

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

+ **WRIT PETITION(CIVIL) No. 6210/2014**

% **Reserved on: 8th February, 2016**
Date of Decision: 19th May, 2016

PRATIBHA PRASHAR

...Petitioner

Through : Mr.J. M. Kalia, Advocate

Versus

UNION OF INDIA

...Respondents

Through : Mr.Rajesh Katyal, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.

1. The petitioner, Pratibha Prashar, assails by this writ petition the final judgment and order of the Principal Bench of the Central Administrative Tribunal (the Tribunal, for short) dated 13th August, 2013 whereby OA.No.1678/2007 filed by her has been dismissed.
2. This is the second round of litigation, as the petitioner had earlier succeeded before the Tribunal by the order dated 16th May, 2011 with the Tribunal directing that the petitioner was entitled to upgradation under the Assured Career Progression Scheme, 1998 ('ACP Scheme' for short). This order was set aside with an order of remand in Writ Petition (C) No.8284/2011 vide order dated 18th July, 2012. The High Court had observed that the order of the Tribunal dated 16th May,

2011 had not adequately addressed the issues raised and in particular the impact of paragraph 4.1 of O.M. dated 24th July, 1990, and also Annexure-1 thereof. The High Court had made reference to the answer to question No.35 of O.M. dated 18th July, 2001.

3. In short, the issue and dispute pertains to grant of second financial upgradation under the ACP Scheme. The petitioner claims that she is entitled to second financial upgradation under the ACP Scheme as her appointment as Library and Information Officer cannot be counted as promotion. She pleads that her appointment to the said post was on account of the restructuring exercise carried out in terms of the recommendation of the 4th Pay Commission read with the OM dated 24th July, 1990. Respondents plead to the contrary and have contested the claim on several grounds.
4. The impugned order accepts the contention of the respondents. As a limited issue arises for consideration, we would only refer to the relevant facts and exclude others.
5. The petitioner had joined the National Museum under the Ministry of Culture on 30th December, 1977 as an Assistant Librarian in the pay scale of Rs.1400 – 2300 (pre revised)/ Rs.5000 – 8000 (revised pursuant to the recommendation of 5th Pay Commission). The post of the Assistant Librarian was a group ‘C’ non-gazetted and non-ministerial post. On 19th November, 1987, the next promotional post in the hierarchy of Senior Librarian fell vacant and the petitioner was asked to officiate on the said post and was eventually promoted. The post of Senior Librarian was in the scale of Rs.2000 - 3500 (pre-

revised)/ Rs 6500 – 10500 (revised on the recommendations of the 5th Pay Commission). This was a group ‘B’ non-gazetted, and non-ministerial post. To this extent there is no dispute or debate. The facts are accepted.

6. The 4th Central Pay Commission in para 11.63 of their report had recommended constitution of a Committee to undertake review of the pay scales, qualifications and recruitment of the library staff. Consequent thereto, a Review Committee was set up by the Department of Culture in September, 1987. The Review Committee submitted their report in 1990. Upon consideration, the government issued the office memorandum No.F No.19(1)IC/86 dated 24th July, 1990 which is of considerable importance and relevance and we would like to reproduce portions of the same for convenience and ready reference:-

“2.1 of OM dated 24.7.90(sic.) after careful consideration of the recommendations made by this committee and also keeping in view the overall policy, the Govt. have decided to introduce following pay structure for Library Staff.

Directory of Govt. Libraries and Pay Scales

Sl. No.	Designation	Existing Pay Scale	Revised Pay Scale	Remarks
1	Junior Library Attendant	750-940	750-940	Direct Entry Middle Pass
2	Library Attendant	775-1025	775-1025	Promotional Grade
3	Sr. Library Attendant	800-1150	800-1150	Promotional Grade
4	Library Clerk	825-1200		Direct Entry

		950-1400 950-1500 975-154 975-1660	950-1500	Matriculation
5	Library & Information Assistant	1200-2040 1320-2040 1350-2200 1400-2300 1400-2600	1400-2600	Direct Entry Graduate with Bachelor in Lib. Science / Promotional Grade for Library Clerk
6	Sr. Library & Information Assistant	1640-2900 1600-2660	1640-2900	Direct Entry Post Graduate with Bachelor in Lib. Science/ Promotional Grade for Library Information Asstt.
7	Assistant Library and Information Officer	2000-3200 2000-3500 2200-4000	2000-3500	Promotional / Direct Recruitment
8	Library & Information Officer	3000-4500	3000-4500	-do-
9	Sr. Library & Information Officer	3700-5000	3700-5000	-do-
10	Principal Library & Information Officer/ Director	4500-5700	4500-5700	-do-
11			5900-6700	-do-
			7300-7600	-do-

2.2 The recruitment qualifications both for the direct recruits and promotees for each grade of the Library Staff are indicated in Annexure-I. All the Ministries and Departments are advised to modify the rules of recruitment for various posts obtaining the Library under their control on these lines. It is not necessary that each Library will have all the grades, a Library may have one or more of these grades.

3. Placement of Existing Library Staff in the Revised Grades.

3.1 The employees in the scales of pay indicated in column 3 of table under para 2.1 may be placed in the revised scales shown there against in Col. 4 provided the incumbent fulfils the recruitment qualifications as indicated in Annexure-I to this OM. In case existing incumbent does not fulfill the qualifications as laid down in Annexure-I, he will continue in the existing scale of pay on personal basis. However, as and when the post falls vacant, it will be filled upon on the appropriate scale in accordance with the rules of recruitment.

3.2 xxxxx

3.3 xxxxx

4. Categories of the Libraries

4.1 After placement of the existing incumbent in the grade structure indicated in para 2 above, each administrative Ministry of may initiate action to categorize the Libraries under their control in consultation with F.A. concerned based on the parameters indicated in Annexure-II to this OM. Based on the categorization of the Libraries so determined the designation and scale of pay of the Librarian Incharge of each category of Library may be adopted on the lines indicated below:

Category	Post with Designation	Pay Scale (Rs.)
I	Library & Information Assistant	1400 – 2600
II	Asstt. Library & Information Officer	2000 - 3500
III	Library & Information Officer	3000 – 4500

IV	Director (Library & Information)	4500 – 5700
V	Director	5900 – 6700

4.2 In case the existing incumbent viz. Librarian Incharge is in a lower scale of pay than the scale determined based on the categorization, he may be considered for appointment in the higher scale provided he fulfills the recruitment qualifications laid down for the post in Annexure I to this OM subject to the provisions of para 4.3.

4.3 Where based on categorization the post of the head of a Library gets upgraded by more than one grade, the post will be upgraded only by one step initially. Its upgradation to the appropriate higher grade may be review after three years in consultation with Ministry of Finance.

5 to 8 xxxxx

ANNEXURE – I

<i>Sl. No.</i>	<i>Designation</i>	<i>Pay Scale</i>	<i>Direct</i>	<i>Promotion</i>
1	Junior Library Attendant	750-940	Middle Pass	
2	Library Attendant	775-1025		Promotional Gr. For Jr. Lib. Atttd.
3	Sr. Library Attendant	800-1150		Promotional Gr. For Lib. Atttd.
4	Library Clerk	950-1500	Matriculation	
5	Library & Information Assistant	1400-2600	B.A./B.Sc./ B.Com Bachelor of Library Science	Promotional Gr. + For Lib. Clerks.
6	Sr. Library & Information Assistant	1640-2900	M.A./M.Sc./ M.Com + B. Lib. Science	Promotional Gr. For Library and Information Asstt.

7	Assistant Library & Information Officer	2000-3500	M.A./M.Sc./M.Com + B. Lib. Science with 3 years experience	
8	Library & Information Officer	3000-4500	M.A./M.Sc./M.Com + B. Lib. Science with 7 years experience	
9	Sr. Library & Information Officer	3700-5000	M.A./M.Sc./M.Com + B. Lib. Science with 10 years of experience	
10	Principal Library & Information Officer/Director	4500-5700	M.A./M.Sc./M.Com + M. Lib. Science with 12 years of experience	
11		5900-6700	M.A./M.Sc./M.Com + M. Lib. Science with 15 years of experience	
		7300-7600	Eminent Library / Scholar Ph. D/M, Lib. Science & Research Work, Publication, 20 years of experience	

”

7. The Government by the said OM introduced and suggested a hierarchy of posts and a pay structure for the library staff. The lowest and highest posts in the hierarchy were that of Junior Library Attendant and the Principal Library and Information Officer / Director. Minimum educational qualifications, experience required, pay scales in the hierarchy of posts (existing and revised) and whether

recruitment/appointment to a post would be by way of direct entry or promotion were stipulated.

8. The OM required each library to be graded between category I to V and dependent on the grading had suggested the designation and pay scale of the library in-charge to be adopted. As per Paragraph 4.2 in case the existing incumbent incharge of the library was in a lower scale than the scale determined on the basis of the categorization, he was to be considered for appointment to the higher scale provided he fulfilled the recruitment qualifications stated in Annexure-1. Paragraph 4.3 had stipulated that in case the post of library incharge i.e. the head of the library was to be upgraded by more than one grade the post would be upgraded by only one step initially. The next upgradation would be reviewed after three years in consultation with the Ministry of Finance.
9. By letter dated 7th August, 1997, the Department of Culture conveyed their approval for categorization of National Museum Library as a category III library. In terms of paragraph 4.1, Library and Information Officer, a post in the scale of Rs.3000-4500 was to be the in-charge or head of the National Museum Library.
10. The petitioner was then the incharge or head of the National Museum Library. She was at that time the Assistant Library and Information Officer in the pay scale of Rs.2000 – 3500/-. In terms of paragraph 4.2 of the O.M., she was entitled to be considered for appointment as Library and Information Officer in the scale of Rs.3000 – 4500/- provided she had qualifications specified for the said post as mentioned in Annexure-1. The petitioner fulfilled the said

qualifications to be appointed to the post of Library and Information Officer in the scale of Rs.3000 – 4500/-.

11. Upon consideration, the respondents had issued two office orders dated 13th August, 1997 and 14th August, 1997. The office order dated 13th August, 1997, reads:-

“New Delhi, the 13-08-97

OFFICE ORDER

In pursuance of the approval conveyed by the department of Culture, vide their letter No.F-13-42/95-CH.I/N.1 dated 07-08-97. The National Museum Library is hereby categorized as a Category III Library, headed by the Library & Information Officer in the scale of pay of Rs.3000-100-350-125-4500, in accordance with the instructions contained in para 4.1 of the Ministry of Finance (Department of Expenditure) O.H. No.19(1)/IC/86, dated 24-07-90.

This order will be effective retrospective from 17th May, 1996, for all purpose.

(S.S. Biswas)
Director General”

The second office order dated 14th August, 1997 is of some significance and reads:

“Accordingly, the incumbents of the National Museum Library are hereby placed in the received grade structure with effect from 17th May, 1996 (except SL No.2) as under:

Sl. No.	Name	Designation	Pay	Remarks
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			Scale	
1	Ms.Pratibha Parashar	Library & Information Officer	3000-4500	
2	Ms.Rima Mara	Library & Information Assistant	1400-2600	Effective from 08.07.96 the date of her joining service
3	Sh. Bhola Dutt	Senior Library Attendant	800-1150	Personal pay scale as per Ministry of Finance O.M. No.13(2)/IC/92 dated 07.04.95
4	Sh. Bhagwan Ji Choube	Senior Library Attendant	800-1500	-- Do --

12. By office order dated 13th August, 1997 it was ordered that National Museum having been categorized as a Category III Library, would be headed by the Library and Information Officer in the scale of Rs.3000-4500. This order was effective from 17th May, 1996. The second order dated 14th August, 1997 appointed the petitioner in the grade of Library and Information Officer with effect from 17th May, 1996 and records the pay scale of three other officers in the National Museum Library. The petitioner relies on these office orders, the language used and the hierarchy of posts in the National Museum Library of Senior Library Attendant, Library and Information Assistant and the in charge- Library and Information Officer. No doubt this Office Memorandum refers to the three step hierarchial structure in the cadre but this would be the position on the date when

the petitioner was appointed to the post of Library and Information Officer. This would not in our opinion be the sole guiding factor that would determine whether or not the petitioner was granted a promotion or the post held was merely upgraded when the petitioner was appointed as Library and Information Officer. For this we would have to examine the upward movement and promotions granted to the petitioner from the date she had joined the service and the effect of the said appointment in terms of the OM dated 24th July, 1990, the relevant clauses of the ACP Scheme and the difference between promotion / upgradation and upgradation pursuant to reorganization. Noticably, Office Order adated 13th Aug.,1997 created the post of Library and Information Officer with effect from 17th May,1996 and by the order dated 14th Aug.,1997 the petitioner was ordered to be placed in the said grade with effect from 17th May,1996.

13. On the basis of the recommendation of the 5th Pay Commission, the Government of India introduced and applied the ACP Scheme with effect from 9th August, 1999. The opening paragraph of the said scheme states that the objective was to grant a 'Safety Net' to Central Government civilian employees to deal with the problem of genuine stagnation and hardship due to lack of adequate promotional avenues. The scheme envisaged grant of two financial upgradations to group B, C and D employees on completion of 12 and 24 years of regular service respectively, on fulfilling requisite qualifications for grant of promotion, which they were denied due to stagnation in their cadre. The financial upgradation allowed under the scheme, was purely personal to the employees and did not have any relevance to the

seniority position. Paragraphs 5.1 and 5.2 of the conditions for grant of benefits under the ACP Scheme read:-

“5.1 Two financial upgradations under the ACP Scheme in the entire Government service career of an employee shall be counted against regular promotions (including in-situ promotion and fast-track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial upgradation only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him;

5.2 Residency periods (regular service) for grant of benefits under the ACP Scheme shall be counted from the grade in which an employee was appointed as a direct recruit.”

14. The ACP scheme thus was for grant of financial upgradation on completion of 12 / 24 years of regular service in the promotional hierarchy of a particular cadre. Financial benefit under the scheme was to be granted from the date of completion of eligibility period prescribed or the date of issue of instructions (i.e. 9th August, 1999), whichever was later. Only two financial upgradations were to be given in the entire career of the government servant, provided he had not secured regular promotions, including fast track promotions availed through limited departmental competitive examinations from the date when the employee was appointed as a direct recruit. Thus where an employee had secured two promotions on regular terms, he would not get any benefit of the financial upgradation under the ACP

scheme. Regular service is to be counted from the grade in which the employee was appointed as a direct recruit.

15. The ACP scheme explained and dealt with cases where employees were granted regular promotions in certain/peculiar situations like existing time-bound promotion scheme, in-situ promotion etc. Paragraph 13 of the Scheme specifically stipulated that the existing time bound schemes indicating *in situ* promotion Schemes in various ministries and departments could continue for the category of employees, but these cannot run concurrently with the ACP Scheme. An option was given to the concerned Ministry /Department to choose between the ACP scheme or the other scheme. However, in case of switching over from the existing time bound promotion Scheme to the ACP scheme, the stipulations for promotion, re-distribution of posts, upgradation, higher functional duties etc. under the former scheme, would cease to operate and provisions of the ACP Scheme had to be adopted in totality.
16. Explaining the ACP scheme and to clear ambiguity and doubts, the Union of India had issued several clarifications, including Office Memorandum No.35034/1/97/Estt.(D)(Vol.IV) dated 18th July, 2001. The relevant portions read as under:

“

35	Whether placement / appointment in higher scales of pay based on the recommendations of the pay commissions or	Where all the posts are placed in a higher scale of pay, with or without a change in the designation; without requirement of any new qualification for holding the post in the higher grade, not specified in the recruitment rules for the existing post, and without involving any
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	Committees set up to rationalize the cadres is to be reckoned as promotion / financial upgradation and offset against the two financial upgradation applicable under the ACP Scheme?	change in responsibilities and duties, then placement of all the incumbents against such upgraded posts is not be treated as promotion / upgradation. Where, however, regularization / restructuring involves creation of a number of new hierarchical grades in the rationalized set up and some of the incumbents in the pre-rationalised set up placed in the hierarchy of the restructured set up in a grade higher than the normal corresponding level taking into consideration their length of service in existing pre-structured / pre-rationalised grade, then this will be taken as promotion / upgradation. If the rationalized / restructured grades required possession of a specific nature of qualification and experience, not specified for the existing posts in pre-rationalised set up, and existing Incumbents in pre-rationalised scales/ pre-structured grades, who are in possession of the required qualification / experience are placed directly in the rationalized upgraded post, such placement will also not be viewed as promotion / upgradation. However, if existing incumbents in the pre-rationalised grades who do not possess the said qualification / experience are considered for placement in the corresponding rationalized grade only after completion of specified length of service in the existing grade, then such a placement will be taken as promotion / upgradation. Where placement in a higher grade involves assumption of higher responsibilities and duties then such
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		upgradation will be viewed as promotion / upgradation. Where only a part of the posts are placed in a higher scale and rest are retained in the existing grade, thereby involving redistribution of posts, then it involves creation of another grade in the hierarchy requiring framing of separate recruitment rules for the upgraded Posts. Placement of existing incumbents to the extent of upgradations involved, in the upgraded post will also be treated as promotion / upgradation and offset against entitlements under the ACPS. For any doubts in this regard, matter should be referred to the Department of Personnel and Training (Establishment 'D' Section) giving all relevant details.
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17. The aforesaid clarification and answers are concerning and differentiate between promotion and financial upgradation and mere re-designation of posts which could result in grant of a higher pay scale but would not be counted and treated as promotion. Rationalization / re-structuring of cadre could involve creation of new hierarchical grades in the rationalized set up. Grant of higher pay-scale without reference to any new qualification, change in responsibilities and duties etc. was not to be treated as promotion or financial upgradation. Albeit, where the existing employees were placed in the new hierarchical structure by stepping up of the grade higher than the normal corresponding level taking into consideration their length of service etc., such placement was to be taken as promotion or financial upgradation. Paragraph 2 of the answer dealt with cases where on

rationalization / restructuring of grades, specific qualifications and experience not earlier specified were stipulated and where the existing incumbent possessed the required qualification in the pre rationalized scales / pre structured grades, and were therefore directly placed in the upgraded post. Such placement it was opined, would not be viewed as promotion or financial upgradation. Where the existing incumbents did not possess the said qualification / experience and were to be considered for placement for the corresponding rationalized grades only after completion of specified length of service, then such placement was to be considered promotion or financial upgradation. This portion of the answer is heavily relied upon by the petitioner. We would examine this contention below. Placement in the higher grade involving assumption of higher responsibilities and duties was viewed as promotion / financial upgradation. Further, where only a part of the posts had been placed in the higher scale and the rest were detained in the existing grade thereby re-distributing the posts or the restructuring involved creation of another grade in the hierarchy, requiring framing of separate recruitment rules, placement of existing incumbent to the extent of upgradation was to be treated as promotion to be offset against entitlements under the ACP Scheme. The last paragraph is equally important for it states that where doubts exist the matter may be referred to the Department of Personnel and Training for relevant details. The reason was obvious for the difference between the change of designation pursuant to rationalization and restructuring of cadres and promotion or financial upgradation can sometimes be tricky and the dividing line can be rather bleak. Equally the differentiation

between the two would depend upon the factual matrix. It is situation specific and a holistic and pragmatic view is essential. Broad parameters to differentiate the two have been laid out in several cases. As such questions cannot be decided in vacuum, but with reference to the given facts. We would, however, like to refer to some decisions explaining the term 'promotion' for greater clarity and better appreciation.

18. The impugned order passed by the tribunal, refers to the decision of the Supreme Court in ***Director General, Rice Research Institute, Cuttack & Anr. Vs. Khetra Mohan Das***, AIR 1995 SC 122, wherein it has been held that 'promotion' as understood, means appointment of any person to any cadre, category of grade of service or class of service to a higher category of service grade or such service or class. Referring to ***C.C. Padmanabhan Vs. Director of Public Instructions***, 1980 Supp SCC 668, it was observed that the word "promotion" in ordinary parlance, as a term would mean appointment of a person already holding a position to another post in the higher category in the same service or a new post which carries higher grade in the same service or class. Similarly, the tribunal has referred to ***State of Rajasthan Vs. Fatehchand Soni***, (1996) 1 SCC 562, in which it has been observed:

“In the literal sense the word “promote” means “to advance to a higher position, grade, or honour”. So also “promotion” means “advancement or preferment in honour, dignity, rank or grade”. (See: Webster’s Comprehensive Dictionary, International Edn., 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”.

(Emphasis supplied).

On the question of what is meant by the term 'stagnation' the impugned decision refers to the said concept and explains:

“i) a state of inactivity (in business or art etc); “economic growth of less than 1% per year is considered to be economic stagnation”

ii) “inactivity of liquids; being stagnant; standing still, without current or circulation”.”

19. Equally pertinent is the decision of the Supreme Court in ***Bishan Sarup Gupta Etc. Vs. Union of India***, (1973) 3 SCC 1 wherein it has been held that the effect of upgradation of posts is to make an incumbent occupy the upgraded post with all logical benefits flowing therefrom and the same can be treated as promotion to the post. This decision was referred to in ***Uday Pratap Singh & Ors. Vs. State of Bihar & Ors.***, 1994 (Suppl. 3) SCC 451 and it was held:

“By a catena of decisions of this Court, it is now well-settled that by an executive order the statutory rules cannot be whittled down nor can any retrospective effect be given to such executive order so as to destroy any right which become crystallized. In this connection, it is profitable to refer a decision of this Court in *T.R. Kapur & Ors. v. State of Haryana & Ors*, A.I.R. (1987) S.C. 415, wherein It is held that rules framed under Article 309 of the Constitution cannot affect or impair vested rights, unless it is specifically so provided in the concerned statutory rules. It is obvious that an executive direction stands even on a much weaker footing. It is true, as laid down in *Bishan Sarup Gupta etc. etc v. Union of India & Ors. etc. etc.*, [1973] 3 S.C.C. 1, that effect of upgradation of a post is to mate the incumbent occupy the upgraded post with all logical benefits flowing therefrom and can be treated as promoted to the post. Still it cannot

be gainsaid that no retrospective effect could be given to any merger of erstwhile lower branch into higher branch in the cadre so as to effect the vested rights of incumbents already occupying posts in the erstwhile higher branch of the cadre. In the present case it has to be kept in view that the contesting respondents were directly recruited and appointed in the Senior Branch on 12.5.1974 and 25.5.1974 respectively, while the appellants were appointed on 2.11.1975 in the merged cadre. It is true their order of appointment purports to give them appointment retrospectively from 1.4.1974 but such effect cannot be given so as to destroy the seniority rights of the writ petitioners, respondents herein, who were inducted as direct recruits in the Senior Branch prior to 2.11.1975.”

In this case the dispute before the Supreme Court related to merger of two branches, namely junior branch and senior branch in the Bihar Finance Service.

20. In ***BSNL Vs. R. Santhakumari Velusami***, (2011) 9 SCC 510, the Supreme Court examined whether the rules of reservation were applicable for promotion to grade –IV under the Biennial Cadre Review Scheme introduced by the Department of Telecommunication, Government of India, with a view to remove stagnation in certain categories of employees. After comprehensively examining several earlier decisions, it was held :

“29. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge :

- (i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both - that is advancement to a higher position and advancement to

a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.”

21. The decision of ***R. Santhakumari Velusami*** (*supra*) was referred to in ***B. Thirumal Vs. Ananda Sivakumar***, (2014) 16 SCC 593, which dealt with a service matter not relating to ACP Scheme, but whether diploma holder junior engineers on acquiring a degree or equivalent qualification and on being designated as Assistant Engineer (Electrical) could be treated as recruited by transfer within the meaning of the State Engineer Service Rules. The contention that this appointment would be promotion was rejected, observing that upgradation was synonymous with re-designation and simply confers financial benefits by raising the scales of pay of the post without there being any movement to a lower position or higher position. The candidate continues to hold the same post without a change in duties or responsibilities. Further, it should be available to anyone, who satisfies the eligibility condition without indicating any process of selection. There should not be any element of selection.
22. We have referred to and quoted relevant portions of OM dated 18th July, 2001 and the answer to question No.35 and with reference to the

first sentence of paragraph 2 observed that this aspect would be discussed subsequently. We would at this stage revert to question No.35 and reiterate that the long answer does try to capture general propositions or precepts but the answer cannot be treated as a universal affirmative or negative statement, which would apply across the board in all situations. A broad brush approach predicated on the answer without reference to a given factual matrix, would lead to incongruous results and difficulties. The answer which refers to several nuances supports the said opinion. What must be kept in mind are the principles of law relating to promotion and financial upgradation, as contrasted from cases of mere upgradation of the post or pay-scale already held that entails payment of a higher salary. In the later case there is no promotion, but an anomaly or discrepancy is corrected whether it is by giving a higher / new designation to the said post or by restructuring or rationalizing the cadre. The second sentence in the first paragraph of answer to question no.35 illustratively states that when the raionalization/ restructuring involved creation of a number of new hierarchical grades and a grade higher than the normal corresponding level was given taking into account the length of service etc. then it would be taken as promotion or financial upgradation. Similarly, the second sentence in paragraph 4 of the answer states that placement of an existing incumbent to the extent of upgradation involved in the upgraded post would be treated as promotion / financial upgradation and would be offset against the entitlement under the ACP Scheme. The first sentence of the same paragraph reflects that where only a part of the posts were given a

higher scale and the rest were retained in the existing scale, it would be treated as upgradation of posts, and promotion as such. The first part of paragraph 4 would only be applicable when there was re-distribution or redrawing of posts i.e. for reasons some posts were upgraded. It should not be re-designation of some posts, which simply confers financial benefits. Creation of a promotional post in the hierarchy or requirement to frame separate recruitment Rules for the upgraded posts have different consequences. The same line of reasoning is palpable and preceptable in the first part of paragraph 1 of the answer. What the petitioner relies upon is the part of the answer given in paragraph 2. This as noted above should not be read in isolation but has to be construed in the factual matrix of each case. A pragmatic and practical approach is required. This part of the answer refers to rationalization or restructuring of grades which requires possession of a specific nature of qualifications or experience which was not specified for the existing post in the pre-rationalized set up. This is the pre-condition for invoking the first part of paragraph 2. In such situations where the existing incumbents in “pre-rationalized” scales or pre-structured grades was directly given and placed in rationalized upgraded posts as they were in possession of required qualifications/ experience, such placement were not viewed as promotion/ financial upgradation but only upgradation of posts already held. The first pre-condition and the second condition are linked and connected. When we examine the said answer in the light of the O.M. dated 24th July, 1990 and the hierarchy and grade created, we would notice that the petitioner was in the grade of Assistant Library and

Information Officer till letter dated 14th August, 1997 when she was appointed to the post of Library and Information Officer. The educational requirements stipulated therein were identical i.e. M.A./M.Sc./M.Com. plus B.Lib. Science. However, there was difference in quantum of experience. For the lower post of Assistant Library and Information Officer three years experience was required, whereas for the higher post of Library and Information Officer seven years experience was mandated. The difference or similarity between the educational and experience requirement for the pre-1997 period is not on record. The post of Assistant Library and Information Officer carried the pay scale of Rs.2000-3500/- and that of Library and Information Officer carried the pay scale of Rs.3000 – 4500. Pertinently, the letter dated 14th August, 1997 appointing the petitioner as Library and Information Officer was in terms of paragraphs 4.1 and 4.2 of the OM dated 24th July, 1990. Paragraph 4.2 specifically stipulates that the Library Incharge if in the lower grade, could be considered for appointment in the next higher scale based upon categorization of the library, provided she fulfilled the recruitment qualifications. The words used in paragraph 4.2 were “considered for appointment”, provided she / he fulfilled the required qualification. It is not a case of direct placement. We also accept the contention that the aforesaid exercise undertaken in the present case in terms of O.M. dated 24th July, 1990 and consequent appointment of the petitioner to the post of Library and Information Officer would be by way of and have the effect of promotion on the basis of the legal position expounded in different decisions quoted above. Paragraphs 4.1 and

4.2 are not to be read in isolation but along with paragraph 2.1 and Annexure-I, including the promotional avenues in the hierarchy. The said paragraphs and the OM deal with initial appointment from existing incumbents who were positioned as Librarian-in-Charge, and appointments to be made in future. The appointment of the petitioner as the Library and Information Officer was not a result of mere rationalization, resulting in the petitioner being granted a higher grade or the nomenclature of the post itself undergoing a change. To repeat, the grade of Rs.2000 – 3500 for the post of Assistant Library and Information Officer and Rs.3000 – 4500 for the post of Library and Information Officer were two separate grades / posts in the hierarchy and there was no merger or rationalization of grades. The post Library and Information Officer as the Librarian-in-Charge was created pursuant to categorization of the Library, as per para 4.1 of the O.M. dated 24th July, 1990. Thus a new post was created and the petitioner was appointed to the said post upon consideration as she fulfilled the recruitment qualification.

23. Our attention was drawn to decision of the Tribunal in the case of *Hari Om Sharma* dated 29th May, 2008 passed in OA.432/2005. This decision in turn refers to another decision by the Chandigarh Bench of the Tribunal. We decline and do not accept the reasoning given by the Tribunal in the said decisions. Indeed the said ratio or reasoning was not elucidated and accepted by the High Court in their order dated 7th January, 2008 in Writ Petition (Civil) No.7881/2008, and the writ petition filed by the Union of India was dismissed altogether on a different ground. Hari Om P. Sharma was placed in the pay scale of

Rs.1640 – 2000 w.e.f. 6th October, 1993 in terms of office memorandum dated 24th July, 1990. He was library incharge of a Category II library. In terms of paragraph 4.3 of Office Memorandum dated 24th July, 1990, he was entitled to review of further upgradation after three years. Accordingly, the second upgradation should have been granted w.e.f. 7th October, 1996, whereas the review was carried out and granted in March, 2000. Thus, the decision of the High Court was based entirely on interpretation of paragraph 4.3 of the O.M. No.24th July, 1990. The High Court did not examine nor go into the question of ACP Scheme, whether it was a case of promotion or mere re-designation. Paragraph 4.3 stipulates that where the post of head of the library gets upgraded by more than two upgradations, the upgradation would be restricted to one step initially, and upgradation to the appropriate higher grade would be reviewed after three years in consultation with the Ministry of Finance. The said decision is, therefore, not of any relevance and inapplicable to the facts of the present case. Similarly, the decision of Delhi High Court in *Union of India Vs. Bansi Dhar*, (2012) 189 DLT 484 (DB) would not be of any assistance to the petitioner. In this case, reference was to the fact that the respondent therein was a mazdoor (labourer), who was re-designated as Motor pump attendant. Hence, there was no promotion. Finding in our case is to the contrary.

24. The petitioner has also relied upon judgment in the case of *Union of India Vs. V. K. Sirothia*, (2008) 9 SCC 283, wherein the appeal filed by the Union of India was dismissed on facts as it was a case of upgradation on account of re-structuring of the cadre, and, therefore,

the question of reservation did not arise. Decision of the Supreme Court in *Municipal Corporation of Delhi Vs. Gurnam Kaur*, AIR 1989 SC 38, explains when a decision should be regarded as sub-silentio. This decision has no relevance to the facts of the present case. The decisions in *M/s.Kesho Ram and Company & Ors. Vs. Union of India & Ors.*, 1989 (3) SCC 151 and *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. & Ors.*, AIR 2003 SC 511 also have no relevance in the factual matrix of the present case.

25. In view of aforesaid discussions, we do not find any merit in the present writ petition and the same is accordingly, dismissed. No order as to costs.

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(SANJIV KHANNA)
JUDGE

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(NAJMI WAZIRI)
JUDGE

May 19, 2016

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