

CENTRAL ADMINISTRATIVE TRIBUNAL  
BANGALORE BENCH

ORIGINAL APPLICATION NO.170/00174/2018

DATED THIS THE 04<sup>TH</sup> DAY OF MARCH, 2020

**HON'BLE DR.K.B.SURESH, MEMBER (J)**

**HON'BLE SHRI C V SANKAR, MEMBER (A)**

Sri Tushar Giri Nath, I.A.S,  
S/o Kashi Nath,  
Aged about 50 years,  
Working as Principal Secretary-II  
To Chief Minister,  
Vidhana Soudha, Bangalore 560 001

.... Applicant

(By Advocate Shri M.S. Bhagwat)

Vs.

1. The State of Karnataka,  
Represented by its Chief Secretary,  
Vidhana Soudha, Bangalore 560 001

2. The State of Karnataka,  
Represented by its Principal Secretary,  
Department of Personnel and  
Administrative Reforms,  
Vidhana Soudha, Bangalore 560 001

3. The Principal Accountant General (A&E)  
Post Box No. 5329,  
Park House Road,  
Bangalore 560 001

.... Respondents

(By Shri R.B. Sathyanarayana Singh, Counsel for Respondent No. 1 & 2  
and Shri V.N. Holla, Counsel for Respondent No.3)

ORDERDR. K.B. SURESH, MEMBER (J):

The Principal Secretary to the Chief Minister is before us. Applicant seeks that the promotion granted to him by the State Government without the concurrence of DoPT which was not granted on the opinion of the CAG was otherwise as per the rules may be treated as regular. In 1954, the Government of India enacted the rules called Indian Administrative Service (Pay) Rules, 1954 in exercise of power conferred under Section 3 of All India Services Act, 1951. The applicant had cleared the civil services examination and was allotted to Karnataka cadre in 1993. The case of the applicant is that in 2007 the Government of India had enacted the rules called Indian Administrative Service (Pay) Rules, 2007 but which is almost similar to the old Act, as far as this case is concerned.

2. The State Government had sought for the concurrence of the Government of India on 19.10.2015 for the promotion of the applicant and some others to HAG payscale as contemplated under Rule 3 (2) (ii) of the Indian Administrative Service (Pay) Rules, 2007. The case of the applicant seems to be that, on 23.12.2015, 1993 batch officers were granted HAG payscale by the Government of Tripura following a Court case to avoid action under contempt. Applicant claims a similarity of

events herein as well and seeks parity. Therefore, what are the powers and responsibilities of CAG?

3. The functions of the Comptroller and Auditor of India are derived mainly from the provisions of Article 149 to 151 of the Constitution of India. Article 149 provides that the Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were exercisable by the Auditor General of India before the commencement of the Constitution in relation to the accounts of the Dominion of India and of the provinces respectively. Under these transitional provisions the Comptroller and Auditor General continued to perform the duties and exercise the powers in relation to the Accounts of the Union and of the States as provided in the Government of India (Audit and Accounts) Order 1936, as adopted by the India (Provisional Constitution) Order, 1947 till the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 (hereafter called the Act) was enacted by the Parliament. The Act which came into force on 15th December, 1971 has been amended in 1976, 1984, 1987 and 1994. The Act is a comprehensive legislation framed under Article 148(3)

and 149 of the Constitution. It prescribes (a) the salary and other conditions of service of the CAG and (b) his duties and powers in relation to the accounts and audit of accounts of the Union, the States, the Union Territories and other authorities and bodies. No law of State Legislature can cast any duties or confer any powers upon the CAG or his representatives. Likewise the duties and powers of the CAG prescribed by law made by the Parliament cannot be superseded or abridged by or under any law made by the State Legislature.

Art. 149—The Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made,, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India of the Provinces respectively.

Art. 150—The Accounts of the Union and of the States shall be kept in such form as the Comptroller and Auditor General of India, may with the approval of the President, prescribe.

Art. 151—(1) The reports of the Comptroller and Auditor General of India relating to the Accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor General of India relating to the Accounts of a State shall be submitted to the Governor or Rajpramukh of the State, who shall cause them to be laid before the Legislature of the State.

**Power to make regulations.**—The Comptroller and Auditor-General is hereby authorised to make regulations for carrying into effect the provision of this Act in so far as they relate to the scope and extent of audit including laying down for the guidance of the Government Departments the general principles of Government accounting and the broad principles in regard to audit of receipt and expenditure.

4. The Supreme Court held that the CAG's functions to carry out examination into economy, efficiency and effectiveness with which the Government has used its resources, is in-built in the 1971 Act. Performance Audit Reports prepared under the Regulations have to be viewed accordingly. The Court observed no unconstitutionality in the Regulations.

5. Article 149 of the Constitution of India provides that CAG shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament. In pursuance of Article 149 of the Constitution, the 1971 Act has been enacted. Amongst other provisions in the 1971 Act, Section 16 provides that:

“16 Audit of receipts of Union or of States – It shall be the duty of the Comptroller and Auditor General to audit all receipts which are payable into the Consolidated Fund of India and of each State and of each Union Territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed and to make for this purpose such examination of the accounts as he thinks fit and report thereon.”

6. CAG's function to carry out examinations into economy, efficiency and effectiveness with which the Government has used its resources is inbuilt in the 1971 Act. Performance audit reports prepared under the Regulations have to be viewed accordingly. We find no unconstitutionality in the Regulations. Moreover, Article 151 of the Constitution provides that the reports of CAG relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament and the reports relating to the accounts of a State shall be submitted to the Governor of the State who shall cause them to be laid before the legislature of the State. The audit

reports which are submitted by CAG are, thus, subject to scrutiny by Parliament or the legislature of the State, as the case may be.

7. The fundamental issue involved is the letter issued by the Deputy Accountant General with No. GM/IAS I/2016-17 dated 24.05.2016, which we quote:

*"S.Murali, IAAS,  
Deputy Accountant General (GE)*

*DO Letter No.GM/IAS I/2016-17*

*Date:24.05.2016*

*Dear Sir,*

*Government Notification No. DPAR 232 SAS 2016 dtd:30.04.2016 may please be seen. The following IAS Officers of 1992 and 1993 batch have been promoted to officiate in the HAG scale of IAS viz., 67000-79000.*

<i>Sl. No.</i>	<i>Name of the Officer</i>	<i>Batch</i>	<i>Eligible for promotion</i>
<i>1.</i>	<i>Smt.UmaMahadevan</i>	<i>1992</i>	<i>2017</i>
<i>2.</i>	<i>Sri.T.Sham Bhatt</i>	<i>1992</i>	<i>2017</i>
<i>3.</i>	<i>Sri.TusharGirinath</i>	<i>1993</i>	<i>2018</i>
<i>4.</i>	<i>Sri. S. R. Uma Shankar</i>	<i>1993</i>	<i>2018</i>

*In this regard, I invite a reference to Government of India decision under Rule 3 (copy enclosed) regarding promotion to various grades of IAS. The Super Time Scale level officers who have completed 25 years of service are eligible for promotion to the grade of above Super Time Scale, i.e., Principal Secretary Level (HAG).*

*The above officers have not completed the 25 years of services as stipulated by Government of India. Officers of 1992 and 1993 batches are eligible for promotion during 2017 and 2018 respectively.*

*Further, I invite a reference to letter from Government of India in No.11030/4/2002-AIS(II) dtd: 24.04.2002 (copy enclosed)*

*addressed to Chief Secretaries of all the State Governments, wherein it is clearly stated that an IAS officer is eligible for promotion to above Super Time Scale (HAG) on completion of 25 years only and the requirement of 25 years of service too has the force of statutory rule in absence any rule to the contrary.*

*Therefore, it is requested to kindly look in to the matter personally and arrange to issue the promotion orders in accordance with guideline and clarification issued by Government of India.*

*Incidentally I bring it to your notice that as per Rule 3(2)(ii) & (iii) of IAS Pay Rules, Government of India, DOPT letter No.F.No.20011/2/2008/AIS(II) dtd: 25.03.2008 and Government of India clarification vide letter No.F.No.20011/2/2008/AIS(II) dtd: 19.06.2008 (Copy enclosed), it is mandatory upon the State cadre to seek prior concurrence of the Central Government on number of vacancies available in each grade and also to indicate in the last para of the promotion order the details of communication from the DOPT conveying concurrence of the Central Government to the availability of vacancies at the level of Selection Grade and above.*

*Therefore, I request you to kindly arrange to indicate the details of concurrence seeking letter and also communicate from Government of India conveying the concurrence in the last paragraph of the promotion order in order to accept the promotion orders.*

*With regards,*

*Yours Sincerely,  
Sd/-“*

Copies of the letter have been sent to the applicant.

8. The wisdom of this statement had been taken up by the applicant and others to which the Accountant General sent another letter No. GM/IAS1/2016-17/338 dated 25.08.2016, which we quote:

*"No.GM/IAS1/16-17/338*

*Date: 25.08.2016*



To

The Director General  
Government Accounts-II  
O/O. The Comptroller & Auditor General of India,  
Pocket No.9, DeenDayalUpadhyayaMarg,  
NEW DELHI-110 124.

Madam,

*Sub: Promotion of IAS officers of 1992 and 1993 batch to  
HAG scale in Karnataka*

*REF: Hqrs. DO letter No.360-AC-MIS/283-97 VOL II dt.14-  
6-2002.*

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*Please refer to HQrs letter dated 14.6.2002 (Enclosure 1) wherein copy of Govt of India, DOPT letter dated 24.4.2002 regarding pay fixation of IAS officers on promotion to above super time scale (HAG) was enclosed. As per letter dated 24.4.2002 of Govt of India, DOPT, the requirement of 25 years of service for above supertime scale (HAG) has the force of Statutory Rule in the absence of any Rule to the contrary and there are no exceptions to these rule and instructions (Enclosure 5). As per HQrs Letter dated 14.6.2002 any case of infraction of the statutory time limit is to be brought to the notice of Govt. of India, DOPT, and also to HQrs Office. In this regard it was noticed that the following IAS officers of 1992 & 1993 batch have been promoted to officiate in HAG Scale of IAS in Pay Band 67,000-79,000, vide Government of Karnataka, Notification No.DPAR 232 SAS 2016 dtd: 30.04.2016 (Enclosure 2).*

Sl. No.	Name of the Officer	Batch
1.	Smt.UmaMahadevan	1992
2.	Sri.T.Sham Bhatt	1992
3	Sri.TusharGirinath	1993
4.	Sri.S.R.Umashankar	1993

*2. Government of India decision under Rule 3 (Guidelines regarding promotion to above super time scale in the IAS, Annexure-I, V) reads as follows "The zone of consideration for promotion in this grade may consist of the Super Time Scale level officers who have completed 25 years' service. Promotion of*

*officers thus cleared could be made at any time during the relevant year, provided vacancies in this grade are available” (Enclosure 3). Rule 3(2)(ii) & (iii) of IAS (Pay) Rules, 2007 is as follows; 3(2) (ii) Appointment of a member of the service in the scales of Selection Grade and above shall be subject to availability of vacancies in these grades and for this purpose, it shall be mandatory upon the state Cadres or the Joint Cadre Authorities, as the case may be, to seek prior concurrence of the Central Government on the number of available vacancies in each grade. (iii) The Central Government shall accord such concurrence within a period of thirty days from the date of receipt of such references and if the Central Government does not accord concurrence within a period of said thirty days, the concurrence on availability of vacancies shall be deemed to have been accorded. (Enclosure 4). As per DP&T letter No.20011/1/2005-AIS (2) dated 14th May 2007, any proposal for concurrence as per the provision of Rule 3(2)(ii) & (iii) of IAS Pay Rules 2007, all necessary details which inter alia include anticipated vacancies on the date of eligibility of a particular batch to a particular Grade has to be sent to the Department. (Enclosure 5). As per letter dated 24.4.2002 of Govt. of India, DOPT, addressed to Chief Secretary of all State Governments, the requirement of 25 years of service for above Supertime scale (HAG) has the force of Statutory Rule in the absence of any Rule to the contrary and there are no exceptions to these rule and instructions (Enclosure 5).*

*3. Since the above officers have not completed 25 years of Services as stipulated in Government of India decision under Rule 3 (guidelines regarding promotion to various grades in the IAS) and instructions issued in this regard mentioned above, promotions of IAS officers of 1992-1993 batch (who have not completed 25 years) to HAG scale have not been accepted by this office and pay slips issued in the Super Time Scale of IAS. A DO letter was addressed (24.5.2016) to Government of Karnataka to issue the promotion orders in accordance with guideline and clarifications issued by government of India (Enclosure 6).*

*4. The Govt. of Karnataka in its reply dated 20.7.16.(Enclosure 7) inter alia stated that the concurrence of Government of India was sought with respect to vacancies vide letter dated 19-10-2015 as required under Rule 3(2)(ii) of IAs(Pay) Rules, 2007. As the concurrence was not received within 30 days from the Government of India, it was considered as deemed to have been accorded under Rule 3(2)(iii) of IAS (Pay) Rules, 2007.*

*While referring to guidelines with respect to promotions it was stated that in all other grades other than the Apex Scale & HAG Scale, i.e., Senior Scale/Selection Grade/Supertime Scale, the guideline mentions that the officer concerned shall be eligible for appointment to the next higher grade upon completion of the required number of years of service. Whereas, for promotion to the HAG Scale from super time Scale, the word used is may, i.e., the zone of consideration may consist of the Super Time Scale level officers who have completed 25 years of service. Hence, the guidelines do not prohibit the State government from promoting officers who have not completed 25 years of service to HAG scale, provided vacancies are available in this grade. State Government have requested this office to issue pay slips to the promoted officers after fixing their pay in the promoted scales as it has complied with rules and guidelines issued by Govt. of India.*

*5. However, based on the rule provision and other instructions issued on the matter and also as per the letter dated 24.4.2002 of Govt. of India, DOPT, as per which the requirement of 25 years of service for above super time scale (HAG) has the force of Statutory Rule in the absence of any Rule to the contrary and there are no exceptions to these rules and instructions. Hence this office has taken a stand that in respect of above cases the eligibility of 25 years of service has to be complied with for promotion.*

*Hence, the above facts were also brought to the notice of Govt. of India vide letter dated 23.8.16 with a request to clarify whether the promotion to HAG scale in respect of above officers who have not completed 25 years can be accepted and acted upon by this office and the same was also intimated (23.8.16) to Govt. of Karnataka.*

*This issues with the approval of Accountant General (A & E).*

*Yours faithfully,*

*Sd/-*

*SR.DEPUTY ACCOUNTANT GENERAL (GE)”*

9. This was also followed by the letter to the Chief Secretary of the Government with No. GM/IAS1/16-17/339 dated 25.08.2016, which we quote:

*"No. GM/IAS1/16-17/339*

*Date: 25.08.2016*

*The Chief Secretary to Government  
Government of Karnataka  
VidhanaSoudha  
Bangalore*

*Sir,*

*SUB: Promotion of IAS officers of 1992 and 1993 batch to  
HAG scale.*

*REF: DPAR 232 SAS 2016 dated 30.4.16.*

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*The following IAS officers of 1992 & 1993 batch have been promoted to officiate in HAG Scale of IAS in Pay Band 67,000 – 79,000, vide Government of Karnataka, Notification No. DPAR 232 SAS 2016 dtd: 30.4.2016 (Enclosure I).*

<i>Sl. No.</i>	<i>Name of the Officer</i>	<i>Batch</i>
<i>1.</i>	<i>Smt.UmaMahadevan</i>	<i>1992</i>
<i>2.</i>	<i>Sri.T.Sham Bhatt</i>	<i>1992</i>
<i>3.</i>	<i>Sri.TusharGirinath</i>	<i>1993</i>
<i>4.</i>	<i>Sri. S. R. Uma Shankar</i>	<i>1993</i>

*2. Government of India decision under Rule 3 (Guidelines regarding promotion to above super time scale in the IAS, Annexure-1, V) reads as follows "The zone of consideration for promotion in this grade may consist of the Super Time Scale level officers who have completed 25 years' service. Promotion of officers thus cleared could be made at any time during the relevant year, provided vacancies in this grade are available". Rule 3(2)(ii) & (iii) of IAS Pay Rules, 2007 is as follows; 3 (2) (ii) Appointment of a member of the service in the scales of Selection Grade and above shall be subject to availability of vacancies in these grades*

*and for this purpose, it shall be mandatory upon the State Cadres or the Joint Cadre Authorities, as the case may be, to seek prior concurrence of the Central Government on the number of available vacancies in each grade. (iii) The Central Government shall accord such concurrence within a period of thirty days from the date of receipt of such references and if the Central Government does not accord concurrence within a period of said thirty days, the concurrence on availability of vacancies shall be deemed to have been accorded. As per DP&T letter No. 20011/1/2005-AIS (2) dated 14<sup>th</sup> May 2007, any proposal for concurrence as per the provision of Rule 3 (2) (ii) & (iii) of IAS Pay Rules 2007, all necessary details which inter alia include anticipated vacancies on the date of eligibility of a particular batch to a particular Grade has to be sent to the Department. As per letter dated 24.4.2002 of Govt of India, DOPT addressed to Chief Secretary of all State Governments, the requirement of 25 years of service for above supertime scale (HAG) has the force of Statutory Rule in the absence of any Rule to the contrary and there are no exceptions to these rule and instructions.*

*3. Since the above officers have not completed 25 years of Services as stipulated in Government of India decision under Rule 3 (guidelines regarding promotion to various grades in the IAS) and instructions issued in this regard mentioned above, promotions of IAS officers of 1992-1993 batch (who have not completed 25 years) to HAG scale have not been accepted by this office and pay slips issued in the Super Time Scale of IAS. A letter was addressed (24.5.2016) to Government of Karnataka to issue the promotion orders in accordance with guideline and clarifications issued by Government of India.*

*4. The Govt. of Karnataka in its reply dated 20.7.16 inter alia stated that the concurrence of Government of India was sought with respect to vacancies vide letter dated 19-10-2015 as required under Rule 3 (2) (ii) of IAS (Pay) Rules, 2007. As the concurrence was not received within 30 days from the Government of India, it was considered as deemed to have been accorded under Rule 3 (2) (iii) of IAS (Pay) Rules, 2007. While referring to guidelines with respect to promotions it was stated that in all other grades other than the Apex Scale & HAG Scale, i.e., Senior Scale/Selection Grade/Supertime Scale, the guideline mentions that the officer concerned shall be eligible for appointment to the next higher grade upon completion of the required number of years of service. Whereas, for promotion to the HAG Scale from super time Scale,*

*the word used is may, i.e., the zone of consideration may consist of the Super Time Scale level officers who have completed 25 years of service. Hence, the guidelines do not prohibit the State Government from promoting officers who have not completed 25 years of service to HAG scale, provided vacancies are available in this grade. State government have requested this office to issue pay slips to the promoted officers after fixing their pay in the promoted scales as it has complied with rules and guidelines issued by Govt. of India.*

*5. Based on the rule provision and other instructions issued on the matter and also as per the letter dated 24.4.2002 of Govt. of India, DOPT as per which the requirement of 25 years of service for above super time scale (HAG) has the force of Statutory Rule in the absence of any Rule to the contrary and there are no exceptions to these rule and instructions. Hence this office has taken a stand that in respect of above cases the eligibility of 25 years of service has to be complied with for promotion.*

*However, the Govt of India, DOPT has been addressed for clarification in the matter and further action will be initiated on receipt of reply from Government of India.*

*Yours faithfully,  
Sd/-*

*SR. DEPUTY ACCOUNTANT GENERAL (GE)”*

10. This was followed by several communication and vide GM/IAS 1/17-18/635 dated 19.08.2017 an explanation is given by the CAG's office indicating that since the zone of consideration must consist of persons with 25 years of service, the relaxation granted by the Government of Karnataka is improper. We quote from this letter:

*“GM/IAS1/17-18/635*

*19-8-2017*

*To  
Sri TusharGiriNath, IAS,  
Principal Secretary II to Chief Minister,*

Vidhana Soudha,  
Bengaluru

Sir,

*Sub: Reg-Issue of pay slip to the promoted HAG Scale Grade and pay*

*Ref: 1. Govt. Notification no DPAR 232 SAS 2016 dt. 30-04-2016  
2. GM/IAS1/16-17/642 dt 27-10-2016  
3. PSCM/3356 GEN2017 dt 07-08-2017*

*With reference to the subject cited above and in continuation to this office letter no. GM/IAS1/16-17/642 dt 27-10-2016, I am to state that DOPT vide letter No. 11030/15/2008-AIS 11 dt 27-10-2016 have clarified that the promotion of IAS Officers of 1992 and 1993 batch of the State cadre to HAG scale by the Government of Karnataka is improper and is in clear violation of Rule 3 (2) (i) and (ii) of IAS (Pay) rules and promotion guidelines which prescribes the length of service required for consideration of promotion of IAS to HAG scale as 25 years and also requested this office not to issue pay slip on behalf of the four officers in HAG Scale till a proper sanction is obtained from DOPT. The same was also communicated to Government of Karnataka through an endorsement letter dt 27-10-2016 by DOPT.*

*A copy of the DOPT letter dt 27-10-2016 is also enclosed for your reference.*

*Yours faithfully  
Sd/-  
Accounts Officer*

*Copy to*

*The Under Secretary,  
DPAR (Services 1)  
Vidhana Soudha,  
Bangalore”*

11. The respondents rely on the circular issued by the Government of India by DoPT vide dated 24.04.2002, which we quote:

“Government of India  
Ministry of Personnel, Public Grievances & Pensions  
Department of Personnel & Training

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New Delhi, the 24 April, 2002

To  
The Chief Secretaries of  
All the State Governments and UTs  
All the Accountants General.

*Subject – Pay fixation of IAS officers while on deputation to lower level post in the Central Government – clarification regarding.*

***I am directed to say that Government of India have issued instructions from time to time that an IAS officer is eligible for Supertime Scale on completion of 16 years service and for the Above Supertime Scale on completion of 25 years service only. While the requirement of 16 years service for promotion to Supertime Scale is a Statutory Rule, the requirement of 25 years of service for Above Supertime Scale too has the force of Statutory Rule in absence of any Rule to the contrary There are no exception to these Rules and instructions now.***

2. Of late, it has been found that some State Governments (for e.g. Manipur-Tripura) are not following these instructions for promotion and have been allowing promotions to their IAS officers before the stipulated eligibility service. It is reiterated that such promotion in violation of extant rules and provision are ab initio void. The State Governments are accordingly advised to strictly adhere to the relevant rules and instructions on the matter and affect cadre, promotions to their IAS officers in different grades only when they have completed the required eligibility service for such promotions

3. ***If promotions are still allowed before the officers concerned have fulfilled the eligibility condition of service, the Accountant General concerned would be within their rights to stop payment in such cases and to continue remunerating such officers only in the lower grades in which they have been previously working in their State cadres. Such an action would be necessary for ensuring the proper Cadre Management of***



***the IAS in different States and to maintain the uniformity in the matter.***

*4. For AIS officers on Central Deputation, the Ministries/Departments concerned would also follow the extant instructions with regard to their pay fixation which needs to be referred to Department of Personnel & Training in every case. In case they have fixed the pay of any AIS officer on Central Deputation at their level, they are requested to let this Department know with full justification.*

*Yours faithfully,*

*Sd/-  
(J.P. Prakash)  
Director (S)*

*Copies for information and necessary action to  
All the Ministries/Departments of the Government of India”*

In this, the ***Paragraph 1 and 3*** seems to be more cogent and explanatory.

12. The applicant submits that on 05.01.1999 the Tribunal Bench at Guwahati in J.S.L.VasavaVs. Union of India and others held that once the promotion is accorded, the Accountant General has no jurisdiction to withhold the payslip and deny the payscale attached to the post. The respondents submits that assuming that the State Government which is utilizing the services of the service officers passes a wrong order and expect the Accountant General to abide by it,it will be in total contradiction of the rules and the law as aforesaid for the simple reason that it is for the union government to fix the parameters of the benefits to

be attributable to civil service officers. That being so, as the actual Cadre Controlling Authority, it is for the DoPT and the government to issue necessary directions on fixing the pay and if a State Government in contradiction to that promotes persons without these persons having completed necessary residency period then it will be an infraction under law. We think that there is some merit in the contention taken by the respondents.

13. But then the applicant relies on a decision of the Hon'ble Apex Court in State of Punjab and another Vs. Dharam Pal reported in (2017) 9 SCC 395 in which it was held that once a promotion is officiated, pay cannot be denied, which we quote:

*“STATE OF PUNJAB V. DHARAM PAL  
(2017) 9 SUPREME COURT CASES 395  
(BEFORE DIPAK MISRA, C.J. AND A.M.  
KHANWILKAR AND DR D.Y. CHANDRACHUD, JJ.)*

*STATE OF PUNJAB AND ANOTHER .. Appellants;*

*Versus*

*DHARAM PAL .. Respondent*

*Civil Appeal No. 1549 of 2011, decided on September 5, 2017*

*The Judgment of the Court was delivered by*

***DipakMisra, CJI***

*1. The present appeal, by special leave, calls in question the legal acceptability of the order dated 20.08.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition*

No. 18843 of 2007 whereby the Division Bench placing reliance on the decision in *Pritam Singh Dhaliwal v. State of Punjab and another*<sup>1</sup> has acceded to the prayer made by the respondent for getting the benefit of the pay scale for the post he was holding on officiating basis.

2. To appreciate the gravamen of the controversy, exposition of facts in brief is necessitous. The respondent was appointed as a clerk on 22.05.1970 1 2004 (4) RSJ 599 2 and promoted to the post of Senior Assistant on 22.09.1980. He was given the officiating charge of the Superintendent Grade II vide order dated 09.12.2004 and thereafter, he was directed to function as Superintendent Grade I vide Government Order dated 26.05.2007. As the factual narration would reveal, he stood superannuated from service on 31.03.2008.

3. Before the respondent attained the age of superannuation, he approached the High Court in a Writ Petition as he was not granted the benefit of the pay scale for the posts of Superintendent Grade II and Superintendent Grade I despite having performed the duties of officiating current duty basis regularly. He sought the relief for grant of pay, the arrears of pay and other consequential allowances and benefits with 18% interest. As stated earlier, the High Court placed reliance on the authority in *Pritam Singh Dhaliwal* (supra) and opined that the controversy is covered by the said decision and disposed of the writ petition in terms of the said judgment. Hence, the present appeal.

4. We have heard Ms. Uttara Babbar, learned counsel for the appellants and Mr. Sudarshan Singh Rawat, learned counsel for the respondent.

5. Criticising the impugned order, it is submitted by Ms. Babbar that the High Court has committed gross illegality in granting the benefit to the respondent totally ignoring the restrictions incorporated in the orders dated 09.12.2004 and 26.05.2007 which clearly stipulated that the respondent official will work in his own pay scale and his officiating promotion would be subject to the recommendations of the Departmental Promotion Committee and on the approval of the Committee, he shall be given the financial benefits.

She would further urge that the authority relied upon by the High Court does not hold good in view of what has been laid down by this Court in *State of Haryana and another v. Tilak Raj and others*<sup>2</sup>,

*S.C. Chandra and others v. State of Jharkhand and other<sup>3</sup> and A. Francis v. Management of Metropolitan Transport Corporation Limited, Tamil Nadu<sup>4</sup>. She has also impressed upon the aspect that under the Punjab Civil Services Rules (for short, "Rules") the respondent is not entitled to the benefit inasmuch as the Rules unequivocally prescribe for denial of benefit.*

*6. Mr. Rawat, learned counsel for the respondent, while defending the order impugned, would contend that the assumption of the State that the said Rules impose conditions in the negative is fundamentally erroneous. According to him, the pronouncements which have been relied upon are not applicable to the facts of the instant case and, therefore, the decision rendered by the High Court cannot be found fault with. He would further contend that the respondent was relieved from the substantive post and worked in the higher posts and carried out the responsibilities of the said posts and, therefore, denial of the benefits to him would be travesty of justice and further permit the State to pave the path of infidelity to the real legal position. That apart, submits the learned counsel, the language used in the order passed by the employer would crush the essential spirit of the Rule.*

*7. In the beginning, it is seemly to state that there is no factual dispute with regard to the appointments or the posts. That being the position, we think it appropriate to refer to the orders of appointment as Ms. Babbar, learned counsel for the appellant-State of Punjab, would harp on the same. The order dated 09.12.2004 reads as follows:*

#### **"ORDER**

*On the retirement of Smt. Chand Prabha, Superintendent Grade I on 31.07.2004 the 5 6 post of Superintendent Grade I had become vacant. On that vacant post Sh. Kewal Singh Supdt. Gr. II is promoted as Superintendent Grade I in his own scale.*

*On account of promotion of Sh. Kewal Singh, Supdt. Gr. II as Superintendent Grade I and on account of proceeding on earned leave of Shri Bhinder Singh Supdt. Gr. II w.e.f. 07.9.2004 Shri Ashwani Kumar Sr. Assistant (Officiating Superintendent Gr. II) and Sh. Dharam Pal (Officiating Supdt. Gr. II) are promoted as Superintendent grade II.*

*The official will work in their own pay scale and above promotions will be subject to the recommendations of the Departmental Promotion Committee. On the approval of the above committee they will be given financial benefits. On the basis of these orders the officials will not claim any seniority etc. "*

*On the basis of the aforesaid order, the respondent functioned as the official Superintendent Grade II.*

*8. As stated earlier, while he was officiating on the said post, he was promoted on officiating basis to function in the post of Superintendent Grade I. The relevant portion of the said order reads as follows:*

*"The officials will work in their earlier own pay scale and above promotions will be subject to the recommendations of the Departmental Promotion Committee. On the approval of the above committee they will be given financial benefits. On the basis of these orders the officials will not claim any seniority etc."*

*9. The said orders have to be tested on the anvil of the Rules. It needs no special emphasis to state that if the orders are in consonance with the Rules indubitably the respondent cannot put forth a claim unless the Rules are declared unconstitutional. Our attention has been invited to Rule 4.13 which occurs under the heading "Pay of Officiating Government Employees". The relevant part of the said Rule reads as follows:*

*"Rule 4.13. (1) Subject to the provisions of rules 4.22 to 4.24, a Government employee who is appointed to officiate in a post shall not draw pay higher than his substantive pay in respect of a permanent post, other than a tenure post, unless the post in which he is appointed to officiate is one enumerated in the schedule to this rule or unless the officiating appointment involves the assumption of duties and responsibilities of greater importance than those attaching to the post, other than a tenure post on which he holds a lien:*

*Provided that the competent authority may exempt from the operation of this rule, any service which is not organised on a time-scale basis and in which a system of acting promotions from grade to grade is in force at the time of the coming into force of these rules:*

*Provided further that the competent authority may specify posts outside the ordinary line of a service the holders of which may, notwithstanding the provisions of this rule and subject to such conditions as the competent authority may prescribe, be given any officiating promotion in the cadre of the service which the authority competent to order promotion may decide and may thereupon be granted the same pay (whether with or without any special pay, if any, attached to such posts) as they would have received if still in the ordinary line.*

*(2) For the purpose of this rule, the officiating appointment shall not be deemed to involve the assumption of duties or responsibilities of greater importance if the post to which it is made is on the same scale of pay as the permanent post, other than a tenure post, on which he holds a lien, or on a scale of pay identical therewith."*

*10. Certain Notes have been appended to the said Rule but they are not relevant for adjudication of the present controversy. On a close scrutiny, it is noticeable that the said Rule postulates that the government employee appointed to an officiating post shall not draw pay higher than his substantive pay in respect of a permanent post unless the post in which he is appointed to officiate is one enumerated in the Schedule to the Rules and further the officiating appointment involves assumption of duties and responsibilities of greater importance than those attached to the post. It is not in dispute that the posts of Superintendent Grade II and Grade I are covered under the Schedule. Be it mentioned, the extension of benefit is subject to the provisions of Rules 4.22 and 4.24.*

*11. In view of the aforesaid Rule position, it is necessary to reproduce Rule 4.22 and Rule 4.24. They read as follows:*

*"Rule 4.22. The competent authority may appoint one Government employee to hold substantively, as a temporary measure or to officiate in, two or more independent posts at one time. In such cases, the Government employee shall draw the highest pay to which he would be entitled if his appointment to one of the posts stood alone: Provided that the employee must fulfil the requisite qualifications and conditions for services for both the posts.*

*Rule 4.24. When a Government employee holds current duty charge of another post, in addition to that of his own*

*substantive post, he does not officiate in the former post and as such is not entitled to any additional remuneration."*

12. As we understand the said Rules, they categorically convey that the employee who holds the higher post must fulfil the requisite qualifications and conditions for service for both the posts. It is not controverted at the Bar that the respondent was eligible to hold the post of Superintendent Grade II and Grade I. In this context, the learned counsel for the appellants has commended us to Rule 4.16. The said Rule reads as follows:

*"Rule 4.16. A competent authority may fix the pay of an officiating Government employee at an amount less than that admissible under these rules.*

*Note 1.- One class of cases falling under this rule is that in which a Government employee merely holds charge of the current duties and does not perform the full duties of the post.*

*Note 2.- When a Government employee is appointed to officiate in a post on a time-scale of pay but has his pay fixed below the minimum of the time-scale under this rule he must not be treated as having effectually officiated in that post within the meaning of rule 4.4 or having rendered duty in it within the meaning of rule 4.9. Such a Government employee, on confirmation, should have his initial pay fixed under rule 4.4 (b) and draw the next increment after he has put in duty for the usual period required, calculated from the date of his confirmation.*

*Note 3.- The power conferred by this rule is not exercisable save by a special order passed in an individual case and on a consideration of the facts of that case. A general order purporting to oust universally the operation of rule 4.14 would be ultra vires of this rule. Although, the practice of passing ostensibly special order on every individual case would not be ultra vires of this rule it would constitute the grossest possible fraud thereon."*

13. On a careful scrutiny of the aforesaid prescription, it is perceptible that the said Rule envisages a different situation altogether. The present factual matrix is quite different. We are inclined to so hold as the respondent herein was holding higher posts and further he was performing the duties of higher responsibility attached to the posts. Thus analysed, we arrive at the

*conclusion that the Rules do not bolster the proposition advanced by the learned counsel for the State.*

*14. Having analysed the Rule position, we may allude to the authorities that have been commended to us. First, we shall dwell upon the decision in Pritam Singh Dhaliwal (supra) that has been relied upon by the High Court in the impugned order.*

*In the said case, the Division Bench of the High Court had placed reliance upon Smt. P. Grover v. State of Haryana and another<sup>5</sup> and Selvaraj v. Lt. Governor of Island, Port Blair and others<sup>6</sup> and earlier decisions of the High Court and analyzing the Rule position opined that the officer therein had been asked to officiate as Deputy 5 AIR 1983 SC 1060 6 1999 (2) SCT 286 11 12 Director with effect from 14.03.1996 and he had been continuously posted to equivalent posts such as Additional Deputy Commissioner (D) and till his superannuation the officiating charge was never withdrawn and hence, his entitlement to claim higher pay scale for the post for which he was asked to officiate and perform his duties till his superannuation would not be negated.*

*15. As the reasoning of the High Court is fundamentally based on enunciation of law propounded by the Court in Smt. P. Grover (supra), we think it apt to appreciate the ratio laid down in the said case. A two-Judge Bench of this Court was dealing with the fact situation wherein keeping in view the policy decision, the appellant therein was promoted as an acting District Education Officer.*

*The order of promotion contained a superadded condition that she would draw her own pay scale which apparently meant she would continue to draw her salary on her pay scale prior to promotion. The claim was put forth by the appellant that she was entitled to the pay of District Education Officer and there was no justification for 12 13 denying the same to her.*

*A Writ Petition was filed before the High Court and the State filed the counter affidavit contending, inter alia, that she was promoted to the post of acting District Education Officer as there was no Class I post and hence, she was not entitled to be paid the salary of District Education Officer. Appreciating the fact situation, the Court held:*

*"3... We are unable to understand the reason given in the counter-affidavit. She was promoted to the post of District Education Officer, a Class I post, on an acting basis. Our*



*attention was not invited to any rule which provides that promotion on an acting basis would not entitle the officer promoted to the pay of the post. In the absence of any rule justifying such refusal to pay to an officer promoted to a higher post the salary of such higher post (the validity of such a rule would be doubtful if it existed), we must hold that Smt Grover is entitled to be paid the salary of a District Education Officer from the date she was promoted to the post, that is, July 19, 1976, until she retired from service on August 31, 1980."*

16. In *Tilak Raj (supra)*, the issue arose regarding justification of grant of minimum pay in the scale of pay applicable to the regular employees to the daily wagers. A two-Judge Bench referred to various decisions and came to hold thus:

*"11. A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-à-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.*

*"12. Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula."*

*On a careful perusal of the said decision in its entirety, we are of the considered opinion that it is not an authority for the proposition canvassed by the learned counsel for the appellants. It remotely does not support the principle that is assiduously sought to be built by the State.*

17. In *S.C. Chandra (supra)*, the appellants therein had filed a Writ Petition in the High Court of Jharkhand 14 15 seeking a writ of

*mandamus against the respondent Nos. 3 to 6 to release the pay, DA with arrears along with interest and further a direction not to close the school or in the alternative, to issue a direction to respondent Nos. 1 to 2 to take over the management and control of the school in question. The writ petitioners before the High Court were teachers and non-teaching staff of the school and claimed themselves to be the employees of Hindustan Copper Limited (HCL). The Court, after going through the judgment of the High Court, came to hold that solely because the management of HCL was giving financial aid that by itself cannot be construed that the school was run by the management of HCL and accordingly, the Court dismissed the appeal. We have no hesitation in opining that the principle that has been laid down in the said judgment has no applicability to the facts at hand.*

*18. In A. Francis (supra), the Court was dealing with the entitlement of the appellant to the salary in higher pay of Assistant Manager wherein he had worked from 28.02.2001 till 31.05.2005. The employer had denied 15 16 certain benefits and the employee preferred a Writ Petition before the High Court which was allowed by the learned Single Judge. The Corporation filed Letters Patent Appeal which reversed the judgment of the learned single Judge. The appellant before this Court placed reliance on Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma and others. On behalf of the Corporation terms of the order were pressed into service contending that there were specific conditions stipulated in the order with regard to salary and emoluments and, therefore, the claim with regard to higher post was not tenable in law.*

*19. The Court appreciating the factual score held thus: (A. Francis case, SCC p. 285, para 6)*

*"6. The order dated 28-2-2001, by which the appellant was allowed to discharge duties in the post of Assistant Manager had made it clear that the appellant would not be entitled to claim any benefit therefrom including higher salary and further that he would continue to draw his salary in the post of Assistant Labour Welfare Officer. If the above was an express term of the order allowing him to discharge duties in the higher post, it is difficult to see as to how the said condition can be overlooked or ignored. The decision of this Court in Secy.-cum-Chief Engineer was rendered in a situation where the incumbent was promoted on ad hoc basis to the higher post. The aforesaid decision is also*

*distinguishable inasmuch as there was no specific condition in the promotion order which debarred the incumbent from the salary of the higher post. Such a condition was incorporated in an undertaking taken from the employee which was held by this Court to be contrary to public policy."*

20. In *Hari Om Sharma (supra)*, the respondent was promoted as a Junior Engineer I in 1990 and had been continuing on that post without being paid salary for the said post and without being promoted on regular basis. It was in this situation, he approached the Central Administrative Tribunal which allowed the claim petition with the direction that the respondent shall be paid salary for the post of Junior Engineer I. That apart certain other directions were also issued. The Court took note of the fact that the respondent was promoted on a stop-gap arrangement as Junior Engineer I and opined that this by itself would not deny his claim of salary for the said post. In that context, the Court held:

*"6... If a person is put to officiate on a higher post with greater responsibilities, he is normally entitled to salary of that post. The Tribunal has noticed that the respondent has been working on the post of Junior Engineer I since 1990 and promotion for such a long period of time cannot be treated to be a stop-gap arrangement."*

21. After so stating, the Court proceeded to opine thus: (*Hari Om Sharma case*, SCC pp. 89-90, para 8)

*"8. Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his*

*own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872."*

*[Emphasis supplied]*

*The principle postulated in the said case is of immense significance, for it refers to concept of public policy and the conception of unconscionability of contract.*

*22. In the instant case, the Rules do not prohibit grant of pay scale. The decision of the High Court granting the benefit gets support from the principles laid down in Smt. P. Grover (supra) and Hari Om Sharma (supra). As far as the authority in A. Francis (supra) is concerned, we would like to observe that the said case has to rest on its own facts. We may clearly state that by an incorporation in the order or merely by giving an undertaking in all circumstances would not debar an employee to claim the benefits of the officiating position. We are disposed to think that the controversy is covered by the ratio laid down in Hari Om Sharma (supra) and resultantly we hold that the view expressed by the High Court is absolute impeccable.*

*23. In view of the aforesaid premises, we do not perceive any merit in this appeal and accordingly the same stands dismissed without any order as to costs."*

14. But the respondents points out that this is a case in which a promotion was not granted but officiated in a promotional post and rightfully and under the law. Therefore, having functioned under the law, the pay cannot be denied is the fulcrum of this decision. Respondents would say that it is not applicable to the case of the applicant herein as he had been given a promotion by the State Government quite illegally and for obviously ulterior purposes. He relies on the circumstances of the

promotion but then we do not think that we need to go at that at this point of time.

15. Therefore, the question is whether 25 years residency period is there. The case of the applicant is that under the IAS officers pay rules there is no residency period mentioned. But then all proceedings under Article 309 to 311 of the Constitution of India, even though a transitory provision, will hold good as otherwise there will be anarchy in service. It is to be noted that there is a hierarchy of rules and regulations in governance system. The statute comes first then comes the statutory rules. It is true that the circulars issued by the government are slightly above the clarifications issued by the government but still it has force of law behind it. Unless the said clarification or the circular is against promulgated law on the subject, these will remain as binding on all concerned. It is to be noted in this connection that the respondent alleges that the circular issued by the government in this regard as Annexure-R4 is not under challenge. We quote from Annexure-R4:

*"No. 11030/15/2008-AIS-II  
Government of India  
Ministry of Personnel, PG & Pensions  
Department of Personnel & Training*

*New Delhi the 27<sup>th</sup> October, 2016*

*To  
The Senior Deputy Accountant General,  
Office of the Principal Accountant General (A&E)  
Karnataka,  
Indian Audit & Accounts Department  
P.B. No. 5329/5369, Park House Road,*

*Bangalore 560 001*

*Subject: Promotion of IAS officers of 1992 and 1993 batch to HAG Scale in Karnataka – reg.*

*Sir,*

*I am directed to refer to your letter No. GM/IAS I/16-17/340 dated the 25<sup>th</sup> August, 2016 on the above mentioned subject and to say that Promotion of IAS officers of 1992 Batch and 1993 Batch of the State Cadre viz. Smt. Uma Mahadevan, Shri T. Sham Bhatt, Shri Tushar Girinath and Shri S.R. Umashankar to HAG scale by the Government of Karnataka is improper and is in clear violation of Rule 3(2) (i) & (ii) of IAS (Pay) Rules, 2007, IAS (Pay) Rule, 2016 and Promotion Guidelines which prescribes the length of service required for consideration of promotion of IAS to HAG scale as 25 years.*

*2. In the light of the above, you are kindly requested not to issue pay slip on behalf of the four officers mentioned above in HAG scale till a proper sanction is obtained from this department.*

*3. This issues with the approval of the competent authority.*

*Yours faithfully,*

*Sd/-*

*(Rajesh Kumar Yadav)*

*Under Secretary to the Government of India”*

16. Respondents would say that unless it is challenged successfully it cannot be said that the State Government has any right. In fact this appears to be the view taken by the State Government also particularly in paragraph 4, which we quote:

*“4. It is submitted that, the Respondent No. 3 vide letter dated 24.05.2016 has stated that above said 4 officers have not completed 25 years of service as stipulated by Government of India. IAS officers of 1992 and 1993 batches are eligible for promotion during 2017 and 2018 respectively. Further, Respondent No. 3 stated that an IAS officer is eligible for promotion to above Super Time Scale (HAG) only on completion of 25 years and the requirement of 25 years of service has the force of statutory rule in absence any rule to the contrary. A copy of letter dated 24.05.2016*

*is produced herewith and marked as Annexure R1 for kind perusal of this Hon'ble Tribunal."*

17. As already stated, the methodology of granting promotion to HAG scale is mentioned in detail in the DoPT letter dated 24.04.2002. Further, the guidelines of DoPT elaborate on this.

***An officer is eligible for appointment to the Senior Time Scale on completion of 4 years' service, subject to the provisions of rule 6A of the IAS (Rectt.) Rules, 1954. A Committee consisting of the Chief Secretary and two officers of atleast Supertime Scale level of the State Government concerned shall evaluate the performance of the eligible officers for deciding their suitability for promotion to posts in the Senior Time Scale. Subject to availability of posts, this scale can be allowed from or after 1st January during the relevant year in which officers become eligible for this scale.***

## **II. APPOINTMENT TO THE JUNIOR ADMINISTRATIVE GRADE**

*An officer is eligible for appointment in the Junior Administrative Grade on completing 9 years of service. This grade is non-functional and shall be admissible without any screening, as a matter of course, to all the officers of the Senior Time Scale from 1st January of the relevant year, except in cases where any disciplinary/criminal proceedings are pending against the officer.*

## **III. APPOINTMENT TO THE SELECTION GRADE**

*An officer of the Junior Administrative Grade shall be eligible for appointment to the Selection Grade on completion of 13 years of service as per the proviso to rule 3(2A) of the IAS (Pay) Rules, 1954. A Committee consisting of the Chief Secretary and two officers of the concerned State Government, in the Supertime Scale or above, shall screen the eligible members of the Service for promotion in this grade. This grade will be available from or after 1st January of the relevant year subject to availability of vacancies in this grade.*

## **IV. PROMOTION IN THE SUPER TIME SCALE**

*The members of the Service who are working in the Selection Grade and have completed 16 years of service shall be eligible for appointment in the Supertime Scale at any time during the year of*

*their eligibility, subject to availability of vacancies in this grade. The Screening Committee to consider officers for promotion in this scale would consist of the Chief Secretary as Chairman and 2 officers working in the grade of Principal Secretary within the State Government concerned, as members.*

*If, however, there is only one officer working in the grade of Principal Secretary to the Government available in the cadre, the senior-most Supertime Scale officer available in the cadre may be included in the in the Committee.*

**V. PROMOTION IN THE FIRST ABOVE SUPERTIME SCALE i.e PRINCIPAL SECRETARY TO THE STATE GOVERNMENT.**

***The zone of consideration for promotion in this grade may consist of the Supertime Scale level officers who have completed 25 years' service. Promotion of officers thus cleared could be made at any time during the relevant year, provided vacancies in this grade are available. The Screening Committee to consider officers for promotion in this scale will consist of the Chief Secretary as Chairman and one senior-most officer each working in the grades of Chief Secretary to the Government and Principal Secretary to the Govt. respectively in the cadre, as members. If an officer of the grade of Principal Secretary to the Government is not available in the cadre, the senior-most officer of the same level of the cadre working in the government of India may be taken as a member.***

*(9.1) The IAS (pay) Rules 2007 have been notified by this department on 20th March 2007 and Rules 3(2)(ii) & (iii) thereof makes it mandatory for the State Cadres or Joint Cadre Authority to seek the prior concurrence of the Central Government regarding the number of available vacancies for appointment of a member of the service in the Selection Grade of IAS and above.*

*(9.2.) It is provided under paragraph 24 of the 'Guidelines regarding promotion to various grades in the Indian Administrative Service' dated 28.3.2000 that 'whenever promotions are vacancy based, while computing the available vacancies for filling up the same by promoting officers placed in the panel, care should be taken to ensure that the total ex-cadre posts treated in various grades for the purpose do not exceed in sum the permissible quota if State Deputation Reserves indicated in the respective Cadre Schedules'. Further, as per these guidelines, promotions to the Selection Grade and above in the IAS are vacancy based.*



*(9.3) It is also provided under paragraph 3 of the above mentioned guidelines that 'vacancies to be taken into account should be the clear vacancies arising in a grade due to death, retirement, resignation, promotions and deputation. As regards vacancies arising due to deputation, only those cases of deputation for periods exceeding one year should be taken into account, taking due note of the number of deputationists likely to return to the cadre. Purely short term vacancies arising as a result of the officers proceeding on leave, training or on deputation for a short-term period or as a result of overutilisation if the sanctioned State Deputation Reserve not approved by the Central Government, should not be taken into account for the purpose of preparation of a panel.*

*(9.4) Therefore, before sending any proposal to this department for concurrence to the availability of the number of vacancies in the Selection Grade and above as per the provisions of rule 3(2)(ii) & (iii) of the IAS (pay) Rules 2007, all necessary details regarding the authorized strength of the posts in the particular grade and the officers in position (with anticipated vacancies on the date of eligibility of a particular batch for promotion to particular grade) in the grade to which promotions are proposed to be made may be sent to this department at least 3 months before the promotions are proposed. Besides, the position regarding the number of ex-cadre posts created in each grade from Time Scale to Chief Secretary Grade may also be indicated along with the permissible quota of State Deputation reserve. The provisions of paragraph 3 of the guidelines regarding promotion should also be kept in mind while taking into account the vacancies arising due to deputation.*

*(DP&T's letter No. 20011/1/2005-AIS(II), dated 14 May, 2007).*

Further, the relevant IAS (Pay Rules) 2016 clearly state:

*3(2)(i) Appointment to the Selection Grade and to posts carrying pay above this grade in the Indian Administrative Service shall be made by selection on merit, **as per the criteria that may be prescribed by the Central Government**, with due regard to seniority:*

*Provided that a member of the Service shall be appointed to the Super Time Scale only after he has completed phase IV mandatory Mid Career Training as prescribed.*

*3(2)(ii) Appointment of a member of the service in the scales of Selection Grade and above **shall be subject to availability of***

***vacancies in these grades and for this purpose, it shall be mandatory upon the State Cadres or the Joint Cadre Authorities, as the case may be, to seek prior concurrence of the Central Government on the number of available vacancies in each grade.***

***3(2)(iii) The Central Government shall accord such concurrence within a period of thirty days from the date of receipt of such references and if the Central Government does not accord concurrence within a period of said thirty days, the concurrence on availability of vacancies shall be deemed to have been accorded. The position emanating as referred to this clause shall be placed before the Screening Committee at the time it meets to consider promotion in these grades. The two elements, criteria prescribed by GoI and approval/deemed approval of GoI for the vacancies, are critical in the issue.***

18. But the government of Karnataka had passed Annexure-A1, which we quote:

**“GOVERNMENT OF KARNATAKA**

No: DPAR 232 SAS 2016      Karnataka Government Secretariat,  
Vidhana Soudha,  
Bengaluru, dated: 30<sup>th</sup> April, 2016

**NOTIFICATION**

***Smt. Uma Mahadevan, IAS (KN: 1992), Secretary to Government, Planning, Programme Monitoring and Statistics Department is promoted to officiate in the HAG Scale of IAS carrying the pay scale of Rs. 67000 (annual increment @ 3%) – 79000 with immediate effect and continued until further orders as Principal Secretary to Government, Planning, Programme Monitoring and Statistics Department in the upgraded post.***

***Shri T. Sham Bhatt, IAS (KN:1992), Commissioner, Bengaluru Development Authority, Bengaluru is promoted to officiate in the HAG Scale of IAS carrying in the pay scale of Rs. 67000 (annual increment @ 3%) – 79000 with immediate effect and continued until further orders as Commissioner, Bengaluru Development Authority, Bengaluru in the upgraded post.***

***Shri Tushar Giri Nath, IAS (KN: 1993), Secretary to Chief Minister is promoted to officiate in the HAG Scale of IAS carrying***

*the pay scale of Rs. 67000 (annual increment @ 3%) – 79000 with immediate effect and posted until further orders as Principal Secretary-II to Chief Minister in the upgraded post.*

*Shri Tushar Giri Nath, IAS is also placed in concurrent charge of the post of Chairman, Bengaluru Water Supply & Sewerage Board (BWSSB), Bengaluru until further orders relieving Shri Mahendra Jain, IAS of concurrent charge.*

*Shri S.R. Umashankar, IAS (KN:1993), Secretary to Government, Kannada, Culture, Information & Public Relations Department is promoted to officiate in the HAG Scale of IAS carrying the pay scale of Rs. 67000 (annual increment @ 3%) – 79000 with immediate effect and continued until further orders as Principal Secretary to Government, Kannada, Culture, Information & Public Relations Department in the upgraded post.*

*Shri R.R. Jannu, IAS (KN: 2002), Commissioner for Religious & Charitable Endowment and E/o Additional Secretary to Government, Revenue Department is transferred with immediate effect and posted until further orders as Commissioner for Labour, Bengaluru vice Dr. D.S. Vishwanath, IAS retiring from service on superannuation on 30.04.2016.*

*Shri R.R. Jannu, IAS is also placed in concurrent charge of the post of Commissioner for Religious & Charitable Endowment and E/o Additional Secretary to Government, Revenue Department until further orders.*

*The services of Shri B.S. Shekarappa, IAS (KN:2005), Chief Executive Officer & Executive Member, Karnataka Industrial Areas Development Board (KIADB), Bengaluru are withdrawn from Commerce and Industries Department with immediate effect and posted until further orders as Additional Secretary to Chief Minister in the upgraded post.*

*The services of Shri S. Ziyaullah, IAS (KN:2008), Joint Secretary to Chief Minister are placed at the disposal of Commerce and Industries Department with immediate effect for being posted until further orders as Managing Director, The Hutti Gold Mines Company Limited, Bengaluru in the existing vacancy.*

**BY ORDER AND IN THE NAME OF THE  
GOVERNOR OF KARNATAKA**

**Sd/-**

**(A. Dinesh Sampathraj)**

**Under Secretary to Government**

**DP&AR (Services-1)”**

19. On the basis of this applicant claims that he may come under the protective ambit of the decision of the Hon'ble Apex Court in State of Punjab and Another Vs. Dharam Pal reported in (2017) 9 SCC 395. The crux of the judgment is that when a person is posted in a position and officiates in it, if the rule do not prohibit grant of payscale, such benefits can be granted to people who are officiating in a position. The respondents submit that that is true only if a position is rightfully acquired and held. In this case the regulation stipulate that the view canvassed by the applicant to be illegal.

***20. The respondents filed a detailed reply and submit that even though the authorized strength at HAG scale is 26 and, at that point of time, there were 24 officers who were working in HAG scale and, if qualified people were not available, the State of Karnataka could have promoted only 2 officers but apparently they had promoted 4 officers and all 4 of them appears to be ineligible for the promotional posting. The State of Karnataka further says that an IAS officer is eligible for promotion to above Super Time Scale only on completion of 25 years of service and the requirement of 25 years of service has the force of statutory rule in absence of any rule to the contrary. They produce and rely on Annexure-R1 letter quoted earlier.***

21. They would also say that important post cannot be kept vacant for the sole reason of not having officers who have completed 25 years of service especially when the guidelines or rules do not prohibit the State Government from promoting the eligible officers if the vacancies are available and therefore they had requested that concurrence may be given by the DoPT. But apparently the DoPT refused to grant concurrence as “the zone of consideration for promotion in this grade may consist of the Super Time Scale level officers who have completed 25 years of service, promotion of officers thus cleared could be made at any time during the relevant year, provided vacancies in this grade are available. This being the guideline, contrary to the said guideline, the Government seems to have based its findings on a DPC held with reference to 30.04.2016 recommending the following officers of 1992 and 1993 batches as fit for promotion, i.e., 1) Smt. Uma Mahadevan, 2) Shri T. Sham Bhatt, 3) Shri Tushar Giri Nath, 4) Shri S.R. Umashankar.

**22. The State Government would say that as per the decision of the Departmental Promotion Committee the government had promoted all these people. The 3<sup>rd</sup> respondent raises an important element in the contention. They say the applicant had deliberately not made DoPT, which is the nodal agency, a party and therefore the OA has become vitiated due to non-joinder of necessary party.**

23. The 3<sup>rd</sup> respondent refers to Ministry of Personnel letter dated 27.10.2016 who have clarified that promotion of IAS officers of 1992 and 1993 batch of the State Cadre by the Government of Karnataka was improper and is in clear violation of Rule 3 (2) (i) & (ii) of IAS (Pay) Rules of 2007 and the promotion guidelines which prescribes that the length of service required for consideration of promotion of IAS officers to HAG scale is 25 years. Admittedly the applicant had not completed 25 years as on 30.04.2016 when he was apparently promoted by the State Government but the applicant takes a stand that in other states the same benefit had been extended, even though contrary to the rules. Therefore, on the basis of an equality situation as provided in Article 14, he claims that he may be granted promotion with effect from 30.04.2016 and granted all the consequential benefits. ***It is clear that no claim for equality can be claimed based on an illegality.***

24. We have heard this matter in great detail. First we will focus on the question of facts. The applicant and the other 3 officers along with him were of 1992 and 1993 batch respectively. The residency period in each position is fixed by the government by statutory formations so that it will be universally applicable. No State Government can apparently deny these statutory formations and go ahead and grant benefits to these officers even though they may be favourably inclined towards such officers, for whatever reason. ***Therefore, it is held that the State***

***Government may not have the power resident in them to violate the rules prescribed by the Government of India in the matter of promotions.***

25. The second element is that, since the Government of Karnataka had sought for concurrence in 2015 and it may not have got the attention of the Government of India, it may not *ipso facto* provide an opportunity to violate a rule. It is to be noted in this connection that it is not a legal exemption that is being sought for but a leave to grant exemption from the statutory rules in force. At this point of time, the learned counsel for the applicant submits that these are only guidelines and may not form a statutory rule. Whether it be guidelines or statutory rules, unless there is something contrary to that is available or the circumstances of the case is such that such guidelines are illegal or arbitrary such guidelines will have the force of law. There cannot be any doubt about that. Further, in all the communications in 2016, the Government of Karnataka stated that on the date of promotion of the applicant and three others on 30.04.2016, there were 2 HAG vacancies. They also state that taking the deemed concurrence route, two officers were promoted to the vacancies as on 01.01.2016. How the number of four vacancies arose on 30.04.2016 is not clear. Therefore, on these grounds also the promotion granted to the applicant and 3 others cannot escape legal scrutiny and is held to be deviant. The next ground taken by the 3<sup>rd</sup> respondent seems

to be that applicant had not brought into the party array Government of India through DoPT which is the nodal agency for determining the effect and applicability of its own rules. Therefore, the cardinal respondent which should have represented the protection of effect of rules has been left out deliberately says the 3<sup>rd</sup> respondent. After hearing all the parties, we also think that a grave injustice has been perpetrated by the applicant on Government of India by not including them in the party array and therefore the whole spectrum has been vitiated. So for non-joinder of necessary party also, this OA will not lie.

26. Therefore, on cumulative conspectus the OA lacks merit. The OA is dismissed No order as to costs.

(C V SANKAR)  
MEMBER (A)

(DR.K.B.SURESH)  
MEMBER (J)

/ksk/



**Annexures referred in O.A. No. 170/00174/2018**

Annexure-A1: Copy of the order dated 30.04.2016  
Annexure-A2: Copy of the charge taking certificate  
Annexure-A3: Copy of the pay slip dated 19.07.2016  
Annexure-A4: Copy of the letter dated 20.07.2016  
Annexure-A5: Copy of the representation dated 04.08.2016  
Annexure-A6: Copy of the representation dated 22.02.2017  
Annexure-A7: Copy of the pay slip dated 11.07.2017  
Annexure-A8: Copy of the representation dated 07.08.2017  
Annexure-A9: Copy of the letter dated 19.08.2017  
Annexure-A10: Copy of the relevant extract of the rules 2007  
Annexure-A11: Copy of the relevant extract of the rules 2016  
Annexure-A12: Copy of the decision of the Hon'ble Central Administrative Tribunal, Guwahati  
Annexure-A13: Copy of the orders dated 23.12.2015  
Annexure-A14: Copy of the order dated 30.01.2017  
Annexure-A15: Copy of the decision reported in (2017) 9 SCC 395  
Annexure-A16: Copy of the pay slip dated 01.01.2018  
Annexure-A17: Copy of the representation dated 31.01.2018

**Annexures with reply statement**

Annexure-R1: Copy of the letter dated 24.05.2016  
Annexure-R2: Copy of the letter dated 20.07.2016  
Annexure-R3: Copy of the letter dated 27.10.2016  
Annexure-R4: Copy of the letter dated 14.12.2016  
Annexure-R5: Copy of the letter dated 30.11.2017  
Annexure-R6: Copy of the letter dated 19.03.2018

**Annexures with reply statement**

Annexure-R1: Copy of the AG's office letter dated 25.08.2016  
Annexure-R2: Copy of the AG's office letter dated 15.09.2016  
Annexure-R3: Copy of the AG's office letter dated 27.10.2016  
Annexure-R4: Copy of the DoPT letter dated 27.10.2016  
Annexure-R5: Copy of the DO letter dated 24.05.2016  
Annexure-R6: Copy of the AG's office letter dated 25.08.2016  
Annexure-R7: Copy of the pay slip of the applicant dated 01.01.2018

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