

Central Administrative Tribunal
Principal Bench, New Delhi.

OA-351/2003
MA-365/2003
MA-618/2003
With
OA-1845/2004
MA-1570/2004
MA-1819/2004
OA-2770/2003

New Delhi this the 27th day of June, 2005.

Hon'ble Shri Shanker Raju, Member(J)
Hon'ble Shri S.A. Singh, Member(A)

OA-351/2003
MA-365/2003
MA-618/2003

1. All India Association of
Investigators National Sample
Survey Organisation,
Field Operation Division,
NSSO (FOD) Rep. By its
General Secretary
2. Mr. Rakesh Singh,
Investigator,
1289, Type-II NH-4,
Faridabad.

Applicants

(through Mrs. Prasanthi Prasad, Advocate)
Versus

1. The Secretary,
Ministry of Statistics and Programme
Implementation,
Government of India,
Sardar Patel Bhavan,
Sansath Marg,
New Delhi-1.
2. The Chief Executive Officer,
National Sample Survey Organisation,
Ministry of Statistics and Programme
Implementation,
Sardar Patel Bhavan,
Sansath Marg,
New Delhi-1.

3. The Director of
M/o Statistics and Programme
Implementation,
Sardar Patel Bhavan,
Sansath Marg,
New Delhi-1.
4. The Deputy Director General,
National Sample Survey Organisation,
Field Operation Division,
East Block No.6,
Level 6-7 R.K. Puram,
New Delhi-66.

5. The Secretary,
Department of Expenditure,
Ministry of Finance,
North Block,
New Delhi-1.

.... Respondents

(through Sh. Rajesh Katyal, Advocate)

OA-1845/2004

MA-1570/2004

MA-1819/2004

1. C.P. Naithani,
S/o Sh. S.P. Naithani,
R/I, D-101, New Jyoti
Apartment, Sector-4,
Dwarka,
New Delhi-45.

2. Sh. S.K. Roy,
S/o Sh. Janardan Roy,
Flat No.20/C-12,
Sector-8, Rohini,
Delhi-85.

.... Applicants

(through Mrs. Prasanthi Prasad, Advocate)

Versus

1. Union of India through



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its Secretary,
 Ministry of Statistics & P.I.,
 Sardar Patel Bhavan,
 New Delhi.

2. Additional Director General,
 NSSO (FOD), Level 5-7,
 East Block, R.K. Puram,
 New Delhi. Respondents

(through Sh. Tiger Singh, Advocate)

OA-2770/2003

1. All India Association of
 Investigators National Sample
 Survey Organisation,
 Field Operation Division,
 NSSO (FOD) Rep. By its
 General Secretary

2. Sh. Rakesh Singh,
 Investigator,
 1289, Type-II NH-4,
 Faridabad. Applicants

(through Mrs. Prasanthi Prasad, Advocate)

Versus

1. The Secretary,
 Ministry of Statistics and Programme
 Implementation,
 Government of India,
 Sardar Patel Bhavan,
 Sansath Marg,
 New Delhi-1.

2. The Chief Executive Officer,
 National Sample Survey Organisation,
 Ministry of Statistics and Programme
 Implementation,
 Sardar Patel Bhavan,
 Sansath Marg,
 New Delhi-1.

3. The Director of
 M/o Statistics and Programme
 Implementation,
 Sardar Patel Bhavan,
 Sansath Marg,
 New Delhi-1. Respondents

(through Sh. B.S. Jain, Advocate)



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ORDER (ORAL)

By Mr. Shanker Raju, Member (J):

As these OAs raise common question of law founded on similar facts, the same are being disposed of by this common order.

2. OA No. 351/2003 has been filed by the Registered Association & Others working as Investigators in Department of Statistics and Programme Implementation in Field Operation Division of National Sample Survey Organization (hereinafter referred to as NSSO). The challenge has been made to Notification dated 12.2.2002 whereby Subordinate Statistical Service (Group C) Rules 2002 have been promulgated with further four grades structure with Statistical Investigators Grade IV and Statistical Investigators Gr.II in the Scale of Rs. 5000-8000 and 5500-9000 being functional grades and also SI Grade-II and SI Grade I being non-functional.
3. In OA No. 2770/03, order dated 24.06.2003 is challenged whereby grant of financial upgradation under ACP Scheme has been applied to SSS in the same hierarchy on grades i.e. non-functional within the structure of SSS.
4. In OA No. 1845/2004, one of the retired employee and others seek quashing of orders dated 21.5.2004 and 24.6.2004 whereby financial upgradation under ACP has been accorded to the incumbents holding the posts included in SSS.
5. A brief history, which is relevant to be highlighted, indicates that one C.P. Nathani in OA No. 1291/98 approached this Court for cadre review and better promotional opportunities in Ministry of Statistics and

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Programme Implementation. On a direction issued, a Notification dated 30.01.2002 was issued to constitute SSS. As such, CP No. 212/2001 in OA No. 1291/98 was disposed of on 9.4.2004 granting liberty to challenge the order passed in compliance with the Tribunal's order afresh as the same gives a fresh cause of action.

6. The Fifth CPC, on examination of qualifications, duties and responsibilities of the Investigators of Field Operation Division, FOD of NSSO in the Ministry of Statistics and Programme Implementation in their para nos. 81.15, 81.16 and 81.17 recommended that Investigators (FOD), who were in the pre-revised pay scales of Rs. 1400-2300, be given an upgraded replacement scale of Rs. 1600-2660/- with a four tier structure for NSSO as well. The Fifth CPC, vide its recommendations contained in para 81.17, also recommended for constitution of SSS by grouping group B & C statistical function posts located in different Ministries/Departments, which was considered by the Government and Investigators of FOD (NSSO) were granted revised scale of Rs. 5000-8000 w.e.f. 1.1.1996 and other recommendations were also accepted. On consideration of the recommendations of Vth CPC, parallel action of constitution of SSS was initiated, proposal was drafted and circulated to all Ministries and Departments. The existing functional structure was recommended in the pay scale of Rs. 1400-2300 and 1640-2900 for giving FOD a two tier functional structure by abolishing the posts of Assistant Superintendents and by creating higher level post based on functional restructuring was sent to Ministry of Finance. However, during this interregnum, Nathani's case and the directions issued (supra), vide OM dated 30.1.2002, SSS was formulated/constituted as a policy decision and later on notified the service rules on 12.2.2002. With the result, the earlier pay scale of Rs. 1600-2660, Rs. 1640-2940,

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Rs. 2000-3200 and Rs. 2375-3750 were revised to Rs. 5000-8000, Rs. 5500-9000, Rs. 6500-10500 and Rs. 7450-11500 respectively, which was accepted by the Govt. Besides the two grades, namely, SI Grade I and SI Grade II, fifth CPC also mentioned about two time bound scales, four grades with four pay scales were formulated.

7. OA No. 1959/2002 filed on behalf of Junior Investigators of CSO where not only multiple reliefs but a restraint order was also sought to give effect to the SSS as formulated vide OM dated 30.1.2002 gazetted and published as statutory rules on 12.2.2002 was also prayed. By an order dated 23.8.2002, the following observations have been made:

“5. A policy decision taken by government in service matters can be questioned only on the basis of arbitrariness and on the ground of violation of article 14 & 16 of the Constitution. Subject to this, the terms and conditions of Government servants can be changed, even to their disadvantage by means of a policy decision taken by the government. The terms and conditions of a few constitutional functionaries cannot, however, be altered to their disadvantage. The government servants are not placed in that category and they constitute a separate category. In this view of the matter, the aforesaid arrangement including the aforesaid rules notified on 12.2.2002 cannot be questioned even if it is assumed for a moment that the applicants have been put to some disadvantage and the chances of their promotion have receded.”

8. However, while considering the relief, the following observations have been made:

“7. Looking at the nature of reliefs sought by the applicants, reproduced in the paragraph 1, we find that the present OA also suffers from the vice of multifarious of reliefs. For instance, the relief at para 8.6 seeks a direction to hold a DPC to consider the claim of the applicants for promotion to the post of Sr. Investigator. This relief clearly does not flow consequentially from the main relief sought by the applicants in paragraphs 8.1 and 8.3 of the OA,

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even if we do not consider para 8.2 which is no longer pressed by the learned counsel."

9. It appears that relief 8.6 is not consequential to para 8.1 and 8.3 and even without consideration of para 8.2, which has not been pressed by the applicants a challenge to OM dated 30.1.2002 has been negated.

10. By OM dated 31.3.1999, recommendations of Vth CPC with regard to upgraded scale of Statistical functional post and the attached Ministries have been asked to give their comments on formulation of SSS. Grant of ACP was kept in abeyance vide OM dated 24.6.2003 till SSS is constituted. However, vide OM dated 14.7.2003 in consultation with the Department of Personnel & Training, status quo was continued and those absorbed in SSS in each of the four grade posts of Statistical Grade IV were included in the hierarchy for the purpose of financial upgradation. In this regard, vide OM dated 24.6.2004 a formula has been arrived at for grant of financial upgradation where it has been laid down that as per four grades structure ACP would be accorded in each of the four grades structure and would be counted for the purpose of grant of financial upgradation. In case one does not opt for four grades structure of SSS, the post would be treated isolated and clarification no. 10 of the Dop&T dated 10.2.2002 would determine the hierarchy of similar posts.

11. Earlier in the light of decision in OA No. 633/2002, a detailed order has been passed by the respondents rejecting the claim of the applicant for any change in the structure of SSS and granting of relaxation of rules.

12. Learned counsel for the applicants Smt. Prashanti Prasad contended that there were only two functional grades recommended by the Vth CPC but in para 8.16 it has been stated that non functional

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posts should not be treated as promotion for grant of ACP as it is stated that if the aforesaid SSS has been framed to remove stagnation then operating a percentage of posts for promotion from functional to non-functional grade is not permissible, which prejudices the rights of the applicants and deprive the applicants of an opportunity for advancement in their career.

13. As regards OA No. 1959/2003, it is contended that the same would not operate as res judicata as the issue regarding four grades structure was not substantially and finally concluded between the parties.

14. As regards adoption of ACP Scheme, Clarification No. 13 and decision of the High Court of Delhi in Union of India vs. F.C.Jain (CWP No. 4664/01 decided on 18.4.2002 is relied upon to contend that both the schemes can run concurrently but if a decision is taken to adopt ACP Scheme, the ACP scheme would be adopted in totality where the hierarchy is only functional i.e. regular promotion. As such, treating non-functional grade as hierarchy of the ACP is not a correct decision of the respondents.

15. On the other hand, in OA No. 351/2003, learned counsel for the respondents opposed the contentions and raised the plea of res judicata and also having regard to OA No. 191/2002, it is sated that the order has attained finality as the challenge to the OMs dated 30.1.2002 and 12.2.2002 has been negated, this issue cannot be racked up in the present OA.

16. Shri B.S. Jain, learned counsel for the respondents in OA No. 2770/2003 has vehemently opposed the contentions and raised a preliminary objection to challenge the OM dated 25.06.2004 whereby

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benefit of ACP was extended to SSS with condition of adoption of four grades structure to SSS in the hierarchy and it is not stated that existing hierarchy can be functional. Even a non-functional grade can be the hierarchy in the financial upgradation under ACP. It is stated that Govt. is within their right to stop ACP Scheme and has relied upon the decision in the matter of Dr. K.Rammul vs. UOI, 1997 (SC) L&S 625. It is also stated that the Vth CPC has recommended for four grades structure which had been accepted by the respondents on promulgation of OM dated 12.2.2002 promulgating rules for Statistical cadre.

17. Learned counsel states that in the light of decision in OA No. 3185/2005 decided on 2.4.2002, the ACP scale would be accorded in the existing hierarchy, which is restructured grade, and has relied upon clarification no. 13 of ACP to substantiate his plea.

18. A reliance has been made to the decision of the Apex Court in LIC vs. Asha Ramchandran, 1994 (27) ATC (SC) 174, to contend that statutory rules have to follow and further relying upon the decision of the Apex Court in Lt. Governor Delhi Administration vs. S.I. Roop Lal, 2000 SC L&S 213 stated that if there is no arbitrariness or mala fide, the decision in OA No. 1958/2003 is to be followed and as rules framed under OM 30.1.2002 is a policy of the Govt. and if no mala fide or arbitrariness is alleged and for want of any discrimination under Articles 14 & 16 of the Constitution of India, action of the respondents is in consonance with the rules.

19. As regards challenge to OMs dated 30.1.2002 and 12.2.2002 and adoption of four grades structure, the claim of the applicants is barred under Order 23 Rule 1 of CPC.

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20. In OA No. 1959/2002, a similar petition by Junior Investigators inter alia among the reliefs also challenged the validity of the above OMs and also prayed for multifarious reliefs. In the above conspectus, the Tribunal, while considering the policy decision which ultimately resulted for promulgation of rules dated 12.2.2002, has upheld the constitution of SSS and pay structure. Moreover, relief sought at para 8.2 was found to be relief unconnected with reliefs prayed in paras 8.1 & 8.3 of the OA and it was specifically observed that para 8.2 is no longer pressed by the learned counsel. In our considered view, abandonment of para 8.2 of the reliefs vide which notification dated 12.2.2002 has been challenged, is not as a result of the relief being multifarious, hit by rule 10 of the CAT (Procedure) Rules, 1987. Despite having pressed and non-sought of liberty, the present challenge to these Notifications and four grades structure is hit not only by order 23 but also by res judicata under Section 11, Explanation 5 of CPC as held by the Apex Court in **M.M.Catholics Vs. M.M. Athanasius, AIR 1954 (SC) 526** and also in **A.K. Basu vs. West Bengal, 1997 (1) SCC 416**. Rule 1, Order 23 is founded on public policy and the present OAs cannot be filed on the same plea which has not been abandoned or withdrawal of suit when no liberty is accorded, fresh cause of action accrues and the same relief claimed in the subsequent proceedings cannot be taken cognizance of. Apex Court in **Chief Administration and Anr. vs. Dr. Abhaya Charan Mishra, 1999 SCC (L&S) 660**, made the following observations:

- “1. Special leave granted.
2. It appears that in the earlier petition filed by the respondent, OA No. 7 of 1988, that very relief was sought, but the same was not granted, in that, there was no reference to that relief. Counsel for the respondent says that it was on account of the fact that it was not pressed. Be that as it may, the relief was sought in view of explanation V to Section 11 of

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the Code of Civil Procedure. Therefore, if the relief is sought and was not granted by the court for whatever reason, a fresh petition seeking the very same relief could not have been entertained. We are, therefore, of the opinion that the Tribunal was in error in entertaining the second petition and granting the relief which was not granted in the earlier petition merely because in the judgment of the earlier petition, there is no reference to that relief. The rule of res judicata should apply in such cases. We, therefore, allow this appeal, set aside the order of the Tribunal and direct that the relief in regard to salary on the principle of equal pay for equal work granted by the Tribunal was not admissible to the respondent. There will be no order as to costs."

21. If one has regard to the above, as the relief has not been pressed by the applicants, similar claim here cannot be gone into by the Tribunal and the same is barred by doctrine of res judicata and is hit by order 23 of CPC.

22. Moreover, we find that constitutional validity on judicial review of SSS having been upheld and no infirmity is found in Notifications ibid being a policy decision of the Govt. in the wake of Nathani's case (supra) and also acceptance of 5th CPC recommendations contained in para 81.17, the decision when not shown to be either arbitrary or mala fide or violative of Articles 14 & 16 of the Constitution of India and on the basis of which a time bound promotion scheme has been promulgated then policy decision cannot be assailed successfully in the present case in the light of observations made by the Apex Court in **P.U. Joshi & Ors. Vs. The Accountant General, Ahmedabad & Ors.**, 2003(1) SC (SLJ), 237:

“10. We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy and with

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in the exclusive discretion and jurisdiction of the state subject of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotions of impose itself by substituting its view for that of the state. Similarly, it is well open and within the competency of the State to challenge the rules relating to a service and alter or amend and vary by addition / subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion from time to time, as the administrative exigencies may need or necessitate. Likewise, the state by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or *cadres by underrating further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service. "

23. Accordingly, OA No. 351/2003 is dismissed.
24. Regarding other two OAs where basically a challenge has been made to adoption of SSC structure as the hierarchy in ACP Scheme for promotion is concerned, we find that ACP Scheme was discontinued and a time bound promotion scheme in the form of SSS promulgated vide OM dated 30.1.2002 and 12.2.2002, the respondents have decided, in consultation with the DoP&T, to apply ACP to SSS as well and their decision to treat each four grades of SSS including non-functional as a specific grade in the hierarchy for grant of financial upgradation has

been promulgated vide OM dated 25.6.2004, which is assailed in OA No. 1845/2004. The contention of the learned counsel for the respondents that there is no infirmity in the adoption of grades in the hierarchy of SSS as ACP hierarchy and the reliance has been placed on OA No. 385/2001(supra) where it is held that OM dated 9.8.1999 granting ACP scheme on review, non-functional pay scales were also treated as part of the hierarchy of CPWD and is to be adopted as per existing hierarchy is concerned, cannot be countenanced.

25. It is trite law supported by the rules and instructions of the Govt. that there cannot be a regular promotion of a functional scale ACP which was introduced vide OM dated 9.8.1999 is with a view to have a safety net to remove stagnation. Clause 3.1 of the OM dated 9.8.1999 provides grant of financial upgradation on completion of regular service and regular service has been defined as per clause 3.2 as eligibility service counted for regular promotion in terms of relevant service rules. The ACP in no case to affect regular promotion and as per clause 5.2 of the conditions for grant of benefit under ACP scheme the residency period of regular services shall be counted where the person is appointed as direct recruit. As per condition 9 on upgradation under ACP scheme pay has to be fixed under FR 22(1)(a)(1) and this would be allowed to be a final decision and no pay fixation benefit shall accrue at the time of regular promotion against functional post. Clause 13 of the ACP Scheme is reproduced as under:-

“13. Existing time-bound promotion schemes, including in-situ promotion scheme, in various Ministries/Departments, may, as per choice, continue to be operational for the concerned categories of employees. However, these schemes, shall not run concurrently with the ACP Scheme. The administrative Ministry/Department – not the employees – shall have the option in the matter to

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choose between the two schemes i.e. existing time bound promotion scheme or the ACP scheme for various categories of employees. However, in case of switch over from the existing time bound promotion scheme to the ACP scheme, all stipulation (viz. for promotion, redistribution of posts, upgradation involving higher duties, etc.) made under the former (existing) Scheme would cease to be operative. The ACP Scheme shall have to be adopted in its totality; "

26. If one has regard to the above, it is relevant to quote the decision of F.C. Jain (supra) where following observations have been recorded:

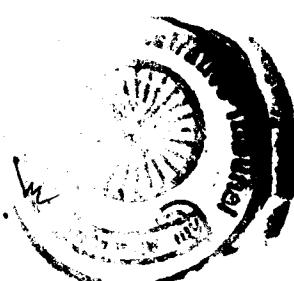
"5. In our judgment, aforesaid conditions also do not provide that the employees who have received benefit under one Scheme will not be entitled to the benefit of the other. Similarly, no such condition is attached to the office order of 13.5.1998 at Annexure 1. In the circumstances, aforesaid contention raised on behalf of the respondents is rejected.

6. Similarly, we find that the office order of 13.5.1988 at Annexure-1 has been issued in terms of the recommendations of the Vth Pay Commission. The same has, therefore, to be uniformly adopted along with other recommendations w.e.f. 1.1.1996. The same cannot be made applicable from the date of the office order later issued on 13.5.1988. Applicant, in the circumstances, is held entitled to the pay scale of Rs. 7500-12000 with effect from 1.1.1996."

27. The aforesaid decision was carried to the High Court of Delhi in CWP No. 4664/2001 and was decided on 18.4.2002 with the following observations:

"10. It is one thing to say that a person is entitled to a higher scale of pay having regard to the policy decision adopted by the State, but the same has nothing to do with the ACP Scheme, which stand on absolutely different footing.

11. By reason of fitment in the scale of pay, the respondent herein had not been promoted to a higher post or to a higher grade of pay.



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12. Para 13 of the ACP Scheme, as referred to hereinbefore, merely excludes its operation only when there exists anytime-bound promotion scheme including in-situ promotion scheme.

13. The scope and purport of both the Schemes are absolutely different whereas in terms of former, the pay scale is revised, which is confined to 50% of the cadre strength; by reason of the ACP Scheme who are stagnated in a particular post or a particular scale of pay is given higher scale of pay.

14. A beneficial scheme, it is trite, should be construed liberally. Unless and until it is found that by reason of the provisions of the ACP Scheme, the other rule would be inapplicable in a case where the benefit like the Scheme in question had been extended and made, the Respondent cannot be deprived thereof.

15. The submission of the learned counsel appearing for the petitioner cannot also be accepted in view of the fact that the respondent was entitled to the said fitment in the scale of pay with effect from 1.1.1996 whereas the ACP Scheme has come into being later on.

16. Furthermore, it is not a case where the respondent herein could have been asked to opt for one of those Schemes as both the Scheme operate in two different fields."

28. If one has regard to the above in the event ACP is adopted alongwith time bound promotion scheme, a beneficial scheme like ACP is to be adopted in totality. It is also not the case that the applicants had given an option either to opt for SSS or for ACP. Clause 5 of the OM dated 25.6.2004 provides that the persons who were not absorbed in SSS even then four grade structure would apply and clause 10 to OM dated 12.2.2000 a clarification would apply. This itself is contradictory to the stand that clarification 10 for an isolated post the comparison would be drawn with ~~the other~~ Ministries/Department but comparing with SSS would deem to be inclusion of a person in the SSS event without option.

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29. Treating a promotion in non functional as a regular promotion for the purpose of grant of ACP will be an ante thesis to the ACP Scheme rejecting the existing hierarchy when there exists two non-functional scale as hierarchy of ACP is a decision which is contrary to condition no. 13 of the ACP and this action is certainly violative of decision in F.C. Jain's case (supra) rendered by the High Court of Delhi, which is binding on us.

30. In case of a policy decision, which is contrary to the Rules as per decision of the Apex court in **UOI vs. K.S. Okulla**, 2002 (10) SCC 226 is to remand the case back to the Government for re-consideration.

31. The contention of the applicant gained support from the CPWD where on a similar structure, non-functional scale has been done away for accord of benefit of ACP as a Govt. and a model employer a uniformity in action is to be maintained and any differential action or treatment would put an infraction to the doctrine of equality enshrined under Articles 14 of the Constitution.

32. In SSS, the respondents have kept only two functional regular scales and if the ACP is to be in conformity with the existing hierarchy and not in conformity with financial hierarchy on completion of 12 years of service in the scale of Rs. 5000-8000, financial upgradation will be to Rs. 6500-10500 and 8000-13500/- . Therefore, the OM is certainly violates guidelines for grant of ACP.

33. In the result, for the foregoing reasons, OA Nos. 2770/2003 and 1845/2004 are partly allowed. The action of the respondents to treat four tier structure including two non-functional grades as existing hierarchy for ACP and their decision to adopt such a hierarchy vide letter dated 25.6.2004 is set aside and the matter is remanded back to the

respondents to reconsider the entire issue in the light of condition no. 13 of the ACP Scheme as well as decision of the High Court of Delhi in F.C. Jain's case (supra). This exercise shall be done, with a speaking order to be passed, within a period of six months from the date of receipt of a certified copy of this order. No costs.

(S.A.Singh)
Member (A)

/na/

(Shanker Raju)
Member (J)