

SK NAUSAD RAHAMAN & ORS.

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v.

UNION OF INDIA AND ORS.

(Civil Appeal No. 1243 of 2022)

MARCH 10, 2022

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**[DR. DHANANJAYA Y CHANDRACHUD AND
VIKRAM NATH, JJ.]**

Central Excise and Customs Commissionerates Inspector (Central Excise, Preventive Officer and Examiner) Group 'B' Posts Recruitment Rules 2016 – r.5 – Central Excise and Land Customs Department Inspector (Group C posts) Recruitment Rules 2002 – r.4(ii) – Constitution of India – Article 309, 14-16, 21 – Circular issued by CBIC stating that since 2016 Recruitment Rules (which superseded and substituted 2002 Recruitment Rules) do not contain any provision for recruitment by absorption, no application for Inter Commissionerate Transfers (ICTs) could be considered after the enforcement of those rules – Validity of the circular challenged – Challenge upheld by CAT – Decision reversed by High Court – Correctness of – Held: High court was justified in concluding that 2002 Recruitment Rules contained a specific provision for ICTs – There is an absence of a provision comparable to r. 4(ii) of 2002 Recruitment Rules in 2016 Recruitment Rules – On the contrary, r.5 of 2016 Recruitment Rules specifically stipulates that each Cadre Controlling Authority (CCA) shall have its own separate cadre unless directed by the Central Board of Excise and Customs (CBEC) – Any ICT would violate the unique identity of each cadre envisaged in r.5 – Any ICT order would transgress a field which is occupied by the rules which have been framed in terms of the proviso to Article 309 – The circular makes it clear that 2016 Recruitment Rules do not have any provision for recruitment by absorption and no ICT application could be considered after the coming into force of 2016 Recruitment Rules – Transfer is a condition of service and it is within the powers of the employer to take a policy decision either to grant or not to grant ICTs to employees – Power of judicial review cannot be exercised to interfere with a policy decision of that nature – While the judgment of the High Court is upheld, it is left open to the respondents to revisit the policy to accommodate posting of spouses,

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- A *the needs of the disabled and compassionate grounds – Such an exercise has to be left within the domain of the executive, ensuring in the process that constitutional values which underlie Articles 14, 15 and 16 and Article 21 are duly protected – Service Law.*

- B *Constitution of India – Art. 21 – Preservation of family Life – Held: State while formulating a policy for its own employees has to give due consideration to the importance of protecting family life as an element of the dignity of the person and a postulate of privacy because preservation of family life is an incident of Art.21 – Service Law.*

- C *Constitution of India – Articles 14, 15 and 16 – Substantive equality of opportunity– Held: It becomes necessary for the Government to adopt policies through which it produces substantive equality of opportunity as distinct from a formal equality for women in the workplace – The true aim of achieving substantive equality must be fulfilled by the State in recognizing the persistent patterns of discrimination against women once they are in the work place – Therefore, the State, both in its role as a model employer as well as an institution which is subject to constitutional norms, must bear in mind the fundamental right to substantive equality when it crafts the policy even for its own employees – Service Law.*

- E *Service Law – Transfer Policy – Rights of Persons with Disabilities Act, 2016 – Held: It is a statutory mandate for recognizing the principle of reasonable accommodation for the disabled members of society – The formulation of a policy therefore, must take into account the mandate which Parliament imposes as an intrinsic element of the right of the disabled to live with dignity.*

- F *Constitution of India – Judicial review – Policy Making – Held: Court in the exercise of judicial review cannot direct the executive to frame a particular policy - Yet, the legitimacy of a policy can be assessed on the touchstone of constitutional parameters – Service Law.*

- G **Disposing of the appeals, the Court**

HELD: 1.1 Certain basic precepts of service jurisprudence must be borne in mind:

- H **i. First and foremost, transfer in an All India Service is an incident of service. Whether, and if so where, an employee should**

be posted are matters which are governed by the exigencies of service. An employee has no fundamental right or, for that matter, a vested right to claim a transfer or posting of their choice. A

ii. Second, executive instructions and administrative directions concerning transfers and postings do not confer an indefeasible right to claim a transfer or posting. Individual convenience of persons who are employed in the service is subject to the overarching needs of the administration. B

iii. Third, policies which stipulate that the posting of spouses should be preferably, and to the extent practicable, at the same station are subject to the requirement of the administration. C

iv. Fourth, norms applicable to the recruitment and conditions of service of officers belonging to the civil services can be stipulated in:

a. A law enacted by the competent legislature;

b. Rules made under the proviso to Article 309 of the Constitution; and D

c. Executive instructions issued under Article 73 of the Constitution, in the case of civil services under the Union and Article 162, in the case of civil services under the States. E

v. Fifth, where there is a conflict between executive instructions and rules framed under Article 309, the rules must prevail. In the event of a conflict between the rules framed under Article 309 and a law made by the appropriate legislature, the law prevails. Where the rules are skeletal or in a situation when there is a gap in the rules, executive instructions can supplement what is stated in the rules. F

vi. Sixth, a policy decision taken in terms of the power conferred under Article 73 of the Constitution on the Union and Article 162 on the States is subservient to the recruitment rules that have been framed under a legislative enactment or the rules under the proviso to Article 309 of the Constitution. [Paras 23 - 29][621-A-D; 622-F-G; 623-A-C] G

1.2 RR 2002 contained in Rule 4 a “Special Provision”. Rule 4(i) envisaged that each Commissionerate shall have its H

- A own separate cadre unless otherwise directed by the CBEC. Rule 4(ii) commenced with a non-obstante provision in terms of which, the jurisdictional Chief Commissionerate of Central Excise was empowered to order that any post in the Commissionerate may be filled up by absorption of persons holding the same or comparable post belonging to the cadre of another Commissionerate under the CBEC. The non-obstante provision was necessary because Rule 4(i) contained a mandate for each Commissionerate to have its own separate cadre unless the CBEC directed otherwise. The plain consequence of each Commissionerate having its own cadre was to preclude the appointment of a person belonging to the cadre of another Commissionerate by way of absorption. The bar on the absorption of persons from outside the cadre was lifted as a consequence of Rule 4(ii), which by embodying a non-obstante provision allowed the jurisdictional Chief Commissionerate to allow a post in the Commissionerate to be filled by persons holding the same or comparable post but belonging to the cadre of another Commissionerate. In RR 2016 as notified, Rule 5 states that each CCA shall have its own separate cadre, unless otherwise directed by the CBEC. The ‘Commissionerate’ in the erstwhile Rule 4(ii) was substituted by the expression “Cadre Controlling Authority” in Rule 5 of RR 2016. The clear intent of Rule 5 is that there would be a separate cadre for each CCA and only CBEC is entrusted with the authority to direct otherwise. Hence only CBEC could direct the constitution of a joint cadre for more than one Commissionerate. The enabling power which was conferred on jurisdictional Chief Commissionerate in Rule 4(ii) of RR 2002 is conspicuously absent in Rule 5 of RR 2016. The central submission which has been urged on behalf of the appellant is that since in RR 2016 there is no provision corresponding to Rule 4(ii) of RR 2002, there is a silence on the subject of the absorption of persons belonging to the cadre of another Commissionerate and this silence or gap can be supplemented by executive instructions. The executive instructions, it was submitted, would be those which are embodied in the OM’s which have been issued by DoPT or the instructions which have been issued by the Department of Revenue from time to time. There is a fundamental fallacy in the submission which has been urged
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on behalf of the appellants. Administrative instructions, it is well-settled, can supplement rules which are framed under the proviso to Article 309 of the Constitution in a manner which does not lead to any inconsistencies. Executive instructions may fill up the gaps in the rules. But supplementing the exercise of the rule making power with the aid of administrative or executive instructions is distinct from taking the aid of administrative instructions contrary to the express provision or the necessary intendment of the rules which have been framed under Article 309. RR 2016 have been framed under the proviso to Article 309. Rule 5 of RR 2016 contains a specific prescription that each CCA shall have its own separate cadre. The absence of a provision for filling up a post in the Commissionerate by absorption of persons belonging to the cadre of another Commissionerate clearly indicates that the cadre is treated as a posting unit and there is no occasion to absorb a person from outside the cadre who holds a similar or comparable post. [Paras 30-32][623-C-H; 624-A-F]

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1.3 Rule 5 of RR 2016 postulates that each CCA has a separate cadre and does not contain a provision for bringing in, by way of absorption, persons from outside the cadre. Inducting persons from outside the cadre by absorption requires a specific provision in the subordinate legislation for the simple reason that the concept of a cadre would otherwise militate against bringing in those outside the cadre. That is the reason why Rule 4(ii) of the erstwhile RR 2002 contained a specific provision to this effect. That provision has however not been included when RR 2016 were framed. If the authority entrusted with the power of framing rules under Article 309 of the Constitution did so on the ground that the provision was subject to misuse and was contrary to the interests of the administration, no employee can assert a vested right to claim an ICT. [Para 34][626-C-E]

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1.4 Undoubtedly, while all matters pertaining to the CBEC and CBDT are under the domain of the Department of Revenue, there has to be a harmonious construction with the subjects which are assigned to the DoPT. In fact, the need for a harmonious reading is emphasized, as we have seen earlier, in Rule 4(4) of

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- A The Government of India (Transaction of Business) Rules 1961, which requires the advice of DoPT to be sought on methods of recruitment and conditions of service and on the interpretation of existing orders relating to recruitment and conditions of service. The executive instructions which have been issued by
- B the DoPT cannot however prevail over the specific provisions which are contained in the rules which have been framed under the proviso to Article 309 of the Constitution. Faced with this difficulty, the appellants have sought to urge that Rule 4(ii) of RR 2002 was not included while RR 2016 were being framed on the
- C advice of the DoPT on the ground that such a provision is generally not made in the recruitment rules. This submission is based on the disclosure made by the Department of Revenue under the Right to Information Act 2005 on 3 July 2018. The attachment with the RTI disclosure contains the tabulation which indicates that the proposal which was under consideration was
- D the provision for Inter-Commissionerate deputation without deputation allowance. This was suggested for deletion. DoPT observed that such a provision is generally not made in the recruitment rules and thus, the proposal may be agreed to. But apart from this, the Department of Revenue did not deem it fit to adopt the specific provision which was contained in Rule 4(ii) of
- E RR 2002 under which absorption of persons from other cadres was envisaged at the Commissionerate level, when Rule 5 of RR 2016 was framed. In the absence of a specific provision to that effect, an employee from outside the cadre under the control of a CCA cannot claim an ICT based on executive instructions. The
- F executive instructions which have been issued by DoPT in the form of OMs will not prevail over RR 2016 which have been framed under the proviso to Article 309. Similarly, the instructions which were issued by the Department of Revenue on 27 March 2009, relaxing the ban on ICT, which was imposed on 19 February 2004 and the subsequent instructions dated 27 October 2011
- G were issued at the time when RR 2016 were yet to be framed. These instructions will not govern or prevail when the regime envisaged under RR 2016 came into force. [Paras 38, 39][630-D-G; 631-F-H; 632-A-C]

- H 1.5 The High Court was justified in coming to the conclusion that: (i) RR 2002 contained a specific provision for

ICTs; (ii) There is an absence of a provision comparable to Rule 4(ii) of RR 2002 in RR 2016; (iii) On the contrary, Rule 5 of RR 2016 specifically stipulates that each CCA shall have its own separate cadre unless directed by the CBEC; (iv) Any ICT would violate the unique identity of each cadre envisaged in Rule 5; (v) Any ICT order would transgress a field which is occupied by the rules which have been framed in terms of the proviso to Article 309 of the Constitution; (vi) The circular dated 20 September 2018 makes it absolutely clear that RR 2016 do not have any provision for recruitment by absorption and no ICT application could be considered after the coming into force of RR 2016; (vii) Transfer is a condition of service and it is within the powers of the employer to take a policy decision either to grant or not to grant ICTs to employees; and (viii) The power of judicial review cannot be exercised to interfere with a policy decision of that nature. [Para 42][634-C-G]

1.6 The realm of policy making while determining the conditions of service of its employees is entrusted to the Union for persons belonging to the Central Civil Services and to the States for persons belonging to their civil services. This Court in the exercise of judicial review cannot direct the executive to frame a particular policy. Yet, the legitimacy of a policy can be assessed on the touchstone of constitutional parameters. Moreover, short of testing the validity of a policy on constitutional parameters, judicial review can certainly extend to requiring the State to take into consideration constitutional values when it frames policies. The State, consistent with the mandate of Part III of the Constitution, must take into consideration constitutional values while designing its policy in a manner which enforces and implement those values. [Para 43][634-G-H; 635-A-B]

1.7 This Court has spoken about the systemic discrimination on account of gender at the workplace which encapsulates the patriarchal construction that permeates all aspects of a woman's being from the outset, including reproduction, sexuality and private choices, within an unjust structure. The OMs which have been issued by DoPT from time to time recognized that in providing equality and equal opportunity to women in the

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- A workplace of the State, it becomes necessary for the Government to adopt policies through which it produces substantive equality of opportunity as distinct from a formal equality for women in the workplace. Women are subject to a patriarchal mindset that regards them as primary caregivers and homemakers and thus, they are burdened with an unequal share of family responsibilities.
- B Measures to ensure substantive equality for women factor in not only those disadvantages which operate to restrict access to the workplace but equally those which continue to operate once a woman has gained access to the workplace. The impact of gender in producing unequal outcomes continues to operate beyond the point of access. The true aim of achieving substantive equality must be fulfilled by the State in recognizing the persistent patterns of discrimination against women once they are in the work place. The DoPT OM's dated 3 April 1986, 23 August 2004, 8 July 2009 and 30 September 2009 recognised the impact of underlying social structures which bear upon the lives of women in the work place and produce disparate outcomes coupled with or even without an intent to discriminate. The provision which has been made for spousal posting is in that sense fundamentally grounded on the need to adopt special provisions for women which are recognized by Article 15(3) of the Constitution. The manner in which a special provision should be adopted by the State is a policy choice which has to be exercised after balancing out constitutional values and the needs of the administration. But there can be no manner of doubt that the State, both in its role as a model employer as well as an institution which is subject to constitutional norms, must bear in mind the fundamental right to substantive equality when it crafts the policy even for its own employees. [Para 48][637-D-H; 638-A-C]

- 1.8 The Rights of Persons with Disabilities Act 2016 is a statutory mandate for recognizing the principle of reasonable accommodation for the disabled members of society. The formulation of a policy therefore, must take into account the mandate which Parliament imposes as an intrinsic element of the right of the disabled to live with dignity. [Para 49][638-C-D; 639-A]

- H *Vikash Kumar v. Union Public Service Commission and Others* (2021) 5 SCC 370; *Avni Prakash v. National*

Testing Agency and Others 2021 SCC OnLine SC 1112;
*Ravinder Kumar Dhariwal and Another v. Union of
India and Others* 2021 SCC OnLine SC 1293; *Akshay
N. Patel v. Reserve Bank of India* 2021 SCC OnLine
SC 1180 – relied on.

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1.9 The State in the present case has been guided by two objectives: first, the potential for abuse of ICTs and second, the distortion which is caused in service leading to plethora of litigation. The State while formulating a policy for its own employees has to give due consideration to the importance of protecting family life as an element of the dignity of the person and a postulate of privacy. How a particular policy should be modulated to take into account the necessities of maintaining family life may be left at the threshold to be determined by the State. In crafting its policy however the State cannot be heard to say that it will be oblivious to basic constitutional values, including the preservation of family life which is an incident of Article 21. [Para 51][639-D-E]

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1.10 The circular dated 20 September 2018 has taken into account, what it describes “exceptional circumstances” such as “extreme compassionate grounds”. Leaving these categories undefined, the circular allows for individual cases to be determined on their merits on a case by case basis, while prescribing that transfers on a “loan basis” may be allowed subject to administrative requirements with a tenure of three years, extendable by a further period of two years. While proscribing ICTs which envisage absorption into a cadre of a person from a distinct cadre, the circular permits a transfer for a stipulated period on a loan basis. Whether such a provision should be suitably enhanced to specifically include cases involving (i) postings of spouses; (ii) disabled persons; or (iii) compassionate transfers, is a matter which should be considered at a policy level by the Board.

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In considering whether any modification of the policy is necessary, they must bear in mind the need for a proportional relationship between the objects of the policy and the means which are adopted to implement it. The policy above all has to

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- A fulfill the test of legitimacy, suitability, necessity and of balancing the values which underlie a decision making process informed by constitutional values. Hence while we uphold the judgment of the Division Bench of the Kerala High Court, we leave it open to the respondents to revisit the policy to accommodate posting of spouses, the needs of the disabled and compassionate grounds.
- B Such an exercise has to be left within the domain of the executive, ensuring in the process that constitutional values which underlie Articles 14, 15 and 16 and Article 21 of the Constitution are duly protected. [Paras 52, 53][639-F-H; 640-A-D]
- C *Prabir Banerjee v. Union of India and Others* (2007) 8 SCC 793 : [2007] 10 SCR 694 – distinguished.
- Bank of India v. Jagjit Singh Mehta* (1992) 1 SCC 306 : [1991] 2 Suppl. SCR 492; *Union of India v. SL Abbas* (1993) 4 SCC 357 : [1993] 3 SCR 427; *Lt. Col. Nitisha and Others v. Union of India* 2021 SCC Online SC 261 – relied on.
- D *Union of India and Others v. Somasundaram Viswanath and Others*, (1989) 1 SCC 175 : [1988] 3 Suppl. SCR 146; *State of Orissa and Others v. Prasana Kumar Sahoo* (2007) 15 SCC 129 : [2007] 5 SCR 697; *JS Yadav v. State of UP*. (2011) 6 SCC 570 : [2011] 5 SCR 460; *Jarnail Singh v. Lacchmi Narain Gupta* 2022 SCC OnLine SC 96 – referred to.
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Case Law Reference

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|---|-------------------------|---------------|---------|
| F | [1991] 2 Suppl. SCR 492 | relied on | Para 26 |
| | [1993] 3 SCR 427 | relied on | Para 27 |
| | [1988] 3 Suppl. SCR 146 | referred to | Para 28 |
| | [2007] 5 SCR 697 | referred to | Para 29 |
| G | [2011] 5 SCR 460 | referred to | Para 33 |
| | [2007] 10 SCR 694 | distinguished | Para 40 |

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1243 of 2022.

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From the Judgment and Order dated 10.04.2019 of the High Court of Kerala at Ernakulam in O.P.(CAT) No.190 of 2018. A

With

Civil Appeal Nos.1246-1248, 1244-1245, 1249, 1250, 1251-1265, 1266 and 1267 of 2022.

K. M. Nataraj, ASG, Maninder Singh, Rana Mukherjee, P. N. Ravindran, Narender Hooda, Ms. Vibha Datta Makhija, Vikas Singh, Sr. Advs., Umakant Misra, Sibho Sankar Mishra, Yelamanchili Shiva Santosh Kumar, Aditya Bhat, Tarun Gupta, Rishi Kapoor, Ashish Pandey, Kapish Seth, Prateek Rai, Ashutosh Bhardwaj, Akanshya Rai, Ms. Saksha Jha, Sandeep Sharma, Vishwa Pal Singh, Mukesh Kumar Maroria, Mohd. Akhil, Anulalp Jain, P. V. Yogeswaran, Abhishek Kumar, Shailesh Madiyal, Ronak Karanpuria, Shyam Agarwal, Yashraj Singh Deora, Ms. Prakriti Roy, Advs. for the appearing parties. B C

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

A	Facts	4*	D
B	Relevant circulars and notifications	10*	
	B.1Executive Instructions issued by DoPT	10*	
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A Facts

1. A Division Bench of the High Court of Kerala dealt with a batch of petitions under Article 226 of the Constitution challenging the orders of the Central Administrative Tribunal on the issue of the withdrawal of Inter-Commissionerate Transfers¹. The High Court has come to the conclusion that the Central Excise and Customs Commissionerates Inspector (Central Excise, Preventive Officer and Examiner) Group 'B' Posts Recruitment Rules 2016² do not contain any provision for ICTs and, on the contrary, stipulate that each Cadre Controlling Authority³ will have its own separate cadre, unless otherwise F G

¹ "ICT"

² "Recruitment Rules 2016" or "RR 2016"

³ "CCA"

*Ed. Note : Pagination is as per the original Judgment. H

A directed by the Central Board of Excise and Customs .The High Court held that ICTs would violate the unique identity of each cadre envisaged under Rule 5 of RR 2016 and hence the circular withdrawing ICTs is not invalid. The judgment of the High Court has given rise to the batch of civil appeals.

B 2. The appellants are Inspectors of the Central Excise and Land Customs or, as the case may be, Goods and Services Tax Administration, who were allocated to different CCAs. Section 4 of the Customs Act 1962 provides that the Central Board of Indirect Taxes and Customs⁴ may appoint such persons as it thinks fit to be officers of customs. A similar provision is contained in Section 4 of the Central Goods and Services Tax Act 2017⁵, which states that:

C “4. (1) The Board may, in addition to the officers as may be notified by the Government under section 3, appoint such persons as it may think fit to be the officers under this Act.

D (2) Without prejudice to the provisions of sub-section (1), the Board may, by order, authorise any officer referred to in clauses (a) to (h) of section 3 to appoint officers of central tax below the rank of Assistant Commissioner of central tax for the administration of this Act.”

E The expression ‘Board’ is defined in Section 2(16) of the CGST Act as the Central Board of Excise and Customs⁶ constituted under the Central Boards of Revenue Act 1963.

F 3. On 29 November 2002, the Central Excise and Land Customs Department Inspector (Group C posts) Recruitment Rules 2002⁷ were notified. RR 2002 trace the source of power to the proviso to Article 309 of the Constitution. Rule 4 was in the following terms:

G “4. **Special provision.** - (i) Each Commissionerate shall have its own separate cadre unless otherwise directed by the Central Board of Excise and Customs*
 (ii) Notwithstanding anything contained in sub-rule (1), the jurisdictional Chief Commissioner of Central Excise may, if he considers to be necessary or expedient in the public interest so to

⁴ “CBIC”

⁵ “CGST Act”

⁶ “CBEC”

⁷ “Recruitment Rules 2002” or “RR 2002”

H * Now referred to as Centra Board of Indirect Taxes and Customs (CBIC)

do and subject to such conditions as he may determine having regard to the circumstances of the case and for reasons to be recorded in writing, order any post in the Commissionerate of Central Excise to be filled by absorption of persons holding the same or comparable posts but belonging to the cadre another Commissionerate or Directorate under the Central Board of Excise and Customs.”

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4. RR 2002 were superseded and substituted by RR 2016. Rule 5 of RR 2016 provides that:

“5. **Special Provision.**— Each Cadre Controlling Authority (CCA) shall have its own separate cadre, unless otherwise directed by the Central Board of Excise and Customs.”

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5. A comparison of Rule 4 of RR 2002 with Rule 5 of RR 2016 would indicate that Rule 5 is similar to Rule 4(i) of the erstwhile Rules. Rule 4(i) stipulates that each Commissionerate shall have its own separate cadre, unless otherwise directed by the CBIC. Rule 5 of RR Rules 2016 substitutes the expression “CCA” for the expression “Commissionerate”. Significantly, Rule 4 (ii) of RR 2002 does not find place in Rule 5 of RR 2016. Rule 4(ii) contained a non-obstante provision under which a jurisdictional Chief Commissioner of Central Excise had enabling power to allow the absorption of persons from another Commissionerate under the CBIC in the public interest, and subject to conditions as would be determined. Rule 4(ii) of RR 2002 which contains an express provision for ICTs was not incorporated in Rule 5 when RR 2016 were notified.

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6. On 20 September 2018, the CBIC issued a circular⁸ stating that since RR 2016 do not contain any provision for recruitment by absorption, no application for ICTs could be considered after the enforcement of those rules. The circular forms the genesis of the dispute in the present case and is hence extracted below:

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“CIRCULAR

Subject: Instructions in respect of Inter Commissionerate Transfer (ICT) in the light of new Recruitment Rules, 2016-regarding.

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These instructions are being issued in terms of “**Central Excise and Customs Commissionerate Inspector (Central Excise, Preventive Officer and Examiner) Group B Posts Recruitment Rules, 2016**”

⁸ F. No. A-22015/117/2016-Ad.IIIA dated 20 September 2018

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- A 2. Any executive instruction in contravention of the Recruitment Rules will be void in accordance with the ratio of the judgment of the Hon'ble Supreme Court of India in the case of UOI & others Vs. Somasundran¹ Viswanath & Ors. dated 22.09.1988 (1990 SC 166 (10) which held as follows: -
- B (1) *"It is well settled that the norms regarding recruitment and promotion of officers belonging to the Civil Services can be laid down either by a law made by appropriate Legislature or by rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued under article 73 of the Constitution of India in the*
- C *case of Civil Services under the Union of India and under Article 162 of the constitution of India in the case of Civil Services under the State Governments. If there is a conflict between the executive instructions and the rules made under the proviso to Article 309 of the Constitution of India, the*
- D *rules made under proviso to Article 309 of the Constitution of India prevail."* Thus, the Recruitment Rules formulated under Article 309 will prevail over any executive instruction that may be contradictory to it"
- E 3. It has come to the notice of this office that various CCAs (Cadre Control Authorities) are taking divergent stands on the issue of Inter Commissionerate Transfers (!CT) of officers in the cadre of Inspector on the basis of guidelines issued vide F.No. A 22015/23/2011-AD IIIA dated 27.10.2011. The issue of Inter Commissionerate Transfer under "**Central Excise and Customs Commissionerate Inspector (Central Excise, Preventive Officer and Examiner) Group B Posts Recruitment Rules, 2016**" has been examined by the Board and following has been observed.
- F 4. The ICT applications were being considered under Rule 4 of erstwhile Central Excise and Land Customs Department Inspector (Group 'C' Posts) Recruitment Rules, 2002 which stated that:
- G *"Rule 4. Special provision. - (i) Each Cadre controlling Authority (CCA) shall have its own separate cadre unless otherwise directed by the Central Board of Excise and Customs*
- H *(ii) Notwithstanding anything contained in sub-rule (1), the jurisdictional Chief Commissioner of Central Excise may, if*

he considers to be necessary or expedient in the public interest so to do and subject to such conditions as he may determine having regard to the circumstances of the case and for reasons to be recorded in writing, order any post in the Commissionerate of Central Excise to be filled by absorption of persons holding the same or comparable posts but belonging to the cadre another Commissionerate of Directorate under the Central Board of Excise and Customs.

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However, under Recruitment Rules, 2016 the corresponding provision containing the special provision under Rule 5 provides that “Each Cadre Controlling Authority (CCA) shall have its own separate cadre unless otherwise directed by the Central Board of Excise and Customs.”

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5. From the above, it is clear that Recruitment Rules, 2016 do not have any provision for recruitment by absorption and accordingly, no ICT application can be considered after coming into force of the Recruitment Rules, 2016.

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6. In exceptional circumstances depending upon the merit of each case such as extreme compassionate grounds, such transfers may be allowed on case to case on loan basis alone keeping in view the administrative requirements of transferee and transferred Cadre Controlling Authority. However, maximum tenure of such transfer will be three years and can be extended with the specific approval of the Board for a further period of two years depending upon the administrative requirement. It is further reiterated that the officials transferred on the loan basis shall not be considered for promotion unless they re-join their parent cadre.

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7. Now, therefore, it is hereby clarified that an office order for Inter Commissionerate Transfer in the Grade of Inspectors issued on or after 26.12.2016 (i.e. from the date of enactment of RR, 2016) will be non-est and accordingly any officer who has joined another zone in pursuance of such order shall be treated as a **deemed case on loan basis w.e.f. 26.12.2016**. These officers shall be on deemed loan till 31.03.2019, on which date the officers shall stand relieved and be reverted to their parent Zones. [...]”

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7. While clarifying that under RR 2016, there is no specific provision allowing for ICTs, the circular notes that Rule 5 stipulates that each

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- A CCA will have its own separate cadre, unless otherwise directed by the Board. Rule 5 has been construed to mean that given that each CCA is to have its own cadre, ICTs, which involve a transfer from one Commissionerate to another would no longer be permissible and accordingly all orders for such transfers which were issued on or after 26 December 2016 (the date on which RR 2016 were notified) would be non-est. The circular, however, allows that in exceptional circumstances, depending upon the merits of each case and on extreme compassionate grounds, such transfers may be allowed on ‘case to case onloan basis’ keeping in view the administrative requirements of the transferee and the transferred CCAs. However, the maximum tenure of such transfer has been fixed as three years which can be extended by a further period of two years.

8. The validity of the circular dated 20 September 2018 was challenged before the Central Administrative Tribunal. The challenge was upheld by the Tribunal. The High Court, in the exercise of its jurisdiction under Article 226, reversed the decision of the Tribunal.

B Relevant circulars and notifications

9. In order to appreciate the controversy in its entirety, it would be necessary to deal with the circulars and office memoranda⁹ which have held the field in the past. There are two sets of executive instructions: (i) the first set concerns those instructions which were issued by the Department of Personnel and Training¹⁰ and (ii) the second set concerns executive instructions which were issued by the Department of Revenue.

B.1 Executive Instructions issued by DoPT

10. The following executive instructions have been issued by the DoPT regarding ICTs:

- (i) On 3 April 1986, an OM¹¹ was issued by DoPT. The subject of the OM was: “Posting of husband and wife at the same station”. The OM dealt with the posting of employees of the Central Government and underscored that within administrative constraints, it was the policy of the Government that spouses should be posted at the same station as far as possible. Paragraph 2 of the circular indicated its rationale in the following terms.

⁹ “OM”

¹⁰ “DoPT”

¹¹ No. 28036/7/86-Estt(A)

“2.The Govt. of India have given the utmost importance to the enhancement of women’s status in all sectors and all walks of life. Strategies and policies are being formulated and implemented by different Ministries of the Central Govt. to achieve this end. It is also considered necessary to have a policy which can enable women employed under the Govt and the public sector and undertaking to discharge their responsibilities as wife/ mother on the one hand and productions workers on the other, more-effectively.It is the policy of the Govt. that as far as possible and within the constraints of administrative feasibility, the husband and wife should be posted at the same station to enable them to lead a normal family life and to ensure the education and welfare of their children.”

Paragraph 4 of the circular envisaged various situations, depending upon the service to which spouses may belong and illustrated the following eventualities:

“4. The classes of cases that may arise, and the guidelines for dealing with each class of case, are given below: -

(i) Where the spouse belong to the same All India Service or two of the All India Service namely IAS, IPSA and Indian Forest Services (Group-A).

(ii) Where one spouse belongs to one of the All India Service and the other spouse belongs to one of the Central Services: -

The cadre controlling authority of the Central Service may post the officer to the station or if there is no post in that station to the State where the other spouse belonging to the All India Service is posted.

(iii) Where the spouse belong to the same central service:

The cadre controlling authority may post the spouses to the same station.

(iv) Where the spouse belongs to one Central Service and the other spouse belongs to another Central Service: -

The spouse with the longer service at a station may apply to the appropriate cadre controlling authority and the said authority

- A may post the said officer to the station, or if there is no post in that station to the State where the other spouse belonging to the other central service is posted.
- (v) Where one spouse belongs to an All India Service and the other spouse belongs to a public sector:
- B The spouse employed under the public sector undertaking may apply to the competent authority and said authority may post the said officer to the station, or if there is no post under the PSU in that station, to the State where the other spouse is posted.
- C (vi) Where one spouse belongs to a central service and other spouse belongs to PSU:
- The spouse employed under the PSU may apply to the competent authority and the said authority may post the officer to the station, to the State where the other spouse is posted. If, however, the request cannot be granted because the PSU has no post in the said station/State, then the spouse belonging to the central services may apply to the appropriate cadre controlling authority and the said authority may post the said officer to the station or if there is no post in that station, to the state where the spouse employed under PSU is posted.
- D
- E (vii) Where one spouse is employed under the Central Govt. and the other spouse is employed under the State Govt.:
- The spouse employed under the central Govt. may apply to the competent authority may post the said officer to the station or if there is no post in that station to the State where the other spouse posted.”
- F

G While recognising that the above illustrations would not cover every case, the OM envisaged that each case not covered by the guidelines would be considered bearing in mind the underlying object of ensuring that spouses are, as far as possible and within the constraints of administrative convenience, posted at the same station.

- (ii) An OM¹² dated 29 May 1986 was issued by the DoPT which dealt with the seniority of the persons absorbed after being on deputation;

H ¹² No. 20020/7/80-Estt.D

- (iii) An OM¹³ was issued on 12 June 1997 which dealt with the “posting of husband and wife at the same station” after the report of the Fifth Central Pay Commission. The OM reiterated the guidelines contained in the earlier OM dated 3 April 1986 for deciding requests for posting of spouses at the same station and envisaged that it should be ensured that such posting is invariably done until the children attain the age of 10 years if a vacancy exists in the organization at the same station and no administrative problem arises as a consequence; A B
- (iv) By an OM¹⁴ dated 23 August 2004, it was noted that the instructions contained in the OMs dated 3 April 1986 and 12 June 1997 were not being followed in letter and spirit by the Ministries and Departments even in the absence of administrative constraints. Accordingly, the OM sought to impress upon all Ministries/Departments “that the guidelines laid down in the aforesaid office memorandum are strictly followed while deciding the request for posting of husband and wife at the same station”. The OM further stated that “the policy of the Government has been to give utmost importance to the enhancement of women’s status in all sectors and all walks of life”; C D
- (v) On 8 July 2009, an OM¹⁵ was issued indicating that the Union Government had taken several steps towards “advancement, development and empowerment of women”, while being conscious of the fact that “women employees play a positive role in their families as well as at their workplace”. The annexure to the OM summarised the policies which have been formulated by the Union Government towards achieving this objective and among them was a provision for posting of spouses at the same station. In that context, the annexure stated: E F
- “Posting of husband & wife at the same station.”** G
- The Govt. of India has issued detailed instructions to its offices to ensure the posting of the husband and wife at

¹³ No. 28034/2/97-Estt.(A) New Delhi

¹⁴ No.28034/23/2004-Estt.(A)

¹⁵ No.13018/4/2009-Estt.(L)

A the same station so as to enable them to lead a normal family life and to ensure the education and welfare of their children (O.M. No.28034/2/27-Estt-A dated 3.4.1986 & 12.6.1997).

B To facilitate posting of couples in the same station, it has been approved that in case of a woman officer whose husband is posted under the Govt. of India, the ‘cooling off’ period may be valued up to six months so that she may get a posting at the station where her husband is posted.”

C (vi) By an OM¹⁶ dated 30 September 2009, the earlier guidelines were consolidated and it was stipulated that when both spouses are in the Central Government or work in the same Department and if posts are available, they must invariably be posted together. Paragraph 5 of the OM stated that:

D “5. Complaints are sometimes received that even if posts are available in the station of posting of the spouse, the administrative authorities do not accommodate the employees citing administrative reasons. In all such cases, the cadre controlling authority should strive to post the employee at the station of the spouse and in case of inability to do so, specific reasons, therefor, may be communicated to the employee.”

E (vii) By an OM¹⁷ dated 31 December 2010, the guidelines were notified for amendments in or for relaxation of the recruitment rules.

F ***B.2 Circulars issued by Department of Revenue, Ministry of Finance***

11. The following circulars have been issued by the Department of Revenue regarding ICTs:

G (i) On 13 May 1998, a circular¹⁸ was issued by the Ministry of Revenue to all the Chief Commissioners of Customs and Central Excise on the subject of Inter-Commissionerate Transfers. The circular stipulated that:

¹⁶ No.F.No.28034/9/2009-Estt.(A)

¹⁷ No. AB.14017/48/2010-Estt..(RR)

H ¹⁸ No.F.No.22015/11/98 Ad. IIIA

“The issue of Inter Commissionerate Transfer has been considered by Board and it has been decided that for the present only 75% portion out of the total DP quota vacancies should be filled up by Inter Commission transfer by CCE, Delhi. A

2.It has also been decided that a committee may be formed which may decide on inter Commissionerate transfer after considering the matter in totally but generally on first come first salary basis. The committee can also consider the hardship cases, like couple cases, “Medical Emergency Cases” and other cases like “Only s[o]n separate from parents” on merits.” B C

(ii) On 16 January 2003, a circular¹⁹ was issued by the Department of Revenue to the:

- (a) Chief Commissioners of Central Excise;
- (b) Chief Commissioners of Customs; and
- (c) Commissioners of Central Excise/Customs. D

The circular notified that the Board had decided that all the powers which were being exercised by the respective Commissioners as CCAs would henceforth be exercised by the respective Chief Commissioners. However, it was stipulated that there would be no merger or bifurcation of the existing cadres and the functions of the each CCA would be exercised separately and independently by the Chief Commissioner. Hence, it was stipulated that this in effect would imply that the independent entity of each cadre shall remain intact and unchanged. E F

(iii) On 19 February 2004, the Department of Revenue addressed a communication²⁰ to all Chief Commissioners and Commissioners of Customs and Central Excise amongst others for the discontinuance of ICTs. The circular noted that ICTs had been taking place for Group ‘B’, ‘C’ and ‘D’ employees on compassionate grounds. However, ICTs caused administrative difficulties resulting in protracted litigation. The matter was reviewed by the Board and it was directed that: G

¹⁹ No. F.No.A-11013/04/2002-Ad.IV

²⁰ F. No.A.22015/3/2004-ad.IIIA H

A “Accordingly, in supersession of all the previous instructions
issued on the subject in the past, it has been decided that
henceforth no inter-Commissionerate transfer shall be
allowed for any Group B, C, D employee. Instead, in
exceptional circumstances depending upon the merits of
B each case where it is considered necessary to accept such
requests on extreme compassionate grounds, such transfers
shall be allowed on deputation basis for a period of three
years subject to the approval of the transferor and transferee
cadre controlling authorities. Further extension of deputation
C period can be made up to one year by the Commissioner
and for a further period of one year by Chief Commissioners
concerned on mutually agree[d] basis. Such transfers shall
be with the specific condition that no deputation allowance
shall be admissible for deputation period including extended
D period, if any. Wherever required, necessary amendments
in Recruitment Rules are under approval and shall be issued
subsequently.”

(iv) A circular²¹ was issued on 27 March 2009 by the CBEC by
which the earlier ban on ICTs was partially relaxed in order
to facilitate the posting of spouses at the same station “in
E line with the instructions of the DoPT”. The circular
specifically referred to the DoPT OMs dated 3 April 1986,
12 June 1997 and 23 August 2004. The circular, insofar as
is material, is extracted below:

F “I am directed to refer to the Board’s Circular
F.No.22015/3/2014-Ad.IIIA dated 19.02.2004, as
modified vide letter dated 09.03.2004, vide which the
inter-Commissionerate Transfers of Groups-B,C and
D officers were banned. Although the term used was
‘Inter-Commissionerate Transfers’, the ban was
actually confined to transfers from one Cadre
Controlling Authority to another. There was no ban
G on transfers amongst the Commissionerates having
common cadre, where no loss of seniority was
involved, as was clarified vide letter dated 09.03.2004
referred to above.

H ²¹ F.No.A.22015/19/2006-Ad.IIIA

2. However, it has been pointed out that the instructions of the DoPT (contained in their OM No.28034/7/86-Estt(A) dated 03.04.1986 as amended by OM dated 12.06.1997 and 23.08.2004), provide that “a husband and wife are, as far as possible, and within the constraints of administrative convenience, posted at the same station”.

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3. The Board deliberated upon the issue in its meeting held on 04.03.2009 and have decided to partially relax the earlier instructions of the Board as referred to above, in order to facilitate posting of husband and wife at the same station in line with the instructions of the DoPT. Accordingly, it has now been decided to permit inter-Commissionerate transfers of Group B, C and D Officers beyond the Commissionerates having common cadres, i.e. from one Cadre Controlling Authority to another, without any loss of seniority, subject to the following conditions: -

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(a) The transfer/change of cadre shall be permissible only in cases where the spouse is employed with either the Central Government or a State Government or a Public Sector Undertaking of the Central Government/ a State Government.

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(b) The option for change of cadre must be exercised within six months of the initial appointment of the officer, if the officer is married at the time of such initial appointment. In case of marriage taking place subsequent to the initial appointment, the option must be exercised within six months of the marriage. Further, as far as the past cases are concerned, the option must be exercised within six months of the issue of these instructions.

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4. The procedure for change of cadre will be same as stipulated in the Board’s instructions dated 19.02.2004 referred to above i.e. the change of cadre will take place with the approval of the transferor and transferee Cadre Controlling Authorities. There

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A will be no need to seek approval of the Boards for this purpose.”

- (v) On 27 October 2011, a circular²² was issued by the CBEC noting that the ban on ICTs which was imposed by the earlier communication dated 19 February 2004 for Group B, C and D employees, was subsequently relaxed in phases to cover cases involving spouses, compassionate appointments and physically handicapped employees by circulars dated 27 March 2009, 29 July 2009 and 9 February 2011. It recorded that such relaxation was allowed without loss of seniority and subject to specific conditions. By the communication, CBEC notified that it had lifted the ban on ICTs with immediate effect. Para 2 of the circular stipulated as follows:

D “2. On consideration of all aspects in the matter of ICT, it has been decided by the Board now to lift the ban on ICT with immediate effect .Accordingly, any willing Group ‘B’\‘C’ employee and the erstwhile Group ‘D’ employee may apply for transfer from the jurisdiction of one Cadre Controlling Authority (CCA) to another. CCA subject to availability of vacancy and on the following terms & conditions:

E i. The concerned two Cadre Controlling Authorities should agree to the transfer,

F ii. The transferee will be placed below all officers appointed regularly to that pots/grade on the date of his/her appointment on transfer basis in terms of Para 3.5 of DOP&T’s G.M. dated 03.07.1986. In other words, such a transferee will be junior to those regularly appointed officers prior to his/her transfer. However, such transferred officer will retain his/her eligibility of the parent Commissionerate for his/her promotion to the next higher grade, etc.

G iii. On transfer he/she will not be considered for promotion in the old Commissionerate.

²² F.No.A.22015/23/2011-Ad.IIIA

iv. He/she will not be entitled to any joining time and transfer travelling allowance; A

v. Under no circumstances, request for ICT should be entertained till the officer appointed in a particular Commissionerate/post completes the prescribed probation period. B

vi. The seniority of the officers who were allowed ICT earlier by the various Cadre Controlling Authorities on the basis of Board's letters F.No.A.22015/19/2006-Ad.III.A dated 27.03.2009, F.No. A.22015/11/2008-Ad.III.A dated 29.07.2009 and F.No. A.22015/15/2010-Ad.IIIA dated 09.02.2011 shall be fixed as per the present instructions. C

vii. Officers who are presently working on deputation basis from their parent Commissionerate to any other Commissionerate/ Directorate and are willing to avail of the ICT in future will have to revert back to their parent Commissionerate first and apply afresh for ICT. The officers who have been continuously on deputation and have been absorbed on ICT during the interim period from 19.02.2004 (i.e. the date from which the ban became effective) till date, their seniority will be fixed from the date of their joining on deputation in the transferred Zone/ Commissionerate. D

viii. A written undertaking (in the enclosed format) to abide by the requisite terms and conditions will be obtained from the officers before the transfers are actually affected. E

ix. All pending Court cases where seniority protection/ ICT has been challenged may be handled appropriately in terms of these instructions and necessary compliance furnished to the Board in due course." F

(vi) On 20 September 2018, CBIC issued a circular (extracted above earlier in this judgment) stating that: G

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- A (a) RR 2016 contain no provision for recruitment by absorption;
 (b) Rule 5 of RR 2016 stipulates that each CCA shall have its own separate cadre unless otherwise directed by the CBEC;
 (c) There is no provision which corresponds to Rule 4(ii) of RR 2002 in Rule 5 of RR 2016;
- B (d) Any executive instructions contrary to RR 2016 would be void;
 (e) After the enforcement of RR 2016, there is no enabling provision for the grant of ICTs;
- C (f) In exceptional circumstances employees could be transferred on a loan basis for a maximum period of three years extendable by a further period of two years; and
 (g) All ICTs in the grade of Inspectors issued on or after 26 December 2016 would be withdrawn and those employees would be deemed to be on a loan basis.

D **C Submissions**

12. We have heard Mr Maninder Singh, Ms Vibha Datta Makhija, Mr PN Ravindran, Mr Narender Hooda and Mr Rana Mukherjee, senior counsel in support of the appeals and intervention applications and Mr Rishi Kapoor and Mr Umakant Misra, learned counsel who have adopted their submissions. Mr KM Nataraj, Additional Solicitor General²³ has appeared on behalf of the respondents.

13. Mr Maninder Singh, learned senior counsel has urged the following submissions:

- F (i) The Division Bench of the High Court of Kerala has held that with the non-inclusion of the provisions of Rule 4(ii) of the RR 2002 in RR 2016, ICTs are not permissible. However, Rule 5 of RR 2016 which stipulates that each CCA will have a separate cadre, contemplates that the CBEC can provide otherwise;
- G (ii) CBEC's instructions of 27 October 2011 lifted the ban on ICTs which was imposed on 19 February 2004;
- (iii) The decision by CBEC to lift the ban on ICTs must be treated as a decision which relaxes the norm that each CCA will have a separate cadre; and

H ²³ "ASG"

- (iv) The basic premise of the circular dated 20 September 2018 is that there is no provision for recruitment by absorption in RR 2016. This premise is fallacious because even after the non-inclusion of Rule 4(ii) of RR 2002 in Rule 5 of RR 2016, the Board has retained its power to issue directions ‘otherwise’ and a circular which had been issued by the Board must be treated as being an exercise of such a power.

14. Ms Vibha Datta Makhija, learned senior counsel has addressed the court on two broad issues:

- (i) Whether RR 2016 place a blanket prohibition on ICTs; and
(ii) Whether the circular dated 20 September 2018 which imposes a blanket prohibition on ICTs is violative of the fundamental rights conferred by Articles 14 and 21 of the Constitution.

15. Ms Makhija has assailed the blanket prohibition on ICTs insofar as it relates to applications made on “spousal grounds”. In this backdrop, learned senior counsel urged:

- (i) In the absence of a specific provision in RR 2016 for ICTs, the OMs issued by DoPT will fill up the gaps in delegated legislation. Hence, in the absence of a specific rule to the contrary, the OMs issued by DoPT will govern the Central Government service unless specifically excluded by a regulatory provision. DoPT has a longstanding policy for posting of spouses at the same station. While Rule 4(ii) of RR 2002 contained a specific provision for ICTs, there is no corresponding provision in RR 2016. The absence of a specific provision will not alter the situation;
(ii) ICTs were governed by OMs/circulars of the DoPT and Department of Revenue. While framing RR 2016, the Board sent the proposal to DoPT and DoPT approved the non-inclusion of Rule 4(ii) of RR 2002 on the basis that such a provision is generally not made in the recruitment rules. From this background, it becomes clear that the non-inclusion of Rule 4(ii) while framing RR 2016 was allowed on the premise that no prohibition for ICTs on compassionate and spousal grounds was required in the proposed rules.

- A The circulars of the Board in 2004, 2009 and 2011 would clearly indicate that ICTs in relation to Group B,C and D employees have never been the subject matter of recruitment rules and have fallen in the domain of administrative instructions. Once the ICTs were governed
- B by executive instructions, the High Court has erred in coming to the conclusion that the absence of a provision corresponding to Rule 4(ii) of RR 2002 in RR 2016 would bar ICTs. Since RR 2016 are silent with respect to ICTs, such transfers remain within the domain of administrative instructions;
- C (iii) DoPT has issued its circulars in furtherance of the constitutional object of maintaining equality and women's empowerment as embodied in Article 15(3) of the Constitution;
- D (iv) In terms of the provisions contained under The Government of India (Transaction of Business Rules) 1961, any conflict between the policy of the DoPT and Department of Revenue would have to be resolved by giving primacy to the former on matters of recruitment, service conditions and cadre management of the central services;
- E (v) The circular dated 20 September 2018 was brought into force without the approval of DoPT and is hence contrary to The Government of India (Transaction of Business Rules) 1961;
- F (vi) The circular dated 20 September 2018 banning ICTs violates the provisions of Articles 14 and 16(1) of the Constitution by bringing about discrimination at two levels:
- (a) It discriminates between Group 'A' and Group 'B'/'C' employees;
- G (b) It discriminates vis-à-vis other services under the Central Government to which the DoPT circulars apply;
- (vii) The impugned circular results in indirect discrimination and denies equality of opportunity to women guaranteed under Articles 15(1) and 16(1) of the Constitution; and
- H

- (viii) The circular banning ICTs does not satisfy an integrated proportionality analysis. A

16. Mr Vikas Singh, learned senior counsel urged that the consequence of the non-inclusion of a provision corresponding to Rule 4(ii) of RR 2002, while framing RR 2016 is that the power to effect ICTs which was given to the Commissionerate has now been entrusted to the Board. Though the power had been taken away from the Commissionerate level, it continues to vest with the Board. B

17. Mr PN Ravindran, learned senior counsel submitted that:

- (i) The circular dated 20 September 2018 proceeds on the sole basis that there is no provision in RR 2016 for ICTs whereas ICTs have always been governed by executive instructions; C
- (ii) Following the decision of the Kerala Central Administrative Tribunal, a provision for ICTs was issued but it was cancelled in the course of barely a week; and
- (iii) The non-inclusion of Rule 4(ii) while framing RR 2016 was on the ground that such a provision is generally not made in the recruitment rules. Hence, the non-inclusion of erstwhile Rule 4(ii) in RR 2016 would be of no practical significance. D

18. Mr Narendra Hooda, learned senior counsel has urged that: E

- (i) The circular dated 20 September 2018 ignores that the advice of DoPT- which led to the non-inclusion of Rule 4(ii)- was merely that such a stipulation was a surplus age in the recruitment rules;
- (ii) Under RR 2016, 90% of the cadre strength is for direct recruitment. Since an ICT is against the direct recruitment quota, no promotional avenues get affected; and F
- (iii) Since 1958, ICTs have always been governed by executive instructions. G

19. Mr Rana Mukherjee, learned senior counsel appearing on behalf of the intervenors submitted that in the alternative, if this Court upholds the decision of the High Court, it may at least protect persons whose transfers have already taken place albeit after RR 2016 were notified. H

A 20. The arguments urged by Ms Makhija have been adopted by Mr Rishi Kapoor while Mr Umakant Misra has adopted the arguments of Mr Maninder Singh.

21. On behalf of the respondents, Mr KM Nataraj, learned ASG has urged the following submissions:

- B (i) No employee can assert a fundamental right or a vested right to transfer. Transfer as condition of service is always a matter which is governed by the applicable rules;
- C (ii) Rule 4 of RR 2002 while stipulating that each Commissionerate would have a separate cadre contained a specific provision in Rule 4(ii), allowing for absorption from the cadre of one Commissionerate to another Commissionerate;
- D (iii) Rule 5 of RR 2016 contains a specific stipulation that there will be a separate cadre for each CCA;
- E (iv) A cadre means a definite sanctioned strength which is stated in the separate unit;
- F (v) In the absence of a specific provision in Rule 5 of RR 2016 to bring a person from one cadre to another cadre by absorption, there is no legal power to absorb a person from outside the cadre;
- G (vi) The non-inclusion of Rule 4(ii) when RR 2016 were framed, was designed to curb a specific mischief. The provision for ICTs was being abused by employees as, for instance, for the purpose of seeking a promotion and reverting to the original cadre;
- H (vii) The entire concept of a cadre and cadre strength would be negated if ICTs are permitted in the absence of an enabling provision such as Rule 4(ii) of the erstwhile RR 2002;
- I (viii) DoPT circulars cannot override statutory rules which have been framed under Article 309 of the Constitution; and
- J (ix) Providing any kind of transfer including ICTs is a matter of policy and cannot be claimed as a matter of right.

22. The rival submissions would now fall for analysis.

D Analysis A

23. While analyzing the rival submissions, certain basic precepts of service jurisprudence must be borne in mind.

24. First and foremost, transfer in an All India Service is an incident of service. Whether, and if so where, an employee should be posted are matters which are governed by the exigencies of service. An employee has no fundamental right or, for that matter, a vested right to claim a transfer or posting of their choice. B

25. Second, executive instructions and administrative directions concerning transfers and postings do not confer an indefeasible right to claim a transfer or posting. Individual convenience of persons who are employed in the service is subject to the overarching needs of the administration. C

26. Third, policies which stipulate that the posting of spouses should be preferably, and to the extent practicable, at the same station are subject to the requirement of the administration. In this context, Justice JS Verma (as the learned Chief Justice then was) speaking for a three-judge Bench of this Court in **Bank of India v. Jagjit Singh Mehta**²⁴ held : D

“5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of all-India services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other’s posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference E F G

²⁴ (1992) 1 SCC 306 H

A to the career prospects by accepting such a promotion or any
 appointment in an all-India service with the incident of transfer to
 any place in India, subordinating the need of the couple living
 together at one station, they cannot as of right claim to be relieved
 of the ordinary incidents of all-India service and avoid transfer to
 B a different place on the ground that the spouses thereby would be
 posted at different places. [...] No doubt the guidelines require
 the two spouses to be posted at one place as far as practicable,
 but that does not enable any spouse to claim such a posting as of
 right if the departmental authorities do not consider it feasible.
 C The only thing required is that the departmental authorities should
 consider this aspect along with the exigencies of administration
 and enable the two spouses to live together at one station if it is
 possible without any detriment to the administrative needs and
 the claim of other employees.”

D 27. The above principle was cited with approval in **Union of India**
 v. **SL Abbas**²⁵ where the Court held that transfer is an incident of service:

“7. Who should be transferred where, is a matter for the
 appropriate authority to decide. Unless the order of transfer is
 vitiated by mala fides or is made in violation of any statutory
 provisions, the court cannot interfere with it. While ordering the
 transfer, there is no doubt, the authority must keep in mind the
 E guidelines issued by the Government on the subject. Similarly if a
 person makes any representation with respect to his transfer, the
 appropriate authority must consider the same having regard to
 the exigencies of administration. The guidelines say that as far as
 possible, husband and wife must be posted at the same place.
 F The said guideline however does not confer upon the Government
 employee a legally enforceable right.”

28. Fourth, norms applicable to the recruitment and conditions of
 service of officers belonging to the civil services can be stipulated in:

- (i) A law enacted by the competent legislature;
- G (ii) Rules made under the proviso to Article 309 of the
 Constitution; and
- (iii) Executive instructions issued under Article 73 of the
 Constitution, in the case of civil services under the Union
 and Article 162, in the case of civil services under the States.

H ²⁵ (1993) 4 SCC 357

Fifth, where there is a conflict between executive instructions and rules framed under Article 309, the rules must prevail. In the event of a conflict between the rules framed under Article 309 and a law made by the appropriate legislature, the law prevails. Where the rules are skeletal or in a situation when there is a gap in the rules, executive instructions can supplement what is stated in the rules.²⁶

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29. Sixth, a policy decision taken in terms of the power conferred under Article 73 of the Constitution on the Union and Article 162 on the States is subservient to the recruitment rules that have been framed under a legislative enactment or the rules under the proviso to Article 309 of the Constitution.²⁷

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30. RR 2002 contained in Rule 4a “Special Provision”. Rule 4(i) envisaged that each Commissionerate shall have its own separate cadre unless otherwise directed by the CBEC. Rule 4(ii) commenced with a non-obstante provision in terms of which, the jurisdictional Chief Commissionerate of Central Excise was empowered to order that any post in the Commissionerate may be filled up by absorption of persons holding the same or comparable post belonging to the cadre of another Commissionerate under the CBEC. The non-obstante provision was necessary because Rule 4(i) contained a mandate for each Commissionerate to have its own separate cadre unless the CBEC directed otherwise. The plain consequence of each Commissionerate having its own cadre was to preclude the appointment of a person belonging to the cadre of another Commissionerate by way of absorption. The bar on the absorption of persons from outside the cadre was lifted as a consequence of Rule 4(ii), which by embodying a non-obstante provision allowed the jurisdictional Chief Commissionerate to allow a post in the Commissionerate to be filled by persons holding the same or comparable post but belonging to the cadre of another Commissionerate.

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31. In RR 2016 as notified, Rule 5 states that each CCA shall have its own separate cadre, unless otherwise directed by the CBEC. The ‘Commissionerate’ in the erstwhile Rule 4(ii) was substituted by the expression “Cadre Controlling Authority” in Rule 5 of RR 2016. The clear intent of Rule 5 is that there would be a separate cadre for each

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²⁶ **Union of India and Others v. Somasundaram Viswanath and Others**, (1989) 1 SCC 175, para 6

²⁷ **State of Orissa and Others v. Prasana Kumar Sahoo** (2007) 15 SCC 129, para 12

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- A CCA and only CBEC is entrusted with the authority to direct otherwise. Hence only CBEC could direct the constitution of a joint cadre for more than one Commissionerate. The enabling power which was conferred on jurisdictional Chief Commissionerate in Rule 4(ii) of RR 2002 is conspicuously absent in Rule 5 of RR 2016. The central submission which has been urged on behalf of the appellant is that since in RR 2016
- B there is no provision corresponding to Rule 4(ii) of RR 2002, there is a silence on the subject of the absorption of persons belonging to the cadre of another Commissionerate and this silence or gap can be supplemented by executive instructions. The executive instructions, it was submitted,
- C by DoPT or the instructions which have been issued by the Department of Revenue from time to time.

32. There is a fundamental fallacy in the submission which has been urged on behalf of the appellants. Administrative instructions, it is well-settled, can supplement rules which are framed under the proviso
- D to Article 309 of the Constitution in a manner which does not lead to any inconsistencies. Executive instructions may fill up the gaps in the rules. But supplementing the exercise of the rule making power with the aid of administrative or executive instructions is distinct from taking the aid of administrative instructions contrary to the express provision or the necessary intendment of the rules which have been framed under Article
- E 309. RR 2016 have been framed under the proviso to Article 309. Rule 5 of RR 2016 contains a specific prescription that each CCA shall have its own separate cadre. The absence of a provision for filling up a post in the Commissionerate by absorption of persons belonging to the cadre of another Commissionerate clearly indicates that the cadre is treated as a
- F posting unit and there is no occasion to absorb a person from outside the cadre who holds a similar or comparable post.

33. In **JS Yadav v. State of UP**²⁸, a twojudge bench of this Court observed that the expression ‘cadre’ generally “*denotes a strength of a service or a part of service sanctioned as a separate unit. It also*
- G *includes sanctioned strength with reference to grades in a particular service. Cadre may also include temporary, supernumerary and shadow posts created in different grades*”. Recently, a three-judge Bench of this Court in **Jarnail Singh v. Lacchmi Narain Gupta**²⁹,

²⁸ (2011) 6 SCC 570

²⁹ 2022 SCC OnLine SC 96

while dealing with the scope of the expression ‘cadre’ referred to various A
judicial pronouncements. The Bench noted:

“24. [...] The dispute that arose for consideration of this Court in *Dr. Chakradhar Paswan v. State of Bihar* [(1988) 2 SCC 214] relates to the posts of Director and three Deputy Directors in the Directorate of Indigenous Medicines, Department of Health, State of Bihar being grouped together for the purpose of implementing the policy of reservation under Article 16(4) of the Constitution of India. [...] It was held that the term “cadre” has a definite legal connotation in service jurisprudence. This Court referred to Fundamental Rule 9(4) which defines the word “cadre” to mean the strength of a service or part of a service sanctioned as a separate unit. [...]

25. [...] The meaning of “cadre” fell for consideration of this Court again in *Union of India v. Pushpa Rani* [(2008) 9 SCC 242]. “Cadre” in the 1985 edition of the Railway Establishment Code is defined as the strength of a service or a part of a service sanctioned as a separate unit. This Court held that the posts sanctioned in different grades would constitute independent cadres, even for the purpose of implementing the roster. The reason for giving an enlarged meaning to the term “cadre” was that the posts in the railway establishment are sanctioned with reference to grades. Even temporary, work-charged, supernumerary and shadow posts created in different grades can constitute part of the cadre.

[...]

28. It is clear from the above statutory regime and the law laid down by this Court that civil posts under the Government are organised into different services. A service constitutes ‘classes’/ ‘groups’ of posts. A ‘class’/‘group’ is further bifurcated into grades. Though the nomenclature might be different, the structure of services under the Union and the States is similar. According to the instructions issued by the Union of India, cadres are constituted for each grade. At the cost of repetition, the Union of India submitted that there are 3800 cadres in 44 Ministries/Departments. **Fundamental Rule 9(4) defines “cadre” to mean the**

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- A **strength of a service or part of a service sanctioned as a separate unit. It is the choice of a State to constitute cadres.**
 The entire service cannot be considered to be a cadre for the purpose of promotion from one post to a higher post in a different grade. Promotion is made from one grade to the next higher grade, in relation to which cadres are constituted. This Court in *Dr. Chakradhar Paswan* (supra) has categorically stated that the post of Director and Deputy Director cannot form one cadre. A cadre is constituted by the Government by taking into account several factors within its sole discretion.”
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C **(emphasis supplied)**

34. Rule 5 of RR 2016 postulates that each CCA has a separate cadre and does not contain a provision for bringing in, by way of absorption, persons from outside the cadre. Inducting persons from outside the cadre by absorption requires a specific provision in the subordinate legislation for the simple reason that the concept of a cadre would otherwise militate against bringing in those outside the cadre. That is the reason why Rule 4(ii) of the erstwhile RR 2002 contained a specific provision to this effect. That provision has however not been included when RR 2016 were framed. If the authority entrusted with the power of framing rules under Article 309 of the Constitution did so on the ground that the provision was subject to misuse and was contrary to the interests of the administration, no employee can assert a vested right to claim an ICT.
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35. Another submission which has been urged on behalf of the appellants is based on The Government of India (Transaction of Business) Rules 1961, which have been framed pursuant to Article 77(3) of the Constitution. Rule 4(4) provides for consultation with the DoPT on specified matters and reads as follows:
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“4. Inter-Departmental Consultations.-

- (1) When the subject of a case concerns more than one department, no decision be taken or order issued until all such departments have concurred, or, failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet.
- G

Explanation- Every case in which a decision, if taken in one Department, is likely to affect the transaction of business allotted

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to another department, shall be deemed to be a case the subject of which concerns more than one department. A

(2) Unless the case is fully covered by powers to sanction expenditure or to appropriate or re-appropriate funds, conferred by any general or special orders made by the Ministry of Finance, no department shall, without the previous concurrence of the Ministry of Finance, issue any orders which may- B

(a) involve any abandonment of revenue or involve any expenditure for which no provision has been made in the appropriation act;

(b) involve any grant of land or assignment of revenue or concession, grant, lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession; C

(c) relate to the number or grade of posts, or to the strength of a service, or to the pay or allowances of Government servants or to any other conditions of their service having financial implications; or D

(d) otherwise have a financial bearing whether involving expenditure or not;

Provided that no orders of the nature specified in clause (c) shall be issued in respect of the Ministry of Finance without the previous concurrence of the Department of Personnel and Training. E

(3) The Ministry of Law shall be consulted on-

(a) proposals for legislation; F

(b) the making of rules and orders of a general character in the exercise of a statutory power conferred on the Government; and

(c) the preparation of important contracts to be entered into by the Government. G

(4) Unless the case is fully covered by a decision or advice previously given by the Department of Personnel and Training that Department shall be consulted on all matters involving-

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A (a) the determination of the methods of recruitment and conditions of service of general application to Government servants in civil employment; and

(b) the interpretation of the existing orders of general application relating to such recruitment or conditions of service.

B (5) Unless the case is fully covered by the instructions issued or advice given by that Ministry, the Ministry of External Affairs shall be consulted on all matters affecting India's external relations."

C In terms of Rule 4(4), the DoPT has to be consulted on the determination of the methods of recruitment and conditions of service of general application to government servants and on the interpretation of existing orders of general application relating to recruitment or the conditions of service.

D 36. The Government of India (Allocation of Business) Rules 1961 have also been framed under Article 77(3) of the Constitution. Rule 2 envisages that the business of the Government of India shall be transacted in the Ministries, Departments, Secretariats and Offices specified in the First Schedule. Under Rule 3, the distribution of subjects is specified in the Second Schedule. The distribution of subjects to the Department of Revenue includes:

E "C. DEPARTMENT OF REVENUE
(RAJASWA VIBHAG)

F 1. All matters relating to-
(a) Central Board of Excise and Customs;
(b) Central Board of Direct Taxes"

G 37. In other words, all matters which relate to CBEC and CBDT were assigned to the Department of Revenue. Matters which are assigned to DoPT under the Ministry of Personnel, Public Grievances and Pension include:

H "A. DEPARTMENT OF PERSONNEL AND TRAINING
(KARMIK AUR PRASHIKSHAN VIBHAG)

I. RECRUITMENT, PROMOTION, AND MORALE A
OF SERVICES

[...]

2. General questions relating to recruitment, promotion and seniority pertaining to Central Services except Railways Services and services under the control of Department of Atomic Energy, the erstwhile Department of Electronics, the Department of Space and the Scientific and Technical Services under the Department of Defence Research and Development. B

[...]

18. Advising Ministries on proper management of various cadres under their control. C

[...]

IV. SERVICE CONDITIONS D

21. General questions (other than those which have a financial bearing including Conduct Rules relating to All India and Union Public Services except in regard to services under the control of the Department of Railways, the Department of Atomic Energy, the erstwhile Department of Electronics and the Department of Space.) E

22. Conditions of service of Central Government employees (excluding those under the control of the Department of Railways, the Department of Atomic Energy, the erstwhile Department of Electronics and the Department of Space and the Scientific and Technical personnel under the Department of Defence Research and Development, other than those having a financial bearing and in so far as they raise points of general service interests). F

23. (a) The administration of all service rules including F.Rs S.Rs and C.S.Rs (but excluding those relating to Pension and other retirement benefits) except- G

(i) proposals relating to revisions of pay structure of employees; H

- A (ii) proposals for revisions of pay scales of Central Government employees;
- (iii) appointment of Pay Commission, processing of the recommendations and implementation thereof;
- B (iv) dearness allowance and other compensatory allowances and travelling allowances;
- (v) any new facility to Government employees by way of service conditions or fringe benefits which involve significant recurring financial implications;
- C and
- (vi) matters relating to amendments to service rules having a predominantly financial character; [...]"

38. Undoubtedly, while all matters pertaining to the CBEC and CBBT are under the domain of the Department of Revenue, there has to be a harmonious construction with the subjects which are assigned to the DoPT. In fact, the need for a harmonious reading is emphasized, as we have seen earlier, in Rule 4(4) of The Government of India (Transaction of Business) Rules 1961, which requires the advice of DoPT to be sought on methods of recruitment and conditions of service and on the interpretation of existing orders relating to recruitment and conditions of service. The executive instructions which have been issued by the DoPT cannot however prevail over the specific provisions which are contained in the rules which have been framed under the proviso to Article 309 of the Constitution. Faced with this difficulty, the appellants have sought to urge that Rule 4(ii) of RR 2002 was not included while RR 2016 were being framed on the advice of the DoPT on the ground that such a provision is generally not made in the recruitment rules. This submission is based on the disclosure made by the Department of Revenue under the Right to Information Act 2005 on 3 July 2018. The attachment with the RTI disclosure contains the following tabulation:

G “4. D/o Revenue has further suggested for following changes in the draft RRs approved by the Department for which DoPT’s observations has been mentioned against them:-

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Sl. No.	Proposal	DoPT's observations
(i)	Col. 12 Addition of Asstt. Programmer (DEO Grade D) (PB-2 GP Rs. 4200) and Steno Gr. I (PB-2 GP Rs. 4200) as feeder grade for Insp (C&E); Insp. (PO) and Insp (Exam)	The reasons available in the file for addition of Asstt. Programmer (only 5 in No.) is to provide the promotion avenue in Ministerial/executive side instead of technical side (p.11/c). No reason has been given for addition of Steno Gr.I. As the justification is not adequate or not given, we may not agree for the addition of both posts in the feeder grade.
(ii)	Col. 12 The requirement for age limit for appearing in the departmental exam has been done away with	This was suggested by this Department earlier, But due to justification given, DoPT agreed while approving the proposal for keeping the age limit for promotion (p.76-83/N of L/F). Now in view of a Court decision, D/o Revenue has suggested the proposal. We may agree for the same.
(iii)	Note 2 in Col. 12 The requisite height is being dispensed with for those who have been recruited without such criteria	It may be mentioned that D/o Revenue has insisted for keeping the provision for physical tests and physical standards for considering promotion due to the job of Inspector being arduous in nature. As the circumstances remain same, we may not agree to the proposal.
(iv)	The provision in Rule 4 (notification part) for describing Inter-Commissionerate deputation without deputation allowance has been suggested for deletion	As such provision is generally not made in the RRs, we may agree.
(v)	The col. 7 related to added years of service	It may be deleted.
(vi)	Col. 10 (renumbered 9)	2 years of DR and promotees (except those who are already holding posts in Group B), since probation is applicable if there is change of Group.
(vii)	Col. 11 (renumbered 10) ... 33 1/3 % by promotion	Col. 11(renumbered 10) ... 33 1/3 % by promotion through Departmental Qualifying Exam. Since, Departmental exam for promotion is either qualifying (not linked to vacancies) or competitive (linked to vacancies) Consequential changes in Col. 12 (renumbered 11)

(emphasis supplied)

39. The above tabulation indicates that the proposal which was under consideration was the provision for Inter-Commissionerate deputation without deputation allowance. This was suggested for deletion. DoPT observed that such a provision is generally not made in the recruitment rules and thus, the proposal may be agreed to. But apart from this, the Department of Revenue did not deem it fit to adopt the specific provision which was contained in Rule 4(ii) of RR 2002 under which absorption of persons from other cadres was envisaged at the Commissionerate level, when Rule 5 of RR 2016 was framed. In the

A absence of a specific provision to that effect, an employee from outside the cadre under the control of a CCA cannot claim an ICT based on executive instructions. The executive instructions which have been issued by DoPT in the form of OMs will not prevail over RR 2016 which have been framed under the proviso to Article 309. Similarly, the instructions
B which were issued by the Department of Revenue on 27 March 2009, relaxing the ban on ICT, which was imposed on 19 February 2004 and the subsequent instructions dated 27 October 2011 were issued at the time when RR 2016 were yet to be framed. These instructions will not govern or prevail when the regime envisaged under RR 2016 came into force.

C 40. On behalf of the appellants, reliance was sought to be placed on the decision of a two judge Bench of this Court in **Prabir Banerjee v. Union of India and Others**³⁰. In that case, the Jabalpur Bench of the Central Administrative Tribunal had been moved for challenging an order of transfer from Indore to Nagpur on the ground that an inter-zonal transfer was prohibited in the Department of Central Excise and Customs. The petitioner was appointed as an Inspector of Central Excise and was promoted as a Superintendent in the Bhopal Zone which comprised the Commissionerates of Bhopal, Indore and Raipur. On 19 February 1994, the Department of Revenue issued instructions for the discontinuance of ICTs for Group B, C and D employees while stipulating that in exceptional circumstances, transfers were allowed on deputation for a period of three years, extendable by one year on extreme compassionate grounds. The above circular was amended on 9 March 2004 envisaging that ICTs among Commissionerates having a common cadre may be allowed to continue as hitherto where there was no loss of seniority involved. Thereafter, together with a batch of other officers, the petitioner was transferred from the Indore Commissionerate to the Nagpur Commissionerate which was sought to be challenged on the ground that inter-zonal transfers continued to be proscribed. The Tribunal dismissed the OA and the High Court disposed of the writ petition, with permission to the petitioner to submit a representation to the competent
E authority. While the petitioner relied on the prohibition on inter-zonal transfers, the Additional Solicitor General appearing on behalf of the Union of India relied on the instructions of the Board dated 24 August 2004 indicating that pending a decision on the demand for bifurcation of

³⁰ (2007) 8 SCC 793

Group B, C cadres relating to Nagpur and Indore Collectorates, it had been decided that the cadre control of the two Collectorates would be distributed between the Collectors of Nagpur Zone and Indore Zone. The Collector of Central Excise of Nagpur Zone was made the CCA of Group B and C employees belonging to the Ministerial cadre while the Collector of Central Excise, Indore was made the CCA in respect of the Group B and C officers in the executive cadres. Since the post of Superintendent was a Group B post in the executive cadre and in respect of two Collectorates, the Collector of Central Excise Indore became the CCA of such employees in the Collectorates. It was in this backdrop, that this Court held that it was inclined to agree with the stand of the respondent that while transfer is an incident of service under the Central Service Rules, the petitioner had no cause to complain of his transfer from the Bhopal Zone to the Nagpur Zone as the order of transfer was issued by the Chief Commissionerate of Central Excise, Bhopal Zone under the powers vested in him by the Board by its circular dated 16 January 2003. This Court held:

“22. No doubt transfer is an incident of service in an all-India service and under the Central Service Rules the controlling authority was competent to transfer the petitioner to any place in India, where it considered expedient to do so. But apart from the above, we also have to take into consideration the decision of the Central Board of Excise and Customs in its communication dated 24-8-1984 by which pending decision on the demand for bifurcation of Group ‘B’ and ‘C’ cadres relating to Nagpur and Indore Collectorates the Board took a decision that cadre control of the said two Collectorates would be distributed between the two Collectors as indicated in the said communication. As mentioned hereinabove, while the Collector of Central Excise, Nagpur, was made the Cadre Controlling Authority of Group ‘B’ and ‘C’ ministerial cadres, the Collector of Central Excise, Indore was made the Cadre Controlling Authority of executive cadres of Group ‘B’ and ‘C’. We are alive to the fact that the decision taken by the Board was an administrative decision, but in the absence of any direct rule relating to transfer between two Collectorates under the Central Board of Excise and Customs, the said administrative instruction would have to be implemented insofar as inter-Collectorate transfers between the Nagpur and Indore Collectorates was concerned. In fact, by subsequent Circular dated

A 16-1-2003 the Board further declared that the Chief Commissioner of Central Excise/Customs in a Commissionerate would be the Cadre Controlling Authority up to Group 'B'-level staff, and its functions would include monitoring the implementation of the Board's instructions with regard to the transfers and equitable distribution of manpower and material resources between the Commissionerates/zones."

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41. The judgment in **Prabir Banerjee (supra)** was hence, on completely different facts.

C 42. For the above reasons, we have arrived at the conclusion that the High Court was justified in coming to the conclusion that:

- (i) RR 2002 contained a specific provision for ICTs;
- (ii) There is an absence of a provision comparable to Rule 4(ii) of RR 2002 in RR 2016;
- D (iii) On the contrary, Rule 5 of RR 2016 specifically stipulates that each CCA shall have its own separate cadre unless directed by the CBEC;
- (iv) Any ICT would violate the unique identity of each cadre envisaged in Rule 5;
- E (v) Any ICT order would transgress a field which is occupied by the rules which have been framed in terms of the proviso to Article 309 of the Constitution;
- (vi) The circular dated 20 September 2018 makes it absolutely clear that RR 2016 do not have any provision for recruitment by absorption and no ICT application could be considered after the coming into force of RR 2016;
- F (vii) Transfer is a condition of service and it is within the powers of the employer to take a policy decision either to grant or not to grant ICTs to employees; and
- G (viii) The power of judicial review cannot be exercised to interfere with a policy decision of that nature.

43. The realm of policy making while determining the conditions of service of its employees is entrusted to the Union for persons belonging to the Central Civil Services and to the States for persons belonging to

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their civil services. This Court in the exercise of judicial review cannot direct the executive to frame a particular policy. Yet, the legitimacy of a policy can be assessed on the touchstone of constitutional parameters. Moreover, short of testing the validity of a policy on constitutional parameters, judicial review can certainly extend to requiring the State to take into consideration constitutional values when it frames policies. The State, consistent with the mandate of Part III of the Constitution, must take into consideration constitutional values while designing its policy in a manner which enforces and implement those values.

44. There are three areas where the circular dated 20 September 2018 has been challenged on the grounds of constitutionality. The first is on the ground that the impugned circular bans ICTs with respect to different classes of posts within the same service, and hence it is discriminatory between Group A, B and C employees. We are unable to accept this ground as there is no material on record to indicate that all three groups are *pari materia* with each other. It may be the case that the instances of abuse of ICTs is higher with respect to employees in Group B, as opposed to the other groups. Such decisions are taken keeping in mind the strength of the service and the needs of the administration.

45. The impugned circular has further been challenged on the aspect of gender equality and need for equal treatment of disabled persons. We will briefly deal with both these issues.

46. In a recent judgment of a two-judge Bench of this Court in **Lt. Col. Nitisha and Others v. Union of India**³¹, of which one of us (Justice DY Chandrachud) is a part, the Court emphasized that discrimination both direct and indirect is contrary to the vision of substantive equality under Articles 14, 15 and 16 of the Constitution. Elaborating on the doctrine of substantive equality and its engagement with discrimination both in its direct and indirect form, the judgment of the Court takes due account of ground realities founded on the socio-economic structure of our society. In **Nitisha (supra)**, this Court held:

“57. Recognizing that certain groups have been subjected to patterns of discrimination and marginalization, this conception provides that the attainment of factual equality is possible only if we account for these ground realities. This conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust *status quo*.”

³¹ 2021 SCC Online SC 261

- A 58. Indirect discrimination is closely tied to the substantive conception of equality outlined above. The doctrine of substantive equality and anti-stereotyping has been a critical evolution of the Indian constitutional jurisprudence on Article 14 and 15(1). The spirit of these tenets have been endorsed in a consistent line of authority by this Court. To illustrate, in *Anuj Garg v. Hotel Association of India* [(2008) 3 SCC 1], this Court held that laws premised on sex-based stereotypes are constitutionally impermissible, in that they are outmoded in content and stifling in means. The Court further held that no law that ends up perpetuating the oppression of women could pass scrutiny.
- B Barriers that prevent women from enjoying full and equal citizenship, it was held, must be dismantled, as opposed to being cited to validate an unjust *status quo*. In *National Legal Services Authority v. Union of India* [(2014) 5 SCC 438], this Court recognized how the patterns of discrimination and disadvantage faced by the transgender community and enumerated a series of remedial measures that can be taken for their empowerment.
- C In *Jeeja Ghosh v. Union of India* [(2016) 7 SCC 761] and *Vikash Kumar v. Union Public Service Commission* [2021 SCC OnLine SC 84] this Court recognized reasonable accommodation as a substantive equality facilitator.”
- D 47. The Court emphasized that discrimination is not always a function or product of a conscious design or intent. Discrimination may result by an unconscious bias or a failure to recognize unequal impacts which are produced by the underlying societal structure. In paragraph 83 of the judgment in **Nitisha (supra)**, the Court held:
- E “83. A study of the above cases and scholarly works gives rise to the following key learnings. *First*, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognize how existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust *status quo*. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited.
- F 84. *Second*, and as a related point, the distinction between direct and indirect discrimination can broadly be drawn on the basis of
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the former being predicated on intent, while the latter is based on effect (US, South Africa, Canada). Alternatively, it can be based on the fact that the former cannot be justified, while the latter can (UK). We are of the considered view that the intention effects distinction is a sound jurisprudential basis on which to distinguish direct from indirect discrimination. This is for the reason that the most compelling feature of indirect discrimination, in our view, is the fact that it prohibits conduct, which though not intended to be discriminatory, has that effect. As the Canadian Supreme Court put it in *Ontario HRC* (supra) [*Ontario Human Rights Commission v. Simpsons-Sears* [1985] 2 SCR 53], requiring proof of intention to establish discrimination puts an “insuperable barrier in the way of a complainant seeking a remedy.” It is this barrier that a robust conception of indirect discrimination can enable us to counteract.”

48. This Court has spoken about the systemic discrimination on account of gender at the workplace which encapsulates the patriarchal construction that permeates all aspects of a woman’s being from the outset, including reproduction, sexuality and private choices, within an unjust structure. The OMs which have been issued by DoPT from time to time recognized that in providing equality and equal opportunity to women in the workplace of the State, it becomes necessary for the Government to adopt policies through which it produces substantive equality of opportunity as distinct from a formal equality for women in the workplace. Women are subject to a patriarchal mindset that regards them as primary caregivers and homemakers and thus, they are burdened with an unequal share of family responsibilities. Measures to ensure substantive equality for women factor in not only those disadvantages which operate to restrict access to the workplace but equally those which continue to operate once a woman has gained access to the workplace. The impact of gender in producing unequal outcomes continues to operate beyond the point of access. The true aim of achieving substantive equality must be fulfilled by the State in recognizing the persistent patterns of discrimination against women once they are in the work place. The DoPT OMs dated 3 April 1986, 23 August 2004, 8 July 2009 and 30 September 2009 recognised the impact of underlying social structures which bear upon the lives of women in the work place and produce disparate outcomes coupled with or even without an intent to discriminate. The provision which has been made for spousal posting is in that sense fundamentally

- A grounded on the need to adopt special provisions for women which are recognized by Article 15(3) of the Constitution. The manner in which a special provision should be adopted by the State is a policy choice which has to be exercised after balancing out constitutional values and the needs of the administration. But there can be no manner of doubt that the State, both in its role as a model employer as well as an institution
- B which is subject to constitutional norms, must bear in mind the fundamental right to substantive equality when it crafts the policy even for its own employees.

49. The other ground of challenge which has been raised is that the impugned circular does not take into account the needs of disabled persons in the State's workforce. The Rights of Persons with Disabilities Act 2016 is a statutory mandate for recognizing the principle of reasonable accommodation for the disabled members of society. This obligation has been elaborated upon in several decisions of this Court including **Vikash Kumar v. Union Public Service Commission and Others**³², **Avni D** **Prakash v. National Testing Agency and Others**³³ and **Ravinder Kumar Dhariwal and Another v. Union of India and Others**³⁴. In **Vikash Kumar (supra)**, this Court observed that:

- E “63. In the specific context of disability, the principle of reasonable accommodation postulates that the conditions which exclude the disabled from full and effective participation as equal members of society have to give way to an accommodative society which accepts difference, respects their needs and facilitates the creation of an environment in which the societal barriers to disability are progressively answered. Accommodation implies a positive obligation to create conditions conducive to the growth and
- F fulfilment of the disabled in every aspect of their existence — whether as students, members of the workplace, participants in governance or, on a personal plane, in realising the fulfilling privacies of family life. The accommodation which the law mandates is “reasonable” because it has to be tailored to the requirements of
- G each condition of disability. The expectations which every disabled person has are unique to the nature of the disability and the character of the impediments which are encountered as its consequence.”

³² (2021) 5 SCC 370

³³ 2021 SCC OnLine SC 1112

H ³⁴ 2021 SCC OnLine SC 1293

The formulation of a policy therefore, must take into account the mandate which Parliament imposes as an intrinsic element of the right of the disabled to live with dignity. A

50. The State's interference in the rights of privacy, dignity, and family life of persons must be proportional. This Court in **Akshay N. Patel v. Reserve Bank of India**³⁵, held that the framing of policy must meet an integrated proportionality analysis which answers whether the measure is: B

- (i) in furtherance of a legitimate aim;
- (ii) suitable for achieving the aim;
- (iii) necessary for achieving the aim; and C
- (iv) adequately balanced with the rights of the individual.

51. The State in the present case has been guided by two objectives: first, the potential for abuse of ICTs and second, the distortion which is caused in service leading to plethora of litigation. The State while formulating a policy for its own employees has to give due consideration to the importance of protecting family life as an element of the dignity of the person and a postulate of privacy. How a particular policy should be modulated to take into account the necessities of maintaining family life may be left at the threshold to be determined by the State. In crafting its policy however the State cannot be heard to say that it will be oblivious to basic constitutional values, including the preservation of family life which is an incident of Article 21. D E

52. The circular dated 20 September 2018 has taken into account, what it describes "exceptional circumstances" such as "extreme compassionate grounds". Leaving these categories undefined, the circular allows for individual cases to be determined on their merits on a case by case basis, while prescribing that transfers on a "loan basis" may be allowed subject to administrative requirements with a tenure of three years, extendable by a further period of two years. While proscribing ICTs which envisage absorption into a cadre of a person from a distinct cadre, the circular permits a transfer for a stipulated period on a loan basis. Whether such a provision should be suitably enhanced to specifically include cases involving F G

- (i) postings of spouses;

³⁵ 2021 SCC OnLine SC 1180

- A (ii) disabled persons; or
- (iii) compassionate transfers, is a matter which should be considered at a policy level by the Board.

B 53. In considering whether any modification of the policy is necessary, they must bear in mind the need for a proportional relationship between the objects of the policy and the means which are adopted to implement it. The policy above all has to fulfill the test of legitimacy, suitability, necessity and of balancing the values which underlie a decision making process informed by constitutional values. Hence while we uphold the judgment of the Division Bench of the Kerala High Court, we leave

C it open to the respondents to revisit the policy to accommodate posting of spouses, the needs of the disabled and compassionate grounds. Such an exercise has to be left within the domain of the executive, ensuring in the process that constitutional values which underlie Articles 14, 15 and 16 and Article 21 of the Constitution are duly protected. The appeals shall be disposed of in the above terms.

D 54. Pending application(s), if any, stand disposed of.

Divya Pandey
(Assisted by : Roopanshi Virang, LCRA)

Appeals disposed of.