

Central Administrative Tribunal
Principal Bench
New Delhi

O.A.No.1849/2016

Order Reserved on: 25.04.2017
Order pronounced on 28.04.2017

Hon'ble Shri V. Ajay Kumar, Member (J)
Hon'ble Shri P. K. Basu, Member (A)

Gurmit Singh
Aged 57 years
S/o Shri Santa Singh
Working as Joint Registrar
Central Administrative Tribunal
Principal Bench, New Delhi
R/o XY-13, Sarojini Nagar
New Delhi – 110 023. ... Applicant

(By Advocate:Shri Harpreet Singh)

Versus

1. The Secretary
Ministry of Personnel, Public Grievances and Pensions
Dept. of Personnel and Training
North Block, New Delhi – 110 001.
2. Principal Registrar
Central Administrative Tribunal
Principal Bench
61/35, Copernicus Marg
New Delhi – 110 001. ... Respondents

(By Advocate: Shri Gyanendra Singh)

O R D E R

By V. Ajay Kumar, Member (J):

The applicant, a Joint Registrar of the 2nd Respondent-Central Administrative Tribunal (in short, CAT), filed the OA questioning the Annexure A2 dated 28.10.2015 of the 1st Respondent-Ministry of Personnel, Public Grievances and Pensions, vide which the proposal of the 2nd Respondent-CAT was rejected and Order dated 06.07.2015 (Annexure A1) was affirmed, resulting the change of date of regular appointment of the applicant as Deputy Registrar from 20.10.2003 to 28.02.2008.

2. The brief facts, as narrated in the OA and not disputed by the respondents are that the applicant while working as Assistant in the Central Secretariat Service in the Ministry of Power, New Delhi, was appointed as Assistant in the 2nd Respondent-CAT, on deputation basis, on 28.03.1988. He was permanently absorbed as Assistant in the 2nd Respondent-CAT on 01.11.1989. He was promoted as Section Officer on 12.01.1992. Later, he was promoted as Deputy Registrar on ad hoc basis on 08.07.2002. Thereafter, he was promoted vide Order dated 25.07.2008 as Deputy Registrar, on regular basis, w.e.f. 20.10.2003, against the panel year 2003-2004 in pursuance of the recommendations of DPC held on 28.02.2008. He was promoted as

Joint Registrar on regular basis on 28.12.2011, and accordingly he has been working as such till date.

3. It is submitted on behalf of the applicant that since the applicant was promoted as Joint Registrar, on regular basis, on 28.12.2011, he is fully qualified and eligible for consideration of his case for promotion to the post of Registrar and when he is waiting for holding of regular DPC for consideration of the eligible candidates for the post of promotion to the post of Registrar on regular basis, the respondents issued the impugned Annexure A2 for revision of the Order dated 25.07.2008, whereunder the applicant was promoted as Deputy Registrar, on regular basis, w.e.f. 20.10.2003, and for consequential revision of his appointment on regular basis as Joint Registrar. It is submitted that the impugned orders are illegal, arbitrary and violative of the principles of natural justice and also violative of the rules in vogue.

4. A counter has been filed, jointly, by the respondents 1 and 2 and the respondents, while denying the contentions of the applicant, through the said counter, submitted as under:

a) On 10.02.2015 a DPC for promotion to the post of Registrar was to be convened in the office of Respondent No.2 (CAT, PB) but the same was put on hold by Respondent No.1 as the date of promotion in the grade of Deputy Registrar, officers to be considered for promotion as Registrar were under revision by the Government.

b) Vide letter No.A-12013/5/2013-AT dated 06.07.2015, the DOPT informed respondent No.2 that while examination of ante-dating of promotion of Smt. Rajalakshmi Ravi in the grade of Deputy Registrar, it was found that the DOPT Order No.A-1203/5/2008 dated 25.07.2008 issued in respect of appointment of 21 Section Officers/Court Officers/Private Secretaries of CAT on promotion as Deputy Registrar on regular basis is erroneous as the officers were promoted with retrospective effect and not from prospective date as has been prescribed in para 6.4.4. of DPC guidelines issued vide DOPT's OM No.22011/5/86-Estt(D) dated 10.04.1989. It was also informed by the DOPT that the matter of revision of date of promotion of those offices as Deputy Registrar on regular basis and some of those officers further promoted as Joint Registrar based on erroneous promotion as Deputy Registrar was examined in terms of the provisions of FR 31A read with Government of India order there under. Accordingly the DOPT conveyed the approval of competent authority as under:-

"(i) Order No.A-12013/5/2008-AT dated 25.07.2008 may be revised to the effect that promotion of the 21 officers as Deputy Registrar may be considered w.e.f. the date of actual promotion or date of holding of DPC (28.02.2008), whichever is later. Also, order No.A-12013/4/2012-AT dated 18.06.2013 so far as promotion of Smt. Rajlakshmi Ravi as Deputy Registrar is concerned may be revised accordingly, i.e. promotion on notional basis may be granted w.e.f. 28.02.2008 and promotion on actual basis may be granted from the date w.e.f. which Smt. Ravi has been holding the post of Deputy Registrar on actual basis.

(ii) Order No.A-12013/4/2011-AT dated 28.12.2011 w.r.t. officers mentioned at S.No.2 to 10 therein and Order No.12013/4/2012-AT dated 20.12.2013 issued in respect of promotion of officers as Joint Registrar on regular basis may be revised to the extent that the promotion given to the officers may be treated as ad hoc."

(c) It is also submitted that by revising the above date of promotion given to the officers no financial loss would be caused to the officers including applicant, as their pay remain unaltered since all of them were already holding the post of Deputy Registrar on ad hoc basis continuously since their promotion on ad hoc basis till 25.07.2008. In respect of Jt. Registrars also whose period of service in that grade has been decided to be revised as ad hoc, no financial loss would occur as their promotion as Jt. Registrar has been kept intact, though on ad hoc basis. However, it would have impact on date of eligibility of officers who have already been promoted as Jt. Registrars w.e.f 28.12.2011 as their date of eligibility would be affected, which consequently would become 01.01.2014.

(d) The respondents further submitted that the impugned order is an internal communication between the Respondents No.1 and 2 and accordingly no cause of action arose for the applicant to question the same and the OA filed for questioning the internal correspondence is liable to be dismissed in limine, as the same is not maintainable.

5. Heard Shri Harpreet Singh, the learned counsel for the applicant and Shri Gyanendra Singh, the learned counsel for the respondents and perused the pleadings on record.

6. Shri Harpreet Singh, the learned counsel appearing for the applicant, submits that the applicant was promoted as Section Officer w.e.f. 12.01.1992 and after rendering 8 years of regular service as Section Officer became eligible for promotion to the post of Deputy Registrar w.e.f. 12.01.2000. Accordingly, he was promoted as Deputy Registrar, however, on ad hoc basis, vide order dated 02.07.2002, as the respondents failed to conduct the regular DPCs from 2002 to 2008, for promotion to the post of Deputy Registrar, on regular basis. Finally, the respondents conducted the DPC during the year 2008 for promotion to the post of Deputy Registrar, on regular basis, and accordingly, promoted the applicant as Deputy Registrar, on regular basis, w.e.f. 20.10.2003. Thereafter, the applicant was promoted as Joint Registrar on regular basis vide Order dated 28.12.2011. The respondents illegally passed orders revising the date of regular promotion of the applicant as Deputy Registrar from 20.10.2003 to 28.02.2008, vide the consequential order dated 13.02.2017, i.e., after lapse of about 9 years, that too, without issuing any show cause notice to the applicant. The applicant was furnished with the impugned orders when he wanted certain information under RTI Act, about non-holding of DPC for regular promotion to the post of Registrar. The learned counsel submits that though the impugned Annexure A2, dated 28.10.2015 is an internal communication but the same was furnished to the applicant under RTI Act as an answer to his queries and the same is adversely affecting the accrued right of the applicant and hence, the OA is maintainable against the said order.

7. The learned counsel for the applicant would further submit that para 6.4.4. of the DoPT OM dated 10.04.1989 (Annexure A15) has no application to his case, and even if it is applicable, the respondents cannot change the date of the regular promotion of the applicant to the post of Deputy Registrar, retrospectively, and without following any due procedure.

8. The learned counsel placed reliance on the following decisions in support of his submissions:

1. Union of India & Another v. Narendra Singh, (2008) 2 SCC 750.
2. P.N.Premchandran v. State of Kerala and Others, (2004) 1 SCC 245
3. Union of India and Others v. N.R.Banerjee and Others, (1007) 9 SCC 287.
4. Rudra Kumar Sain and Others v. Union of India and Others, (2000) 8 SCC 25.
5. Dr. Sahadeva Singh v. UOI & Ors., WP(C) No.5549/2007, decided on 28.02.2012 by Hon'ble High Court of Delhi.
6. J.D.Vashisht v. Union of India & Others, OA No.3811/2012, decided on 08.09.2016 by the CAT, PB, New Delhi.
7. M.A.Khan v. Union of India & Others, 2009 SCC Online CAT 427 (OA No.2364/2008, decided on 01.01.2009 by the CAT, PB, New Delhi.
8. Y.S.Chaudhary & Ors. V. Union of India & Another, 2012 SCC Online CAT 3798, OA No.280/2008 and batch, decided on 07.03.2012 by the CAT, PB, New Delhi.
9. Ms. Shamin Ismat v. Union of India & Anr., 2006 SCC Online CAT 1132, OA No.939/2005, decided on 01.01.2006 by the CAT, PB, New Delhi.

10. Direct Recruitment Class II Engineering Officers' Association v. State of Maharashtra and Others, (1990) 2 SCC 715.

11. Ajit Kumar Rath v. State of Orissa and Others, (1999) 9 SCC 596.

9. Per contra, Shri Gyanendra Singh, the learned counsel appearing for the respondents would contend that their earlier action in promoting the applicant on regular basis as Deputy Registrar w.e.f. 20.10.2003, is against to para 6.4.4. of the DoPT OM dated 10.04.1989 and hence, a mistake and that they can always rectify the mistake. Even as per the settled principles of law all promotions should be prospective only and accordingly placed reliance on **Narendra Singh** (supra) and **Union of India v. K.K.Vadera & Others**, 1989 Suppl.(2) SCC 625.

10. The learned counsel for the respondents further submits that non holding of the DPC for regular promotion to the post of Deputy Registrar during the period 2002 to 2008 was neither intentional nor deliberate but due to the pendency of Court litigations and hence, there is no irregularity or illegality in the impugned action in revising the date of the regular promotion of the applicant as Deputy Registrar. Vide the impugned orders, they have revised the date of regular promotion to the post of Deputy Registrar not only of the applicant and that of number of other identically placed persons, and hence, it cannot be said that their action is arbitrary or violative of Articles 14 and 16 of the Constitution of India.

11. The learned counsel for the respondents submitted that the judgements on which the applicant has placed reliance, have no application to the facts of the present case.

12. In so far as the preliminary objection of the respondents that the instant OA questioning the internal correspondence is not maintainable, we agree with the submission made by the learned counsel for the applicant that the impugned order was furnished to the applicant as a reply to his representations, and forms basis for the consequential order dated 13.02.2017 revising the date of regular promotion of the applicant to the post of Deputy Registrar, and accordingly, we hold that the instant OA is maintainable.

13. In the backdrop of the aforesaid rival submissions it is relevant to refer para 6.4.4 of the DoPT OM dated 10.04.1989, along with certain other relevant paras (as printed in Swamy's Establishment & Administration – Edition-2014) wherein consolidated instructions on Departmental Promotion Committees and related matters were issued.

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

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

(i) Determine the actual number of regular vacancies that arose in each of the previous year (s) immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.

(ii) Consider in respect of each of the years those officers only who would be within the field of choice with reference to the vacancies of each year starting with the earliest year onwards.

(iii) Prepare a 'Select List' by placing the select list of the earlier year above the one for the next year and so on.

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6.4.4. Promotions only prospective- While promotions will be made in the order of the consolidated select list, such promotions will have only prospective effect even in cases where the vacancies relate to earlier year (s)."

Frequency at which DPC should meet

3.1 The DPCs should be convened at regular annual intervals to draw panels which could be utilized on making promotions against the vacancies occurring during the course of a year. For this purpose, it is essential for the concerned appointing authorities to initiate action to fill up the existing as well as anticipated vacancies well in advance of the expiry of the previous panel by collecting relevant documents like CRs, Integrity Certificates, Seniority List, etc., for placing before the DPC. DPCs should be convened every year if necessary on a fixed date, e.g., 1st April or May. The Ministries/Departments should lay down a time-schedule, for holding DPCs under their control and after laying down such a schedule, the same should be monitored by making one of their officers responsible for keeping a watch over the various cadre authorities to ensure that they are held regularly. Holding of DPC meetings need not be delayed or postponed on the ground that Recruitment Rules for a post are being reviewed/amended. A vacancy shall be filled in accordance with the Recruitment Rules for a post are being reviewed/amended. A vacancy shall be filled in accordance with the Recruitment Rules in force on the date of vacancy, unless rules made subsequently have been expressly given retrospective effect. Since amendments to Recruitment Rules normally have only prospective application, the existing vacancies should be filled as per the Recruitment Rules in force.

[Very often, action for holding DPC meeting is initiated after a vacancy has arisen. This results in undue delay in the filling up of the vacancy causing dissatisfaction among those who are eligible for promotion. It may be ensured that regular meetings of DPC are held every year for each category of posts so that an approved select panel is available in advance for making promotions against vacancies arising over a year.]

3.2 The requirement of convening annual meetings of the DPC should be dispensed with only after a certificate has been issued by the appointing authority that there are no vacancies to be filled by promotion or no officers are due for confirmation during the year in question."

Date from which promotions are to be treated as regular:

17.10 The general principle is that, promotion of officers included in the panel would be regular from the date of validity of the panel or the date of their actual promotion, whichever is later.

17.11 In cases where the recommendations for promotion are made by the DPC presided over by a Member of the UPSC and such recommendations do not require to be approved by the Commission, the date of Commission's letter forwarding fair copies of the minutes duly signed by the Chairman of the DPC or the date of the actual promotion of the officers, whichever is later, should be reckoned as the date of regular promotion of the officer. In cases where the Commission's approval is also required, the date of UPSCs letter communicating its approval or the date of actual promotion of the officer, whichever is later, will be the relevant date. In all other cases, the date on which promotion will be effective will be the date on which the officer was actually promoted or the date of the meeting of the DPC, whichever is later. Where the meeting of the DPC extends over more than one day the last date on which the DPC met shall be recorded as the date of meeting of the DPC.

Appointments to posts falling within the purview of ACC can, however, be treated as regular only from the date of approval of ACC or actual promotion, whichever is later, except in particular cases where the ACC approves appointments from some other date."

14. Since the entire dispute revolves around para 6.4.4. of the DoPT OM dated 10.04.1989, and since the submissions identical to that of the submissions made in this OA were already considered in various decisions on which the learned counsel placed reliance, it is relevant to examine the same.

15. In **Narendra Singh** (supra), the respondent therein, while working as Accountant, was mistakenly promoted as Senior Accountant (Functional) and after about four years, the department realized that the promotion given to the respondent was erroneous and he was not eligible to be promoted and when sought to correct the said mistake, after issuing a notice under Rule 31-A of the Fundamental Rules, 1922 and after considering his reply thereto, by cancelling the promotion, he questioned the same. The Hon'ble Apex Court upheld the action of the Department, however, observed that since the respondent continued as Senior Accountant (Functional) till his date of retirement, the salary paid to him in that capacity will not be recovered, though his retiral benefits will be fixed as Accountant only.

16. The learned counsel for the applicant relied on this decision to the extent of requirement of following the principles of natural justice before passing any adverse order, which was followed in **Narendra Singh** (supra), whereas the learned counsel for the respondents relied

on this decision in support of his contention that the bona-fide mistake and action in violation of the rules/instructions/law can be rectified by the authorities, even belatedly.

17. In **K.K.Vadera** (supra), the Hon'ble Apex Court held as under:-

"2. The short question involved in this appeal is whether the Tribunal was justified in directing that the respondents' promotion should be with effect from the date the promotional posts were created.

5. We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion."

18. In **Dr. Sahadeva Singh** (supra), when the action of the respondents in not adhering to the modal calendar in conducting the DPCs for regular promotions resulted in depriving the petitioner in getting the regular promotion when the vacancy arose, though he was eligible, the Hon'ble High Court of Delhi observed, as under:

"15. We are unable to accept the contention that failure of the respondents to adhere to the Model Calendar suggested in the OMs dated 08.09.1998 and 13.10.1998, would not entitle an employee to seek directions for considering him for promotion as per the time schedule stipulated in the Model Calendar, even if there is no justification for not convening the DPC in terms of the Model Calendar. In our view, if the Department is able to justify the delay in convening the DPC as per the schedule laid down in the Model Calendar, an employee would not be entitled to seek a direction to consider him for promotion in terms of the time schedule stipulated in the Model Calendar. But, if there is no explanation given by the Department for not convening the DPC within the time stipulated in the Model Calendar or the explanation given by the Department is not found acceptable, there would be no justification for making the employees suffer merely on account of inaction or delay on the part of the Department for not convening the DPC and postpone his promotion till the DPC actually met. In our view, in such a case, an employee is entitled to approach the Tribunal or the Court, as the case may be, for a direction to the Department to convene DPC for the relevant vacancy year and in case he is eligible and falls in the zone of consideration, to consider him for promotion, in the year in which the vacancy against which he was eligible, arose. It is true that no employee has no vested right for promotion, but, the respondents cannot act arbitrarily and without any reasonable excuse defer the meeting of DPC W.P(C) 5549/2007 Page 38 of 40 and thereby

deprive the employee of his legitimate expectations for being considered for promotion to a post to which he is eligible for being promoted. In such a case, the Tribunal or the Court, as the case may be, ought to step in and direct the respondents to convene DPC for the vacancy year and consider the petitioner if otherwise eligible and falling in the zone of consideration for promotion against the vacancies arise in the vacancy year. Any other view would negate the policy of the Government to prepare the Select List well in advance demoralize the employees and also result in the vacancies remaining unfilled without any reasonable excuse."

Accordingly, while allowing the WP, directed the respondents to treat the petitioner promoted as Deputy Commissioner (Crops), w.e.f 01.01.2005, against one of the two vacancies which had arisen in the year 2004 and which were carried forward to the vacancy year 2005.

19. In **M.A.Khan** (supra), the applicant sought for a direction to hold review DPC for the year-wise vacancies which had occurred in the posts of Director from the year 2003 onwards, and consider the applicant along with other eligible incumbents for promotion against the vacancies of 2003 and thereafter to promote him on the post of Director from a date earlier to when he was actually promoted. In this case also, the reason given by the respondents for not holding the DPCs regularly for year-wise vacancies is a litigation with regard to seniority pending in different fora. The Tribunal, after holding that there was no stay justifying the action of the respondents, observed as under:

"5. Assuming that there was some justification for the respondents to withhold promotions lock, stock and barrel, till such time the courts were to render decisions in various cases pending at different levels, then in that case, promotion of the applicant and others ought to have been considered from the date the vacancies occurred. Year-wise vacancies had to be notified and against such vacancies, eligible persons had to be considered. Surely, in such process, the applicant being senior most would have been eligible for promotion from 2003. The applicant, in any case, deserved consideration of his promotion from the year 2003, whereas he has been promoted only in the year 2007. At the most, the respondents could promote him notionally, but as mentioned above, his consideration for promotion had to be from the year 2003 onwards."

20. In **Y.S.Chaudhary** (supra), the issue involved was whether the delay in convening the meetings of the DPCs by the Respondent-Railway Board, in the case of the applicants was due to reasons beyond control or because of administrative delay/inefficiency and what would be the consequence if the delay on the part of the respondents is not found to be explained/justified. This Tribunal, after examining the paragraphs 6.4.1, and 6.4.4, and also the decisions in **P.N.Premachandran** (supra), **N.R.Banerjee** (supra), and **M.A.Khan** (supra), and certain other decisions, observed, as under:

"25. "It is the contention of the respondents that Para 6.4.4 prescribed that "promotions will have only prospective effect even in cases where the vacancies relate to earlier year (s). However, in our view, para 6.4.4 is qualified by para 6.4.1 and will have to be read along with it. It would, therefore, apply only in cases where the DPC could not be held for reasons beyond control. The repeated emphasis in various instructions issued by the DoPT is on convening DPCs/preparing of promotion panels in time, and it is not open to the respondents to ignore these instructions and place reliance only on a particular para of the instructions.

26. The crucial question, and in fact the only question, to be decided in this OA is whether the delay on the part of the respondents in convening the relevant DPC was bona fide and for reasons beyond control or just the result of administrative laxity/lethargy and could have been avoided."

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"31. Therefore, we have no hesitation in holding that the present case will not fall in the category mentioned in para 6.4.1 above, i.e., where for reasons beyond control, the DPC could not be held and, therefore, para 6.4.4. would not be applicable. The case, therefore, must be categorized as a case of unexplained delay attributable to administrative laxity/lapses. In fact, although this may not be the case here, such delays can also be deliberate and can be resorted to, to deprive an individual or a group/class of individuals, the benefit of promotion which would accrue to them in normal course had their cases been dealt with promptly. Such a position cannot be allowed to continue or go unnoticed."

and accordingly, held as under:

"45. In view of the above discussion and particularly in the context of the Apex Court Judgement in **P.N.Premachandran** (supra) and the order of the Coordinate Bench of this Tribunal in OA No.2364/2008 and OA No.1536/2011

(supra), the OA is partly allowed. The impugned notification dated 18.05.2006 is quashed and set aside. The respondents are directed to consider the request of the applicants herein by convening a review DPC to consider the promotion/induction of the applicants from the date when the vacancies arose in 2002-2003, and thereafter to pass appropriate follow up orders with regard to their seniority in Group 'A'. Action as above may be taken within a period of three months from the date of receipt of a copy of this order."

21. In **J.D.Vashisht** (supra), the applicants sought for a direction for their retrospective promotions from the post of Sub Area Officer (SAO) to Joint Area Officer (JAO) and from JAO to Area Officer from the dates of their eligibility and occurrence of vacancies. When the respondents, while placing reliance on **Union of India & Others v. K.K.Vadera & Others**, 1989 (Suppl.2) SCC 625 and other decisions, contended that retrospective promotion is impermissible in law, this Tribunal after considering the said decisions and also para 6.4.4. of the DoPT OM, referred to hereinbefore, while answering the question whether promotions can be made retrospectively, if so, under what circumstances, observed, as under:

"9. The above view also found favour with the Hon'ble Supreme Court in *State of Uttaranchal & another v Dinesh Kumar Sharma* [(2007) 1 SCC 683], and *Sk. Abdul Rashid & others v State of Jammu & Kashmir* [(2008) 1 SCC 732]. A similar view has been expressed by the Delhi High Court in case of *Union of India & others v Vijender Singh & others* [(176) 2011 DLT 247 (DB)], and another co-ordinate Bench of this Tribunal, of which one of us [Hon'ble Mr. Shekhar Agarwal, Member (A)] was the author in OA No.2506/2011 in case of *Dr. Ramakant Singh v Union of India & others*, decided on 05.09.2014. However, we find that in the above noted cases, the earlier view of the Hon'ble Supreme Court in *P. N. Premchandran v State of Kerala & others* [(2004) 1 SCC 245] has not been considered. In the aforesaid judgment, the Hon'ble Supreme Court observed as under:

"7. It is not in dispute that the posts were to be filled up by promotion. We fail to understand how the appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private respondents herein. It is not disputed that in view of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their part. It is also not disputed, that in ordinary course they were entitled to be promoted to the post of Assistant Directors, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time,

although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect."

10. Though apparently the view in P. N. Premchandran (*supra*) seems to be at variance with the view taken in K. K. Vadera's case (*supra*), however, a keen reading of the two views makes the two judgments reconcilable. In K. K. Vadera's case and subsequent judgments referred to hereinabove, the clear and unambiguous opinion of the Apex Court is that retrospective promotion is impermissible in absence of any statutory rules, notwithstanding the occurrence of vacancies at a date anterior to the date of promotion and even the eligibility of the incumbents and their availability, or even the delay on the part of the DPC. In P. N. Premchandran's case, the Hon'ble Supreme Court, however, ruled that where the eligible persons were promoted on temporary basis on higher post and they were eligible at the time of such temporary promotion and continued on the post for a considerable period, although on temporary basis, on their promotion they should be promoted with retrospective effect. In K. K. Vadera (*supra*) and Nirmal Chandra Sinha (*supra*) this position has not been dealt with nor deprecated in any manner. A similar view has been expressed by the Hon'ble Supreme Court in *Suraj Prakash Gupta & others v State of Jammu & Kashmir and others* [(2000) 7 SCC 561]. Relevant observations of the Hon'ble Supreme Court are reproduced hereunder:

"52. Under Rule 23, whenever probation is commenced in respect of an officer, it is permissible to appoint him to the service with retrospective effect from such date from which the person was "continuously on duty as a member of the service". Read with Rule 2(e) which defines "member of service" it means the time from which he was "continuously holding the pensionable post". Rule 23 does not make any distinction between different modes of recruitment. It is well settled that in the case of a direct recruit, the probation can commence only from a date after his selection and he can hold a permanent vacancy only after such selection. According to service jurisprudence (see in fact, discussion under Point 4), a direct recruit cannot claim appointment from a date much before his selection. So far as a promotee and also one who is recruited by transfer, are concerned, before such persons are appointed as members of the service under Rule 23, first their probation must commence. Then such person becomes a probationer for purposes of Rule 23. Once he is on probation, and if a substantive vacancy in the permanent cadre existed in which the promotee or a recruit by transfer can be accommodated, and if such a vacancy has arisen from a date previous to the issue of the order of appointment (i.e. appointment by promotion or transfer) then under Rule 23 he may be 14 OA-3811/2012 appointed to the service (i.e. regularly) with retrospective effect from such anterior date (or, as the case may be, from such subsequent date) from which he has been continuing on duty on a non-pensionable (sic pensionable) post [see Rule 2(e) defining "member of service"]. This period can certainly be one that a person holds in a stopgap or ad hoc manner. The order of "promoting a person in the service" regularly from an anterior date and the order of probation from an anterior date can be simultaneously passed. That is how under Rule 23, a person holding a temporary, stopgap or ad hoc appointment beyond three months can become a probationer and get appointed regularly to the service with retrospective effect."

Above view in *Suraj Prakash Gupta's* case was on the strength of statutory rule, in a case where an official is allowed to hold the promotional post even though as an ad hoc arrangement without being regularly promoted in accordance with the prescribed procedure but was eligible and such arrangement was against a clear vacancy, on

regular promotion ordinarily he would be entitled to retrospective promotion with effect from the date he was holding the promotional post. Another situation that needs to be taken note of is where a junior has been promoted for whatever reason ignoring the rightful claim of the senior, the retrospective promotion of the senior may not be contrary to law, even in absence of any rule permitting retrospective promotion, as it would be in contravention of the doctrine of equality envisaged under Articles 14 and 16 of the Constitution of India.

11. The DOP&T instructions relied upon by the applicants clearly indicate, rather impose an obligation on the respondents to hold regular DPCs every year and accord consideration for promotion to the eligible candidates, and on account of administrative lapses employees should not be made to suffer. The DOP&T instructions relied upon by the respondents as noticed from the Swamy's compilation do not take into consideration the circumstances and the DOP&T instructions, as noticed above and relied upon by the applicants. These DOP&T instructions have not been withdrawn and are still in vogue.

12. In *Union of India and others v N. R. Banerjee and others* [(1997) 9 SCC 287], the Hon'ble Supreme Court had the occasion to consider the nature and enforceability of the DOP&T office memorandum No.22011/5/86-Est.(D) dated 10.04.1989, as amended from time to time. This office memorandum provides for convening of DPCs every year, if necessary, on a fixed date, i.e., 1st of April or May, and preparation of the year-wise panel by the DPC. The Apex Court has held that the preparation and finalization of the yearly panel, unless duly certified by the appointing authority that no vacancy would arise or no suitable candidate was available, is a mandatory requirement. The Hon'ble Supreme Court, however, observed that mere inclusion of one's name in the select list does not confer any right on him/her to appointment. It is not incumbent that all the posts may be filled up, but the authority must act reasonably, fairly and in public interest, and omission thereof should not be arbitrary. Even though the ratio of N. R. Banerjee's case (*supra*) is that the DOP&T memorandum prescribing preparation of year-wise panel is mandatory, however, the said judgment does not lay down any law for retrospective promotion in the event of infraction of the mandatory conditions of the memorandum.

13. Apart from the aforementioned DOP&T instructions, we are of the considered opinion that any arbitrary action on the part of the State resulting in sufferings to the Government employee is impermissible in law being violative of Article 14 of Constitution."

Accordingly, finally, held as under:

"15. This OA is disposed of. The respondents are directed to consider the claims of the applicants for promotion from Sub Area Organizer to Joint Area Organizer and from Joint Area Organizer to Area Organizer within two months from the date of receipt of copy of this order, in the event the applicants are otherwise eligible and do not suffer any disqualification for such promotion. The applicants may not be entitled to retrospective promotion. However, the claim of the applicants is required to be considered on the caveat that if pursuant to judgments of the Tribunal dated 05.01.2010 passed in OA No.2104/2009 and dated 05.09.2011 passed in OA No.1712/2010, any person(s) junior to the applicants has/have been promoted, the applicants shall be entitled to be promoted retrospectively with effect from the date(s) such junior(s) was/were promoted."

22. After examining the facts of the instant OA, and the various decisions on which the learned counsel for the applicant placed reliance and referred as above, we are of the considered view that the Coordinate Bench of this Tribunal in **J.D.Vashisht** (supra), elaborately considered identical submissions, including paras 6.4.1 and 6.4.4 and the model calendar, and the various decisions of the Hon'ble Apex Court and of this Tribunal, answered all those submissions, in favour of the applicant.

23. Before concluding, we refer the following decision, which is also having a bearing on the subject matter of the OA, and fortifies our view.

24. In **Manpreeth Singh Poonam v. Union of India & Others**, (2014) SCC online Delhi 7201 (WP(C) No.8494/2014, decided on 05.12.2014), the Hon'ble High Court of Delhi, held as under:

"7. The narrow controversy which the Court is called upon to decide is whether the petitioner's claim for promotion with effect from the date or dates the vacancies arose respectively in different years should have been acceded to. It is uncontroverted that by the letter dated 19.10.2011 No.14016/21/2011-UTS.II, the MHA notified the number of vacancies available for different years commencing from 2004. It is also a conceded fact that for 16 years, the exercise had not been undertaken by the MHA or the GNCTD. In these circumstances, the denial of the limited request of the petitioners that they be granted promotions from the date they declared eligible in view of the conceded position that 7 clear vacancies existed as in 2009, in our opinion was indefensible.

8. The denial of ante-dating was clearly arbitrary, considering that there were 7 vacancies in the year 2009 and the petitioners were placed at serial numbers 1 and 2. The mere formality that the MHA or the GNCTD found it convenient to constitute the DPC much later, ought not to have prejudiced the petitioners or - for that matter, other eligible officers whose cases ought to have been considered time to time, on periodical basis. The respondents are in fact urging that their inability to carry out this period exercise should be held against the petitioner - an argument flawed in logic and utterly unreasonable. If the justification offered by the respondents were to be accepted, the ante-dating of promotion of the petitioners to 1.7.2011 - when the DPC met only at the end of 2012 cannot be explained. The CAT, in fact, relied upon and has cited the decisions of the Supreme Court in *P.N. Premchandran v. State of Kerala*, 2004 (1) SCC 245, *Union of India & Anr. v. Hemraj Singh Chauhan & Ors.*, 2010 (4) SCC 290 and *Union of India v.*

Vipinchandra Hiralal Shah, 1996 (6) SCC 721 to the effect that directions can be issued in given circumstances to accord retrospective or ante-dated promotions. Having considered these cases, it is clear that the Court had a normative basis for deciding the question of prospectivity, and also appreciated the relevant surrounding circumstances. In the present circumstances, the CAT in our opinion fell into error in refusing relief that the petitioners sought from it."

25. All the judgments, referred to above, lays down that normally, all promotions will have only prospective effect. However, in certain cases, keeping in view the circumstances peculiar to the said cases, such as delay in conducting the DPCs without there being valid reasons, etc., upheld the orders granting antedated promotions, if the vacancies for the relevant years were in existence and the incumbents satisfy the eligibility criteria, in all respects, and were actually working in the promotional posts, may be on ad hoc basis, we are of the considered view, that the instant case is also one such exceptional case and deserves to be allowed, in these peculiar circumstances.

26. It is not in dispute that as on 20.10.2003, the applicant was fully qualified and eligible for consideration of his case for promotion to the post of Deputy Registrar, on regular basis, as per Rules. It is also not in dispute that sufficient regular vacancies in the cadre of Deputy Registrar were available as on the said date and the applicant was appointed on ad hoc basis with effect from 20.10.2003, against such an existing regular Deputy Registrar vacancy.

27. It is also not in dispute that the respondents were under obligation to hold the regular DPC for consideration of the cases of the applicant and others for promotion to the post of Deputy Registrar, on regular basis, in respect of the vacancies meant for the year 2003-

2004. It is also not the case of the respondents that any specific stay prohibiting them from holding the DPC for promotion to the post of Deputy Registrar, on regular basis, was in operation during the period 2002-2008. Hence, in the facts of the instant case and in view of the above referred legal position, the applicant cannot be deprived of his legitimate right of appointment as Deputy Registrar, on regular basis, w.e.f. 20.10.2003, due to the delay of conducting the DPC at the appropriate time by the respondents and accordingly, the impugned action and the consequential orders passed thereto by the respondents are unsustainable.

28. The Hon'ble Apex Court in **Indrapal Yadav vs. Union of India**, 1985 (3) SCR 37 held that 'those who do not come to Court need not be at a disadvantage to those who rushed to here and if they are otherwise similarly situated, they are entitled for similar treatment if by no one else at the hands of the Court.'

29. The applicant, vide Order dated 25.07.2008 of the respondents, was promoted as Deputy Registrar, on regular basis, w.e.f. 20.10.2003 against the panel year 2003-2004, in pursuance of the recommendations of the DPC held on 28.02.2008. Through the said order, the respondents promoted certain others also, as Deputy Registrars, on regular basis, w.e.f. respective dates under identical circumstances. The respondents vide the impugned Orders and the consequential order dated 13.02.2017 sought to revise the date of regular promotion of the applicant as well as others, who were also

promoted in the similar circumstances, vide Order dated 25.07.2008. As we have declared the impugned orders of the respondents, in respect of the applicant, as unsustainable, as above, though in normal circumstances when a OA is allowed, the impugned orders in respect of the applicant(s) only to be quashed, but in the circumstances of the instant case, and since the applicant and others, whose dates of regular promotion as Deputy Registrars are sought to be revised in the identical circumstances and for the same reasons, we quash the impugned orders and the consequential order dated 13.02.2017 in its entirety.

30. In these peculiar circumstances of the instant case and for the aforesaid reasons, the OA is allowed and the impugned orders and the consequential order dated 13.02.2017 are quashed and set aside, with all consequential benefits. The respondents shall consider the case of the applicant and others for promotion to the post of Registrar, on regular basis, if they are otherwise eligible, along with others, as per rules, by treating their respective dates of appointment as Deputy Registrars, on regular basis, with effect from the respective dates, as was ordered vide Order dated 25.07.2008 read with Order dated 26.08.2008. No costs.

(P. K. Basu)
Member (A)

(V. Ajay Kumar)
Member (J)