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

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W.P.(C) 2953/2015

Reserved on: 23rd February, 2016

Date of decision: 2nd June, 2016

DR. G.S. TIWARI

..... Petitioner

Through Mr. Padma Kumar, S., Advocate.

Versus

UNION OF INDIA AND ORS.

.... Respondent

Through: Mr. Rakesh Kumar, CGSC
with for UOI.

W.P.(C) 2954/2015

J.S. JOSHI

..... Petitioner

Through Mr. Padma Kumar, S., Advocate.

Versus

UNION OF INDIA AND ORS.

.... Respondent

Through: Mr. Rakesh Kumar, CGSC with
for UOI.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.:

This common order and judgment would dispose of the
aforestated writ petitions filed by Dr. G.S. Tiwari and Mr. J.S. Joshi. The
two petitioners impugn the common order dated 3rd July, 2014 passed in

OA No. 2820/2012, filed by Dr. G.S. Tiwari and OA No.2822/2012, filed by Mr. J.S. Joshi. The impugned order had also disposed of the OA filed by one Mr. Gautam Ray. However, it appears that Mr. Gautam Ray has not challenged or filed any writ petition before this Court.

2. The petitioners claim and have prayed that they should be granted the grade of Principal Director, as Dr. G.S. Tiwari had become eligible and was due for promotion as Principal Director on 1st September, 2007 as per the 2007-08 select list published on 27th May, 2011. Similarly, Mr.J.S. Joshi had become eligible and due for promotion as the Principal Director on 1st September, 2008 as per the select list for the year 2008-09 published on 27th May, 2011. Dr. G.S. Tiwari and Mr. J.S. Joshi had retired from service on 30th June, 2008 and 30th September, 2008, respectively. The claim of the petitioners is that they are entitled to back wages and re-fixation of pension and the principle of “no work-no pay” should not be applied. Reliance is placed on the decision of the Supreme Court in *Union of India & Ors. Vs. K.V. Jankiraman and Ors* (1991) 4 SCC 109.

3. In order to appreciate the controversy, we would separately notice the factual matrix in the two cases.

G.S. Tiwari

4. Dr. G.S. Tiwari was appointed in the grade of Assistant Civilian Staff Officer, re-designated as Section Officer, in the Armed Forces Headquarters Civil Service on 1st May, 1973. In August, 1977, he was promoted to the post of Civilian Staff Officer, re-designated as Deputy Director. In November, 1982, Dr. G.S.Tiwari was promoted to the post of Senior Civilian Staff Officer, re-designated as Joint Director. In September, 1988, Dr. G.S.Tiwari was promoted to the post of Director.

J.S. Joshi

5. Mr J.S. Joshi had joined the Armed Forces Headquarters Civil Service in the grade of Assistant Civilian Staff Officer on 1st May, 1974. This post has been re-designated as Section Officer. In September, 1979, he was promoted to the grade of Civilian Staff Officer, re-designated as Deputy Director. In July, 1984, he was promoted to the grade of Senior Civilian Staff Officer, re-designated as Joint Director and in August, 1994, he was promoted to the post of Director.

6. The contention of the petitioners is that there were inter se seniority disputes between the direct appointees and those appointed on promotion to the post of Assistant Civilian Staff Officer. Our attention is drawn to order dated 20th November, 1992 passed by the Principal Bench of the Central Administrative Tribunal, New Delhi in TA No.356/1985 and the subsequent decision of the Supreme Court in the second round of

litigation dated 19th February, 2008 reported as *AFHQ/ISOs SOs (DP) Association and Ors. Vs. Union of India and Ors.*, (2008) 3 SCC 331. The contention is that the *inter se* seniority disputes had remained pending for more than two decades and as a result, the two petitioners had suffered. They had initially succeeded in the litigation in terms of the order passed by the Tribunal on 20th November, 1992, which was subsequently affirmed by the Supreme Court in their decision dated 19th February, 2008. The Supreme Court had directed that the seniority list must be drawn strictly in compliance with and as per the spirit of the judgment of the Tribunal dated 20th November, 1992 and the directions contained in the said decision shall be carried out within three months from 19th February, 2008. The petitioners assert and plead that they would be entitled to the benefit of the said long fought litigation. Specific reliance was placed on paragraph (g) of the order of the Tribunal dated 20th November, 1992, which for the sake of convenience is reproduced below:-

“(g) None of the parties including the official respondents have given relevant data as to when the actual promotion of Assistants were made to the temporary cadre of ACSOs in the direct recruit quota under Note (2) of Schedule 3. The official respondents on the other hand have taken the stand in the chart quoted in the body of the judgment that none of such vacancies in the direct recruit quota were left unfilled and have been filled temporarily by the Assistants by making departmental promotions and since the exact number is not coming forth (*sic*) and also the

position whether such departmental promotees were absorbed in the subsequent vacancies within their quota of 75%, a direction is issued to revise the impugned seniority list in the light of the observations made in the above sub-paras which shall be made final after hearing the objections on the same and the petitioners, who have since retire, shall be entitled to any consequential benefits occasioned on account of the revision of the seniority list. The impugned seniority list of 1977 shall stand quashed to that extent. In the circumstances, the parties shall bear their own costs.”

7. We have considered the said contention but do not find any merit in the same. Paragraph (g) quoted above from the order of the Tribunal dated 20th November, 1992 is being read and understood out of context.

8. One Mr. M.C. Bansal and two other promotees to the post of Assistant Civilian Staff Officers (ACSOS for short) had filed W.P.(C) No.3 of 1978 in the Delhi High Court alleging that direct recruits freshly inducted in service were wrongly placed above the departmental promotees without paying regard to the continuous service rendered in the grade. The allegation was that the respondent- authorities had misapplied and misinterpreted the rota and quota Rule 16(7) as well as the third schedule, in particular Note (2), of the Armed Forces Headquarters Civil Services Rules, 1968 (Rules, for short). The said writ petition was transferred to the Central Administrative Tribunal and registered as TA No.356/1985. The prayer in the transfer petition was

rejected holding that the quota prescribed in the Rules had not broken down and the seniority between the direct recruits and promotees regularly appointed/promoted within their respective quota should be determined by the length of continuous officiation in the grade of ACSOs. This order of the Tribunal was challenged by the Union of India before the Supreme Court. The order of the Tribunal was set aside with a direction for fresh adjudication. In the meanwhile, the three petitioners retired and the question remained of academic interest. The three petitioners had also been promoted to the grade of CSO soon after filing of the petition. However, as some intervener promotees had joined, to settle the controversy, the Tribunal in the order dated 20th November, 1992 had issued the following directions including the direction in paragraph (g):-

“(a) It is held that Rule 16(7) and Schedule III so far as it relates to appointment of the promotees and direct recruits in their respective quota and determination of seniority on the basis of quota and rota is held valid and these are not ultra vires of Articles 14 and 16 of the Constitution of India.

(b) Seniority between direct recruits and promotees regularly appointed/promoted within their respective quota should be determined by the length of the continuous officiation in the grade of ACSOs from their respective appointment to the substantive vacancies under Schedule II within their quota i.e. in the case of promotee ACSOs the length of continuous officiation in the grade will

be reckoned from the date when they are promoted in substantive vacancies.

(c) To elucidate further, in the case of temporarily appointed promotee ACSOs under Note (2) of Schedule III of the Rules in the direct recruit quota w.e.f. 1969 onwards till 1977 and also thereafter their seniority will be reckoned from the date when they get a berth in the substantive vacancies of their 75% quota as envisaged under Schedule III of the Rules.

(d) The incumbents belonging to one source in excess of their own quota and utilising the quota of the incumbents belonging to another source will only officiate in the promoted post. It is made clear that the direct recruits when inducted as nominees of UPSC, the promotees in the quota of the direct recruits on the basis of Note (2) of Schedule III of the Rules will either be reverted or will be absorbed in the vacancies within their quota of subsequent year. The period of officiation outside their quota of either of the incumbents from other source will not count for their seniority. If an officer has been promoted within his quota, then it would be date of confirmation which would be relevant for the officer's seniority.

(e) When the promotions are made from either of the sources, by direct recruitment or by departmental promotion there shall be due compliance with the various instructions and office memorandum issued by the Department of Personnel and Training on the reservation of vacancies for SC/ST and categories in the proportion directed in the said instruction. The reservation, however, shall remain only at the time of appointment and not in the seniority interest of the direct recruits and promotees which shall be fixed as laid down in Rule 16(7) read with

Schedule III and as directed in the preceding sub-
paras above.

(f) It is further directed that each quota, as referred to in Schedule III of the Rules has to be worked out independently on its own force. Direct recruit quota of ACSOs which is confined to substantive vacancies in the grade can be filled by temporarily appointed Assistants by promotion in the grade of ACSOs, but without giving them any right of seniority on the basis of continuous officiation on the vacancies earmarked for direct recruits and indent for which has been sent to UPSC for nomination from the civil services examination of a particular year. The hopes and aspirations of the promotees aforesaid cannot be related to availability of direct recruits filling their quota in that particular year and it can only be when there is total collapse and breakdown of the quota for a number of years.

(g) None of the parties including the official respondents have given relevant data as to when the actual promotion of Assistants were made to the temporary cadre of ACSOs in the direct recruit quota under Note (2) of Schedule III. The official respondents on the other hand have taken the stand in the chart quote in the body of the judgment that of such vacancies in the direct recruit quota which were left unfilled and have been filled temporarily by the Assistants by making departmental promotions and since the exact number is not coming for the (*sic*) and also the position whether such departmental promotees were absorbed in the subsequent vacancies within their quota of 75% direct is issued to revise the impugned seniority list in the light of the observations made in the above sub-*paras* which shall be made final after hearing the objections on the same and the petitioners, who have since retired, shall be entitled to any consequential benefits occasioned on account of the revision of

the seniority list. The impugned seniority list of 1977 shall stand quashed to that extent. In the circumstances, the parties shall bear their own costs.”

9. The direction given in paragraph (g) has to be read in the context of the earlier portion of the decision wherein it is specifically mentioned that the three petitioners had already retired and had been given the promotional grade within a few months.

10. The dispute subject matter of controversy before the Supreme Court in the case of *AFHQ/ISOs SOs (DP) Association* (supra) decided vide decision dated 19th February, 2008 was an offshoot of the said decision of the Tribunal dated 20th November, 1992. The authorities had after decision dated 20th November, 1992 prepared two seniority lists from the year 1992 for the grade of ASCOs. The Supreme Court noticed that prior to implementation of the order dated 20th November, 1992, a draft seniority list had been issued in 1995 based on the principle of carry forward of vacant slots and the direct recruit ACSOs were given the benefit of about 10 to 15 years of antedated seniority, even though they were not holding any office, nor were they then in service. It was in these circumstances that some of the promotee officers had filed Original Application No.1356/1997 before the Tribunal. They were aggrieved by the seniority list of ACSOs prepared by the Departmental Promotion Committee for the years 1988-89 and 1989-90 for promotion to the grade

of Civilian Staff Officers (CSOs). The Tribunal vide order dated 1st April, 2002 had directed that the inter se seniority between direct recruits and promotees regularly appointed/promoted within their respective quotas should be determined by counting the length of continuous officiation from their respective appointment to the substantive vacancies. For the promotee ACSOs, the length of continuous officiation in the grade would be reckoned from the date when they were promoted in the substantive vacancies in the lawful quota. There would be one select list and there cannot be two select lists. Other directions were also issued.

11. The High Court in WP (C) No. 5396/2002 by judgment dated 14th November, 2006 had reversed the said finding observing that the decision of the Tribunal was contrary to the first order of the Tribunal dated 20th November, 1992, which was affirmed by the Supreme Court and had attained finality. The Supreme Court in their decision dated 19th February, 2008 in *AFHQ/ISOs, SOs (DP) Association* (supra) reversed the High Court decision, and restored the verdict of the tribunal dated 1st April, 2002 in OA No.1356/1997. Directions to abide by the decision of the Tribunal in TA No.356/1985 dated 20th November, 1992 were made.

12. We do not understand how the said decision would affect the two petitioners. It is important to reproduce the factual narration given by

the respondents in the counter affidavit. This narration reflects and elucidates the consequential effect of the decision of the Supreme Court in *AFHQ/ISOs/Sos (DP) Asociation & Ors.* (supra) dated 19th February, 2008 on the petitioners' promotion to the post of CSO, Joint Director and Principal Director. For the sake of completeness and clarity, we would like to reproduce the said version, which is undisputed:-

J.S.Joshi

Grade	Pre-revised (Panel Yr.)	Post-review (Panel Yr.)	Remarks
ACSO	1974-75 (Vacancy Year)	1974-75 (Vacancy Year)	No change
CSO	1978-79	1978-79	No change in the panel year
Jt. Director	1983-84	1983-84	No change in the panel year
Director	1993-94 (Regularly promoted on 10.10.2002 in the grade of Director)	2002-03	Relegated from 1993-94 to 2002-03. Note:- Drawing pay & allowances in the grade of Director from 11.07.1994.
Principal Director	2008-09 (However, recommendation could not be given effect as not approved by the Appointment Committee of the Cabinet due to anticipated changes in the seniority list) The DPC held on 18.09.2008 and the Petitioner retired on superannuation on 30.09.2008.	2008-09 (Applicant retired from service on superannuation by the time Panels for promotion were drawn on basis of Revised Seniority List of Directors.	No change in the panel year. (No benefit accrues to the officer as he did not assume charge on promotion)

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G.S.Tiwari

Grade	Pre-revised (Panel Yr.)	Post-review (Panel Yr.)	Remarks
ACSO	1972-73 (Vacancy year)	1972-73 (Vacancy year)	No change
CSO	1976-77	1978-79	Seniority post-dated
Jt. Director	1982-83	1983	Seniority post-dated
Director	1987-88	1989	Seniority post-dated
Principal Director	Recommended for 2007-08 (however, recommendation could not be given effect to due to anticipated changes in the seniority list)	2007-08 (Extended Panel)	Retired before assumption of charge.

It is seen from the aforesaid tables that as a result of the decision of the Supreme Court, the promotion of the two petitioners to the post of CSO and Joint Director was at the right time. Their promotions to the post of Director were made before the due dates if the principle or ratio in the order dated 20th November, 1992 of the tribunal had been applied. The petitioners had not suffered any disadvantage. In fact, they had secured an advantage. The decision of the Supreme Court dated 19th February, 2008 or even the earlier decision of the Tribunal dated 19th November, 1992 did not to this extent affect them. It is in this context that we have mentioned the dates given by the petitioners themselves in the writ

petition as the date of their regular promotions in the hierarchy. For this reason also, reliance placed on paragraph (g) of the order dated 20th November, 1992 of the tribunal is misconceived. The judgment of the Supreme Court in *AFHQ/ISOs, SOs (DP) Association & Ors.* (supra) would not in any manner justify their claim and prayer. The petitioners in fact had gained. Mr Joshi was promoted as a Director in 1993-94, whereas post review in terms of the decision in *AFHQ/ISOs, CDs (DP) Association & Ors.* (supra) he would have been promoted in 2002-2003 only. Dr G.S. Tiwari was promoted as Director in 1987-88, whereas his promotion was due in the year 1989. However, it is correct that when the matter of seniority list was subjudice and pending consideration before the Supreme Court in *AFHQ/ISOs, SOs (DP) Association & Ors.* (supra), promotion etc. in different grades were not made. The effect thereof has to be examined.

13. The real reason and difficulty faced by the petitioners and why they could not be promoted as Principal Director have been set out and given in the counter affidavit. For the sake of convenience, we would like to reproduce the averments made in the form of a table in the counter affidavit filed by the respondents in the case of Dr. G.S. Tiwari, which reads as under:-

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Grade	Pre-revised (Panel Yr.)	Post-review (Panel Yr.)	Remarks
ACSO	1972-73 (Vacancy year)	1972-73 (Vacancy year)	No change
CSO	1976-77	1978-79	Seniority post-dated
Jt. DIRECTOR	1982-83	1983	Seniority post-dates
DIRECTOR	1987-88	1989	Seniority post-dates
PRINCIPAL DIRECTOR	Recommended For 2007-08 (however, recommendation could not be given effect to due to anticipated changes in the seniority list).	2007 (Extended Panel)	Retired Before assumption of charge

“8. That the Petitioner appears to be actually aggrieved due to his non-promotion in the grade of Principal Director. A chronological account of facts and circumstances relating to his grievance are explained as follows:

<u>Date/Year</u>	<u>Events relating to PD promotion</u>	<u>Remarks/concurrent events having impact on the promotion proposal in the PD Grade</u>
Oct. 2006	Department had initiated action for preparation of DPC proposal well before occurrence of the vacancy on 01.09.2007 due to retirement of Shri Upendra Kumar, Principal Director on 31.08.2007 (Panel year 2007-08). Dr. G.S. Tiwari was the second senior most officer in the grade of Director (feeder grade for promotion to Principal Director grade).	A number of Writ Petitions were pending in the Hon'ble High Court of Delhi against the Hon'ble CAT (PB) Order dated 01.04.2002 in OA 1356/97 (Ammuni Rajan & Ors. Vs. UOI), arising out of CAT Judgment in M.G. Bansal's case viz. TA No.356/85 related to the fixation of inter se seniority of officers in the SO grade Seniority in the SO grade would have consequential effect on the seniority of officers in the higher grades viz. DD, JD and Director.
Nov, 2006	DPC proposal against the aforesaid vacancy under process	Hon'ble High Court passed a judgment on 14.11.2006 in the aforesaid Writ Petitions.
Dec, 2006	DPC Proposal for promotion to PD grade against the aforesaid vacancy sent to the UPSC, based on the pre-revised Seniority List of Directors	Affected parties filed SLPs before the Hon'ble Supreme Court against the High Court Judgment ibid.
07.03.2007	DPC proposal was pending with the UPSC.	SLPs admitted by the Apex Court, registered as SLPs 4545 & 5853 of 2007. Hon'ble Supreme Court

		passed order to maintain status quo, in the SLPs. Copy of the order dated 07.03.2007 is being annexed herewith as <u>ANNEXURE-A</u> . Law Ministry advised not to do any promotions in any grade viz. SO and above, up to PD grade in the wake of status quo order.
06.05.2007	UPSC fixed the date of DPC on 06.05.2007 for the above purpose. UPSC were informed about the status quo orders. DPC meeting cancelled.	Status quo continued to be in operation.
01.09.2007	Post of PD in question fell vacant on retirement of Sh. Upendra Kumar, DPC proposal kept in abeyance in wake of status quo orders	Status quo continued to be in operation.
19.02.2008		Hon'ble Supreme Court passed final order in the SLPs 4545 & 5853 of 2007 on 19.02.2008, directing to re-fix the inter-se seniority between DP and DR SOs w.e.f. the date of their continuous officiation in the substantive vacancies of lawful quota(s) right from 1968 onwards; within a period of three months. Status quo ceased to be in operation with the issue of final orders.
Feb, 2008 to June, 2008	Status quo stood vacated after Hon'ble Supreme Court's Order dated 19.02.2008. Action was immediately initiated for convening DPC for the year 2007-08 and 2008-09 for regular promotion to the grade of Principal Director. Respondents had simultaneously initiated action for filling up the post of Principal Director on ad hoc basis as regular promotions would take long time. Revised seniority list of Director was not available till that time, pending redrawing of Revised Seniority List of SOs in terms of Hon'ble Apex Court's order dated 19.02.2008 and sequential exercise for redrawing the promotion panels/Seniority Lists in the higher grades upto Director. Therefore, promotion proposal for the DPC year 2007-08 and 2008-09 to Principal	Considering that a long-drawn exercise was involved, Hon'ble Supreme Court vide their Order dated 16.06.2008 granted 3 more months i.e. up to 19.08.2008 for compliance of their Judgment dated 19.02.2008 on request of the Respondents. Copy of the Order dated 16.06.2008 is being annexed herewith as <u>ANNEXURE-B.</u>

	Director grade was on the basis of pre-revised Seniority List of Directors. The UPSC had raised certain observations on the regular DPC proposal which was duly replied to by the Respondents, giving special reference to the fact that the petitioner (Dr. G.S. Tiwari) is due for retirement on 30.06.2008. The UPSC vide their letter dated 22.05.2008 raised following specific queries- (a) Present status of the case (Implementation of Hon'ble Supreme Court's Judgment) (b) Impact of the Judgment on the DPC proposal. (c) Fresh opinion/Views of Learned Legal Advisor (Defence) in respect of prevised (sic) Seniority List of Directors keeping in view the judgment of the Apex Court. The Learned Legal Advisor (Defence) in his opinion tendered on 26.03.2008 and 10.04.2008 was of firm view that before making promotions, Department should first draw the seniority list in accordance with the Hon'ble Supreme Court's Order dated 19.02.2008. An exhaustive reply was furnished to the UPSC. The Respondents had vide D.O. letter No.A/40295/PrDir/CAO/P-1, dated 29.05.2008, written by the then Additional Secretary, UPSC, again requested the need for urgent convening of DPC in organizational interest. The UPSC in turn vide their letter 24.06.2008 asked for the confirmation that the DPC proposal would not attract any contempt of the Hon'ble Supreme Court's order dated 19.02.2008. Same query was raised by DOP& T (ACC Sectt.) on the proposal for ad hoc promotion to PD grade on basis of pre-revised Seniority List.	
30.06.2008	The DPC proposal was still in the rounds of deliberations. Dr. G.S. Tiwari retired on superannuation on 30.06.2008 in the grade of Director.	Action for implementation of Apex Court order underway.
July 2008	The matter was again referred to LA (Defence), who in his advice dated 14.07.2008 opined that the Department at the first instance should prepared the	

	revised seniority list in the grade of SO and thereafter they should move upwards consequentially revising the seniority lists of the other grades taking the seniority list of SOs (prepared in accordance with the Judgment of Supreme Court dated 19.02.2008 in the above mentioned matter) as the foundation up to the grade of Director. In their opinion dated 14.07.2008 the Legal Advisor had observed that if the revised seniority list so prepared is not strictly in accordance with the direction contained in para 25 of M.G. Bansal's case as directed by Hon'ble Supreme Court, then administration concerned may be responsible for such laxity. Copy of the Legal advice dated 14.07.2008 of Ministry of Law & Justice is being annexed herewith as <u>ANNEXURE-C.</u>	
Aug, 2008	--	Revised inter se seniority of DPs and DRs in SO grade from 1968 to 2000 was issued on 13.08.2008, in terms of Hon'ble Supreme Court order dt. 19.02.2008. Revision of seniority in SO grade would have consequential effect on seniority of officers in higher grades viz. DD, JD, Director and Principal Director. Review exercise in respect of higher grades was yet to be conducted.
01.09.2008	The aforesaid post of PD remained vacant for one year and, thus, deemed to be abolished in terms of Ministry of Finance orders. Proposal for revival of post initiated.	-do-
18.09.2008	The UPSC convened the DPC for 2007-08 and 2008-08 for promotion to Principal Director grade on 18.09.2008 subject to the changes that might be occurring in course of implementation of Hon'ble Supreme Court's dated 19.02.2008.	Preliminary actions for reviewing the Select Lists in the grade of DD initiated, as a sequential action to revision of seniority in SO grade.
Oct, 2008	Approval of Ministry of Finance/Deptt. Of Expenditure for revival of the post of PD, which stood abolished w.e.f. 01.09.2008 for being held in abeyance, received on 27.10.2008. DPC's recommendations for promotion to the grade of PD sent to the DOP&T (ACC) for approval of the Appointments	Revised Eligibility List of SOs for drawing up the reviewed Select Lists for promotion in the DD grade issued.

	Committee of the Cabinet (ACC).	
Nov, 2008 to Aug, 2010	Exchanges of communication between DOP&T (ACC) and Office of JS (Trg.) & CAO on the validity of the Select Lists drawn by the DPCs conducted on the basis of pre-revised seniority list of Directors. ACC Sectt ultimately directed to re-conduct the DPCs for promotion to PD grade after drawing up the revised Select Lists/Seniority List of Director, in terms of the revision taking place in the junior grades	`Revised Select Lists for promotion to the Dy. Director grade and Reviewed Select Lists in the grade of Jt. Director issued.
18.08.2010	--	Revised Seniority List of Directors up to 2009-10 issued, followed by action for drawing the revised Select Lists for the years 1993-94, 2002-03 and 2007-08 to 2008-09 and fresh Select Lists for the years 2009-10 to 2010-11 for promotion to the grade of PD was initiated.
09.09.2010	DPC proposal sent to the UPSC for drawing the revised Select Lists for the years 1993-94, 2002-03, 2007-08 and 2008-09 and fresh Select Lists for the years 2009-10 and 2010-11 for promotion to the grade of Principal Direction (PD).	--
10.01.2011	DPCs held at the UPSC.	--
31.01.2011	After obtaining the approval of the RM, DPCs' recommendations sent to the DOP&T (ACC) for approval of the ACC.	--
May, 2011	ACC approval received. As approved, Select Lists were issued as under: 1993-94: 1. Sh. Hari Singh 2. Sh. S.K. Mukhopadyaya 2002-03: 1. Sh. G.N. Tripathi 2. Sh. K. Khansnobis 3. Sh. B.B. Mohapatra, (extended panel in lieu of retirement of Sh. G.N. Tripathi) 2007-08 1. Sh. Upendra Kumar 2. Dr. G.S Tiwari (extended Panel in lieu of retirement of Sh. Upendra Kumar)	Promotion orders in accordance with the Select Lists were issued on 27.05.2011 except in the case of following officers who had already retired from service and could not be promoted as PD as they already retired before their empanelment and promotion:- 1. Sh. G.N. Tripathi 2. Sh. H. Khasnobis 3. Dr. G.S. Tiwari 4. Smt. Dayal Ray 5. Sh. J.S. Joshi 6. Sh. Goutam Ray Sh. Hari Singh, Sh. S.K. Mukhopadhyay, Sh. B.B. Mohapatra and Sh. Upendra

	2008-09: 1. Smt. Dayal Ray 2. Sh. J.S. Joshi 3. Sh. Goutam Roy 4. Sh. G. Vijaya Kumar, (extended panel in lieu of retirement of Sh. J.S. Joshi) 2009-10: 1. Sh. G.P Chand 2010-11: 1. Sh. S.N. Singh 2. Sh. Ranbir Singh 3. Smt. Uma Bhattacharyya 4. Sh. Dilip Kumar, (extended panel in lieu of retirement of Sh. Ranbir Singh)	Kumar had worked as regular PDs based on the erstwhile Select Lists. No fresh order for regular promotion in their case was issued.) ➤ It may noted that: i) None of the applicant's junior has got the benefit of promotion as Principal Director from a date prior to the date of retirement of the applicant. ii) The officers who have assumed promotion as Principal Director are getting the benefit of promotion only from the date of their physical charge assumption.
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9. That as is evidence from the table above, a vacancy in the grade of Principal Director arose on 01.09.2007 due to retirement of Shri. Upendra Kumar on 31.08.2007. The DPC proposal for drawing up a select list against the said vacancy was sent to the Respondent No.3 (UPSC) in December, 2006 who fixed the DPC meeting for 06.05.2007. The DPC however could not be held on 06.05.2007 in wake of the orders of the Hon'ble Supreme Court dated 07.03.2007 in the CA Nos. 1384 and 1385 of 2008 (arising out of SLP Nos.4545 and 5853 of 2007 respectively) to maintain status quo and the Ministry of Law had advised not to make promotions even on ad-hoc basis in the grades of ACSO and above till such time the status quo orders were not vacated.”

10. That the status quo continued to be in operation till 19.02.2008 when the Hon'ble Apex Court eventually decided the said CAs as per para 5 above. On 30.06.2008, Dr. G.S.Tiwari, the Petitioner retired on superannuation as Director without having been promoted to the grade of Principal Director.

11. That in compliance of the Apex Court order dated 19.02.2008, as a first step of the sequential actions revised seniority in the grade of ASCO from 1968 onwards was issued on 13.08.2008. Thereafter, based on the revised

inter-se seniority list of ACSOs, the Select Lists/Seniority Lists in the grades of CSO, Jt. Director and Director also underwent change. Ultimately, all the select lists viz. 1993-94, 2002-03, 2007-08, 2008-09, 2009-10 and 2010-11 for promotion to the grade of Principal Director had been revised and notified on 27th May, 2011, with the approval of the Appointments Committee of the Cabinet (ACC).

12. That the ACC accorded their approval vide their Order No. 12/6/2011-EO (SM.II) dated 22.05.2011 for promotion of officers in the grade of Principal Director with effect from the date of assumption of charge of the post till superannuation or until further orders, whichever was earlier. accordingly, such empanelled officers including the Petitioner who had retired before notification of select lists *ibid* could not be promoted to the grade of Principal Director, as the benefit of promotion takes effect only on assumption of the higher post. It may, however, be noted that the empanelled officers who were in service on 27.05.2011 viz. date of notification of select list for promotion to Principal Director, have got the benefit of promotion only from the date of assumption of duties in the grade of Principal Director. It is further stated that none of the applicant's juniors who were included in the select lists *ibid* and was thereupon promoted as Principal, has got the benefit of promotion in that grade from a date prior to 30.06.2008 viz the date of retirement of the Petitioner who due to his retirement before the issue of select list could not be promoted as Principal Director.

13. That the Petitioner preferred a representation on 29.06.2011 for grant of notional promotion in the grade of Principal Director and consequential benefits thereof, based on his empanelment in the select list for the year 2007-08. Office of the Respondent No. 2 made a reply vide their Letter No. A/47947/REP/PD/CAO/P-1 dated 26.08.2011 as follows:

"2 As per the DOP&T instructions, the regular promotion becomes effective only on charge assumption of the empanelled officer. The Appointments Committee of the Cabinet (ACC) has also accorded approval for grant of promotion to

the grade of Principal Director w.e.f. the date of assumption of the post by the empanelled officers till their superannuation or till further orders, whichever would be earlier.

3. You had already retired from service when approval of the ACC for promotion to the grade of Principal Director was received . As such, orders for promotion in the grade of Principal Director in your case were not issued. consequently, the relief claimed by you are not admissible."

The aforesaid quotation, though lengthy, sets out in great detail the steps taken from time to time by the respondents for holding of the DPC after the decision of the Supreme Court. The aforesaid reasoning would squarely indicate that the respondents had acted with promptitude and were not lethargic and maledict. There were practical difficulties in implementation of the order. A similar table/chart has been filed by the respondents in the case of Mr. J.S.Joshi. To avoid repetition we are not reproducing the said table/chart and reasons. Paragraphs 10-13 of the counter affidavit quoted above in the case of Dr. G.S. Tiwari elucidate the reasons for delay in holding the meeting of the DPC for promotion to the post of Principal Director consequent to which the petitioners herein could not be considered for promotion to the said post. It is pertinent to mention here that Dr. G.S. Tiwari was entitled for promotion and could have been considered for the vacancy year 2007-08 because of the extended panel in view of retirement of Mr. Upender Kumar. Thus there

were others also who could not be considered for promotion to the post of Principal Director because of the delay in holding the DPC. Dr. G.S.Tiwari would not have been in the zone of consideration for the vacancy year 2007-08, but for the fact that Mr.Upender Kumar had retired. As recorded above, Dr.G.S.Tiwari had retired on 30th June, 2008, i.e. within a few months of the pronouncement dated 19th February, 2008 in *AFHQ/ISOs/SOs (DP) Association and Ors.* (supra). Mr.J.S.Joshi retired on 30th September, 2008 as noticed below, before the DPC could be held on the basis of revised seniority and the empanelment notified.

15. It has been explained that the Supreme Court had passed an order maintaining status quo on 07.03.2007, which was in operation till 19.02.2008. In terms of the judgment dated 19.02.2008, the seniority list had to be revised within three months. This time was extended till 19.08.2008 by the Supreme Court by order dated 16.06.2008. The entire chain/hierarchy had to be re-worked and the exercise undertaken. Appointments Committee of the Cabinet did not agree with the minutes of the meeting of the DPC held on 18.09.2008 for empanelment of the two petitioners in the select list for the years 2007-2008 and 2008-2009 respectively, for the reason that the entire or complete sequential exercise had been directed by the Supreme Court in

their order dated 19.02.2008. Accordingly, the recommendation of the DPC held on 18.09.2008 based upon the pre-revised seniority list could not be given effect to and was unacceptable. Revised seniority list in the grades of Deputy Director and Joint Director for the corresponding years was drawn on 13.08.2008. Revised seniority list of Directors drawn on this basis was re-drawn on 18.08.2010. DPC was, thereafter, held for drawing of the select list to the grade of Principal Director for the years 1993-1994(revised), 2002-2003(revised), 2007-2008 (revised), 2008-2009(revised), 2009-2010 and 2010-2011. Recommendations of the DPC for promotion from the grade of Director to that of Principal Director were notified on 27.05.2011 with the approval of the Appointments Committee of the Cabinet which was accorded on 22.02.2011. The approval was granted from the date of assumption of charge of the posts of the Principal Director till superannuation or further orders, whichever was earlier. Thus, the promotion was to take effect on assuming of the higher post of Principal Director. Consequently, only empanelled officers who were still in service on 27.05.2011, i.e. the date of notification of the Selection Committee, were promoted as Principal Directors. Others, who had retired, were not given promotion to the grade of Principal Director. It is also a fact that the two petitioners were

never appointed and had not worked at the post of Principal Director. They had retired earlier, in June and September, 2008.

16. The question which arises for our consideration is whether in the aforesaid background, the two petitioners could claim appointment to the said posts of Principal Director with retrospective effect or even notionally. The answer in the facts of the present case would be against the petitioners. The normal rule is that promotion is effective prospectively from the date of issue of the order of promotion and those employees who have retired prior to such date, should not be granted promotion retrospectively. Even when an employee is included in the select list in the panel of promotion and has retired before he could be promoted, retrospective promotion should not be given. There is no rule that promotion could be given from the date of creation of promotional posts or from the date of vacancy. Promotion to a post would be from the date promotion is granted and not from the date the post falls vacant. The aforesaid general rule is subject to exceptions. Two significant exceptions are, when there is a specific stipulation to the said effect in the rules and when a junior to the retired employee has been granted promotion from the date when the retired employee claiming notional promotion was in service. In the present case, no rule has been brought to our notice. The first exception is not applicable. The Tribunal has

specifically recorded and it has not been challenged that juniors to the petitioners were not promoted from a date when the petitioners were in service. The second exception therefore cannot be invoked and applied.

17. To elaborate and affirm the legal position, we would like to refer to some decisions. In *Union of India vs. K.K. Vadera & Ors*, 1989 Supp (2) SCC 625, Junior Scientific Officers were granted promotion to the post of Scientist B with retrospective effect from 1st July, 1984 and not from the date of actual promotion. The contention of the respondents was not accepted though the promotion was vacancy based. It was unequivocally held that service jurisprudence does not know of any law or rule under which promotion is to be effected from the date of creation of the promotional post or after a post falls vacant for any reason whatsoever. Promotion to a post should be from the date the promotion is granted and not from the date on which such post falls vacant. The judgment of the Tribunal was reversed.

18. In *Uttaranchal Forest Rangers Association (Director Recruits) vs. State of U.P.* (2006) 10 SCC 346 the Supreme Court observed that seniority has to be decided on the basis of rules in force on the date of appointment, no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre. In *Nani Sha and Others vs. State of Arunachal Pradesh and Others*

(2007) 15 SCC 406, after examining the legal position, the Supreme Court observed that in order to make a provision applicable with retrospective effect, it should be specifically expressed in the provision. Otherwise the rule would be prospective. This case related to disputes between direct recruits and promotes and after referring to their earlier judgment in the case of *State of Uttaranchal v. Dinesh Kumar Sharma* (2007) 1 SCC 683, the Supreme Court opined that seniority is to be reckoned not from the day when the vacancy arose but from the date on which the appointment is made to the post. The Supreme Court in *Dinesh Kumar Sharma (supra)* had disapproved the decision of the High Court which had directed retrospective effect be given from the date of vacancy. It was held that retrospective effect could not have been given in the absence of rules as this was not the general principle. In *Amarjeet Singh and others v. Devi Ratan and others* (2010) 1 SCC 417, the Supreme Court reversed the order of the High Court granting notional promotion. It was held that law permits retrospective effect in exceptional circumstances and not otherwise.

19. We are conscious and aware that in *Rajinder Pal Singh Lamba Vs. Suraj Bhan and Others*, (2008) 14 SCC 679, the Supreme Court has observed and referred to the fiduciary duty of the employer to consider names of eligible candidates for promotion in accordance with the

statutory rules, as and when the vacancy arises. The facts of the present case, however, show that there were issues and questions pertaining to seniority which were pending consideration. The judgment of the Supreme Court was pronounced in the case of *AFHQ/ISOs/SOs (DP) Association and Ors.* (supra) on 19th February, 2008 and thereafter on the basis of year-wise vacancy position, DPCs were held and promotions were made, but the petitioners could not be promoted as they had retired. They also could not be given notional promotion as no junior was promoted. This is not a case wherein the respondents had deliberately and for extraneous reasons, arbitrarily and contrary to the law belatedly held and delayed holding of the DPC, causing prejudice. Lethargy, remiss and lackadaisical approach is not apparent and perceptible.

20. Learned counsel for the petitioner had relied upon the observations of the Tribunal in their order dated 20th November, 1992 that the parties would be entitled to consequential benefits. It is submitted that this should be read as part and parcel of the order dated 19th February, 2008 passed by the Supreme Court in *AFHQ/ISOs/SOs (DP) Association and Ors.* (supra). There was no such specific direction in the order dated 19th February, 2008. In fact, the Supreme Court had stated that DPCs would be held. What was affirmed and upheld by the Supreme Court was the rule of seniority which would be implemented by

applying the principle of rota-quota. Nowhere did the Supreme Court direct that the persons who had retired or would retire shortly thereafter, would be entitled to benefits from retrospective effect. We have also elucidated that the seniority position as determined pursuant to and in terms of the Supreme Court directions was not to the advantage or benefit of the two petitioners. However, the seniority dispute had prevented official respondents from holding the DPCs. In the absence of specific directions by the Supreme Court in the order dated 19th February, 2008, we do not think that the petitioners on the basis of the said judgment can claim retrospective or notional promotion from the date/year of vacancy.

21. In these circumstances, the Tribunal in the impugned order has rightly relied upon the decisions of the Supreme Court in *Union of India Vs. K.K. Vadera & Ors.*, 1989 Supp (2) SCC 625, *Baij Nath Sharma Vs. Hon'ble Rajasthan High Court (Jodhpur Bench)*, 1988 SCC (L&S) 1754 to hold that retrospective promotion cannot be granted. Pertinent in this regard is reference to the Fundamental Rule 17(1), which reads:-

“FR 17(1) Subject to any exception specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence.

(2) The date from which a person recruited overseas shall commence to draw pay on first appointment shall be determined by the general or special order of the authority by whom he is appointed.”

22. Decision in the case of ***K.V. Jankiraman*** (supra) proceeds on its own facts. This is not a case wherein a junior to the petitioners had been promoted. Had that been the situation, different consequences would have followed.

23. In view of the aforesaid reasoning, we do not find any merit in the present writ petitions and the same are dismissed.

(SANJIV KHANNA)
JUDGE

(NAJMI WAZIRI)
JUDGE

JUNE 2nd, 2016
NA