to the determination of inter se seniority among the persons appointed on the basis of competitive examination, and, similarly, Rule 28(ii), which embodies the principles governing inter se seniority amongst the persons recruited by selection at the time of initial constitution of service, is of no relevance in the present case and, hence, what is relevant, in the present case, is really Rule 28(iii).

23. A careful reading of Rule 28(iii) reflects that the relative seniority of "direct recruits" and "promotees" shall be based on rotation of vacancies between direct recruits and the promotees, the quota for direct recruits as well as promotees being, however, reserved in terms of the recruitment rules.

24. What Rule 28 reflects is the rule-maker's intention that the relative seniority between the direct recruits and the promotees shall be determined not merely on the basis of their respective dates of appointment-by promotion or by direct recruitment-but also on the basis of rotation of vacancies between the direct recruits and the promotees meaning thereby that apart from the fact that direct recruitments as well as promotions shall remain limited within the respective quota reserved for these two streams, the inter se seniority between the two modes of appointees-promotees and direct recruits-shall remain thus: 1 direct recruit: 1 promotee and soon.

25. The determination of relative seniority of direct recruits and promotees, on the basis of "rotational system", has been the subject of consideration by a Constitution Bench, in *Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others*, the Apex Court held as follows:

The system that prevails for recruitment to the post of Appraisers is that 50 per cent is reserved for direct recruits while the remaining 50 per cent is filled up by promotion from subordinate in the Customs Department. It further appears that seniority is determined in the cadre by the system of rotation, i.e., the list is arranged in such a way that there is one person from the direct recruits and one from the promotees alternately. The contention of the Petitioners is that this system has resulted in discriminatory treatment against them with the consequence that promotees of much longer service in the cadre of Appraisers are put in the seniority list below direct recruits with much shorter service. This, according to the Petitioners, offends against equality of opportunity guaranteed under Article 16(1) of the Constitution.

26. Substantially, same as Rule 28(iii), a circular of 1959, which was the subject-matter of discussion, in *Mervyn Coutindo (supra)*, laid down,

...that relative seniority of direct recruits and promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of reservation for direct recruitment and promotion respectively in the recruitment rules.

27. Upholding the granting of relative seniority to persons coming from two different sources, namely, "direct recruitment" and "promotion" by resorting to "rotational system" and describing such a system as not offensive to Article 16 or in violation of the principles of equality and opportunity enshrined in Article 16(1) of the Constitution of India, the Apex Court, in *Mervyn Coutindo (supra)*, held thus:

Where therefore recruitment to a cadre is from two sources, namely, direct recruits and promotees and rotational system is in force, seniority has to be fixed as provided in the explanation by alternately fixing a promotee and a direct recruit in the seniority list. We do not see any violation of the principle of equality of opportunity enshrined in Article 16(1) by following the rotational system of fixing seniority in a cadre half of which consists of direct recruits and the other half of promotees, and the rotational system by itself working in this way cannot be said to deny equality of opportunity in government service. The anomalies which have been referred to in the petition arise not on account of there being anything opposed to equality of opportunity in government service by the use of the rotational system; they arise out of the fortuitous circumstance that in this particular service of Appraisers, for one reason or Anr. , direct recruitment has fallen short of the quota fixed for it. It is merely because of this fortuitous circumstance that anomalies to which reference has been made in the petition have arisen. There is no doubt that if direct recruitment had kept pace with the

quota fixed therefore there would have been no anomalies in fixing the seniority list. The question therefore narrows down to this : Can it be said that there is denial of equality of opportunity which arises out of this fortuitous circumstance and which is not a vice inherent in the rotational system? We are not prepared to say that the rotational system of fixing seniority itself offends equality of opportunity in government service. Any anomalies which may have resulted on account of insufficient recruitment of direct recruits in the past cannot in our opinion be a ground for striking down the rotational system, which, as we have said, does not itself amount to denial of equality of opportunity in the matter of employment in government service.

28. From a careful reading of what has been observed in *Mervyn Coutindo* (supra), it is abundantly clear that when recruitment, to a cadre, is made from two sources, namely, "direct recruitment" and "promotion" and the relative seniority between these two sources of recruitment is determined on "rotational system" or on the basis of "rotation of vacancies", it would, broadly speaking, imply two conditions precedent subject to which recruitments can be made, these two conditions being (i) that the direct recruits as well as the promotees shall be brought to the cadre by limiting their numbers to the quota fixed for each of them in the service and (ii) that their inter se seniority shall be by way of "rotational system" meaning thereby that while granting seniority, one promotee shall be followed by one direct recruit, who, in turn, would be followed by a promotee and, then, the promotee would be followed by a direct recruit and so on. The decision in *Mervyn Coutindo* (supra) further demonstrates that when, in a cadre, half of the cadre consists of direct recruits and other half of promotees and the relative seniority" is determinable on the basis of "rotation of vacancies", the effect would be that though appointed within their specified quota, the roster of seniority should be prepared in such a manner that a promotee would be succeeded by a direct recruit, the direct recruit by a promotee and, then, the promotee by a direct recruit and so on. This, in effect, would mean that irrespective of their individual date of appointment in the cadre, a direct recruit or a promotee, as the case may be, would occupy his own slot in the roster of seniority prepared by such rotational system of vacancy.

29. In the case at hand too, when Rule 28(iii) makes it clear that inter se seniority would be determined on the basis of rotational system, it is not material as to whether a promotee has been promoted subsequent to a direct recruit or prior thereto. The gradation list would have to be prepared on the basis of rotational system and not by placing enblock the direct recruits over the promotees merely on the ground that the direct recruits were appointed before the promotees were even born in the cadre of Grade-II. Put in simpler words, what this rotational system of granting of inter se seniority between direct recruits and promotees, which is popularly known as quota rota rule, means is that while the appointments to the quota of direct recruits or promotees would have to be kept confined within the quota fixed for each of them under the recruitment rules, their relative seniority would not depend on their individual

date of appointment, but would rest on the roster, which has been prepared in a rotational system. Such a roster shall run thus: promotee-direct recruit, promotee-direct recruit and so on. On his appointment, the direct recruit or the promotee, as the case may be, would occupy his own slot in the seniority list and such an opportunity cannot be denied to a promotee on the ground that the promotee was appointed, in the cadre, by way of promotion, subsequent to the date of appointment of the direct recruit or vice versa. In the case at hand too, the gradation list ought to have been worked out in terms of Rule 28(iii), which envisages granting of inter se seniority by rotational system, i.e. quota-rota rule.

30. Drawing our attention to Rule 5, Mr. Sana has attempted to show that there is no quota fixed in the authorized permanent strength of the TCS service inasmuch as only substantive vacancy, falling in a particular year, would be filled up on the basis of reservation of 50% of vacancies in favour of the two sources of appointees. To our reading, attributing, in the light of the provisions of Rule 28(iii), such a meaning to Rule 5, as suggested by Mr. Sana, would be a misreading of the entire scheme of Rule 5, for, in a given year, if there is only one vacancy in the substantive post of Grade-II, the question of dividing such a post into two vacancies would not arise and, in such an event, the vacancy would be impossible to be filled up. What has been suggested by Mr. Saha will make the scheme of filling up of vacancies wholly unworkable. What, in effect, Rule 5 postulates is that the entire authorized permanent strength of the TCS, in the cadre of Grade-I as well as Grade-II, would stand divided into two groups, namely, direct recruits and promotees and the strength of each group would be 50% of the total authorized permanent strength of the service in each cadre. It is, therefore, not material as to how many vacancies, in a given year, has arisen. When the quota has been fixed @50% for each of the two groups, it logically follows that ideally, a promotee would be followed by a direct recruit and even if an appointment is made in excess of the quota fixed for the two modes of appointees, the rotational system of seniority would be followed, while fixing inter se seniority meaning thereby mat apart from following the roster for the purpose of appointment, as indicated hereinabove, no appointee would be allowed to occupy, in the list of seniority, a place fixed for the other mode of appointee.

31. In short, in the rotational system of vacancy or quota rota rule, a direct recruit cannot occupy, in the roster of seniority or in the gradation list of seniority, the place meant for a promotee and vice versa. When the recruitment rules, governing service conditions, embody the concept of "quota rota rule" for the purpose of fixing inter se seniority between the direct recruits and the promotees, a promotee cannot be denied his position in such a roster merely on the ground that he has been promoted to the cadre, in question, subsequent to the date of recruitment thereto of a direct recruit nor can a direct recruit be denied his position in such a roster of seniority on the ground that he was not even born in the cadre, when the promotees was promoted to this cadre, for, be it a promotee or a direct recruit, each one would occupy his or her position in the

roster of seniority by adopting quota rota rule. The decision, rendered in *Mervyn Coutindo* (supra), we may point out, has been considered in *Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports and Others*, , but the Court expressed no opinion disagreeing with the view taken in *Mervyn Coutindo* (supra); rather, the Apex Court, in *Govind Dattatray Kelkar* (supra), observed thus:

This point directly arose for consideration in *Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others*, Therein, this Court accepted the validity of rotational system where the recruitment to a cadre was from two sources and held that such a system did not violate the principle of equal opportunity enshrined in Article 16(1) of the Constitution.

32. When there is a direct authority available, as in *Mervyn Coutindo* (supra), and when no other decision to the contrary has been cited before us, we deem it unnecessary to look for any authority and we find it wholly safe to hold that Rule 28(iii) does not envisage confinement of the rotational system to any particular calendar year. The strength of the cadre of Grade -II of the TCS having been divided into two equal parts, the question of granting of seniority, on the basis of the year of recruitment, does not arise at all. What, on the other hand, the impugned order, dated 25.5.2000, aforementioned seeks to do is that it makes the rotational system confined to a given calendar year by laying down that if the recruitments are made within a single calendar year and within the quota fixed for each mode of appointment, the rotational system of granting of inter se seniority between the direct recruits and the promotees would be followed or else, the rotational system would not be followed. In effect, the impugned order, dated 25.5.2000, aforementioned brings into fore the same mode of granting of seniority, which the order, dated 25.5.1981, sought to impose and when the impugned notification, dated 25.5.1981, had already been set aside by a Division Bench of this Court, it was wholly impermissible for the State Government to bring out the presently impugned order, dated 25.5.2000, and confine thereby, in effect, the granting of inter se seniority between the direct recruits and the promotees on the basis of appointment in a given calendar year and not on the basis of quota rota rule, which Rule 28(iii) envisages and guarantees.

33. What is also important to note is that it is not necessary that in every recruitment rule, wherever a quota is fixed for direct recruits and promotees, the rotational system of inter se seniority would automatically follow. In fact, it was contended, in AIR 1977 251 (SC) , that when the quota has been fixed for the two modes of appointees, the rotational system or, as is commonly called, rota rule shall be followed. Rejecting such a contention, in *N. K. Chauhan* (supra), the Apex Court speaking through Krishna Iyer, J. held thus:

Here again, we are not disposed to hold, having special regard to the recent decisions of this Court cited before us, that "quota" is so interlocked with "rota" that where the former is expressly prescribed, the latter is impliedly inscribed. Let us logicise a little. A quota necessarily postulates more than one source of

recruitment. But does it demand the manner in which each source is to be provided for after recruitment, especially in the matter of seniority? Cannot quota stand independent of rota? You may fix a quota for each category but that fixes the entry. The quota methodology may itself take many forms-vacancy-wise ratio, cadre composition-wise proportion, period-wise or number-wise regulation. Myriad ways can be conceived of. Rotational or roster system is a commonly adopted and easily understood method of figuring out the placement of officers on entry. It is not the only mode in the code and cannot be read as an inevitable consequence on the basis of rotational system of seniority. This was, however, not allowed on the ground that at the time of initial constitution of the service, in terms of Rule 25(ii), which is parametaria with Rule 28(ii), the seniority would be counted from the respective dates of appointment in the cadre; whereas Rule 25(iii), which is parametaria with Rule 28(iii), would apply to cases for determination of seniority between direct recruits and promotees subsequent to the initial constitution of the service. This is clear from the observations made in *Devendra Prasad Sharma (supra)*, at para 6, which runs as follows: "...In our opinion, the aforesaid principle for determination of seniority under Sub-rule (ii) of Rule 25 quoted above is in accord with the well settled principle of service jurisprudence that seniority of officers should normally be determined from the dates of their respective appointments in the cadre. The learned single Judge has relied on Sub-rule (iii) of Rule 25, which provides that the relative seniority of the direct recruits and promotees have to be determined in accordance with the rotation of the vacancies of the direct recruitments and the promotees as per quota of vacancies reserved for direct recruits and promotees, but it would be apparent on a plain reading of provisions of Rule 25 quoted above that Sub-rule (iii) of Rule 25 applies to officers who were appointed to the service by direct recruitment or promotion subsequent to the initial constitution of service and not to the Respondents who were appointment to the service at the time of initial constitution of service. The direction of the learned single Judge in the impugned judgment for placing the Respondent No. 1 above the Respondent No. 2 is, therefore, erroneous in law and is liable to be set aside.

38. The decision in *Devendra Prasad Sharma (supra)*, too, thus, makes it clear that Rule 28(iii), which embodies the concept of rotational system of seniority, would be applied to persons, who come to the service subsequent to the initial constitution of the service. As the present one is a case of persons, who came into service after the initial constitution of the service, Rule 28(iii) would have to be adhered to and all the consequences, which are inevitable, shall be allowed to follow.

39. In *M. Subba Reddy and Anr. v. A.P. State Road Transport Corporation and Ors.* AIR 2004 SCW 3374, the Apex Court, taking note of its decision in *Devendra Prasad Sharma (supra)*, observed:

7. ...In the case of *Devendra Prasad Sharma Vs. State of Mizoram and others*, , Rule 25 (iii) stated that the relative seniority of direct recruits and of promotees

shall be determined according to rotation of vacancies between direct recruits and promotees based on the quotas of vacancies reserved for direct recruitment and promotion. Rule 25(iii) is similar to item 3(1) of Appendix-A (Section B). It was held by this Court that in cases, where there is rotation of vacancies between direct recruits and promotees based on quota of vacancies, the rotation has to be considered in accordance with the vacancies as and when they accrue under the rules.

40. Thus, even in *M. Subba Reddy (supra)*, it was clearly laid down by the Apex Court that when the Rule provided for granting of inter se seniority on the basis of rotational system, the rotation has to be considered in accordance with the vacancies as and when the vacancies accrue under the rules.

41. We notice that the learned Single Judge has observed at para 10 of the impugned judgment, "It is settled position of law that seniority of an officer in service is determined with reference to the date of his entry in the service, which will be consistent with the requirements of Articles 14 and 16 of the Constitution of India and that promotion cannot be ante dated retrospectively to the date, when the promotee is not borne on the cadre." The statement of law, so made, namely, that it is settled position of law that seniority of an officer in service is determined with reference to the date of his entry in the service and that promotion cannot be ante dated to the date, when the promotee is not borne on the cadre, we may point out, is really the general principle governing inter se seniority in a service, which does not embody the principle of quota rota rule. This general principle is, however, subject to the relevant recruitment rules. If the recruitment rules provide for granting of seniority on the basis of quota and rota principle, the principle that the date of appointment would determine the inter se seniority would remain irrelevant and immaterial inasmuch as when the quota rota rule is applied, the person would occupy his place in the gradation list or roster of seniority in accordance with slot in such a roster meant for his category of appointee and not on the basis of the date or year of the appointment.

42. The learned Single Judge, we also notice, relied on the decision, rendered in *Jagdish Ch. Patnaik and Others Vs. State of Orissa and Others*, , to hold that seniority of a person in a service is determined with reference to the date of entry into the service and that a promotion cannot be ante dated by taking recourse to quota rota rule. We may point out here that the learned single Judge, however, did not take into account the recruitment rules, which had been considered in *Jagdish Ch. Patnaik (supra)*. Rule 26 of the recruitment rules, in *Jagdish Ch. Patnaik (supra)*, which dealt with the question of seniority, read as follows:

26. Seniority. - (1) When officers are recruited by promotion and by directed recruitment during the same year, the promoted officers shall be considered senior to the officers directly recruited irrespective of their dates of joining the appointment.

(2) Between the two groups of promoted officers, those promoted from the rank of Sub-Assistant Engineers shall en bloc be senior to those promoted from the rank of Junior Engineers.

(3) Subject to provision of Sub-rules (1) and (2) seniority of officers shall be determined in accordance with the order in which their names appear in the lists prepared by the Commission.

43. From a bare reading of Rule 26, which fell for consideration in Jagdish Ch. Patnaik (supra), it is clear that the inter se seniority between the direct recruits and the promotees, in Jagdish Ch. Patnaik (supra), were not to be granted on rotational system or on the basis of quota rota rule. It was, in this context, that the decision was rendered by the Apex Court, in Jagdish Ch. Patnaik (supra), to the effect that when a person is not even born in the service, the question of granting seniority to him does not arise. The decision, rendered in Jagdish Ch. Patnaik (supra) was, therefore, not applicable at all to the case at hand. The case of Ajit Kumar Rath Vs. State of Orissa and Others, , is also not a case based on quota rota rule and, hence, this decision too was wrongly relied upon by the learned single Judge inasmuch as this case too arose out of the same recruitment rule, i.e., Rule 26, which was already considered in Jagdish Ch. Patnaik (supra). Thus, the two decisions, namely, Jagdish Ch. Patnaik (supra) and Ajit Kumar Rath (supra), which the learned single Judge has relied upon, were wholly inapplicable to the facts of the present case.

44. The fact that the direct recruits have been recruited within the quota of 50% allotted to them is immaterial, for, it is neither the year of vacancy nor the year of recruitment, which is the governing factor, while following the quota rota rule. What is relevant is the point or slot in the roster of seniority. If, according to the roster, prepared on the basis of the quota rota rule, a vacancy meant for a promotee exists, it cannot be filled up by a direct recruit on either the ground that the direct recruit had been recruited prior to the date, when the promotee was born in the cadre of the service, or on the ground that the direct recruitment is within the quota fixed by the recruitment rule.

45. The impugned order, dated 25.05.2000, seeks to achieve the same object, which the Notification, dated 25.5.1981, (which already stood quashed by a Division Bench of this Court) sought to realise. When the Notification, dated 25.5.1981, already stood quashed, the question of bringing in Anr. notification, having the same effect, cannot be legally permitted and cannot be sustained.

46. What crystallizes from the above discussion is that the impugned clarificatory order, dated 25.5.2000, and the impugned seniority list published by order, dated 09.06.2000, which is, admittedly, based on the impugned clarificatory order, dated 25.05.2000, are contrary to, and in consistent with, the provisions of Rule 28(iii). Hence, the impugned order, dated 25.05.2000 and 09.06.2000, cannot be allowed to survive.

47. In the result and for the reasons discussed above, this appeal succeeds. The

impugned order, dated 23.04.2004, is hereby set aside and quashed. The impugned clarificatory order, dated 25.05.2000, and the impugned gradation list, dated 09.06.2000, shall also, therefore, stand set aside and quashed. The Respondents/authorities concerned are hereby directed to prepare, finalise and publish the gradation list in respect of Grade-II of Tripura Civil Service, so far as the same concern the present Appellants and the private Respondents, in terms of the principles embodied in amended Rule 28(iii) of the TCS Rules, 1967. While so preparing, finalizing and publishing the gradation list, the Respondents/authorities concerned shall bear in mind the observations made hereinabove. The whole exercise, so directed, shall be completed within a period of one month from today.

48. With the above observations and directions, this writ appeal shall stand disposed of.

49. No costs.