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Central Administrative Tribunal
Principal Bench

O.A.No.3346/2002

New Delhi, this the 2nd day of February 2006

Hon'ble Shri V.K. Majotra, Vice Chairman (A)
Hon'ble Shri Shanker Raju, Member (J)

1. Shri BS Gupta (aged 57)
working as Assistant Director
in the office of CWC
Sena Bhawan, RK Puram
New Delhi-66

R/o 809 Sector 4, RK Puram,
New Delhi-22

2. JN Ghosh, Assistant Director
s/o Late KP Ghosh (Age 56)
in the Office of Deptt. of
Family Welfare
Ministry of Health & Family Welfare
Nirman Bhawan, New Delhi

Permanent Add: Flat No.A-90,
Kendriya Vihar, Sector-51
NOIDA,
Gautam Budha Nagar (UP)
R/o Qr.No.N-200, Sector 8
RK Puram, New Delhi

3. Tej Vir Singh
s/o Shri Ishwar Singh (Age 56)
employed as Assistant Director
In the office of CSO, SP Bhawan
New Delhi

Permanent Add: 90-R, Model Town
Ambala City, Haryana
R/o 551/IV RK Puram, New Delhi

4. G. Namasivayam
s/o S. Garapathy (Age 55)
employed as Assistant Director
in the office of Data Processing Centre
NSSO, Govt. of India
Brindavan Nagar, Bangalore

Permanent Add: 10/33 IG Flats 57
Kamrapor Colony r/o R.No.201
Hotel White Empire Paharganj
New Delhi

5. Jagir Singh s/o Kher Singh, age 54
employed as Asstt. Director
in the office of the RHS TC
Pry. Health Centre, 3B-I, Mohali
Chandigarh - 160059

Permanent Add: Bachittar Nagar, Patiala
 At present staying New Ringo Hotel
 Room No.4, Paharganj, New Delhi

6. A.N. Mansuri s/o Shri NK Mansuri
 age 54 years
 employed as Asstt. Director in the
 office of Labour Bureau, 3rd Floor
 Hari Om Center, Juna Wadi
 Ahmedabad-380013 at present staying at
 Hotel Great Shiva Dx 2896 Bazar
 Sangatrashan, Paharganj, New Delhi
7. Shri Mohan Chandra Das
 s/o Late J.L. Das aged about 55 years
 employed as Research Officer, in the office
 of Development Commissioner
 for Iron & Steel, Nigam Palace
 234/4, AJ Bose road
 Kolkata-20 at present staying at
 Kailash Guest House, 4469 Mira Bazar
 Paharganj, New Delhi
8. Shri CM Gairi (age 52)
 s/o Shri BR Gairi employed as
 Assistant Director in the office of the
 CWC, Sewa Bhawan, RK Puram
 New Delhi-22
 R/o S-9/824, RK Puram, New Delhi-22
9. Umed Singh (age 47 years)
 s/o late Shri Kanwar Singh
 employed as Asstt. Director in the office of
 CSO, New Delhi
 R/o 185, Nawnda Village, Uttam Nagar
 New Delhi-59
10. S.S. Tanwar (age 55 years)
 s/o Shri CR Tanwar
 employed as Asstt. Director in the office of
 the Chief Labour Commissioner (Central)
 Min. of Labour, New Delhi
 R/o WZ-1263A, Nangal Rai
 New Delhi-46
11. Shri R. Chandrashekhar (age 54 years)
 s/o Shri VAK Rangam
 employed as Asstt. Director (Stat)
 Zonal Joint Directorate General of Foreign
 Trade, Min. of Commerce
 Permanent Add: 92-A, TTK Road
 Madras 600014
 At present staying at Vasant Vihar Club
 New Delhi-57
12. Balwant Singh (Age 57 years)
 s/o Shri Sher Singh employed as
 Asstt. Director, Central Water Commission
 Sewa Bhawan, RK Puram, New Delhi
 R/o 1592 Valan Estate Jind (Haryana)
 At present staying at 536 A, Sector-3
 RK Puram, New Delhi

13. D.L. Sabharwal (age about 58 years)
s/o Shri RK Sabharwal, employed as
Asstt. Director, CWC, Sewa Bhawan
New Delhi r/o A-4/192,
Paschim Vihar, New Delhi
14. Barham Singh (age 57 years)
s/o Shri Fakir Chand
employed as Asstt. Director CWC
Sewa Bhawan, New Delhi
R/o 1327, Sector XII, RK Puram, New Delhi
15. RS Pouply (age 58 years)
s/o Shri Gokal Dass employed as
Asstt. Director, DGS&D, New Delhi
R/o 1312, Dr. Mukherjee Nagar, Delhi-9
16. B.S. Madhavarao (age 48 yrs.)
s/o B.V. Ramiah, Employed as
Asstt. Director, DGS&D, Deptt. of Supply
Min. of Commerce, New Delhi-1
R/o 91-D, Jhang Co-op Housing
Society, Sector-13, Rohini
Delhi-85
17. K.S. Rawat (age 46 years)
s/o J.S. Rawat employed as
Asstt. Director, Min. of Commerce
DGFT, Udyog Bhawan, New Delhi
R/o Block 16/428, Lodhi Colony
New Delhi-3
18. Ashutosh Goyal (age 58)
s/o late OP Goyal employed as
Asstt. Director, NSSO, FOD
AS Wing, Faridabad
R/o 1331, Sector 8, Faridabad
19. Ashok Kumar Sharma (age 49)
s/o late BD Sharma employed as
Asstt. Director, Central Bureau of
Health Intelligence, DGHS
Nirman Bhawan, New Delhi
R/o G-512, Sarojini Nagar
New Delhi-23
20. N. Haridass (Age 57)
s/o Late CA Namppa Naidu
Asstt. Director, NSSO, FOD
R/o 190, IIInd Floor, Addis Street
Coimbatore, 641018
21. Arthur D. Joseph (age 56)
s/o late David I. Joseph
Asstt. Director, NSSO (FOD)
Permanent Add: C/o Mr. Sudhir D. Joseph
647, Girifeth, Canal Road
Nagpur 440 010
22. Dr. Siyaram (age 55)
s/o Shri Baliram
Asstt. Director, NSSO DPD
Min. of Statistics & Programme

Implementation,
 Permanent Add: Flat A4/G-2
 Govinda Gurkhede Complex
 Seminary Hills, Nagpur - 440006

23. P.V. Berde (age 57 years)
 s/o Vishvanath Berde
 Research Officer, office of the Director
 Central Water and Power Research Centre
 Khadakwasla, Pune-24
 Permanent Add: D-3, Rout Bagh
 Dhaukawadi, Pune-43
24. Akhileshwar Jha (Age 55)
 s/o Shri BN Jha
 Asstt. Director DPD, NSSO Kolkatta
25. Shiv Shankar roy (age 57)
 s/o Late BN Roy
 Asstt Director NSSO DPD
 Kolkatta, 108,
 Permanent Add: Valayam, Purndha
 PO B. Deogher (Distt. Deoghar) Jharkhand
26. KL Chattopadhyaya (age 56)
 s/o Shri Brij Lal Chattopadhyaya
 Asstt. Director, NSSO (FOD) Kolkata
27. Santosh Aggarwal (age 48)
 s/o Late JS Aggarwal
 Asstt. Director SDRO, NSSO, Kolkata
28. S. Dhar (Age 56)
 s/o Shri JN Dhar
 Asstt. Director, NSSO, SDRD, Kolkata
29. SR Banerjee (age 56)
 s/o Shri Hiranmoy Banerjee
 Asstt. Director, NSSO, DPD
 Kolkata
30. P Saxena (age 50)
 s/o late BB Saxena
 Asstt. Director CSO, I.S. Wing
 1, Council House Street, Kolkata
31. B.S. Landge (age 58 years)
 s/o Shri Shanka Landge
 Asstt. Director, office of Textile
 Commissioner, New CGO Building
 48, New Marine Lines
 BB No.11, 500 Mumbai 20
32. TK Bhattacharya
 s/o Shri Kailash Bhattacharya
 Asstt. Director, CSO, IS Wing
 Kolkata
33. V.K. Muraleedharan Nair (age 58)
 s/o Shri R. Krishna Pillai
 Asstt. Director NSSO, FOD
 Vidyanagar, Hubli-21

34. P. Narayana Kutti (age 58)
 S/o P. Kurhukuttatharkar
 Asstt. Director (R) NSSO FOD
 Regional Office, Bangalore-34

35. LRC Prakash (age 59)
 s/o Shri LM Ramchandran
 Asstt. Director, SISI, Bangalore

36. D.K. Patil (age 57)
 s/o Shri KV Patil
 office of the Dy. Dir. NSSO (FOD)
 Sharaddha Building
 RV Desai road, Baroda (Gujrat)

37. Smt. SK Sharma (age 54 years)
 w/o Shri DP Sharma
 Asstt. Director, Deptt. of Culture
 Min. of Culture and Tourism
 New Delhi

38. Ms. Arati Kachroo (age 53)
 d/o Shri BB Bhattacharya
 in the office of Prime Minister
 268, Deshbandhu Aptts, Kalkaji, New Delhi

39. Shri B.S. Kambo (age 52)
 s/o Shri Lakhbir Singh
 Asstt. Director
 Ministry of Statistics & PI
 SP Bhawan, New Delhi

40. Shri DK Joshi (age 57)
 s/o G.L. Joshi
 Research Officer
 Direct of Eco. Statis, Shastri Bhawan
 New Delhi

41. Shri S. Jesuraj (age 57)
 s/o Shri G. Susai
 Research Officer
 Directorate of Eco. & Stat.
 Deptt. of Agriculture & Cooperation
 Chennai

..Applicants

(By Advocate: Shri Gyan Prakash)

Versus

Union of India through

1. Secretary, Ministry of Statistics & Programmes, Implementation
 Deptt. of Statistics, Sardar Patel Bhawan
 Sansad Marg, New Delhi-1
2. The Secretary
 Deptt. of Personnel & Training
 North Block, New Delhi-1
3. The Secretary
 Union Public Service Commission
 Shahjahan Road, New Delhi

(By Advocate Shri SM Arif for R-1- R-2
Ms. B. Rana for R-3)

.. Respondents

O R D E R

Shri Shanker Raju, M (J) :

By virtue of this amended OA, the applicants have sought the following reliefs:

"8.1 Respondents may be directed to prepare yearwise select panel for 32 unfilled vacancies for the year 1996-97, 97-98, 98-99, 99-2000, 2000-2001, 2001-2002 and also for the vacancies for the year 2002-2003 by holding DPC/Review DPC after excluding 28 vacancies already filled vide their order dated 7.10.2003 as given at Annexure A-13. The DPC preparing yearly select panel may be held keeping in view ISS rules and law laid down by the Hon'ble Court on the subject specially the law laid down in N.R. Banerjee's case and Vipin Chand Hiralal Shah's case and Nirmal Chandra Bhattacharya's case by Hon'ble Supreme Court. Any other view will be arbitrary, discriminatory and violative of Article 14 & 16 of the Constitution of India.

8.2 To encourage transparency in the administration and service matters and to safeguard the right of consideration of promotion of the applicants, the respondents may be directed to give yearwise vacancies promotions to Grade IV of ISS under 40% promotion quota for the years 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001, 2001-2002, 2002-2003 and name of applicants selected for select panel of each years, keeping in view the mandatory requirements of preparation of yearly select panel in terms of law laid down by Hon'ble Supreme Court in N.R. Banerjee's case and preparation of Seniority list based in terms of law laid down in Vipin Chand Hiralal Shah's case and other similar cases.

8.3 The respondents may be directed to give consequential benefits to the applicants in terms of salary, promotion etc. on the basis of their position in the yearly select list in accordance with the law laid down on the subject.

8.4 The respondents may be directed to waive the condition of 2 years probation vide their order dt. 7.10.2003 (Annexure A-13) since the applicants covered in aforesaid order have already worked in Grade IV of ISS since last four to six years.

8.5 Respondents may be directed to produce relevant records.

8.6 Any other relief which Hon'ble Tribunal may deem fit keeping in view of the facts and circumstances of the case."

2. A brief factual matrix essential for adjudication is that the Indian Statistical Service (hereinafter referred to as 'ISS') was constituted with initially Grades IV, III, II & I. The cadre controlling authority of ISS was DOPT till October 1984 when it has been taken over by the Ministry of Statistical & Programme Implementation. Grade IV of the Service ibid provided filling up of vacancy not less than 75% by direct recruitment and not more than 25% by promotion amongst the feeder category. However, presently there is no direct recruitment existed in Grade IV JTS cadre, whereas in all other grades in STS, JAG, NFSG and SAG, etc. filling up of post is by 100% promotion. Persons holding feeder post in Group 'B' in statistical discipline have been appointed by various Ministers as Assistant Director, which was equivalent to Grade IV JTS of ISS on ad hoc basis, which had been carried for number of years led to filing of CWP-1595/79 (**Narender Chadha & others v. Union of India & others**). By an order dated 11.2.1986 appointees in Grade IV have been treated as regular appointee, which was implemented by preparing a draft seniority list of 11.2.1986. 365 ad hoc officials were inducted in Grade IV of ISS from the date of continuous ad hoc officiation. The Tribunal vide its order dated 8.9.1989 in OA-844/86 (**Shri Pratap Narain & others v. Union of India & others**) quashed the Grade IV list in implementation of **Narender Chadha's case** (supra) and directed to review all the promotions made in Grade III and above. SLP, being SLP No.14973 of 1989, maintained status quo regarding promotion. The process of promotion in all Grades of ISS was delayed. A final order was passed on 11.9.1990 by the Apex Court in CA-4612-13/90 (**B.S. Kapila & others v. Cabinet Secretary & others**). During the interregnum encadrement of more statistical functional posts, a final seniority list was circulated on 7.3.1997 and a proposal thereof taken to fill up the posts. A revised proposal in December 1998 proposed filling up of 34 vacancies for the year 1993-94, 8 vacancies in 1994-95 and 14 vacancies in 1998-96. These vacancies calculated for the year 1996-97 onwards were not reported to Commission as per revision of pay

scale of 5th Central Pay Commission on 1.1.1996. Promotion order was issued on 16.10.2001 after holding a DPC. However, for filling up of around 60 vacancies from 1996 till 2002, a DPC was convened on 23.9.2003 led to an order passed by the respondents promoting 28 officials as Grade IV, as other officials were either retired or expired.

3. It is relevant to note that out of 41 officials, 19 applicants had been promoted. The cases of two applicants at Sl.Nos.34 & 35 were recommended for promotion, however, they have not been promoted due to death and retirement. The case of one of the applicants has been placed under sealed cover.

4. In the above backdrop, learned counsel for the applicant has since argued the case vehemently by filing the written submissions. Basically, the issue raised is violation of rules while holding DPC and wrong calculation of vacancies. The main thrust of the arguments, apart from other submissions made, is that no doubt in case of anticipated vacancies of holding year-wise DPC, those who are to retire and those who has retired, these vacancies should be carried forward and those who are within the zone of consideration would have to be considered retrospectively. Other contention raised is that while holding DPC, chain vacancies resultant to those who had been promoted in the higher grade and the vacancies created thereupon in the promoted post should also to be taken into account, which has not been done in the present case requiring review of the DPC and re-calculation of vacancies, which would antedate the promotion of the applicants and also would make other eligible promotion being included in the zone of consideration by extending the zone.

5. Learned counsel of the applicants has filed written submissions and also extended vehemence arguments. Learned counsel would contend that as per the decision of the Apex Court in **N.R. Banerjee & others v. Union of India & others**, 1997 SCC (L&S) 1194 and as per Govt. of India's instructions of 10.4.1989 as well as of 1997,

the year-wise DPC has not been held timely with the result right from the year 1986 till 2001-02, no DPC was held, whereas in 2001-02, DPC held for 56 vacancies was for the years 1993 & 1996 and 35 vacancies were filled up on 16.10.2001 though 21 vacancies had been remained unfilled. However, during the interregnum when the OA was pending, DPC held on 23.9.2003 for 16 vacancies covered the time period from 1996 to 2002 and few of the applicants were promoted leaving behind 32 vacancies. Learned counsel would also contend that there had been a wrong calculation of vacancies as there is no certification for the year 1995-96 as to non-availability of eligible candidates, which is in violation of the decision of the Apex Court in **A.K. Bhatnagar & others v. Union of India & others**, (1991) 1 SCC 544.

6. It is contended that all the applicants were eligible for Grade IV promotion in ISS since 1985 to 1992. At the fag end of service according them promotion in Grade IV would mar their further promotions in Grade III. It is stated that though the quota for direct recruitment and promotion was to be maintained, yet the respondents continued making appointments in direct recruitment quota, as such rota quota rule was broken. However, the direct recruits had been given ad hoc promotion in Grade III of ISS. This has been agitated on the ground that had the DPC been conducted at the appropriate time, several applicants would have become eligible in Grade IV in 1997-98 and would have become Grade III officers by now. This, he reiterates on the basis of the decision of the Apex Court in **Nirmal Chandra Bhattacharya v. Union of India & others**, 1992 SCC (L&S) 236.

7. On the wrong calculation of vacancies as per DOPT's instructions of 10.4.1989 on DPC, it is stated that the vacancies, which are to be taken into account, should be clear vacancies arising out of death, retirement and resignation. It is further reiterated in OMs dated 8.9.1998 and 6.10.1999 where the concept of chain vacancy had been elaborated, which, *inter alia*, includes

vacancies arisen by retirement in all higher grades as per para 7 of the OM dated 8.9.1998. In this backdrop, it is stated that while calculating vacancies for the years 1996 to 2002, OM dated 6.10.1999 has not been taken into consideration. Had this been taken into consideration, there would have been more vacancies, whereas on consideration by the DPC in 2001, 56 vacancies were, in all, available but only 35 officials had been promoted and these 21 posts, which remained unfilled and had not been carried forward to 2003 DPC on year-wise basis, which not only offends OM dated 11.7.1997 issued by the DOPT but also the reservation rules. Learned counsel would contend that if the very basis of calculation of vacancies is incorrect, it results into the great injustice as has been held by the Apex Court in **Sri Kant Tripathi & others v. State of UP & others**, 2002 SCC (L&S) 968 and in case of **Bishan Sarup Gupta v. Union of India & others**, 1973 SCC (Lab.1) (Constitution Bench).

8. By filing reply to the additional counter affidavit dated 14.2.2005, it is stated by the respondents that the vacancies as per Annexure T-1 are the correct calculation of vacancies, which is at variance as reflected by the respondents. In their additional pleadings, learned counsel would contend that though the respondents have shown year-wise vacancy position under 40% quota for promotion to Grade IV of ISS, which has not been correctly worked out, the vacancies arising out of retirement of officers from higher posts of Grade IV and STS, JAG, NFSG and SAG does not include the details which are the chain vacancies and have not been considered for calculation of vacancies, depriving the consideration of the applicants at the appropriate time.

9. Learned counsel would also contend that the applicants have not been either considered under the extended panel as laid down under para 6.4.1 of DOPT's OM of 1989. Insofar as roster is concerned, it is stated that after post based roster, it is only the roster points, which are to be counted for reservation. In the year 2000-2002, whereas 63 vacancies were available in

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the promotion quota, 53 vacancies were for general and 7 for SC/ST but the panel, keeping in light the resultant chain vacancies, had not been extended. Though several officers had retired in various grades, i.e., 39, 26, 3, 10 and 25 in various hierarchy, yet as per OM of 9.10.1999, chain vacancies had not been anticipated for calculation of year-wise vacancies to consider applicants for promotion.

10. On the other hand, respondents' learned counsel Shri S.M.Arif vehemently opposed the contentions and stated that to fill up 60 vacancies for the year 1996 till 2002, UPSC convened DPC on 23.9.2003. The respondents have issued orders promoting 28 officials and as per DOPT's OM those, who were in the zone of consideration and eligible and those who had retired before promotion orders, though to be considered but should not be actually promoted, the promotion cannot be claimed as a matter of right.

11. Giving brief history of the litigation, it is stated that there is no illegality in calculation of vacancies by the respondents and applicants' reliefs claimed in the OA are vague. In the additional affidavit filed on 11.2.2005, it is stated that due care has been taken as to DOPT's instructions dated 2.7.1997 regarding post-based roster with a background of reduction in the number of posts in Grade IV (JTS) of ISS vide order dated 17.2.1998. In the DPC held on 23.9.2003, 53 officials (against 60 vacancies) have been recommended in the year-wise panel. The remaining 7 vacancies reserved for SC/ST for the year 2000-01 and 2001-02 were not taken into consideration for want of eligible persons in the normal and extended zones. Accordingly, 28 officials were promoted on 7.10.2003 as the remaining officials were either retired or expired by that time. The DPC held on 9.11.2004 recommended 36 more officials in year-wise panel for promotion and regarding 3 applicants, who could not be covered under the zone of consideration for the years, i.e., 2002-03 and 2003-04, there is no illegality in the procedure.

12. Complying with the directions of this Court dated 22.3.2005, by way of additional affidavit, it is contended that out of 41, 38 applicants either had already been covered or have no further cause of action and as per DOPT's OM dated 2.7.1997 while preparing the roster, no year-wise vacancies of general category for the year 1997 to 2001 was available. Vacancies at point Nos.13, 9, 32 and 35 of general category had occurred but had been utilized to adjust excellent officers belonging to general category on implementation of post based roster.

13. In nutshell what has been reflected that while calculating vacancies for the year 1996-97, 21 vacancies were sought to be taken as carried forward vacancies as 2001 DPC panel, the contention of the applicants is wrong. The proposal sent by the Ministry to the Commission in December 1998 was to fill up 56 vacancies for the years 1993 to 1996 and a panel was formed on 13.9.1991. 35 officials were promoted, excluding those who had retired and died and 21 vacancies, which had arisen during the early years, i.e., 1993 to 1996, stood exhausted after giving panels by the Commission, which included the officials recommended against 56 vacancies, which, *inter alia*, included 21 vacancies.

14. We have carefully considered the rival contentions of the parties and perused the material placed on record.

15. Guidelines for holding DPC had been promulgated on 10.4.1989 and were amended on 27.3.1997 through OM issued by DOPT. As per para 6.4.1, the following decision has been taken:-

"Preparation of Year-wise panels by DPC where they have not met for a number of years

6.4.1 Where for reasons beyond control, the DPC could not be held in a year(s), even though the vacancies arose during that year (or years), the first DPC that meets thereafter should follow the following procedures:-

- (i) Determine the actual number of regular vacancies that arose in each of the previous year(s) immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.
- (ii) Consider in respect of each of the years those officers only who would be within the field of choice with reference to the vacancies of each year starting with the earliest year onwards.
- (iii) Prepare a 'Select List' by placing the select list of the earlier year above the one for the next year and so on."

16. As regards DOPT's OM dated 9.4.1996, which deals with the guidelines for preparing extended panel in the case of promotion. The following is the decision of the DOPT:

"Sub:- Guidelines for preparing extended panel in the case of promotion - Regarding.

The undersigned is directed to refer to Department of Personnel & Training, O.M. No.22011/5/86-Estt. (D), dated 10-4-1989 laying down guidelines on Departmental Promotion Committees. Normally in the case of promotion, the number of persons recommended in the panel is equal to the number of vacancies reported. However, sometimes DPCs recommended additional vacancies (extended panel) to tide over situations where officers on the select panel are not available for appointment by reason of being on deputation, etc. There are at present no clear instructions regarding the guidelines to be followed for preparation of such extended panel. It has been noticed that such extended panels have sometimes been utilized for filling vacancies which have arisen subsequent to the DPC or during currency of the panel. This is an incorrect use of the extended panel.

2. The matter has been examined in consultation with the UPSC and it has been decided that DPCs shall prepare an extended panel only in the following contingencies:

- (i) when persons included in the panel are already on deputation or whose orders of deputation have been issued and will be proceeding on deputation shortly for more than a year, OR
- (ii) when persons included in the panel have refused promotion on earlier

occasions and are under debarment for promotion, OR

(iii) when officers included in the panel are retiring within the same year, provided there is no change in the zone of consideration by the expected date of their retirement.

3. It has also been decided that while giving the extended panel, the DPC should stipulate a condition against the additional names to the effect that they will be promoted only in the event of the officer(s) in regular panel not being available for promotion/appointment for the reason given by the Ministry/Department.

4. Ministries/Departments are requested to bring these instructions to the notice of all concerned including their Attached and Subordinate Offices for guidance and strict compliance."

17. Insofar as the procedure to be followed by the DPC in regard to retired employees is concerned, it has been observed by the DOPT vide its OM dated 12.10.1998, which reads:

"Promotion to be followed by the Departmental Promotion Committee in regard to retired employees.-

2. Doubts have been expressed in this regard as to the consideration of employees who have since retired but would also have been considered for promotion, if the DPC(s) for the relevant year(s) had been held in time.

3. The matter has been examined in consultation with the Ministry of Law (Department of Legal Affairs). It may be pointed out in this regard that there is no specific bar in the aforesaid Office Memorandum, dated April 10, 1989 or any other related instructions of the Department of Personnel and Training for consideration of retired employees, while preparing yearwise panel(s), who were within the zone of consideration in the relevant year(s). According to legal opinion also, it would not be in order, if eligible employees, who were within the zone of consideration for the relevant year(s) but are not actually in service when the DPC is being held, are not considered while preparing yearwise zone of consideration / panel and, consequently, their juniors are considered (in their places) who would not have been in the zone of consideration, if the DPC(s) had been held in time. This considered imperative to identify the correct zone of consideration for relevant year(s). Names of the retired officials may also be included in the panel(s). Such retired

officials would, however, have no right for actual promotion. The DPC(s), may, if need be, prepare extended panel(s) following the principles prescribed in the Department of Personnel & Training, O.M. No.22011/8/87-Estt. (D), dated 9-4-1996. (copy enclosed).

4. Ministries/Departments are requested to bring these instructions to the notice of all concerned including their Attached and Subordinate Offices."

18. As regards procedure observed by the DPC, which resulted to chain vacancies on retirement, the following is the decision by the DOPT dated 6.10.1999

"G.I., Dept. of Per. & Trg., O.M. No.22011/9/98-Estt. (D), dated the 6th October, 1999

Clarifications regarding procedure to the observed by the DPCs with reference to "chain vacancies" on account of retirement, etc., in the higher grades/hierarchy during that vacancy (panel) year

The undersigned is directed to invite reference to the Department of Personnel & Training O.M. of even number, dated 8-9-1998 on the subject cited above. Paragraph 7 of the said O.M., inter alia, provides that DPC for the concerned grade may take into account the existing and clear anticipated vacancies due to retirement, etc., in the concerned grade as well as "chain vacancies" on account of retirement, etc., in the higher grades which can be clearly anticipated in the same vacancy year. References are being received in the Department of Personnel and Training seeking clarifications as to whether the "chain vacancies" in the higher grades may include vacancies arising on account of promotion also in the higher grades.

2. The aforesaid matter has been considered in consultation with the Union Public Service Commission. Accordingly, it is hereby clarified that the "chain vacancies" on account of retirement, etc., in the higher grades in a vacancy (panel) year shall include:-

The vacancies which can be clearly anticipated as likely to become available in the concerned grade by promotion of officers of the service to higher grades during that vacancy (panel) year. (Expected promotion to the higher grades under the Model Calendar for DPCs would normally be against vacancies arising by retirement in all the higher grades/hierarchy as per Paragraph 7 of the OM, dated 8-9-1998).

For the sake of illustration, if a panel is being prepared for promotion to JTS, the chain vacancies in the higher grades in that vacancy (panel) year shall include vacancies arising

on account of retirement in STS, JAG, NFSG and SAG, etc., in the same panel year, i.e., if four officers are retiring in STS, three officers in JAG and two in NFSG and one in SAG in the panel year, the total number of anticipated chain vacancies for JTS in the said panel year shall be 10.

3. With the Model Calendar for DPCs coming into operation, panels for various grades of a cadre would become available well in time. Moreover, in terms of Paragraph 6 of the Department of Personnel, and Training O.M. No.22011/9/98-Estt.(D), dated 8.9.1998, an occasion may arise necessitating preparation of a fresh panel for the same year/grade during the currency of the earlier panel prepared for the purpose. It shall, therefore, be ensured that officers included in the earlier panel are promoted before officers from the next panel are picked up.

4. Ministries/Departments are requested to give wide circulation to these clarifications for general guidance in the matter and to ensure strict adherence to the time-schedule prescribed in the Model Calendar for DPCs including the position clarified in the preceding paragraphs for successful operation of these instructions."

19. Though these guidelines issued for the DPC are supplementary to the recruitment rules where it is obligatory upon the DPC to give grading of fit or unfit while evaluating the comparative chart of the candidates in selection post. As per DOPT's OM dated 12.10.1998 ibid, as the issue of consideration for promotion of those who have since retired is concerned, the Ministry of Law has been consulted and it has been laid down that those who are even retiring and are within the zone of consideration, it is imperative for an identification of correct zone of consideration to include these retired officials in the panel but they would not be having any right for actual promotion. However, in such an event, the vacancies, which are not filled up due to the retirement, an extended panel has to be prepared as per DOPT guidelines dated 9.4.1996. In the above guidelines, when officers included in the panel are retiring, extended panels are utilized for filling up vacancies, which had not been filled up. DOPT's OM dated 6.10.1999, which had been issued with a concept of chain vacancies, for the purposes of considering extended zone of consideration, are the vacancies not only in the wake of the retirement of the officials but also the vacancies

which had likely to become available in the concerned grade by promotion of officers of the service to the higher grades.

20. The respondents, insofar as 40% quota of Grade IV as promotee quota, have given a calculation of vacancies against the years 1996-97, 1997-98, 1998-99 and 1999-2000 where they have accorded the details of the vacancies accrued, which were 56 in number, according to them. Out of which, 35 had been filled up, as 21 pertains to those who have retired. The contention put-forth by the applicants to carry them forward for the erstwhile years in the year-wise consideration of the panels initiated from 1996 and had been turned down for all practical purposes. As per the additional affidavit, these vacancies had been utilized as retirees, though empanelled against 21 vacancies, have not been actually promoted and these vacancies pertain to the erstwhile years 1993 to 1996 and were exhausted by the Commission, which included the officials recommended against 26 vacancies. There is no whisper as to application of DOPT's OM of 1999 as to calculation of vacancies in the year-wise panel, i.e., resultant vacancies on account of agreement in the higher cadre and post, whereas only 35 officers had been promoted in DPC held in September 2001, the remaining vacancies are not explained.

21. The respondents have not correctly worked out the vacancies arising out of promotion to Grade IV to Grade III of ISS and also those who had retired from higher post and vacancies arising out of their retirement and chain vacancies on account of retirement of senior officers where they had been considered while drawing panels by extending the zone of consideration is a feel, which has not been occupied by any justified and reasonable explanation of the respondents to the contentions raised is to the resultant vacancies and non-following the DOPT's OM of 1999 even if there is a reduction in cadre, i.e., number of posts in Grade IV. For want of explanation, the contention of non-following the valid procedure of computing or calculating the resultant vacancies out of retirement on higher grades.

This has not been followed. These instructions do not override the statutory rules but supplement it. As mandatory guidelines have not been followed, DPC has acted illegally dehors the procedure.

22. Insofar as the resultant vacancies are concerned, the Apex court in **N.R. Banerjee's case** (supra) held as follows:-

"13. It is true that the material furnished before us would indicate that action was taken on 22-12-1993 by the Ordnance Factory Board and circulated for action to be taken by the Government and thereafter the Union Public Service Commission was consulted. Action taken on this material should have been taken much earlier to the date on which it was taken since they knew that four members were due to retire in August, September, October 1994 and March 1995. These were anticipated vacancies likely to arise on permanent basis and promotion to them was to be made on regular basis. In other words, they were all clear vacancies. So they were to be finalised before April 1994 and the confidential reports should have been approved before 31-3-1993 and all eligible candidates within the zone of consideration as on the date of DPC were entitled to be considered. The direction given by the Tribunal referred to above is clearly in accordance with the procedure indicated hereinbefore. Therefore, we do not find that the orders are vitiated by any error of law warranting interference."

23. In **Vinod Kumar Sangal v. Union of India & others**, 1995 (3) AISLJ 143, the Apex Court ruled that in a case where DPC has not been held for number of years, the year-wise panel should be made for selection.

24. In **Sri Kant Tripathi's case** (supra), the Apex court while dealing with U.P. Higher Judicial Service Rules, 1975 as to mode of determination of vacancies in the year concerned also took note of vacancies likely to occur during the succeeding years and not on the basis of percentage of the total cadre strength. While observing so, the Apex court held as follows:-

"23. That apart, from the averments made as well as materials on record, including the resolution of the Full Court, it transpires that the Selection Committee, constituted under Rule 16 by the Chief Justice, took upon itself the task of finding out the number of vacancies in the cadre available to

be filled up by direct recruitment and then selected persons on the basis of such determination. The preliminary selection list submitted by the Selection Committee under sub-rule (3) of Rule 18, was for nine appointments, notwithstanding the fact that the advertised vacancies were only five. The determination of the number of officers to be taken at a recruitment, keeping in view the vacancies then existing and likely to occur in the next two years, is a statutory obligation of the Court under Rule 8 and the Court cannot abdicate its obligation and leave it to be determined by the Selection Committee constituted under Rule 16. The factual fixation of the number of officers to be taken at a recruitment could be determined by a committee, constituted by the Court if the administrative exigency so requires, but then such determination would have to be approved by the Court in its Full Court meeting. Until such number is fixed under Rule 8, the question of taking recourse to Rule 17 for direct recruitment and Rules 20 and 21 for promotion would not arise. At any rate the Selection Committee, constituted under Rule 16 by the Chief Justice has to discharge its function of scrutinising the applications and holding of such examination, as it may consider necessary for judging the suitability of the candidates and it may call for interview such of the applicants, who in its opinion have qualified for interview and thereafter, assess the merits of the candidates, having regard to the guidelines indicated in sub-rule (2) of Rule 18. It would not have any jurisdiction to consider the question of determining the number of vacancies, already determined by the Court under Rule 8. In the case in hand, the conceded position being that it is the Selection Committee who determined the number of posts available for being filled up by direct recruitment, on account of the judgment of this Court in Garg case holding that the quota available in favour of direct recruits in Rule 6 would also apply to the temporary vacancies, such determination must be held to be not in accordance with the Rules."

25. In **Suraj Prakash Gupta & others v. State of J&K & others**, 2000 (2) ATJ 563, the Apex Court ruled that in the matter of any deviation from the procedure where the DPC had acted in such a manner that there appears to be mala fide, persons on review DPC can be considered for promotion from a retrospective date.

26. In our considered view, while the DPC may be delayed due to the intricacies of judicial system whereby right from **Narender Chadha's case** (supra), the issue was settled only after holding DPC in 2001, i.e.,

for the yester years and also for the year 2003 yet the respondents, while calculating the vacancies, have not adhered to the resultant chain vacancies on account of retirement and promotion to higher grades, which had certainly prejudiced applicants' claim to be considered from the date of the accrual of vacancies in the year-wise panel on attainment of eligibility and by not extending the panel as per the procedure laid down *ibid*, their right for consideration has been affected. Though it is settled law that mere chances of promotion does not constitute a right but one has a right being fundamental to be considered for promotion.

27. In the matter of the policy of the Government and the administrative action, though statutory rules and supplementary Govt. instructions, which do not override the statutory rules framed under Article 309 hold the field and should be consonance with the requirement of the Articles 14 & 16 of the Constitution as has been held by the Apex Court in **State of Haryana & others v. Piara Singh**, 1992 SCC (L&S) 825 and also in **Kailash Chand Sharma v. State of Rajasthan & others**, 2002 AIR 2877.

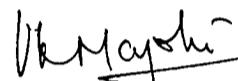
28. The other contentions raised are not adjudicated for the present. Only on the above score, we find it difficult to reconcile with the justification and explanation tendered by the respondents as to calculation of vacancies in their two DPCs held in 2001 and 2003 pertaining to the vacancies for the years 1996 till 2003 though many of the applicants are promoted but still they have a right to be considered on re-calculation of vacancies in accordance with procedure and guidelines from retrospective date, which would also give them an opportunity to be further considered for higher post and in the wake of their approaching retirement on superannuation.

29. It is trite law that when a decision of the Government is not consonance with law, rules and instructions, the only direction can be issued is for re-consideration.

30. In the result, for the foregoing reasons, the OA stands disposed of with a direction to the respondents to re-examine the entire matter in the light of our observations and in furtherance to that, prepare year-wise select panel for the vacancies pertaining to the years 1996 to 2003 by holding review DPC, except those 28 vacancies filled up by an order dated 7.10.2003 and in that event, the claim of the applicants be also considered for promotion from an anterior date and in case of their fitness, they may be accorded all the consequential benefits. The applicants' promotion in the event is antedated would require consideration for further promotion to Grade III. The above-said exercise shall be completed within a period of three months from the date of receipt of a copy of this order. No costs.



(Shanker Raju)
Member (J)



(V. K. Majotra)
Vice Chairman (A)

/sunil/