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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

<u>O.A. No.</u>	50	1985
Ex.A.No.	&	
O.A.No	154	1986

DATE OF DECISION 30.5.1986

<u>Smt. Vina Sanyal</u>	Petitioner (first)
&	
<u>Shri Kasi Nath Saha</u>	Petitioner (second)
<u>Shri Randhir Jain</u>	Advocate for the Petitioner(s)

Versus

<u>Union of India & Others</u>	Respondent
Shri V. Balachandra for Respondent No.1	
Shri M. Chandrasekharan for Respondent No.2	Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. S.P. MUKERJI, ADMINISTRATIVE MEMBER

The Hon'ble Mr. H.P. BAGCHI, JUDICIAL MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgement ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement ? No

JUDGEMENT

The first petitioner in OA No.50 of 1985, Smt. Vina Sanyal has moved the Tribunal under Section 19 of the Administrative Tribunals Act, 1985, with her application

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dated 23.12.1985 praying that the impugned Notification of 24.10.1985 (Annexure F to the petition) issued by the Respondent, the Department of Tourism appointing the main respondent Miss Asha Malhotra as officiating Director on a regular basis with retrospective effect from 16.7.1976 and placing her immediately above Shri K.N. Saha in the earlier notification of officiating promotions as Director dated 22.7.1976 should be quashed as illegal and the respondent Miss Asha Malhotra may be declared as junior to the petitioner. In this application the petitioner had impleaded Shri K.N. Saha, the (second) petitioner in OA. No.154 of 1986 as one of the respondents. After a notice from Smt. Sanyal was served on Shri Saha as a respondent, the second petitioner Shri K.N. Saha also came up with a similar petition (OA. No. 154 of 1986) making an identical prayer for quashing the Notification of 24.10.1985 and declaring Miss Malhotra as junior to him. He also prayed that his seniority should be amended and he should be appointed as DDG with effect from 12.9.1983. Since these two petitions pertain to the same matter and seek identical relief, they have been disposed of by this common order as follows. While the petitioners have vehemently challenged the decision to have a Review DPC for the 1976 panel the respondents have contended that the panel approved by the government in 1976 on the basis of which appointments had been made, suffer from unconscionable irregularities and malafide action which would make the appointments ab initio void. It has also been argued that the circumstances of the preparation and revision

of the panel of 1976 were found both by the Department of Personnel & Administrative Reforms as also by the UPSC to suffer from such procedural improprieties and infirmities as would warrant the appointment of a Review DPC for reconstructing the proper panel for 1976. It was to undo the patent injustice that the government had to review the promotions made in 1976 with the approval of the UPSC. It is against this back-drop of alleged improprieties and malafides that we thought it not only appropriate but necessary to examine not only the pleadings but also the concerned file of the Department of Tourism which was produced before us by Respondent No.1 during the course of the arguments. (File No.A.32013/5/75-Admn.I).

2. The brief material facts of the case are that the petitioners Smt. Sanyal and Shri Saha were appointed as Assistant Directors in the Department of Tourism with effect from 3.3.1959 and 1.4.1959 respectively while the main respondent Miss Asha Malhotra was so appointed with effect from 2.2.1959. Whereas the aforesaid two petitioners were promoted on an ad hoc basis as Director starting continuous officiation in that grade with effect from May 1974 and August 1973 respectively, the respondent Miss Asha Malhotra started her continuous officiation with effect from May 1968. Out of the three, Shri Saha is the senior most and belongs to the Scheduled Caste category and Miss Asha Malhotra is the junior most in the grade of Assistant Director. However on merits, she had been included in the promotion panel by the DPC for the first time for

appointment as Director, in November 1967 whereas Shri Saha was so included for the first time in the panel prepared in January 1976 and Smt. Vina Sanyal for the first time in the panel prepared in 1982. However, under certain extraordinary circumstances as have been discussed in the judgement the name of Miss Malhotra having been included in the first panel by the DPC in January 1976 above Shri Saha, was subsequently removed from the same panel as revised and approved by the Government. As has been stated earlier Smt. Sanyal had not been included in any of the panels till 1982. On the basis of the revised 1976 panel, notification of officiating regular appointments as Director was issued on 22.7.1976 for three names in the following order:-

- (1) Smt. L.S., Nadhan
- (2) Shri Y. Kohli
- (3) Shri K.N. Saha

3. In the 1982 panel the main respondent Miss Malhotra who had also been included in the original 1976 panel above Shri Saha was placed at the bottom below the petitioner Smt. Sanyal in the following order:-

- (1) Shri J.M. Malik
- (2) Smt. Vina Sanyal
- (3) Miss A.K. Malhotra

On repeated representations by Miss Malhotra about her exclusion from the 1976 panel and reinclusion in the 1982 panel below Smt. Sanyal the Department of Tourism in consultation with the Department of Personnel and Administrative Reforms and the UPSC arranged a Review DPC meeting in 1985 to prepare a panel for 1976 in supersession of the panel approved in 1976. The Review DPC held its meeting in 1985 and reviewed the 1976 panel and recommended a panel as follows:-

- (1) Shri L.S. Nadhan
(2) Shri Y. Kohli
(3) Miss A.K. Malhotra
(4) Shri J.M. Malik
(5) Shri K.N. Saha

Accepting the recommendations of the Review DPC the impugned notification was issued on 24.10.1985 restoring Miss Malhotra's name above Shri Saha giving her regular officiating promotion with effect from 16.7.1976. As a result of this restoration of regular promotion with retrospective effect she regained her seniority in the grade of Director over both Smt. Sanyal and Shri Saha. It is against that action that the petitioners have come up before us.

4. We have heard the arguments of the learned counsel for both the parties in the two cases under consideration and gone through the documents very closely. The Department of Tourism i.e. respondent No.2 during the course of arguments produced their file No.320/3/5/75-Admn.I for our perusal and we went through the file also. The crucial point around which the two petitions revolve is the validity of the decision taken in retrospectively promoting the respondent Miss Asha Malhotra over the heads of the two petitioners Smt Vina Sanyal and Shri K.N. Saha. While Shri K.N. Saha was promoted on the basis of the revised DPC recommendations forwarded by the UPSC in July, 1976 and Smt. Vina Sanyal on the basis of recommendations of DPC held in 1982, Miss Malhotra was promoted by holding a review DPC meeting in 1985 in substitution of the DPC meeting held in 1976. Ms. Asha Malhotra was restored back in the panel of 1976 and promoted with retrospective effect as Director

with effect from 16.7.1976 above the two petitioners. The material facts which have been either admitted or revealed from the documents before us must be recapitulated as follows.

5. To start with, since the petitioners in both the cases are challenging the seniority and retrospective promotion of Ms. Asha Malhotra, the following relevant dates in respect of Smt. Sanyal the petitioner in the first case, Shri K.N. Saha the petitioner in the second case and Ms. Asha Malhotra the contentious respondent in both the cases, which have been culled out may be kept in view:-

	<u>Smt.V.Sanyal</u>	<u>Ms.A.K.Malhotra</u>	<u>Sh.Saha(SC)</u>
Appointment as Asstt.Director	3.3.59	2.2.59	1.4.59
Ad-hoc continuous appointment as Director	May 1974	20.5.68	1.8.73
First inclusion in DPC Panel for appointment as Director	1982	November 1967	1976
Appointment as regular Director	10.9.82	10.9.82 16.7.76(revised in 1985)	16.7.76
Grading by DPC in January 1976	GOOD	OUTSTANDING	GOOD

6. From the above it is clear that Ms. Asha Malhotra on the basis of her date of appointment as Assistant Director, date of continuous officiation as Director, date of selection by the DPC and grading of performance in 1976 scores well above the petitioners in both the cases. On the other hand, from the Departmental file mentioned above it is revealed that Smt. Sanyal appeared for interview before the UPSC twice in April 1974 and in March 1975 in response to advertisement by the UPSC

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for the Director's post in the Department and she was not selected. Shri K.N. Saha, petitioner in the second case had been considered by the successive DPCs held prior to 1976 and was adjudged to be "not yet fit for promotion" as Director. He was at the bottom of the first panel of five names prepared by the DPC in January 1976. On the other hand, the common respondent Ms. Asha Malhotra had been continuously included in the panel by the DPC from November, 1967 onwards except that in the DPC meeting held in 1971 her name was not put up before the DPC under the erroneous impression that as she had already been officiating as Director inclusion of her name in the panel was not necessary. The DPC which held its meeting in January, 1976 included her name in the 3rd position in the original panel as also in the first revised panel but in the second revised proceedings of that very meeting changed by the UPSC and forwarded in July 1976 only the first two names of the January, 1976 panels were included and Shri Saha's name as a Scheduled Caste candidate was placed at No.3 and the name of Ms. Malhotra was dropped by reducing the size of the panel from five to three. Smt. Vina Sanyal was not included in any of the three panels prepared in 1976.

7. It will thus be clear that on the basis of the factual position as enunciated above the case of the common respondent Ms. Asha Malhotra appears to be quite meritorious and deserving vis a vis ^{the} petitioners in both these cases. She could not be regularly

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appointed as Director even though her name was included in the DPC from 1967 because of lack of vacancies.

8. In the context of the comparative merits between the two petitioners on one hand and the common respondent Ms. Asha Malhotra on the other, as indicated above, it will be useful to reconstruct the events which took place in 1976 between the UPSC and the Ministry of Tourism and Civil Aviation. On the 21st November, 1975, the Department moved the UPSC for holding a meeting of the Departmental Promotion Committee for promotion to the grade of Director in the Department of Tourism and sent CR dossiers of 21 officers. In the note for the Departmental Promotion Committee enclosed with the letter it was indicated that the Recruitment Rules for the post of Director provided for 33-1/3% quota by promotion from the grade of Assistant Director/Manager and that "at present there are four regular vacancies in the grade of Director in the Departmental Promotion quota. However, the Departmental Promotion Committee may be requested to place on the panel six officers to fill in the existing vacancies which may arise during the validity period of the panel." It was also mentioned in the note that "for the four vacancies of Director the officers to be considered may be five times." A list of 21 officers arranged in order of seniority who had completed seven years of regular service was also enclosed with that letter. In that list, Shri K.N. Saha, the petitioner in case No.2, a Scheduled Caste candidate was the senior-most, Smt. Sanyal petitioner in the first case was at No.6 and Ms Asha Malhotra was at

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No.6 and Ms. Asha Malhotra was at No.7. It was also mentioned that the following principles were to be followed for promotion to selection grade post:-

- “(i) Appointment to selection post and selection grade should be made on the basis of merit.
- (ii) From among eligible officers those who are considered unfit for promotion should be excluded.
- (iii) The remaining officers should be classified as outstanding, very good and good on the basis of merit as determined by the respective records of service. The select list should then be prepared by placing the names in the order of those three categories, without disturbing the seniority inter-se within each category.”

It was further mentioned that "in accordance with the orders contained in the Ministry of Home Affairs O.M. No.1/12/67-Ests(G) dated 11.7.1968, if there were any Scheduled Caste and Scheduled Tribe employees within the zone of eligibility those amongst them who are considered unfit for promotion by the Departmental Promotion Committee will be excluded from consideration. Thereafter, the remaining Scheduled Caste and Scheduled Tribe employees will be given by the D.P.C. one grading higher than the grading otherwise assignable to them on the basis of their record of service i.e. if any Scheduled Caste and Scheduled Tribe has been categorised by the Committee on the basis of his record of service as 'Good' he should be recategorised by the Committee as 'Very Good'. Likewise, if any Scheduled Caste or Scheduled Tribe employee is graded as 'Very Good' he will be recategorised by the Committee as 'Outstanding'. Of course, if any such employee had already been categorised by the Committee as 'Outstanding', no recategorisation will be needed in his case. However, this

concession would be confined to only 25% of the total vacancies in a particular grade or post filled in a year from the Select List. In other words, the Appointing Authority while making Scheduled Caste/Tribe employees promoted in a year on the basis of this concession will ensure that such promotions are limited to 25% of the posts filled in a year from the Select List. The orders also provide that those Scheduled Caste/Tribe employees who are senior enough in the seniority list so as to be within the number of vacancies for which the Select List has to be drawn should be included in the Select List, if they are not considered unfit for promotion and should also be given one grading higher than the grading otherwise assignable to them on the basis of their record of service and their place in the Select List determined on the basis of this higher categorisation. It may be stated here that among the eligible officers proposed to be considered, Shri K.N. Saha belongs to a Scheduled Caste Community."

9. In the filled up proforma for referring proposals for promotion to the UPSC, the number of vacancies falling in the promotion quota was indicated as follows:-

Existing	4
Anticipated	Nil
Total	4

Against anticipated vacancies, a foot note was added that two or three short-term vacancies may, however, arise.

The meeting of the Departmental Promotion Committee was held on the 3rd January, 1976 in the office of the

UPSC under the chairmanship of Shri Mattoo, Member, UPSC and comprising besides the Chairman, the Director General of Tourism and Shri B.R. Agarwal, Deputy Secretary, Ministry of Tourism and Civil Aviation.

The minutes of the meeting were forwarded by the UPSC with their covering letter No.F.1/4/34/75-A.III, dated 6th January, 1976 duly signed by the Chairman of the Committee and asking the Ministry to get the minutes duly signed by the Departmental members of the Committee. The panel recommended by the Committee comprised five officers in the following order:-

1. Smt. L.S. Nadhan
2. Shri Y. Kohli
3. Kumari A.K. Malhotra
4. Shri J.M. Malik
5. Shri K.N. Saha (S.C.)

10. On the receipt of the minutes of the DPC meeting, the Ministry replied on the 9th January, 1976 indicating that "I find from the minutes that the name of Shri K.N. Saha who is a Scheduled Caste Officer has been included in the list of names recommended by the Committee for inclusion in the panel for officiating promotion to the grade of Director. Shri Saha was graded by the Committee as 'Good'. On the basis of his grading his name does not qualify for being included in the panel." It was further clarified that the direct recruitment quota for the post of Director being 66-2/3% (that is more than 50%) the orders regarding reservation in favour of Scheduled Caste and Scheduled Tribes in posts filled by promotion as contained in Department of Personnel & A.R. O.M. 10/41/73-Estt.3(SCT), dated 20th July, 1974 did not apply in this case and since these

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orders supersede the earlier orders issued by the Ministry of Home Affairs vide their O.M. No.1/12/67-Estt.(c) of the 11th July, 1968, the system of re-categorisation by the DPC of officers belonging to the Scheduled Caste and Scheduled Tribe referred to in the Ministry's note for the DPC was also not applicable in this case. It appears that on the basis of this reference, the name of Shri Saha was excluded from the panel and that of Shri S.N. Sarup who was adjudged as 'Very good' was included. The revised proceedings were forwarded by the UPSC again duly signed by the Chairman of the DPC, for signature of the two Departmental Members on the 11th February, 1976 with the following panel of five names for promotion to the grade of Director:-

1. Smt. L.S. Nadhan
2. Shri Y. Kohli
3. Kumari A.K. Malhotra
4. Shri J.M. Malik
5. Shri S.N. Sarup

The signed minutes with the aforesaid five names generated some further ^{thinkings} ~~reservations~~ in a new direction in favour of some excluded candidates and against inclusion of some names. In the meantime, the DP&AR issued a O.M. of 25th February, 1976 extending the reservations available to Scheduled Caste and Scheduled Tribe candidates in the promotion quota where direct recruitment was not more than 50% to even those cases (as in the present one) where direct recruitment extends upto 66-2/3%. It was also mentioned that the new policy will "take effect from the

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date of issue of these orders except where a select list for promotion under the relevant orders has already been prepared by the Departmental Promotion Committee and approved by the appropriate authority before the date of issue of orders." Accordingly, since the minutes of the recommendations of the DPC held on 3.1.1976 had not been approved by the Government, the concessions which had been made available to Shri Saha and were withdrawn by the letter of 9th January, 1976 had to be restored to him. This made further revision of the DPC proceedings necessary.

11. As had been stated earlier, there were other ^{thinkings} ~~reservations~~ also in favour of some excluded candidates in the Ministry and discussions took place between the then Secretary of the Ministry and the Chairman of the UPSC and after two such discussions and with the approval of the then Minister concerned, the number of vacancies was reduced from five to three. From the examination of the file, it appears that the explicit purpose of reducing the number of vacancies was to ^{build up justification for a} ~~justify~~ the holding of another DPC during 1976 itself so that some candidates who were not included by the DPC in ^{the} January meeting could be considered. A cursory reading of the file also showed an unconcealed though misplaced concern for a candidate. Consequent upon the various confabulations and the changed policy in respect of reservations of vacancies for Scheduled Caste candidates, the minutes of the 3rd January of the DPC were revised for the second time even after the same had been signed by the members and

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the revised minutes were forwarded by the Commission again on 31st May, 1976 vide UPSC's letter of that date (enclosed with the counter affidavit in the first case) para 1 of which reads as follows:-

" I am directed to refer to Shri H.S. Gidwani's demi-official letter No. A.32013/5/75-Admn.I(Tourism) dated 15.4.1976 and to say that the case relating to the revision of the minutes of the DPC meeting held on 31.1.1976 was discussed by Shri N.K. Mukarji, Secretary, Ministry of Tourism and Civil Aviation with the Chairman on 22.5.1976. Shri Mukarji mentioned that for the purpose of promotion to the grade of Director of Tourism only 3 vacancies are available. In view of this, the Commission agreed to review the DPC proceedings to the extent of limiting the panel of officers to only 3. One of the vacancies has been reserved for the Scheduled Caste Officer as required in terms of the instructions contained in the Department of Personnel and Administrative Reforms O.M. No.36021/7/75-Estt (SCT) dated 25.2.1976. The minutes of the DPC have accordingly been revised. Three copies of the minutes duly signed by the Chairman of the DPC are forwarded herewith. One copy of the minutes after having been signed by the departmental members of the Committee may kindly be returned to this office for record. "

The revised minutes which were officially approved by the Government are quoted below:-

" Minutes of the meeting of the Departmental Promotion Committee held on 3rd January 1976 in the office of the Union Public Service Commission, Dholpur House, Shahjehan Road, New Delhi.

PRESENT

1. Shri R.B. Muttoo,
Member,
Union Public Service Commission - Chairman
2. Shri S.Y. Ranade,
Director General of Tourism &
ex-officio Additional Secretary,
Ministry of Tourism and Civil
Aviation. - Member^a

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3. Shri Banu Ram Aggarwal,
Deputy Secretary(Tourism),
Ministry of Tourism and
Civil Aviation.

- Member

Items:- Selection of officers for officiating promotion to the grade of Director of Tourism(Rs.1100-1600) in the Department of Tourism.

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The Committee were informed that a panel of 3 names was required. The Committee examined the character rolls of the undermentioned 15 eligible officers in the order of their seniority and assessed them as indicated against their names below:-

<u>S.No.</u>	<u>Name of Officer</u>	<u>Assessment</u>
1.	Shri K.N. Saha (S/C)	Good
2.	Smt. K.R. Prithi Singh	Good
3.	Smt. L.S. Nadhan	Outstanding
4.	Shri Y. Kohli	Outstanding
5.	Shri J.M. Malik	Very Good
6.	Smt. Veena Sanyal	Good
7.	Kumari A.K. Malhotra	Outstanding
8.	Shri S.N. Sarup	These officers were also considered but none of them was found to be outstanding.
9.	Smt. Bina Krishnamurti	
10.	Shri R.N. Wadhawan	
11.	Kumari V. Maneklal	
12.	Shri D.R. Khurana	
13.	Shri A.C. Bagchi	
14.	Shri M.M. Verma	
15.	Shri E. Pereira	Findings in sealed cover attached.

On the basis of the above assessment, the Committee recommend the names of the undermentioned 3 officers for inclusion in the panel for officiating promotion to the grade of Director of Tourism in the Ministry of Tourism and Civil Aviation in the following order:-

<u>S.No.</u>	<u>Name of officer</u>
1.	Smt. L.S. Nadhan
2.	Shri Y. Kohli
3.	Shri K.N. Saha (S/C)

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2. The Ministry have rendered the requisite integrity certificate in respect of the officers recommended by the DPC for promotion.

Sd/-
(R.N. Muttoo)

Sd/-
(S.Y. Ranade)

Sd/-
(Banu Ram Aggarwal) "

12. It appears that exclusion of the name of Ms. Malhotra and inclusion of the name of Shri Saha and reduction of number of vacancies from five to three could not be kept secret and Ms. Malhotra who has obviously been the main victim of the developments between January and July, 1976 represented on 16.8.76. She again represented on 2.3.1977 and 10.5.1977 without any effect. The main purpose of reducing the number of vacancies from five to three was that another DPC could be held in 1976 itself. This for some reasons did not fructify and the next meeting of the DPC could be held only in 1982 and the following three names were included:-

1. Shri J.M. Malik
2. Smt. Vina Sanyal
3. Miss A.K. Malhotra

Miss A.K. Malhotra represented again on 14.1.1983.

It appears that the ~~proposed~~ exclusion of her name from the 1976 panel and inclusion of her name in the 1982 panel below Smt. Sanyal revived the feeling of ^{righteous} ~~just~~ injury ^{and} which she had been nursing all those years. She was fortunate enough this time to get a better but belated attention than on her previous undecided representations and her case was referred to

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the Department of Personnel & AR. Paras 2 and 3 of DP&AR's Joint Secretary, Shri S. Krishnan's note enclosed with the counter-affidavit may be very pertinent and are quoted below:-

- "2. The facts of the matter as they are known today show that had the panel included 5 names as it did originally, then Miss Asha Malhotra would also have been included in the panel. In that case, however, Shri Saha the SC candidate who was placed 3rd in the panel would presumably have been placed last in the panel of 5 based on seniority and assessment. At the same time the fact also remains that a regular vacancy did arise in November 1976 though unanticipated, it having arisen as a result of death of an official. Further, it is understood from the Min. of Tourism and C.A. that a DPC was held some time last year which took into account the provisions of this Department O.M. No. 22011/3/76-Estt(D) dated 24.12.80 and prepared year-wise panels and in that panel Miss Asha Malhotra was placed at S.No.3.
3. While Miss Malhotra has already missed the promotion to the post of Director in 1976 on account of the reduction in the number of posts even though she was given higher grading and empanelled by the DPC, now she would appear to have been superseded when compared to her position in the panel prepared in 1976, when she secured a position above Shru Mullick and Mrs Sanyal. At the same time it is not clear as to how Miss Asha Malhotra could be placed below Shri Mullick and Mrs Sanyal, even by applying the yearwise panel orders of 24th December 1980. According to the provisions of O.M. No.22011/3/76-Estt(D) dated 24.12.80 read with O.M. of even number dated 20.5.81, the DPC is required to take into account only those records which are relevant to the year of occurrence of the vacancies. If the present DPC had taken into account the same records which were taken into account by the DPC held on 31.1.1976 which categorised Miss Malhotra as outstanding and had also assigned her a higher relative position as compared to others in the zone, than it is not clear as to how it can come to a different conclusion in regard to the grading of the officer when the records have not changed. In view of this it is felt that the matter would require reconsideration in consultation with the UPSC to see whether it would not be appropriate to hold a review DPC in this case.

It may incidentally be added that if on the basis of the findings of any review DPC that is held now in consultation with the UPSC Miss Asha Malhotra is found suitable for appointment as Director against November 1976 vacancy, then she could perhaps be considered for regularisation from that date particularly as she has been continuing in the post of Director on adhoc basis from that date.

4. It is, therefore, suggested that the case may be referred to the UPSC for reconsidering the position."

13. The matter was referred to the UPSC and ^{with their concurrence} it was decided to hold a review DPC in substitution of the DPC's recommendation in 1976 and the following five names were included:-

1. Shrimati L.S. Nadhan
2. Shri Y. Kohli
3. Kumari A.K. Malhotra
4. Shri J.M. Malik
5. Shri K.N. Saha

The effect of the recommendations of the review DPC was that Ms. Malhotra was restored back to her original position which the DPC's meeting held on the 3rd January, 1976 had given and Shri K.N. Saha whose name was included in the original panel, then excluded from the first revised panel and ^{re-}introduced in the second revised minutes of the DPC was left undisturbed.

14. An analytical recitation of the proven facts of the case shows that none of the three different minutes of the DPC for a single meeting held on the 3rd January, 1976 qualifies for official recognition for the purpose of effecting promotion to the grade of Director. For the sake of convenience, the five different panels which are relevant to these two cases can be recapitulated as follows:-

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(1) The original panel actually prepared by the DPC in the meeting held on 3.1.1976 and forwarded by the UPSC on 6.1.1976.

- (i) Smt. L.S. Nadhan
- (ii) Shri Y. Kohli
- (iii) Ms. A. Malhotra
- (iv) Shri J.M. Malik
- (v) Shri K.N. Saha

(2) First revised panel of 1976 forwarded by the UPSC on 11.2.1976 excluding the Scheduled Caste candidate Shri Saha:- (no meeting was held)

- (i) Smt. L.S. Nadhan
- (ii) Shri Y. Kohli
- (iii) Ms. A. Malhotra
- (iv) Shri J.M. Malik
- (v) Shri S.N. Sarup

(3) Second revised panel forwarded by the UPSC on 31.5.1976 on the basis of reduced size of three which was approved by the Government: (no meeting was held)

- (i) Smt. L.S. Nadhan
- (ii) Shri Y. Kohli
- (iii) Shri K.N. Saha

(4) September, 1982 panel: (meeting was held)

- (i) Shri J.M. Malik
- (ii) Smt. V. Sanyal
- (iii) Ms. Asha Malhotra

(5) Review panel of 1976 (in replacement of panels at 1, 2 and 3 above) prepared in 1985: (meeting was held)

- (i) Smt. L.S. Nadhan
- (ii) Miss Asha Malhotra
- (iii) Shri J.M. Malik
- (iv) Shri K.N. Saha

15. We feel that none of the first three panels can have any official sanctity for the purpose of effecting promotion to the grade of Director. Though the first panel mentioned above is the only genuine panel which was actually prepared by the DPC in the regular meeting held on 3rd January, 1976, it did not receive the final approval of the competent authority i.e. the Government and cannot have any official authority for making promotion except as a panel of reference. The first panel in any way, seems to us to be the ideal panel based on proper assessment of the performance of the candidates and also, by mere accident, in complete

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consonance with the policy of giving concessions to the Scheduled Caste Candidates in fulfilment of the O.M. of February, 1976 even though that OM was not in sight when the DPC met in January, 1976. The DPC included Shri Saha's name under an erroneous direction of the Ministry to consider Shri Saha under the 1968 order, at a time when that order had been made inapplicable by the order of 1974 but again made applicable by the order of February, 1976.

16. The second (first revised) list mentioned above replacing Shri Saha by Shri Sarup is indefensible not only because it tampered with the panel actually prepared by the PDC but also it had to be governed by ^{a but violated a} the February, 1976 order and was subject to the obligation to include Shri Saha as a Scheduled Caste candidate. In any case, otherwise also it was not approved by the competent authority that is the Government.

17. Coming now to the third panel which is the second revised list of 1976 DPC, though this ultimately received the approval of the Government and given effect to by the actual promotions made, it suffers from the following fatal infirmities:-

- (a) The list was the result of tampering with the panel actually prepared by the DPC on 3rd January, 1976.
- (b) No fresh meeting of the DPC was requisitioned even for approval by circulation.
- (c) The list was prepared and signed when the DPC had prepared and signed the first revised list with five names and that had not been withdrawn.
- (d) There was no valid reason for reducing the number of vacancies from 4 to 3. That the number of vacancies was four in 1976 is established not only by the note sent for the DPC in 1975, the requisition form filled in 1975, but also by the averment of the respondents in para 15 of the counter-affidavit

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filed by the Union of India to the petition of Shri K.N. Saha in which it has been stated, "however, in July, 1976 the number of vacancies was reduced to three when there were at least four clear vacancies." There are clear and positive indications that the number of vacancies was reduced from four to three so as to facilitate holding of another DPC in 1976 itself and accommodate other candidates who could not be included by the 1976 DPC.

- (e) Even if the number of vacancies had been kept at four, if not five, against four clear vacancies falling in 1976, Ms Malhotra at No.3, would have definitely been included along with Shri Saha. The exclusion of Ms. Malhotra's name by reducing the number of vacancies from four to three was clearly made with the intention to accommodate some other candidate in her place by holding a subsequent meeting by the DPC in 1976 itself. This purpose seems to have been achieved though belatedly by holding the DPC meeting in September, 1982.

18. We do not want to go deeper but would assert that the facts to the extent they leapt up to our attention without any effort, as enunciated above, should suffice to convince any rational and impartial mind that the developments of 1976 cannot be justified or sustained to deprive Ms. Malhotra of what obviously and legitimately was her due. The Department of Personnel and A.R. and the UPSC in 1983 were convinced about the injustice meted out to Ms. Malhotra and thought it a fit case for holding a review DPC meeting to wash out the inequities and the extraneous motivations which engineered the preparation of the successive panels in 1976. The learned counsel for the petitioner in the first case quoted a number of rulings in his much learned and persuasive manner to uphold the second revised panel of 1976. His main contention is that after a passage of nine years, one should not try to "unscramble the scrambled egg." We have given our

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most ardent and careful consideration to the various rulings and the facts of those cases and compared the same with the instant two cases before us. In the various cases quoted by the learned counsel for the petitioner, certain benefits and rights had accrued to some as a result of the impugned decision or action long ago and there was a direct jeopardy of vested interests between the parties. In the instant two cases, benefits and rights to the petitioners were created and bestowed by taking them away from Ms. Malhotra who had already got them. Ms. Malhotra was originally included in the panel of January, 1976. She could still be there along with Shri Saha (a Scheduled Caste candidate) if the number of vacancies had been kept at four which were clearly available in 1976. In order to make one vacancy available so that another DPC is called in 1976, that clear vacancy was also taken away and even the size of the panel was reduced from five to three by dropping the name of Ms. Malhotra. This was nothing less than robbing Ms. Malhotra of her rightful place awarded to her in the panel prepared by the DPC and re-opening her selection for another DPC. Thus the impugned review DPC of 1985 did not create any right for Ms. Malhotra but gave her back not only what was due to her but what had been given to her but then taken away by departmental manipulation. Her right to the place she had got in the DPC panel in January, 1976, cannot be dismissed as stale and cannot be allowed to be usurped by others merely through

passage of time just as stolen or robbed property cannot be legitimised by possession over a period. Ms. Malhotra has been asserting her claims right from August 1976 against the 1976 panel and in 1983 against the 1982 panel and at no point of time her claims were rejected.

19. Further, inclusion of Ms. Malhotra's name in the 1976 panel should not be a legitimate grievance for either of the two petitioners. There was no clash in January, 1976 between Ms. Malhotra and Smt. Sanyal (petitioner in the first case). The latter was not included in any of the three panels prepared in 1976 while Ms. Malhotra was included in the first genuine panel of 1976 and would ^{have continued to} ~~have been~~ included if the size of the panel had been kept at four as per the four clear vacancies available. Inclusion of Ms. Malhotra's name in the review panel was done not by dropping the name of either of the two petitioners. No reversion of either of the petitioners took place. Thus the rulings quoted by the learned counsel for the petitioners cannot be applied to this case on any of the grounds of inadmissibility, of stale or delayed remedy or of protection of vested rights long established. Since the representations of Ms. Malhotra had never been rejected by the Government, it cannot be said that a closed case was reopened by the Government through the review DPC to give her an undue and unwarranted benefit. On the other hand, it can be stated in this case with

with commendation to the Ministry that a case of continuing grave injustice was arrested and justice and rights were restored to one from whom they ^{had} ~~were~~ ^{been} wrongfully snatched through powerful malfeasance.

20. Let us not ignore the fact that Ms. Malhotra had been included by the DPCs in the panels prepared in 1967, 1969 for Directors and was erroneously as admitted by the respondents, not considered in 1971 as she was then officiating as Director. Let us recall that in the only one meeting by the 1976 DPC held in January, 1976 she was included at the third place in the panel of five names. This panel was assailed, revised, cannibalised and mutilated not once but twice through internal confabulations. The Secretary himself of the Ministry discussed it not once but twice with the Chairman of the UPSC to displace some from and include others in the panel and when such an alternative failed to pass muster with the UPSC, the size of the panel was unwarrantedly reduced to three and at least one clear anticipated and already reported vacancy was allowed to remain untouched with the unconcealed purpose of justifying holding of another meeting in 1976 itself to induct persons in view.

21. One can understand the need of moving the UPSC for expanding the size of a panel ^{to cover} ~~for~~ unforeseen vacancies, if the panel is too short but one cannot rationalise Ministry's out of the way efforts to reduce the size of the panel to three, when even a panel of five did not cast any obligation to promote all. In the past also officers included in the

panel like Ms. Malhotra could not be promoted regularly as the size of the panel was larger than the number of vacancies. Even if the number of vacancies already reported as four had to be later reduced to three, the size of the panel even by recognised standard (number of vacancies plus 25% of that number to cover unforeseen vacancies due to death, resignation etc.) had to be kept at four (3 plus 25% of 3) and both Ms. Malhotra and Shri Saha would have stayed in the panel. The Ministry's unusual insistence on reducing the size of the panel to three by suppressing the actual fact of expected vacancies and norms followed, was in our considered opinion unwarranted, unjustified and unsustainable. Ms. Malhotra was flagrantly robbed of her right which the DPC had bestowed on her in January, 1976. Exclusion of her name from the panel (after it was communicated by the UPSC with signature of the Chairman of the DPC) by devious means and subterfuges of dubious nature and design cannot be justified by any learned dissertation of law and precedents. No length of time can heal or regularise, no canon of a just system can uphold and no jurisprudence can forgive or suffer much less legitimise such egregious misappropriation by dispossession of well-deserved rights. The Ministry of Tourism in this case has acted correctly by undoing the injustice and laying open before the Tribunal by its own volition all facts and documents, in the ultimate interests of justice and fair play. For one thing, in the instant two cases, by allowing

Ms. Malhotra to retain what is her due neither of the two petitioners is going to suffer by reversion or monetary or status loss. Secondly, we cannot convince ourselves that injustice perpetrated should be allowed to attain a garb of validity merely by passage of time especially when the injustice was perpetrated with deliberations and confabulations by superior authorities from whom nothing but impartial justice is expected if the system of impartial and efficient civil service has to function. We are aware of cases where Hon'ble Supreme Court itself has been pleased to order review of the DPC after a lapse of a number of years in order to undo patent injustice or irregularity. Here also, as stated earlier, no vested interests or rights have been destroyed by restoring to the respondent, Ms. Malhotra her rightful position in appointment and seniority. The next promotion as Deputy Director General is no less open to the two petitioners and being by selection and merit, losing a few places in seniority which they seem to have unwarrantedly gained through the unfortunate exercises of the Department during January - July 1976, will not in any case affect their chances of promotion adversely even if for the sake of arguments the chances and prospects of promotion are considered to merit protection.

22. As regards Shri Saha's contention about his seniority in the grade of Director, since seniority in the grade has to follow the order in which the names are included in the panel by the DPC and since no promoted officer including Ms. Malhotra who has been shown senior to him has lesser length of service

in the higher grade than his, we find no reason to intervene for his seniority. Even otherwise, the petitioner Shri Saha in the second case came up to the Tribunal after he had been impleaded as a respondent in the first case and his petition is in essence nothing more than an afterthought if not aftermath to the first petition of Smt. Sanyal.

23. To sum up the result of deliberation, in the facts and circumstances of the cases, we hold that the action taken by the Government to order review DPC meeting for 1976 and on the basis of their recommendation to restore to Ms. Malhotra the promotion and seniority rightly deserved by but earlier denied to her, is fully justified and accordingly ^{we} reject the two petitions under consideration. There will be no order as to costs. The Ministry of Tourism and Civil Aviation File No.A 32013/5/75-Admn. I may be returned to them with the direction that the file should be kept in safe custody and should not be weeded out till the period of appeal against this order is over or the appeal, if any, is disposed of.

A copy of this judgement may be placed on the case file of OA.154/86 also.


(H.P. BAGCHI)
JUDICIAL MEMBER

30.5.86.


(S.P. MUKERJI)
ADMINISTRATIVE MEMBER