

**Central Administrative Tribunal
Principal Bench
New Delhi**

OA No.3811/2012

Reserved on : 03.05.2016

Pronounced on : 08.09.2016

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. Shekhar Agarwal, Member (A)**

1. J. D. Vashisht S/o B. D. Vashisht,
Area Organizer (A.O.),
Sector Hqrs., Pilibhit,
R/o Sham Kunj, 10 Kaur Garh,
Distt. Pilibhit, U.P.-262001.
2. Ashok Kumar Srivastava S/o Dr. Jagdish Prasad Srivastava,
Joint Area Organizer (JAO), Force Headquarters,
SSB, East Block-V, R.K. Puram,
New Delhi.
3. Deepak Joshi S/o B. M. Joshi,
Joint Area Organizer (JAO),
R/o Basljees Flats,
Flat No.2, Shimla (HP).
4. P. S. Bisht S/o T. S. Bisht,
Sub Area Organizer (SAO),
R/o House No.67, Sector 3,
Sadiq Nagar, New Delhi-110049. Applicants

(By Advocate : Shri Rajesh Katyal)

Versus

1. Union of India through
Secretary, Ministry of Home Affairs,
North, New Delhi-110011.
2. The Director General,
Sashastra Seema Bal (SSB),
Force Headquarters,
East Block-V, R.K.Puram,
New Delhi-110066. Respondents

(By Advocate : Shri Sunil Ahuja)

O R D E R

Justice Permod Kohli, Chairman :

The applicants herein are seeking 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 (AO) from the dates of their eligibility and occurrence of vacancies. Details indicating their appointments as SAO, JAO and AO, except in case of applicant No.4 who was initially appointed as Circle Officer (CO), are indicated hereinbelow:

Sl No.	Name S/Shri	Rank	Date of appointment/promotion as			
			CO	SAO	JAO	AO
1.	J.D. Vashisht	AO	--	20.10.1991	31.10.07/ AN (Regular) 01.04.2006 (Notional)	12.04.2011
2.	A.K.Srivastava	Jt.AO	--	09.07.1994	11.04.11/ AN	--
3.	Deepak Joshi	Jt.AO	--	23.02.1994	18.04.11	--
4.	P.S.Bisht	SAO	16.11.1989	24.08.1993	--	--

Service conditions of the applicants are governed and regulated by the recruitment rules, namely, the Special Service Bureau (Senior Executive) Service Rules, 1977, as amended from time to time. A Sub Area Organizer (SAO) is entitled to be considered for promotion to the post of Joint Area Organizer (JAO) after six years of regular service as SAO, and after having completed Junior Officers/ Executive Officers Training Course. A JAO is entitled to be considered for next higher promotion as Area Officer (AO) after six

years regular service in the grade, or 16 years of gazetted service, including 2 years as JAO.

2. It is the case of the applicants that they became eligible for promotion from SAO to JAO and from JAO to AO on completion of minimum qualifying period as prescribed under the rules, as they were otherwise eligible having completed the Junior Officers/ Executive Officers Training Course and having put in requisite service in the respective grades.

3. The respondents vide order dated 16.07.2007 (Annexure A-1) de-notified the service rules referred to hereinabove. The relevant order reads as under:

“Subject: De-notification of Service Rules.

The SSB (Senior Executive) Service Rules, 1977 notified by Cabinet Secretariat (Department of Cabinet Affairs) vide Notification No. EA/SE-191/74 dated 01.03.1977 (as amended from time to time) are hereby de-notified with immediate effect.

2. These Service Rules were not notified in the official Gazette of India due to administrative reasons.”

This de-notification order became subject matter of challenge in OA No.2104/2009. A coordinate Bench of this Tribunal vide its judgment dated 05.01.2010 set aside the order dated 16.07.2007 and issued directions for consideration of claim of the applicants in the said OA for promotion. The relevant directions are reproduced hereunder:

“4. The Original Application is allowed. Order dated 16.07.2007 is set aside with a direction to the respondents to consider the claim of the applicants, if they are eligible under the rules as expeditiously as possible and preferably within a period of three months from the date of receipt of a copy of this order. Surely, if the applicants are promoted, they will be entitled to all consequential benefits.”

The aforesaid judgment having attained finality, the respondents implemented the same, and vide order dated 27.04.2010 (Annexure A-3) withdrew the de-notification order dated 16.07.2007. The order reads as under:

“Subject: De-notification of Service Rules.

In compliance of CAT (Principal Bench), New Delhi order dated 05.01.2010 in O.A. No.2104/2009 titled Bakhtawar Singh & others Vs. UOI & others, de-notification or the SSB (Senior Executive) Service Rules, 1977 vide this Ministry’s Order No.10/SSB/A2/2007 (1)/Pers.III dated 16.07.2007 is hereby withdrawn.”

4. On account of de-notification of the rules and restoration thereof between the period 16.07.2007 and 24.04.2010, when the rules remained inoperative, no DPC was held to consider the eligible members of various grades for their promotion to the next higher posts. The applicants are suffering on account of the aforesaid act of commission of the respondents. According to the averments made in the Application, applicant No.1 was eligible for promotion for the post of AO on 01.04.2008, but not considered for promotion on account of de-notification of the rules. He was, however, promoted

as AO on 12.04.2011 with a delay of three years. Applicant No.2 became eligible for promotion to the post of JAO on completion of six years of service as SAO. However, on account of non-availability of the vacancy for promotion to the post of JAO, he could be considered for promotion only when the vacancy occurred on 01.04.2009. He also could not be considered for promotion on account of de-notification of the rules. He was, however, promoted as JAO on 11.04.2011, and his promotion has been delayed by two years. In case of applicant No.3, he also became eligible for promotion to the post of JAO on completion of six years of service as SAO, for which vacancy arose only on 10.06.2010, but on account of de-notification of the rules he could not be considered for such promotion, and was promoted as JAO only on 18.04.2011 with a delay of one year. Similarly, applicant No.4 was promoted as SAO on 24.08.1993 and was required to be considered for further promotion as JAO as he had rendered the required service in the grade and completed the Junior Officers/Executive Officers Training Course. Since no promotions were made, no vacancies became available for his promotion to the post of JAO and further promotion as AO.

5. All the applicants except applicant No.4, however, were promoted as JAOs on the dates indicated hereinabove. Applicant No.1 has earned promotion as AO on 12.04.2011, whereas applicant

No.4 could not earn promotion even as JAO due to non-promotion of persons senior to him from the post of JAO to AO. As a matter of fact, DPC for promotion to the rank of JAO for the vacancy years 2007-08 and 2008-09 could not be held due to non-availability of vacancies, as the DPC for promotion of JAO to AO was not convened during these years due to de-notification of the service rules. The applicants have accordingly prayed for their consideration for promotion to the post of JAO and thereafter as AO. Reliance is placed upon DOP&T office memorandum dated 13.05.1991 which prescribes that DPC should be held every year for each category of posts. Similarly, DOP&T OM dated 14.12.2000 prescribes that non-adherence to the prescribed time frame for holding DPC is a serious concern. DOP&T OM dated 21.09.2006 provides that delay in filling up the promotional vacancies adversely affects the functioning of the Government.

6. We have heard the learned counsel for parties.

7. In the counter affidavit filed, the factual position is not disputed. The only defence of the respondents for non-holding of DPC is de-notification of the service rules, which resulted in non-promotion of candidates from the post of SAO to JAO and from JAO to AO. Neither the eligibility of the applicants is disputed nor are their claims for such promotion questioned. Mr. Sunil Ahuja, learned

counsel appearing for the respondents has argued that the non-convening of DPC cannot be attributed to the respondents, and secondly that retrospective promotion is impermissible in law. According to him, the vacancies only became available when the service rules were restored vide order dated 27.04.2010 and promotions made from one grade to another. It is accordingly submitted that with the restoration of the service rules, the eligible candidates were considered for promotion, and on being promoted, the next candidate in the line of promotion was considered against the resultant vacancy and promoted accordingly by DPC, and that such promotion can only be prospective and not retrospective. Respondents have relied upon para 6.4.4 of the Guidelines on Departmental Promotion Committees circulated vide DOP&T office memorandum No.22011/5/86-Estt.(D) dated 10.04.1989, contained in *Swamy's Establishment and Administration* to contend that retrospective promotion is impermissible. The relevant para reads as under:

“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).”

8. We have carefully considered the respective contentions of parties. The applicants have placed on record a chart indicating

adverse impact on promotions of the applicants on account of de-notification of the service rules vide order dated 16.07.2007. The said chart is reproduced hereunder:

Sl No	Name of applicants	Promotion to the rank of SAO to Joint AO		Promotion to the rank of Joint AO to AO	
		Date of eligibility vis-a-vis date of vacancy	Date of actual promotion	Date of eligibility vis-a-vis date of vacancy	Date of actual promotion
1.	J. D. Vashisht (Applicant No.1)	01.04.2006	01.04.2006	01.04.2008	12.04.2011
2.	A. K. Srivastava (Applicant No.2)	01.04.2009	11.04.2011	01.01.2012	Not yet promoted
3.	Deepak Joshi (Applicant No.3)	10.06.2010	18.04.2011	01.01.2013	Not yet promoted
4.	P. S. Bisht (Applicant No.4)	01.01.2012	16.04.2013	01.01.2014	Not yet promoted

This position is not disputed. From the perusal of the above chart, it appears that the applicant No.1 has suffered a delay in his promotion for a period of almost three years. He was eligible for promotion as AO on 01.04.2008 and was promoted on 12.04.2011. Applicant No.2 became eligible for promotion and vacancy of JAO could have been available on 01.04.2009, but he was promoted as JAO on 11.04.2011. He became eligible for promotion as AO on 01.01.2012 but has not earned promotion as such till date. On the same footing is applicant No.3, who became eligible for promotion from SAO to JAO on 10.06.2010 when vacancy occurred, but was promoted as JAO on 18.04.2011. He should have become due for promotion as AO w.e.f. 01.01.2013, but has not been promoted till date. Similar is the case of

applicant No.4 who should have been promoted as on 01.01.2012 from SAO to JAO, but has been promoted as JAO on 16.04.2013. He should have been considered for further promotion as AO on 01.01.2014, but has not been considered for promotion till date.

9. Facts having been admitted, this takes us to the question whether promotions can be made retrospectively, if so under what circumstances. In *Union of India & others v K. K. Vadera & others* [1989 Supp (2) SCC 625], a question arose whether promotion to the post of Scientist-B should take effect from the date it was granted or the date of creation of the promotional post. The Division Bench of the Hon'ble Supreme Court held as under:

“5. There is no statutory provision that the promotion to the post of Scientist “B” should take effect from July 1 of the year in which the promotion is granted. It may be that, rightly or wrongly, for some reason or other, the promotions were granted from July 1, but we do not find any justifying reason for the direction given by the Tribunal that the promotions of the respondents to the posts of Scientist “B” should be with effect from the date of the creation of these promotional posts. 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. In the circumstances, it is difficult to sustain the judgment of the Tribunal."

In *Nirmal Chandra Sinha v Union of India & others* [(2008) 14 SCC 29], relying upon *K. K. Vadera's* case (supra) and some other cases, another Division Bench of the Hon'ble Supreme Court opined as under:

"7. It has been held in a series of decisions of this Court that a promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post vide *Union of India v. K.K. Vadera* [1989 Supp (2) SCC 625 : 1990 SCC (L&S) 127], *State of Uttaranchal v. Dinesh Kumar Sharma*[(2007) 1 SCC 683 : (2007) 1 SCC (L&S) 594] , *K.V. Subba Rao v. Govt. of A.P.*[(1988) 2 SCC 201 : 1988 SCC (L&S) 506 : (1988) 7 ATC 94] , *Sanjay K. Sinha-II v. State of Bihar* [(2004) 10 SCC 734 : 2005 SCC (L&S) 169] , etc.

8. Learned counsel for appellant Nirmal Chandra Sinha, however, relied on a decision of this Court in *Union of India v. B.S. Agarwal* [(1997) 8 SCC 89] . We have carefully perused the decision and we are of the opinion that the said decision is distinguishable. In that case the facts were that, under the relevant rule for promotion as General Manager it was necessary to have at least two years' tenure on the lower post. The respondent did not actually have two years' tenure, yet this Court held that he was eligible for promotion since he had been empanelled and the vacancy on which he should be promoted had occurred before two years of his consideration for promotion.

9. In our opinion, the aforesaid decision in *Union of India v. B.S. Agarwal* [(1997) 8 SCC 89] was given on the special circumstances of that case and on humanitarian considerations, but it cannot be said to be a precedent for other cases. When the rule requires two years' actual service in the lower post before a person can be considered for promotion as General Manager, that rule

cannot be violated by considering a person who has not put in two years' service in the lower post. Moreover, in the aforesaid decision in *Union of India v. B.S. Agarwal* [(1997) 8 SCC 89] the respondent had not actually been promoted as General Manager, but he only claimed that he was eligible to be considered for promotion as General Manager. This fact also makes the aforesaid decision distinguishable.

10. In the present case, appellant Nirmal Chandra Sinha was promoted as General Manager on 29-11-1996, but he claims that he should be deemed to have been promoted w.e.f. 13-3-1996 with consequential benefits. We are afraid this relief cannot be granted to him. It is settled law that the date of occurrence of vacancy is not relevant for this purpose."

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 recruitee 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

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. De-notification of the service rules vide order dated 16.07.2007 was illegal, arbitrary and unjustified. It has created a complete administrative vacuum for all the members of the service and has brought unnecessary and avoidable sufferings for the applicants and similarly situated employees who are members of various cadres of the service. Only reason for de-notification of the service rules indicated in the de-notification order dated 16.07.2007 is rules were not notified in the official Gazette of India due to administrative reasons. Such deficiency could have been rectified by notifying the rules instead of de-notifying the service rules. Be that as it may, the

de-notification order has been quashed by this Tribunal vide judgment dated 05.01.2010 in OA No.2104/2009. Not only that the judgment has attained finality, the respondents have themselves withdrawn the de-notification order, meaning thereby that the rules have been restored. The employees have been deprived of their rightful claim of consideration for promotion for a period of more than three years when the rules remained inoperative. The employees cannot be made to suffer on that count. It was under these circumstances that this Tribunal in OA No.2104/2009 set aside the de-notification order. Following the aforesaid judgment, the Tribunal in OA No.1712/2010 – *V. S. Rawat & another v Union of India*, decided on 05.09.2011, issued directions to consider the claims of the applicants therein for promotion to the post of JAO retrospectively. The relevant directions are noticed hereunder:

“3. That being so, we dispose of this Original Application directing the respondents to consider the case of the applicants for promotion to the post of Junior Area Organizer from 2007 onwards in view of our order dated 05.01.2010 passed in OA No.2104/2009, and if they are found to be eligible and fit for promotion, they will also be entitled to all consequential benefits, as said in OA No.2104/2009 as well, and order in that regard shall be passed as expeditiously as possible and preferably within a period of six weeks from today. There shall be no order as to costs.”

14. The claim of the applicants is no different.

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.

(Shekhar Agarwal)
Member (A)

(Permod Kohli)
Chairman

/as/