

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

Reserved on: 17.12.2013
Pronounced on : 11.07.2014

+ W.P.(C) 5214/2011, C.M. APPL. 10579/2011 & 6798/2012

DHARAM PAL AND ORS. Petitioner
Through: Ms. Jyoti Dutt Sharma, Sh. Piyush
Sachdeva and Sh. Rahul Sharma, Advocates.

Versus

DELHI HIGH COURT Respondent
Through: Sh. Chetan Lokur, for Sh. Viraj. R.
Datar, Advocate, for DHC.
Sh. Baldev Malik with Sh. Arjun Malik,
Advocates, for Resp. No.2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioners, working as peons and Ushers in the Delhi High Court, seek directions to quash the Office Orders dated 16.4.2004 and 14.5.2004 issued by the first respondent, the Delhi High Court ("DHC") and the Report dated 18.7.2009 of the Committee constituted by the Hon'ble Chief Justice, DHC on 1.7.2009 to consider their

grievances. They claim a writ of mandamus directing the DHC to fix their pay at the pay scale which existed at the time of implementation of the recommendations of the 5th Pay Commission (“5th PC”) i.e. ₹ 3200-4900/-, and, further a writ of mandamus directing the DHC to grant the benefit of the Assured Career Progression Scheme (“ACP”) in the hierarchy as it existed when the 5th PC recommendations came into effect. The second respondent is the Union of India, through the Secretary, Ministry of Law and Justice, responsible for granting sanction to revised pay scales as proposed by the first respondent, the DHC.

2. The Petitioners were appointed as Ushers, Court Attendants, Gestetner Operator Grade II, Security Attendant, Lawn Attendant, Library Attendant, Sweeper and Farash in the establishment of the DHC.W.P.(C) 3464/1990 was filed before this Court, in 1990 by an Usher in a representative capacity for grant of higher pay scale. By judgment dated, 4.11.1991, that petition was allowed and the 4th Pay Commission pay scale recommendations were directed to be implemented for Class IV employees. Thus, all Class IV employees of this Court were placed in the pay scale of ₹ 975-1660/-. Subsequently, an application, C.M. 3715/1993 was filed by some Ushers, Daftries and Book Binders, seeking modification of the judgment in W.P.(C) 3464/1990, on the ground that parity of pay ought to be ensured between the employees of the High Court and the Supreme Court. The Court allowed the application and directed by order dated 10.12.1993, that the following pay scales be implemented for those posts:

Book Binders (Library Attendants) and Ushers	₹ 1000-1750/-
Court Attendants, Lawn Attendants, Peons etc.	₹ 975-1660/-

3. The 5th PC recommendations were made effective on 1.1.1996 by which all Group D employees (Court Attendants, Ushers, Sweepers, Daftries, Book Binders, law attendants, library attendants etc.) were put on the pay scale of ₹ 3200-4900/-. This apparent merger of pay scale for all Group D employees into a single scale was, however, not challenged by the Petitioners.

4. It was in this background that a previous writ petition, W.P.(C) No. 740/2003 was filed by some Class III and Class IV employees claiming implementation of the “Assured Career Progression” (ACP) Scheme, introduced on 9.8.1999 by a memorandum of the Department of Personnel and Training by DoPTM No. 35034/1/97-Estt. (D). The Court held in its judgment of 4.11.2003 that despite repeated requests to the Central Government to sanction, what was termed “*normal replacement of pay scales*” in terms of the 5th PC’s recommendations, the Central Government had not responded. Thus, pending approval of the revised pay scales of the staff of the High Court, the ACP was to be implemented on the basis of the “proposed revised pay scales”.

5. The DHC issued the impugned office orders i.e. Office Order no. 144/Estt/E.IV/DHC and Office Order Endst. No. 222/C-4 Cash DHC on 16.4.2004 and 14.5.2004 respectively, granting the benefit of the 1st and 2nd financial upgradations under the ACP to the Petitioners

in the pay scales of (i) ₹ 3500-5120/- and (ii) ₹ 4500-7000/- instead of in (i) ₹ 4500-7000/- and (ii) ₹ 5500-9000/-. The petitioners argue that this new scale of ₹ 3500-5120/-, claimed to be corresponding to ₹ 1000-1750/- (which was granted pursuant to recommendations of the committee constituted in the judgment in W.P.(C) 3464/1990) was non-existent as it finds no mention in the records of the DHC's hierarchy of pay scales.

6. Aggrieved by the two office orders, the Petitioners subsequently filed CM no. 11920/2004 in the disposed off W.P.(C) 740/2003 asking for clarification of the judgment dated 4.11.2003 but then withdrew the same. A writ petition W.P. (C) no. 3929/2008 was instead filed before the Delhi High Court praying *first*, that the impugned orders be quashed as the benefit of the ACP was granted to the Petitioners in a non-existent pay scale, *second*, that directions be given to the DHC to grant the benefit of the 1st and 2nd financial upgradations in to the next existing pay scales in the hierarchy i.e. (i) ₹ 4500-7000/- and (ii) ₹ 5500-9000/-, and *third*, that arrears from the due dates be granted with 9% interest. The Court by its order of 21.5.2008 directed the Petitioners to approach the administrative side of this Court with a representation, on the disposal of which they were permitted to move the Court if they were aggrieved by such decision. The Court in an application, CM No. 3147/2009 (filed by the Petitioners for clarification of the order dated 21.5.2008) also ordered that their representation should be disposed of within four weeks.

7. Pursuant to the above orders, the Chief Justice of this Court formed a Committee to consider the Petitioners' grievances. The

Committee gave its report on 18.7.2009 and concluded that the post of Usher was a promotional post, using the following reasoning:

“It was the stand of the Ushers in the Writ Petition No. 3464/1990 that they were promoted from Group D as Ushers. The said stand was accepted by the Division Bench of this Court in the judgment dated 10th December, 1993 wherein it was observed under:

“In reply to this application the Deputy Registrar in his affidavit on behalf of the High Court has admitted and stated that the posts of Usher and Daftri are promotional posts and only Peon, Frash and chowkidar are considered for promotion to the said posts of Ushers and Daftri. It is clear, therefore, that all of these categories cannot be placed in the same scale and it is for this reason that the Supreme Court directed the Usher and Safaiwala to be placed in the higher scale of Rs.1000-1750. In the aforesaid decision the Supreme Court in terms came to the conclusion that the pay-scale of Peon, Farash and Safaiwala of Rs.975-1660 has been fixed as it regarded the said posts as corresponding to the posts of Peon, Farash and Sweeper in the Delhi High Court. As the posts of Peon, Farash and Sweeper of the Delhi High Court have been equated by the Supreme Court with their own employees in the categories of Peon, Farash and safaiwala, it must logically follow that the posts of Usher and Daftri in this Court which is also promotional posts, should be regarded as equal to that of Farash and Safaiwalaa in the Supreme Court and should have the same scales. As the Book-Binder is also in the same category as Usher, Daftri and Jamadar, the pre-revised scale of these being the same it must follow that all of these categories, namely, Daftri, Usher, Jamadar and Book-Binder would be entitled to the pay-scale of

Rs. 1000-1750. We accordingly allow this application and modify the judgment dated 4th November, 1991 in so far as the employees falling in the category of Daftri, Book-Binder, Usher and Jamadar are concerned and we direct that their pay scales should be fixed in the scale of Rs.1000-1750. The pay should be fixed within two months from today and the other directions contained in the judgment dated 4th November, 1991 shall ipso facto apply.”

On the strength of the above reasoning, the Committee recommended that a scale of ₹ 3500-5120/- ought to be treated as corresponding to the old pay scale of ₹ 1000-1750/-.

Petitioners contentions

8. The Petitioners submit that the Committee failed to appreciate that the introduction of a pay scale which is non-existent and not sanctioned scale in the 5th PC report, by the DHC unilaterally at the time of the coming into force of the ACP scheme is illegal and prejudicial to their rights. They also argue that the scale of ₹ 3500-5120/- did not exist even in the pay scales of the Supreme Court and that the Chief Justice of India had used his discretion in fixing the said pay scale of Ushers of the Supreme Court, and thus, such Ushers could not be equated with the Ushers of the High Court

9. It is argued that salaries of Ushers were not being paid in the scale of ₹ 3500-5120/- since 1.1.1996, contrary to the Committee's report, but were in fact being paid in the pay scale of ₹ 3200-4900/- to all Group D employees including Ushers, Daftaries and Book Binders, per the 5th PC recommendations. Only after this Court's order dated

4.11.2003 was the scale of ₹ 3500-5120/- introduced. It is submitted that the post of Usher could not possibly have been treated as a promotional post since *first*, the Committee had noted in the same report that the Ushers/Daftries and Book Binders were given the pay scale of ₹1000-1750/- because the nature of their duties was more onerous than that of similar employees like peons etc., in CM 3715/93 of WP 3464/1990; *second*, there are no rules to justify treating the post of Usher as a promotional post from the post of Peon, as can be seen from the service list of Ushers, Court Attendants, Room Attendants, Safaiwalas, Security Attendants, Lawn Attendants, Library Attendants and Photocopy Machine Operators; *third*, since 2004, no Peon or Court Attendant whose educational qualification is below 8th standard has been made an Usher even though juniors of such employees occupy the said post, thus clearly showing that the post of Usher was not a promotional post to Peon or Court Attendant. If it were a promotional post, then the fact that juniors occupied the post of Usher indicates that the act of promotion is not only arbitrary, unjust, discriminatory but also illegal, *malafide* and against Art. 14 of the Constitution of India.

10. Ms. Jyoti Dutt Sharma, learned counsel for the Petitioners submitted that:

(i) a comparison of the pay scales for different posts in the High Court and those corresponding pay scales in the Supreme Court shows that all the posts have higher salaries in the High Court in comparison to those in the Supreme Court, with the exception of Ushers of the High Court whose pay was put at parity with those of the Supreme

Court. She placed strong reliance on the decision reported as *Grade I, DASS Officers Association v. Secretary, GOI*, 148(2008) DLT 342 and submitted that in view of the clarifications made in respect of the ACP scheme, especially clarification No. 1 and 2, pay scales or grades outside of the prevailing hierarchy of posts within an organization or department should be disregarded for the purpose of conferring the benefit of ACPs. It was submitted, therefore, that the decision to give the first upgradation at ₹ 3500-5120/- and the next upgradation at ₹ 4500-7000/- is arbitrary and untenable;

(ii) The upgradation claimed could not be denied simply because it may result in paying the High Court employees 50% higher salaries than those payable to the Government of India employees, as the ACP clearly mandates that upgradation must take place in the next higher pay scales. In any event, the pay scales of the Central Government were not applicable to the Petitioners and, therefore, there was no need for comparison. (iii)

On learning that the DHC Establishment had requested for introduction of the pay scale of ₹ 3500-5120/- to replace the pre-revised scale of ₹ 1000-1750/- (based on the corresponding scales in the Supreme Court) in December 1998 itself, much before the ACP scheme and the order of 4.11.2003 came into being, the Petitioners had applied under the RTI to obtain access to the documents. They submit that requests were made eight times before 22.12.2008 (4.3.1999, 26.10.1999, 4.4.2000, 3.11.2003, 28.2.2004, 18.5.2004, 11.1.2005, 28.3.2005) to the Central Government, to replace the pay scale as described above, all of which were rejected. The final request was sent on 25.8.2005 after a joint meeting was

convened between the Registrar General of the Court and the officers from the Union Ministry of Law and Justice, Union Ministry of Finance and the Department of Law, Justice and Legislative Affairs, Govt. of NCT of Delhi in which the need to replace scales was impressed upon the Government. Consequently, the Government on 13.10.2005 reversed its stance and accorded sanction to the replacement of the pay scales with retrospective effect, thus creating a non-existent and non-functional pay scale without regard to the Fifth Pay Commission's recommendations. This replacement of pay scales has not even been notified in the gazette.

(iv) Other departments sought clarifications from the government on how the ACP is to be implemented when two posts in different pay scales, one from the feeder grade and one from the promotion grade, are merged. The Government has stated that the ACP must facilitate financial upgradation to the subsequent pay-scale, in the hierarchy as it exists after the merger. Any person who was promoted from the feeder post to the promotion post before the merger of pay scale, must still be allowed benefits under the ACP without regard to his/her promotion, failing which he/she would face a disadvantage compared to any new entrant starting in the merged grade.

11. In view of these arguments, the Petitioners submit that the orders granting the ACP in a non-existent pay scale and the Committee Report dated 18.7.2009 which concluded that the post of Usher was a promotional post from Peon etc., thus meriting a pay-scale of ₹ 3500-5120/- should be set aside or quashed. Counsel also submits that a direction to the DHC establishment to grant the first

upgradation to Peons, Ushers and all Group D employees in the scale of Junior Judicial Assistant (JJA)/Restorer, should be given.

Stand of DHC Establishment

12. The DHC in its counter affidavit stated that:

(i) the posts of Ushers, Court Attendants, Gestetner Operators – Grade II, Security Attendant, Lawn Attendant, Library Attendant, Sweeper and Farash (all termed “Group D” posts) are not in the same pay scale of ₹ 3200-4900/- as claimed by the Petitioners. Instead, the posts of Usher and Library Attendant are in the pay scale of ₹ 3500-5120/- (pre-revised) and the posts of Court Attendants, Gestetner Operator, Security Attendants, Lawn Attendants, Sweepers and Farash are Group D posts and are in the pay scale of ₹ 3200-4900/- (pre-revised), as indicated in the Delhi High Court Establishment Rules. The claim of the Petitioners that the pay scale of ₹ 3500-5120/- is non-existent cannot be countenanced as this is the corresponding scale to ₹ 1000-1750/- which was granted at the request of some Ushers and Book Binders in the application CM No. 3715/93 (in W.P.(C) 3464/1990) before this Court.

(ii). While disposing of CM No. 3715/1993 in the order dated 10.12.1993, this Court had observed that since the posts of Peon, Farash and Sweeper Court had been equated to the similar posts in the Supreme Court, parity ought to likewise be ensured for the posts of Ushers, Daftries, Book Binders etc. in the High Court. Thus these posts were entitled to the pay-scale of ₹ 1000-1750/- while other Class IV employees like Peons, Farash and Sweeper were to remain on the

pay scale of ₹ 975-1660/- (fixed pursuant to the judgment in W.P.(C) No. 3463/1990 dated 4.11.1991 in accordance with the 4th Pay Commission Report). On the recommendation of a Committee constituted by the Chief Justice of the DHC, these pay scales were approved and fixed by the Chief Justice of the Delhi High Court.

(iii). There was no scale corresponding to ₹ 1000-1750/- in the fifth PC's report, thus creating an anomaly. In order to remove this and to ensure parity with the corresponding posts in the Supreme Court (which principle was directed to be complied with by the Delhi High Court in disposing of CM no. 3715/1993 in W.P.(C) 3464/1990), a request to sanction the pay scale corresponding to the Supreme Court scale of ₹ 3500-5120/- was made, to replace the pre-revised scale of ₹ 1000-1750/- by letter dated 22.12.1998 to the Central Government, through the Secretary, Ministry of Law and Justice.

(iv). This letter clarified that the question of ₹ 3500-5120/- being the replacement scale of ₹ 1000-1750/- arose well before the ACP was sought to be implemented, as well as before the Order dated 4.11.2003 in W.P.(C) No. 740/2003. The Union Government granted sanction to this revision of pay scales w.e.f. 01.01.1996 by its response letter dated 13.10.2005. Since some Ushers themselves sought parity with their counterparts in the Supreme Court in terms of pay scales, it is now not open to the Petitioners to challenge as void this hierarchy of pay scales, especially after having enjoyed the benefit of said pay scale w.e.f. 01.01.1996. Further, the DHC Establishment states that the employees of the same category (Group D) with the Government of India are entitled to financial upgradations in the pay scales of ₹ 2610-

3540/- and ₹ 2650-4000/- as per the terms of the Fifth PC report. Should the Petitioners be granted the relief sought (financial upgradations in the pay scales of ₹ 4500-7000/- and ₹ 5500-9000/- in the first and second ACP), it would lead to disparity between the employees of the Delhi High Court and the Government of India; and lastly,

(v) that the same claim was made as a representation before the Administrative side of the High Court, which was rejected by a Committee comprising two judges of the High Court, with reasons; this rejection was approved by the Chief Justice of the High Court on 17.7.2009.

Analysis/Conclusions

13. In this context, the issue that arises for this Court's determination is the proper manner of implementation of the ACP for the posts of Ushers, Court Attendants, Lawn Attendants, Safaiwalas, Room Attendants, Security Attendants. This issue chisels down to discerning the existing hierarchy of pay scales within the DHC establishment.

14. Before proceeding to answer these questions, it would be appropriate to understand the hierarchy of posts and pay scales in the Delhi High Court Establishment (Appointment and Conditions of Service) Rules, 1972 ("Establishment Rules"), which were brought in by notification dated 15.9.1972. Schedule I of these Rules contains the hierarchy of posts in the DHC Establishment. The hierarchy of posts and the corresponding pay scales, in relevant part is:

GROUP 'C'		4 th PC		5 th PC	6 th PC
21.	Junior Judicial Assistant	1350-2200		4500-7000	5200-20200
22.	Restorer				
23.	Chauffeur				
23.A.	Despatch Van Driver (Rider)				
23.B.	Despatch Rider				
24.	Gestetnor Operator Grade — I				
GROUP 'D'		4 th PC		5 th PC	6 th PC
24A	Gestetnor Operator Grade — II	975-1660		3200-4900	5200-20200
25.	Deleted	Xxx			
26.	Library Attendant	975-1660	1000-1750	3000-5120 (by recommendation of the CJ of Delhi to the Union Govt.)	??
27.	Usher				
28.	Court Attendant		975-1660	3200-4900	5200-20200
29.	Room Attendant				
30.	Security Attendant				
31.	Safaiwala				
32.	Lawn				

	Attendant				
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15. The mode of “Appointment to the posts in Class IV” was laid out in Rule 9, which, as it currently stands, was brought in by an amendment on 08.03.1994 and reads:

“Appointment to the posts in Class – IV mentioned in Schedule – I shall be made by the Registrar unless the Chief Justice otherwise directs.

Appointment to Class – IV posts mentioned in Schedule – I may be made by one or more of the following methods, namely:-

- a. By promotion of a person already employed in the Court;*
- b. By transfer or deputation of a person serving outside the Court in connection with the affairs of a State or the Union or of the Govt. of N.C.T. of Delhi;*
- c. By direct recruitment”*

Prior to 8.3.1994, i.e. between September, 1972 and March, 1994, Rule 9 read as follows:

“Appointment to the posts in Class IV mentioned in Schedule I shall be made by the Registrar unless the Chief Justice otherwise directs.”

16. It is pertinent to note that when Rule 9 was amended, Schedule II -which comprises the conditions of eligibility/qualifications to posts, *did not stipulate qualifications for Class IV posts* i.e. Safaiwala, Lawn Attendant, Room Attendant, Court Attendant, Security Attendant, Usher, Library Attendant, thus leaving unclear the mode of entry into the posts of Usher etc. This was also acknowledged in the recommendations of the Committee of Judges dated 25.9.2003 (made in response to the matters referred to them by the orders of the Chief

Justice dated 22.08.2003 and 27.08.2003), in which they noted as follows:

*“We have noticed that there are no Recruitment Rules for appointment to the posts of Usher and other Class IV posts. We are of the view that these posts should be manned by persons having some minimum educational qualification. In view of this and in order to have consistence in the matter of appointment to these posts, we recommend that following minimum qualifications may be prescribed for future appointment to these posts:
...”*

17. For the first time, the qualifications for appointment to these posts was stipulated in Schedule II, by order of the Chief Justice dated 1.10.2003. The qualifications for appointment for posts between serial numbers 26-32 (i.e. Library Attendant, Usher, Court Attendant, Room Attendant, Security Attendant, Safaiwala and Lawn Attendants) was stipulated in the following manner:

“1. Usher - Middle Pass (Matric/Higher Secondary to be preferred) with 5 years’ service in any of the posts of categories of Court Attendant, Room Attendant, Security Attendant, Safaiwala and Lawn Attendant.

2. Class-IV posts of Court Attendant, Room Attendant, Security Attendant and Lawn Attendant - Middle Pass

3. Library Attendant(Book Binder) – Matric/Higher Secondary (Graduate to be preferred) with knowledge/experience of Book Binding.”

18. Thus, after 1.10.2003, the qualifications necessary for appointment to the post of Usher were a minimum of five years’ service in in any of the posts of Court Attendant, Room Attendant, Security Attendant, *Safaiwala*, Lawn Attendant. Prior service of at

least five years in one of these named posts became a pre-requisite for the appointment, thus excluding direct recruitment to the post of Usher altogether. In other words, since all Class IV posts are to be filled in either by direct recruitment, transfer or promotion, the absence of stipulated qualifications for direct recruit aspirants to the post of Usher indicates that the post is open to be filled only by promotion, after 1.10.2003.

19. This leaves open the question of whether, prior to 1.10.2003, the post of Usher was a promotional post from the posts of Library Attendant, Usher, Court Attendant, Room Attendant, Security Attendant, Safaiwala and Lawn Attendant. It would be apposite to note the Court's decision dated 10th December, 1993, in CM No. 3715/1993, which was filed by some Ushers, praying for a higher pay than other Class IV employees in those writ proceedings:

“It is alleged that according to the Delhi High Court officers and Servants (Salaries, Leave, Allowances and Pension) Rules, 1970, there are 8 Class-IV employees categories in the establishment of High Court of Delhi. We find from the First Schedule to the said Rules, as promulgated in 1970, that Daftri, Book Binder and Usher/Jamadar were in the pay-scale of Rs. 75-1-85-EB-2-95 whereas Peon, Frash, Chowkidar and Sweeper were in the pay-scale of Rs. 70-1-80-EB-1-85. In other words, the scale of Daftri, Book Binder, Usher and Jamadar was higher than the scale of Peon, Frash, Chowkidar and Sweeper even though all of them were in Class IV.”

[emphasis supplied]

20. Clearly then, the DHC Establishment Rules envisaged that Ushers were considered to be in a higher pay-scale than other Class-IV posts. The Deputy Registrar on behalf of the High Court, even

“admitted and stated that the posts of Usher and Daftri are promotional posts and only Peon, Frash and chowkidar are considered for promotion to the said posts of Ushers and Daftri”

in those proceedings. Even the claim before the Court in CM No. 3715/1993 was advanced by some Ushers who were aggrieved by the judgment in WP 3464/1990, because it did not recognize the hierarchy between the post of Usher and other Class IV posts, as well as the hierarchy in pay scales between the two categories. In absence of express recruitment rules/qualifications for the post of Usher and given that the original Establishment Rules, the petitioners’ plea, as well as the admission on the part of the DHC in the 1993 writ proceedings affirm the hierarchy of posts between the posts of Usher and other Class IV posts, the compelling inference would be that the existing hierarchy in practice till 1.10.2003 was that of treating the post of Usher as a promotional post from other Class IV posts.

21. Having concluded this, it would be necessary to understand the manner of implementation of the ACP. The Conditions for the Grant of ACP benefit are extracted below, in relevant part:

“1. The ACP Scheme envisages merely placement in the higher pay-scale/grant of financial benefits (through financial upgradation) only to the Government servant concerned on personal basis and shall, therefore, neither amount to functional/regular promotion nor would require creation of new posts for the purpose;

7. Financial upgradation under the Scheme shall be given to the next higher grade in accordance with the existing hierarchy in a cadre/category of posts without creating new posts for the purpose.”

22. The meaning of the phrase “existing hierarchy” as regards the hierarchy of pay, was made clear in *Grade I, DASS Officers Association v. Secretary, GOI*, 148(2008) DLT 342. The question before the Court was whether, in cases when the feeder and promotion post are both allowed the same emoluments, the ACP would operate to only ensure progression into the next higher *post* in the hierarchy, without regard to the fact that the pay scale is the same. This Court held that promotion to the next pay scale was mandatory, by interpreting the requirement to allow progression in the “existing hierarchy” in these terms:

“25. Keeping in mind the letter and spirit of the ACP scheme it is crystal clear that the same was introduced to provide relief to those employees who have put in many years of service with no promotion and no increments. The object and intention of the legislature in providing ACP scheme is to provide same financial reprieve to such employees who are stagnating with no promotion. Evidently, the term financial upgradation in the scheme means financial improvement and as is apparent in the present case there cannot be any improvement financially if the petitioners are granted this upgradation in the same scale which is the entry grade of DANICS and is also the scale of Grade-I DASS. In other words, the grant of scale of Rs. 6500-10500/- i.e. entry scale of DANICS means that they are continuing to get the same pay scale though on paper they are said to have been granted benefit of upgradation under the ACP scheme.

26. Therefore, we are of the considered view that the Tribunal erred in holding that the expression 'financial upgradation in accordance with the existing hierarchy without creating new posts...' is a rider to grant of financial upgradation to be granted under the ACP scheme. In fact it is a natural and logical consequence of the scheme, the objective of which truly is to remove stagnation and give benefit under the ACP scheme of financial upgradation in the next higher grade, though in accordance with the existing hierarchy, to those employees who have not earned any regular promotion in the 12/24 years of their regular service. The scheme is a breather for those employees who are stuck in the same scale for 12/24 years. The logical and favorable interpretation of the expression is that the hierarchy in the cadre as is existing is to be followed and no new posts are to be created for the purpose of granting the benefit under the ACP scheme."

23. The import of this judgment is that while in the hierarchy of posts, as it exists in the cadre, is imperative in the implementing of the ACP, financial improvement by providing the emolument in the next higher grade in the defined hierarchy must be ensured. The "existing hierarchy" relevant for ACP benefit then is a hierarchy of pay scales/grades. However, this hierarchy must be understood in tandem with Clarification 2. Clarification 2 to the ACP scheme issued in O.M. No. F.No.35034/1/97-Estt(D)(Vol.IV) on 10.2.2000 reads as follows:

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Sl.	Point of doubt	Clarification
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2.	Some employees have been <u>allowed selection grade/in-situ promotions though these grades are not a part of the defined hierarchy.</u> Whether this is to be considered as promotion for the purpose of ACPS? <u>Also, what will be the situation if selection grade has been allowed in lieu of higher pay-scale?</u>	<u>Mobility under ACPS is to be allowed in the 'existing hierarchy'.</u> As such, if any selection grade/in-situ promotion has been allowed to employees which is not a part of the hierarchy, <u>it shall not be counted as promotion for the purpose of ACPS.</u> For illustration sake, junior engineers of CPWD appointed in the grade Rs.5000-8000/- are allowed the scale of Rs.5500-9000/- on completion of five years of regular service and the scale of Rs.6,500-10,500/- on completion of fifteen years of regular service. <u>The scale of Rs.5500-9000/- is not a part of the defined hierarchy for them.</u> <u>In such cases, the pay-scale which is not a part of the hierarchy may be treated to have been withdrawn.</u> However, fall in pay resulting out of this shall be protected by granting personal pay in the aforesaid direct entry grade to be adjusted against future increments. Moreover, as per Condition No.13 of ACPS, such existing (previous) schemes would be discontinued with the adoption of ACPS. However, in the case of common category of posts, the existing hierarchy in relation to a cadre would mean the
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		<i>restructured grades recommended by the Fifth Central Pay Commission.”</i>
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24. This clarification states that if (a) a post is not part of the defined hierarchy and (b) that post is a selection grade post granted *in lieu* of higher pay-scale, then promotion to that selection grade must not be considered “promotion” for the purposes of the ACP and second, that selection grade must be “treated as withdrawn”. Thus, both requirements must be fulfilled. Clarification 2, therefore, insists on the discerning of “hierarchy”, when a selection grade is introduced outside the establishment’s defined hierarchy of pay-scales/grades.

25. To understand this clarification, the meaning of “selection grade” must be understood. It was made clear in *Lalit Mohan Deb v. Union of India*, (1973) 3 SCC 862:

“It is well recognised that a promotion post is a higher post with a higher pay. A selection grade has higher pay but in the same post. A selection grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the selection grade to prevent stagnation on the maximum of the scale. Selection grades are, therefore, created in the interest of greater efficiency.”

The import of the post of Usher being selection grade is that those employees who are promoted from the other Class IV posts (i.e. *Safaiwala*, Court Attendant, Room Attendant, Security Attendant and

Lawn Attendant) are promoted to a higher scale but not a higher post, in being conferred the post of Usher.

26. This Court is of the opinion that the post of Usher is in reality, a “selection grade” vis-à-vis the other Class IV posts like *Safaiwala*, Court Attendant, Lawn Attendant, Room Attendant, Security Attendant. This is because the post of Usher only confers a higher pay, but is not a higher post than the other Class IV employees. Even the original establishment rules of the DHC do not recognise it to be a higher post, but merely a higher grade/pay-scale. The writ proceedings in 1993 also recognised the hierarchy of the post of Usher only in terms of the higher pay scale, vis-à-vis the other Class IV employees.

40. While it is true that the Court and the parties in CM 3715/1993 to the 1991 writ proceedings termed the post of Usher as a “*promotional post*”, the Courts had, simultaneously, begun to be consider selection grade posts as “promotional posts”. This was recognised for instance in *State of Rajasthan v. Fateh Chand Soni*, (1996) 1 SCC 562, in which the Supreme Court, following *Union of India v. S.S. Ranade*, 1995 (4) SCC 462 defined 'promotion' thus:

“The High Court, in our opinion was not right in holding that promotion can only be to a higher post in the service and appointment to a higher scale of an officer holding the same post does not constitute promotion. In the literal sense the word "Promote" means "to advance to a higher position, grade, or honour". So also "Promotion" means "advancement of preferment in honour, dignity, rank or grade". [See: Webster's Comprehensive Dictionary, International Edition, p. 1009]. "Promotion" thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also

the expression "Promotion" has been understood in the wider sense and it has been held that "Promotion can be either to a higher pay scale or to a higher post."

The Court went on to explain that their decision was consistent with the decision in *Lalit Mohan Deb* (supra) in these terms:

"9. In Lalit Mohan Deb ... This Court observed that 'provision of a Selection Grade in the same category of posts is not a new thing' and that 'a Selection Grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the Selection Grade to prevent stagnation on the maximum of the scale' and that 'Selection Grades are, therefore, created in the interest of greater efficiency'. The Court took note of the fact that the basis for selection of some of the Assistants to the Selection Grade scale was seniority-cum-merit which is one of the two or three principles of promotion widely accepted in the administration and, therefore, the creation of Selection Grade in the category of Assistants was not open to challenge. In that case, the Court had proceeded on the basis that the appointment to the higher grade amounted to promotion."

27. In *S.S. Ranade* (supra), the Court held:

"6. ... The use of the word 'promotion' in Rule 6 and the Constitution of a Departmental Promotion Committee for selection of Commandant (Selection Grade) in Rule 7, do not necessarily lead to the conclusion that the promotion which is contemplated there is necessarily a promotion to a higher post. Promotion can be either to a higher pay scale or to a higher post. These two Rules and the use of the word 'promotion' there do not conclude the issue."

28. In any event, even assuming the Court in CM 3715/1993 was not using the term "*promotion*" in the wider sense as held in *S.S.*

Ranade (supra) and *Fateh Chand Soni* (supra), the absence of any qualifications for promotion to the post of Usher in the Delhi High Court Establishment Rules till 1.10.2003, leads this Court to conclude that the post of Usher was merely a higher pay scale/grade, and not a higher post than the posts of Court Attendant, Lawn Attendant etc.

29. When a selection grade post is outside the existing, defined hierarchy of posts, clarification 2 makes it clear that such a selection grade cannot be considered a “promotional post”. This conclusion is buttressed further by clarification 53 issued by OM. F.No.35034/1/97-Estt(D)(Vol.IV) dated July 18, 2001:

“S.No.	<i>Point of doubt</i>	<i>Clarification</i>
53.	<i>If for promotion on regular basis, an employee has to possess a higher/ additional qualification, will it be necessary to insist on possession of these qualifications even while considering grant of financial upgradation under the ACPS?</i>	<i>In terms of condition No. 6 of, Annexure-I to DoP&T O.M. dated 9.8.1999, only those employees who fulfill all promotional norms are eligible to be considered for benefit under ACPS. Therefore, various stipulations and conditions specified in the recruitment rules for <u>promotion to the next higher grade, including the higher/additional educational qualification, if prescribed, would need to be met even for consideration</u></i>

		<u>under ACPS.”</u>
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30. This clarification makes it amply clear that ACP benefits are conferred in a hierarchy of pay grades and not promotional posts i.e., posts with higher pay, and not necessarily higher posts. The employee must fulfill all the conditions of eligibility for the next higher grade like additional educational qualifications or experience, whatever they may be, in order to be eligible for ACP benefits. Given that the object of the ACP Scheme is to provide reprieve from stagnation within the services (be it due to fewer number of promotional posts or excessive number of employees in the feeder grades), it is logical that the ACP, once granted, results in the accrual of the higher pay of higher pay grade. This was also the reasoning in *Grade I, DASS* (supra).

31. This Court is thus of the opinion that the post of Usher till 1.10.2003 cannot be considered a “promotional post” for the purposes of the ACP, because, firstly, it is outside the defined, existing hierarchy and secondly, it is clearly a selection grade from the time of the original Establishment Rules. The ACP benefits for these Ushers must thus be granted by treating this selection grade as withdrawn, as required by Clarification 2. Once it is treated as withdrawn, the two subsequent pay scales corresponding to the two higher posts are (i) ₹ 4500-7000/- and (ii) ₹ 5500-9000/-.

32. This Court holds that the position after 1.10.2003 is different, for the reason that on 1.10.2003, by the Chief Justice’s order, Schedule II was amended to introduce the post of Usher in the

existing, defined hierarchy, as a promotional post, even if as merely a selection grade (with qualifications of a minimum of 5 years' experience as Court attendants, Lawn Attendants, Safaiwala, Security Attendants, Room Attendants). Thus, for those Court Attendants, Lawn Attendants, Room Attendants, Security Attendants and Safaiwalas appointed after 1.10.2003, the ACP benefits must be conferred in the two subsequent pay scales corresponding to the two higher posts, which are (i) ₹ 3500-5120/- and (ii) ₹ 4500-7000/-. This Court acknowledges that this creates an anomalous position in that Court Attendants, Lawn Attendants, Room Attendants, Security Attendants and Safaiwalas appointed prior to 1.10.2003 are able to avail of greater or better ACP benefits than those appointed after 1.10.2003. However, this anomaly is one that service employees are required to live with given the frequency of cadre restructuring and the unfeasibility of reviewing ACP benefits each time a restructuring takes place. This anomaly has been recognized and resolved in clarification 44, issued in Office Memorandum No. 35034/1/97-Estt(D)(Vol.IV) dated 18.7.2001:

41.	<i>A cadre consists of 4 Grades - 'A', 'B', 'C' and 'D' (in ascending order). Upon restructuring of a cadre, Grade 'B' is abolished from a date subsequent to 9.8.1999. Employees recruited in Grade 'A', who are eligible for financial upgradation on or after</i>	<i>The benefit of ACP Scheme is to be allowed as per the hierarchy existing, as on the date the employees become eligible for financial upgradation under ACPS. . <u>Cadres/hierarchical structures are never static and are always subject to review based on recommendations of Pay Commissions/Expert</u></i>
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	9.8.1999 but before the date of effect of restructuring, get first/second financial upgradation in Grade 'B' and Grade 'C' respectively but those who become eligible for financial upgradation after the restructuring has been effected are entitled to first financial upgradation in Grade 'C' and second financial upgradation in Grade 'D'. This is anomalous. The cases of earlier set of employees should be reviewed and they may be allowed financial upgradations as applicable to the latter category of employees."	<u>Committees or otherwise and it is not possible to review the entitlements under ACPS already earned every time a cadre is reviewed.</u> ACPS is only a temporary solution to provide relief to stagnating employees and the lasting solution for stagnation lies in review of cadre structures, as regular promotions will be earned in such restructured grades. All the employees will benefit from such cadre restructuring.
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33. This explanation clarifies that since cadre-restructuring by Pay Commissions is a frequently undertaken exercise, privileges under ACPs should not be open to review, each time a cadre is restructured. The existing hierarchy itself is to be implemented. Because the ACP is required to be implemented in the "existing hierarchy", it is imperative to consider the hierarchy as it exists at the time the employee becomes eligible for upgradation.

34. It is appropriate to note here that this Court in its judgment of 4.11.2003 in W.P. 740/2003, also ordered that the ACP scheme ought to be implemented keeping in mind the existing hierarchy. The Court

was of the opinion that the “existing hierarchy” at that time was that which was proposed by the 5th PC (though not sanctioned by the Central Government). The Court noted that the affidavit filed on behalf of the High Court stated that the Administrative Committee of the High Court had recommended the ACP’s implementation, as it had already been implemented in the Supreme Court and the Subordinate Courts. The Screening Committee (constituted to work out the modalities, per the ACP scheme) reported that till pay scales of the Class III and Class IV employees are decided, their cases cannot be processed. A Committee of three judges subsequently considered the matter and was of the view that since the Supreme Court had implemented the ACP, the High Court was also in a position to implement it along the lines of the Supreme Court. This Court also notes that the affidavit of the Ministry of Personnel, Public Grievances and Pensions stated that the employees of the DHC enjoy special status under the Constitution and that it was for the High Court to evolve a suitable promotion scheme or to adopt the ACP in its stead. Consequently, only the administrative side of the High Court had powers in this area and there was no question of Central Government approval. However, the only requirement was sanction from the Central Government for replacement of pay scales in line with the 5th PC’s proposed pay scales.

35. The Court proceeded to note that on implementation of the 5th PC report, the High Court had requested the Ministry of Law and Justice vide letters dt. 22.12.1998 and 26.10.1999 to obtain sanction of the Government for the normal replacement of the pay scales in

respect of posts in Class III and Class IV, w.e.f. 1 Jan 1996. However, the Deputy Secretary of the Ministry without reasons, by letter dated 22.08.1999 stated it was not possible to do so. Once again, a letter was written on 4.4.2000 to the Ministry of Law and Justice for normal replacement of pay scales. The Union Law Minister by letter dated 26.6.2000 informed the Chief Justice that serious anomalies existed in the pay scales of the employees of the Delhi High Court owing to the many judgments and orders passed in the various writ petitions filed by employees. He stated that in order to remedy these anomalies, a Bill was pending in the Rajya Sabha. The Chief Justice sent another letter dated 11.9.2000, reiterating that only normal replacement of pay scales of the 4th Pay Commission's report in terms of the 5th PC report was being sought and that further revision of pay scales for the posts in question was not being sought.

36. The judgment in W.P. 740/2003, then noted that akin to the request for sanction of the President for revision of pay scales in terms of the 4th Pay Commission report (which was, ultimately conveyed to the High Court on 21.9.1998 pursuant to directions of the High Court on 27.8.2998 in *Chaman Lal Sharma v. Union of India*), sanction was being sought only to effect a normal replacement of pay scales in terms of the 5th PC, for the categories of employees in question. Non-grant of sanction was forcing the employees to draw lower salaries than those of other posts of equal status, thus creating an anomaly. However, no reply was received. This being the situation, the High Court noted that under Art. 229, the Chief Justice is the sole authority in the matter of regulating conditions of service of the officers of the

High Court. Proviso to clause Art. 229(2) states that rules made with regard to salaries, allowances, leave, pensions of officers and servants of the High Court shall require the approval of the Governor of the State. After considering the law on the matter, particularly in *Supreme Court Employees Welfare Association v. Union of India*, (1989) 4 SCC 187, the High Court directed in its judgment that the ACP be adopted and implemented on the basis of the proposed revised pay scales, pending approval of the Central Government of revised pay scales in line with the 5th PC's recommendations.

37. At this point, it is necessary to note that, contrary to the judgment in W.P. 740/2003, the letter dated 22.12.1998 (Annexure R-4) did not in fact, request sanction for normal replacement of pay scales in terms of the 5th PC report. The first respondent admits this in its counter affidavit. It requests sanction for replacement of the old scale of ₹ 1000-1750/- with a new scale of ₹ 3000-5120/-, for the posts of Ushers/Daftries and Book Binders, while the 5th PC report did not recommend a replacement pay scale for this post. The 5th PC only provided the replacement scale of ₹ 3200-4900/- for the old scale of ₹ 975-1660/-. The same is the request made in the letters dated 25.8.2005 (391), 4.3.1999 (411), 3.11.2003 (420), 28.2.2004 (421), 18.5.2004 (423), 11.1.2005 (428), 28.3.2005 (432), 25.8.2005 (438). The Ministry's response letter dated 13.10.2005 also sanctioned the new pay scale of ₹ 3000-5120/-, and thus clearly did not sanction normal replacement of pay scales in terms of the 5th PC report.

38. This concededly, was consistent with the High Court having notified the post of Usher as being a post to be filled only by

promotion (by order of the Chief Justice dated 1.10.2003, in which qualifications for appointment to the post of Usher was notified as being a minimum of 5 years' service in in any of the posts of Court Attendant, Room Attendant, Security Attendant, Safaiwala, Lawn Attendant, Library Attendant; as observed earlier, if one necessarily must have served for at least 5 years in one of these named posts, it is clear that a direct recruit candidate cannot possibly qualify for the post of Usher; the post is open to be filled only by promotion, after 1.10.2003.). The Court is of the opinion that having regard to the absolute right of the Chief Justice to control the establishment and employees of the High Court, under Article 229 of the Constitution, the decision to amend the Rules with effect from 01.10.2003 cannot be gone into. If any doubts about the feasibility of this existed, they were not voiced by the Central Government, which could have possibly indicated a different view, for good and valid reasons. This Court notes that the judgment of 4.11.2003 proceeded on an assumption- not entirely accurate- that all the requests for sanction sent by the Chief Justice to the Ministry of Law and Justice were for mere "normal replacement of pay scales" in line with the recommendations of the 5th PC. Having regard to the power of the Chief Justice under Article 229 of the Constitution, the change in hierarchy made subsequently through the amendment of 2003 has to be given due weightage in considering the issue of ACP benefits and the relevant pay scales applicable for the scheme.

39. It is the argument of the petitioners that the sanction of pay scale of ₹ 3000-5120/- is contrary to the intent of the ACP. This

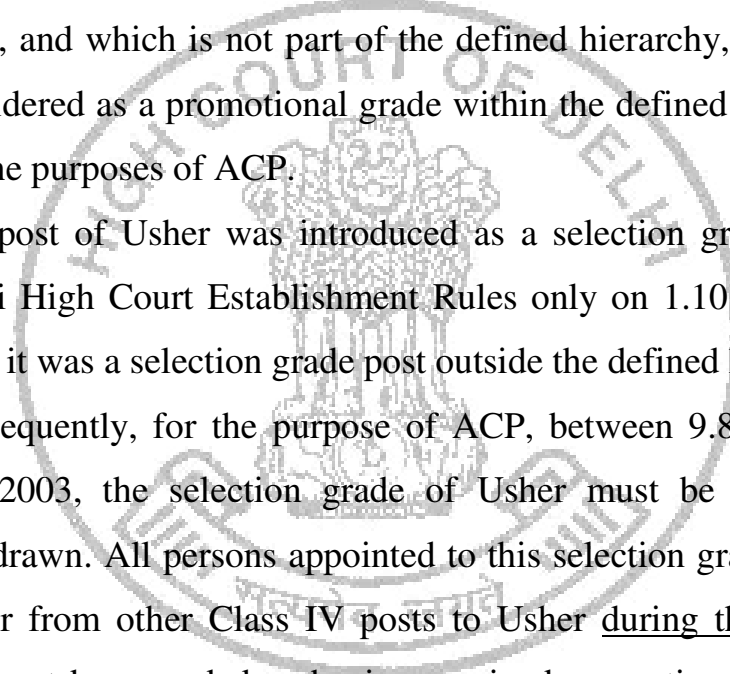
argument is premised on the assumption that the 5th PC merged two pay scales, thus rendering the scale of ₹ 3000-5120/- “non-existent”. The argument, though not advanced in this form in Court, appears to be relying on clarification 1 issued in O.M. No. F.No.35034/1/97-Estt(D)(Vol.IV) issued on 10.2.2000 which stipulates that when two pay scales are merged, then the ACP should result in financial upgradation to the pay scale immediately above the merged pay scale. Thus, it is argued that the existing hierarchy is the hierarchy as it exists at the time the employee becomes eligible for upgradation. Since the ACP scheme was introduced on 9.8.1999 by the Department of Personnel and Training by DoPTM No. 35034/1/97-Estt. (D) and the 5th PC recommendations were introduced w.e.f. 1.1.1996, the existing hierarchy of posts at that time was that under the 5th PC recommendations.

40. The Court has already dispelled this contention by holding that the hierarchies of posts and corresponding pay scales must be viewed differently prior to 1.10.2003 and post 1.10.2003. Prior to 1.10.2003, even though in practice, the post of Usher was treated as a selection grade as against the pay grades of Court Attendant, Room Attendant, Security Attendant etc., no qualifications had been stipulated in the Establishment Rules to expressly state this. Thus, for the period till 1.10.2003, the post of Usher must be considered a selection grade that is not a part of the defined hierarchy in Schedule II of the Establishment Rules. According to Clarification 2, (issued on 10.2.2000), this selection grade, for the purpose of the ACP scheme, must not be considered a promotional grade and must be treated as

withdrawn. Such being the case, in the hierarchy of posts as it existed when the ACP was introduced i.e. as of 09.8.1999, till the date of the Chief Justice's order of 1.10.2003, the post of Usher cannot be considered a promotional grade from the posts of Court Attendant, Lawn Attendant etc. After 1.10.2003, since the post of Usher was made a part of the existing, defined hierarchy in Schedule II of the Establishment Rules, even if only as a selection grade (since the only manner of appointment to the post of Usher is through promotion after satisfying the educational and experience requirements), the post of Usher must be considered as a promotional grade as against Court Attendant, Lawn Attendant, etc. The hierarchy of posts, pre and post the 2003 Amendment would be as follows:

Old scales prior to the ACP scheme	Replacement Scales	
	Appointment between 9.8.1999 to 1.10.2003	Appointment after 1.10.2003
	5500-9000	--
1350-2200	4500-7000	4500-7000
1000-1750	3200-4900	3000-5120
975-1660		3200-4900

41. From the above analysis, the following conclusions emerge:

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- (i) The ACP scheme must be implemented within the existing hierarchy of pay grades/pay scales, in keeping with the purpose of the Scheme i.e. to grant reprieve from stagnation due to lack of promotional posts, by way of financial upgradation.
 - (ii) The ACP scheme operates to grant two financial upgradations, i.e. to the two higher promotional grades, after 12 and 24 years in service respectively.
 - (iii) Any selection grade that is introduced in lieu of a higher pay scale, and which is not part of the defined hierarchy, cannot be considered as a promotional grade within the defined hierarchy, for the purposes of ACP.
 - (iv) The post of Usher was introduced as a selection grade in the Delhi High Court Establishment Rules only on 1.10.2003. Till then, it was a selection grade post outside the defined hierarchy.
 - (v) Consequently, for the purpose of ACP, between 9.8.1999 and 1.10.2003, the selection grade of Usher must be treated as withdrawn. All persons appointed to this selection grade, i.e. of Usher from other Class IV posts to Usher during this period, shall not be regarded as having received promotion grade pay for the purposes of the ACP. The ACP shall be granted for Class IV posts including Ushers first to the pay grade of ₹ 4500-7000/- and then to the next higher grade of ₹ 5500-9000/-.
 - (vi) After 1.10.2003, since the selection grade of Usher was introduced within the Delhi High Court Establishment Rules, as Ushers, the post of Usher is a promotional grade as against the feeder grade of the other Class IV posts. Thus, for all persons

appointed after 1.10.2003, ACP is granted to Class IV posts first to the promotional grade of Usher in the pay scale of ₹ 3000-5120/- and then the next higher pay grade of ₹ 4500-7000/-.

42. Accordingly, the writ petition is allowed in part; a direction is issued to the respondents to ensure that all employees who were allowed the selection grade (i.e. of Usher from other Class IV posts to Usher) during this period between 1999 and 01-10-2003 shall not be regarded as having received promotion grade pay for the purposes of the ACP. The ACP shall be granted for Class IV posts including Ushers first to the pay grade of ₹ 4500-7000/- and then to the next higher grade of ₹ 5500-9000/-. In respect of those granted the post of Usher after 1-10-2003, the first ACP shall be ₹3000-5120/- and the second ACP shall be in the grade of ₹ 4500-7000/-. The respondent Delhi High Court establishment is directed to issue necessary and consequential orders, to comply with the findings of the Court, within six weeks from today. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JULY 11, 2014