

CENTRAL ADMINISTRATIVE TRIBUNAL,
ERNAKULAM BENCH

Original Application No. 180/00036/2015

Original Application No. 180/00207/2016

Thursday, this the 22nd day of November, 2018

CORAM:

Hon'ble Mr. E.K. Bharat Bhushan, Administrative Member

Hon'ble Mr. Ashish Kalia, Judicial Member

1. Original Application No. 180/00036/2015 -

P.C. Rajalakshmi, Administrative Officer (Retd.),
Central Excise, Ragam, House No. 1-4104, Gurukul Road,
East Hill, West Hill PO, Kozhikode-673 005. **Applicant**

(By Advocate : Mr. C.S.G. Nair)

V e r s u s

1. Union of India, represented by the Secretary,
Department of Revenue, North Block, New Delhi – 110 001.
2. Chairman, Central Board of Excise & Customs, North Block,
New Delhi – 110 001.
3. Chief Commissioner of Central Excise & Customs,
Central Revenue Buildings, I.S. Press Road, Cochin – 682 018.
4. Commissioner of Central Excise & Customs,
Central Revenue Buildings, I.S. Press Road, Cochin – 682 018.
5. Commissioner of Central Excise & Customs,
Central Revenue Buildings, Manachira, Kozhikode – 673 001.
6. Secretary, Union Public Service Commission, Dholpur House,
New Delhi – 110 069. **Respondents**

**[By Advocates : Mr. N. Anilkumar, SCGSC (R1-5) &
Mr. Thomas Mathew Nellimoottil (R6)]**

2. Original Application No. 180/00207/2016 -

1. N. Rajam, W/o. M.K. Prabhakaran Nair, aged 66 years,
Administrative Officer (Retd.), Central Excise, Sreevihar,
Alagappanagar PO, Amballoor, Thrissur – 680 302.

2. P.V. Sujatha, W/o. N.K. Krishnan, aged 65 years,
Administrative Officer (Retd.), Central, Excise, Srikri
Sreevilasam Road, Valiyapadam, Edapally PO, Cochin-682 024.
3. S. Thulasi, W/o. K.K. Sukumaran, aged 64 years,
Administrative Officer (Retd.), Central Excise, Kadavil House,
ERPS No. 7, Kattithara Road, Maradu PO, Ernakulam
District – 682304.
4. J. Ruhiyanath Beevi J., W/o. Mohaboob Jan Sahib, aged 65 years,
Administrative Officer (Retd.), Central Excise, Rahath,
Vellappilmukku, Mayyanadu PO,
Kollam – 691303. **Applicants**

(By Advocate : Mr. C.S.G. Nair)

V e r s u s

1. Union of India, represented by the Secretary,
Department of Revenue, North Block, New Delhi – 110 001.
2. Chairman, Central Board of Excise & Customs, North Block,
New Delhi – 110 001.
3. Chief Commissioner of Central Excise & Customs,
Central Revenue Buildings, I.S. Press Road, Cochin – 682 018.
4. Commissioner of Central Excise & Customs,
Central Revenue Buildings, I.S. Press Road, Cochin – 682 018.
5. Commissioner of Central Excise & Customs,
Central Revenue Buildings, Manachira, Kozhikode – 673 001.
6. Commissioner of Central Excise & Customs, ICE Bhavan,
Press Club Road, Thiruvananthapuram – 695 001.
7. Commissioner of Customs (Preventive), Catholic Centre,
Broadway, Cochin – 682 031. **Respondents**

(By Advocate : Mr. P.G. Jayan, ACGSC)

These applications having been heard on 13.11.2018, the Tribunal on
22.11.2018 delivered the following:

ORDER

Per Hon'ble Mr. Ashish Kalia, Judicial Member –

OAs Nos. 180-36-2015 and 180-207-2016 have common points of fact and law involved and hence are being disposed of through this common order. The pleadings, documents and records in OA No. 180-36-2015 are referred to in this common order for the sake of convenience.

2. The relief claimed by the applicants in OA No. 180-36-2015 are as under:

“(i) To direct the 2nd respondent to promote the applicant as Chief Accounts Officer based on the select panel prepared by the DPC held for the year 2009-2010 or 2010-2011 with all consequential benefits.

(ii) To direct the respondents to refix the pay of the applicant in the cadre of Chief Accounts Officer, grant arrears of pay and allowances consequent to the promotion and arrears of all retirement benefits including leave encashment amount.

(iii) Grant such other relief or reliefs that may be prayed for or that are found to be just and proper in the nature and circumstances of the case.

(iv) Grant cost of this OA.”

3. The relief claimed by the applicants in OA No. 180-207-2016 are as under:

“(i) To direct the 1st and 2nd respondent to promote the applicants as Chief Accounts Officer based on the select panel prepared by the DPC held for the year 2008-2009 and 2010-2011 as the case may be, with all consequential benefits.

(ii) To direct the respondents to refix the pay of the applicants in the cadre of Chief Accounts Officer, w.e.f. Date of notional promotion and grant arrears of pay and allowances for the period of notional promotion and revise all retirement benefits including pension, gratuity, commuted value of pension, leave encashment amount etc. within a stipulated period.

(iii) Grant such other relief or reliefs that may be prayed for or that are found to be just and proper in the nature and circumstances of the case.

(iv) Grant cost of this OA.”

4. The brief facts of the case in OA No. 180-36-2015 are that the applicant is a retired Administrative Officer from the 5th respondent office on 31.12.2010 on superannuation. She had more than 14 years of service as Administrative Officer. The next promotion was to the post of Chief Accounts Officer. However, on account of the delay and laches on the part of the 2nd respondent in convening the DPC for promotion to the post of Chief Accounts Officer, the applicant though included in the panel for promotion as Chief Accounts Officer in 2009-2010 and 2010-2011 was not considered for promotion as Chief Accounts Officer as she had retired by the time the DPC met in 2014. Therefore, no promotion order was issued in her favour. Applicant submitted representations request to grant her notional promotion w.e.f. The date on which it was due to her but so far no reply has been received. Applicant submitted that in an identical case in OA No. 996 of 2012 this Tribunal directed the respondents to promote the applicant therein although he had retired from service before the DPC meeting. The applicant therein was granted notional promotion from the date of occurrence of vacancy with all consequential benefits including monetary benefits. The applicant herein prays for a similar treatment as in OA No. 996 of 2012.

5. Notices were issued to the respondents and they entered appearance through Shri N. Anilkumar, SCGSC (R1-5) in OA No. 180/36/2015, Mr. Thomas Mathew Nellimoottil (R6) in OA No. 180/36/2015 and Shri P.G. Jayan, ACGSC in OA No. 180/207/2016. Reply statements have been filed

by the respondents in both the OAs. Respondents 1-5 submitted that applicant joined the respondents as Lower Division Clerk on 7.8.1972 and was promoted as Upper Division Clerk, Deputy Office Superintendent Level II, Level I, Office Superintendent and then as Administrative Officer on 1.7.1996. While working as Administrative Officer, she retired from service on superannuation on 31.12.2010. Respondents contend that since the requisite documents and particulars to enable holding of DPC's have to be collected from various field formations of CBEC spread all over India in respect of eligible candidates some delay took in convening of the DPC. Thereafter these details have to be compiled by the CBEC to ensure that the information and materials submitted to the UPSC are free from any error. The DPC for promotion to the post of Chief Accounts Officer for the years 2007-08, 2008-09 and 2009-10 was held on 22.6.2013. Though the applicant was recommended by the DPC in the extended panel for the vacancy year 2009-10, she was not promoted as she retired from service on 31.12.2010 well before the date of holding of the DPC. Respondents pray for dismissing the OA.

6. Heard Mr. C.S.G. Nair learned counsel appearing for the applicants in both the OAs, Mr. N. Anilkumar, SCGSC, learned counsel appearing for the respondents Nos. 1-5 in OA No. 180-36-2015, Mr. Thomas Mathew Nellimoottil, learned counsel appearing for respondent No. 6 in OA No. 180-36-2015 and Mr. P.G. Jayan, ACGSC learned counsel appearing for the respondents in OA No. 180-207-2016. Perused the records. We have also perused the common argument note filed by the counsel appearing for the

applicants.

7. In a similar matter in OA No. 143 of 2013 this Tribunal vide order dated 9th February, 2017 held as under:

“5. In view of what is stated above the attempt now made by the applicant to rely upon the judgment in OP CAT 2617/2013 which was against the order in OA 296/2012 is of no avail to the applicant since the judgment in OP CAT 2617/2013 has already been distinguished by the Hon'ble High Court as can be seen from the remand order itself. Since it is a remand order parties are bound by the observations made in the said remand order. Since that remand order has become final it is not open to the applicants to contend that the observations made in the said remand order is inapplicable to the case of the applicants. In para 17 of the remand order also it was made clear that the case projected by the applicant that promotion is automatic' once four years of service is over is untenable But it was stated that the position may be different if sufficient number of vacancies were available after acquiring the eligibility and before the date of retirement of the respondent on 30.9.2010. Again it has been observed in the remand order that promotion to the vacancies had to be effected in terms of Rule 19 strictly based on the seniority subject to rejection of the unfit. (underlined by the Division Bench of the High Court.)

6. An additional statement was filed by the respondents after the case was remanded by the High Court. The following information was furnished by the respondents in the said statement dated 8.12.2016.

(i) *A DPC was held on 28.5.2009, 29.5.2009 and 19.6.2009 for considering the name of officers who were promoted tot he post of Assistant Commissioner upto 31.12.2004 and completed 4 years of qualifying service in the grade of Assistant Commissioner as on 1.1.2009. A total number of 626 vacancies in the grade of Deputy Commissioner as on 31.3.2008 was reported to the above referred DPC, against which a total number of 510 officers were promoted to the grade of Deputy Commissioner, vide order No.138/209 dated 30.6.2009.*

(ii) *The promotee officers who were promoted in the grade of Assistant Commissioner upto 31.12.2005 were considered in the DPC dated 4.11.2010 for promotion to the grade of Deputy Commissioner. However, Shri Hally Itty Ipe though promoted to the grade of Assistant Commissioner on 30.8.2005, was not considered by the DOPC held on 4.11.2010 for promotion to the grade of Deputy Commissioner, as he had retired from the service on 30.9.2010 after attaining the age of superannuation ie., prior to the date of DPC held on 4.11.2010.*

(iii) *The DPC held on 4.11.2010 was for considering promotion to the grade of Deputy Commissioner on adhoc basis. Offices who were fulfilling the eligibility criteria for promotion to the grade of Deputy Commissioner was considered for promotion on adhoc basis. The seniority list in the feeder grade of Assistant*

Commissioner beyond the vacancy year 2001-02 has not been finalized so far. The eligibility list considered by the said DPC dated 4.11.2010 was thus not on the order of seniority.

(iv) Due to pending litigations in the feeder grade for promotion to the grade of Assistant Commissioner on regular basis, promotion to the grade of Assistant Commissioner on regular basis, promotion to the grade of Deputy Commissioner was held on adhoc basis. The DPC held on 4.11.2010 on adhoc basis was not vacabct year based.

(v) 357 vacancies were lying vacant in the grade of Deputy Commissioner as on 30.4.2010. Shri Hally Itty Iype was not considered by the DPC held on 4.11.2010 for promotion to the grade of Deputy Commissioner, as he had retired from the service on 30.9.2010 after attaining the age of superannuation ie., prior to the date of DC held on 4.11.2010."

7. It is stated that a review DPC was held on 12.11.2010 for reviewing the DPCs held on 29.11.2002, 27.3.2003, 27.4.2004, 27.2.2005, 17.4.2006 and 19.6.2009 for considering promotion to the grade of Deputy Commissioner on adhoc basis in respect of officers from 1997 batch to 2004 batch. It was further stated that the DPC held on 4.11.2010 considered the cases of directly recruited officers of 2005 batch and officers who were promoted to the grade of Assistant Commissioners upto 31.12.2005. The applicant was promoted to the grade of Assistant Commissioner on adhoc basis on 30.8.2005. It was stated by the respondents before the Hon'ble High Court that due to pending litigations in the feeder grade for promotion to the grade of Assistant Commissioner on regular basis promotion to the grade of Deputy Commissioner was held on adhoc basis and that the DPC held on 4.11.2010 was on adhoc basis and was not on vacancy year based. The statement made available to the Hon'ble High Court would show that 357 vacancies were lying vacant in the grade of Deputy Commissioner as on 30.4.2010. The applicant was not considered by the DPC held on 4.11.2010 for promotion to the grade of Deputy Commissioner since he had already retired from service on 30.9.2010, after attaining the age of superannuation. Therefore, the stand taken by the respondents is that though review DPC was held on 4.11.2010 the applicant was not considered for promotion to the post of Deputy Commissioner on the ground that the applicant had retired on 30.9.2010.

8. The stand so taken by the respondents has been taken exception to by the learned counsel for the applicant pointing out that there were vacancies so as to consider the applicant for promotion during the period from 30.8.2009 to 30.9.2010. Admittedly the applicant was promoted to the grade of Assistant Commissioner on 30.8.2005. Therefore, he could complete the four years eligibility criteria only on 30.8.2009. Earlier the plea was that on completion of 4 years that is on 30.8.2009, the applicant was entitled to be promoted to the post of Deputy Commissioner because it was an automatic promotion. That has been set aside by the Hon'ble High Court and so the other point that deserves consideration is whether there were vacancies for the period from 30.8.2009 after he acquired the qualification and before he retired on superannuation on 30.9.2010. It is not disputed by the respondents that there were vacancies. According to the applicant had the DPC been convened regularly the case of the applicant could have been considered during that period, in which case the applicant could have got promotion.

9. A stated earlier the contention raised by the applicant that the promotion is based on seniority alone has already been negated by the Hon'ble High Court. It was clearly held that the promotion from grade V to Grade IV ie., from Assistant Commissioner to Deputy Commissioner is by way of selection and not based on seniority. The respondents would contend that since it has already been held by the High Court, by pointing out the different words used in Rule 19 and Rule 20, that promotion from the Assistant Commissioner to Deputy Commissioner ie., from Grade V to Grade IV is by selection and not based on seniority, whether, without considering the review DPC the applicant is entitled to be promoted to that post.

10. The learned counsel for the applicant has relied upon a decision of the Hon'ble High Court of Delhi (judgment dated 28.2.2012) in ***Dr.Sahadeva Singh Vs. Union of India and others.(WP(C) No. 5549/2007)***. In that case the petitioner therein became eligible for being considered for promotion to the post of Deputy Commissioner in the vacancy year 2005, relevant date for reckoning eligibility being 1.1.2005 and the applicant had completed 5 years service in the grade of Assistant Commissioner on 28.6.2004. It was contended that no DPC was held in the year 2005. During the pendency of the original application, the petitioner therein was promoted as Deputy Commissioner w.e.f. 4.10.2006. In view of the said promotion the original application filed by the applicant was dismissed and his prayer for promotion with effect from 26.6.2004 was declined. It was observed by the Hon'ble High Court of Delhi that had the respondents adhered to the time schedule laid down in the model calendar, the petitioner would have been considered for promotion for the vacancy year 2005 sometime in 2004 and since he has been found fit for promotion, had the DPC been held in the year 2004, he would have been granted promotion with effect from 1.1.2005 which was the crucial date to determine the eligibility for the vacancy year 2005. The facts dealt with therein are entirely different, the learned counsel for the respondents submits. It is pointed out that in that case nobody was either promoted or directly appointed as Deputy Commissioner between 1.1.2005 when the petitioner therein became eligible to be considered for promotion on 26.6.2006 when he was actually promoted and so it was held that the promotion of the petitioner w.e.f. 1.1.2005 will not adversely affect any other person nor will it disturb the existing seniority. But it was held that had someone been appointed or promoted as Deputy Commissioner between 1.1.2005 and 26.6.2006, the position would have been different.

11. The judgment rendered by the Hon'ble Supreme Court in Civil Appeal No.6770/2013 (judgment dated 14.8.2013) also has no application to the facts of this case. There the question was whether a person can be deprived of his pension without the authority of law which is the constitutional mandate enshrined in Article 300A of the constitution. Here, there was no attempt on the part of the respondents to take away any part of pension, gratuity or even leave encashment and as such the said decision has no relevance at all.

12. The decision of the Hon'ble Supreme Court in ***Union of India and other Vs. K.K. Vadhera and others - 1989 Supp.(2)SCC 625 : AIR 1990 SC 442*** has been relied upon by the learned Sr. Panel Central Govt. Counsel appearing for the respondents. That was a case where there were total number of 512 posts available in the grade of Scientist-B in 1979. In view of Rule 8(1)(a) of the Rules mentioned therein the Junior Scientific officers

were entitled to be promoted to the 50% of the posts; that is to say 256 posts. Those 256 posts were filled up by promotion of the Junior Scientific Officers between 1979 and 1983. According to the respondents the posts of Scientist B to which they have been promoted w.e.f. 16.10.2005 were created between 1984 and 1985 and accordingly the respondents should have been promoted to those posts with effect from 1.7.1984. It was observed therein that the promotions of the Junior Scientific Officers to the posts of Scientist-B are vacancy based and such promotions are granted after the assessment is made by the Board as provided in the Rules. Normally the promotions will take effect only from the date of granting such promotions. The only ground on which the Tribunal has directed that the promotions of the respondents should take effect from the date the posts of Scientist-B were created was that up to 1983 such promotions were given effect to from the 1st July of the year in which the promotions were granted. In that case the Tribunal directed that the promotions of the applicants therein should take effect from the date, the posts of Scientist B were created; that is up to 1983. Such promotions were given effect to from 1st July of the year in which the promotions were granted. Dealing with that issue it was held:

“We do not know of any law or any rule under which the 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 posts fall 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 creation of additional post then it would have the effect of giving promotions even before the assessment board has met and assessed the suitability of the candidates for promotions.”

13. According to the respondents this decision is per force applicable to the case on hand.

14. The decision of the Supreme Court in ***Union of India and others Vs. N.R.Banerji and others – Judgment dated 16.12.1996*** has also been relied upon by the respondents. It was observed that filling up of the posts are done in clear or anticipated vacancies arising in the year. But it was also held that it is a settled law that mere inclusion of one's name in the list does not confer any right in him/her to appointment. It is also not incumbent that all posts should be filled up but the authority must act reasonably, fairly and in public interest and omission thereof should not be arbitrary.

15. In ***Sankarasen Das Vs. Union of India and others – 1991 (2) SCR 567*** it was held by the Constitution Bench that inclusion of the name of a candidate in a merit list does not confer any right to be selected unless the relevant Recruitment Rules so indicate. It was also held that the State is not under no legal duty to fill up all or any of the vacancies even though the State acts in an arbitrary manner. Again it was held that mere inclusion of one's name in the panel does not confer on him/her any indefeasible right to appointment.

16. The decision rendered by the Hon'ble Supreme Court in ***Baij Nath Sharma Vs. Rajasthan High Court (decided on 2.9.1998)*** also has been relied upon by the respondents in support of the submission that the

applicant herein can have a grievance if only his juniors had been given promotion from a date prior to his superannuation but that is not the case here. It is contended that the promotions were not granted to other officers, from the dates the post had fallen vacant, and as such the applicant can have no legitimate claim to contend that he should be promoted with effect from the date the post had fallen vacant. The decision in ***KK Vadera and others - AIR 1990 SC 442*** which has been referred to earlier was relied upon by the Hon'ble Supreme Court in ***Baijnath Sharma***. As stated earlier in ***Vadera's*** case it was held that 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 ***Baij Nath Sharma's case*** cited supra it was held that the service is not constituted merely for the benefit of the officers in the service but with a certain purpose in the view and in that particular case it was for dispensing justice to the public at large. It was also held in that decision that in the cases of posts created, promotion to those posts can be granted only after the assessment board had met and made its recommendations for promotion being granted and that if on the contrary, promotions are directed to become effective from the date of 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.

17. In para 7 of the judgment in ***Nirmal Chandra Sinha Vs. Union of India and others – Civil Appeal No.8058 of 2001 decided on 31.3.2008*** it was held by the Supreme Court:

“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 and others vs. K.K. Vadera and others](#) 1989 Supp (2) SCC 625, [State of Uttaranchal and another vs. Dinesh Kumar Sharma](#) 2007 (1) SCC 683, [K. V. Subba Rao vs. Government of Andhra Pradesh](#) 1988(2) SCC 201, [Sanjay K. Sinha & others vs. State of Bihar and others](#) 2004 (10) SCC 734 etc.”

Again in Para 10 it was held:

“It is settled law that the date of occurrence of vacancy is not relevant for this purpose”

namely; for the purpose of granting promotion.

18. The decision rendered by the High Court of Delhi in ***PP Verma Vs. Chief Secretary and others*** - WP(C) No. 7968/2012 (judgment dated 11.11.2013) has also been relied upon by the learned counsel for the respondents. In that case the petitioner being aggrieved by his non-promotion to the post of Assistant Director approached the Court seeking that he be promoted to the post of Assistant Director with effect from 1.12.2007 ie., the date when the vacancy became available with all consequential benefits including arrears of pay. Though the Judicial Member of C.A.T agreed with the claim of the applicant the Administrative Member did not agree with the same and so it was referred to a third member. Agreeing with the Administrative Member the original application was dismissed. The view taken was to the effect that the case of review DPC and review promotion is made out only when due to default on the part of the respondents persons junior to the applicant got promoted and even then only the notional promotion is granted so that pensionary

benefits are suitably modified. In the case dealt with therein the applicant had retired from service on 31.8.2000 and no person junior to him was promoted prior to that date. It was held that it was not necessary to create a supernumerary post as the applicant had already retired and was no longer eligible for promotion. In that case the respondents admitted that they have made a mistake in holding that the 6th point was of SC candidate whereas it should have been of a general candidate but no DPCs were held prior to the retirement of the applicant and two persons who are juniors to the applicant were promoted by holding DPC in the year 2009. (The applicant therein retired on 31.8.2008). Thus no claim was made out for either review DPC or for notional promotion in favour of the applicant. It was argued before the Delhi High Court on behalf of the petitioners therein that the respondents were required to convene a DPC much in advance to prepare a panel for a vacancy that may accrue in the next one year and that the petitioner had made representation to that effect to the authorities concerned. Thus according to the petitioner therein for the fault of the respondents the petitioner must not suffer. It was argued that if a promotion is denied to an employee because of the mistake of administration and due to no fault of the employee then the authorities are bound to pay the arrears of salary upon giving the benefit of retrospective promotion after realizing their mistake. It was pointed out that the respondents had realized their mistake as to whether the vacancy should go to the SC candidate or should it go to the general candidate. It was found that the vacancy in question was to be filled by a general candidate and not by a SC candidate. The DPC was convened on 10.12.2009. Since the petitioner therein stood retired on 31.1.2008 his candidature was not considered. Referring to the DOP&T OM dated 12.10.1998 it was held that the procedure is to be followed by DPC in regard to retired employees based on which it was found that retired employees are not entitled to actual promotion after his retirement in terms of the said instruction. Though they were included in the zone of consideration for relevant years their names were not included in the panel for promotion. The learned counsel for the applicant would submit that the aforesaid decision would not negative the case pleaded by the applicant. Even in that case what was stated was with respect to the actual promotion and not the notional promotion.

19. According to the applicant though he had retired from service on 30.09.2010 before the date of DPC, there is nothing which would preclude the department from granting the applicant notional promotion so as to have hike in retiral benefits.

20. An earlier decision of the Delhi High Court in ***Union of India Vs. Rajinder Roy – 2010 (1) 66 DLT 706*** and other decisions were referred to by the High Court of Delhi in PP Verma's case, cited supra. The Memorandum which was referred to by the Delhi High Court reads as follows:

“We are conscious of the fact that instructions have been issued by the DOP&T, Government of India dated September 08, 1998 and September 14, 2007 to the extent that a panel for promotion must be prepared in advance against anticipated vacancies. As and when vacancy arises the promotion to that vacancy is made from the panel. At the same time, the OM dated October 12, 1998 issued by DOP&T, Government of India, also stipulates procedure to be followed by DPC in regard to retired employees. In terms of the said instructions, which have been reproduced by the Tribunal,

it is revealed that a retired employee is not entitled to any actual promotion after his retirement. In terms of the said instructions the names of the retired employees are included in the zone of consideration so as to determine the correct zone of consideration for relevant years except that their names are not included in the panel nor they are promoted.”

Referring to the same it was held by the High Court of Delhi that this part of the Office Memorandum is in consonance with the the decision of the Hon'ble Supreme Court in **Baij Nath Sharma (supra)** since it provides that the superannuated employees should not be considered by the DPC which is being held after their superannuation and in their place juniors who are otherwise eligible should be brought into the zone of consideration. The argument advanced by the learned counsel for the applicant herein that since the applicant had retired he may not be entitled to get actual promotion, but he would be entitled to get notional promotion. But it was held by the Hon'ble Supreme Court in **K.K. Vadera's case – 1989 Supp(2) SCC 625** cited supra:

“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.”

21. It was also held in the very same judgment in **K.K. Vadera:**

“13. The clear view taken by the Supreme Court is that a promotion cannot be granted prior to the convening of the Departmental Promotion Committee which considered the question of promotion. The only rider is where a junior has been promoted prior to the superannuation of the retired employee.”

22. Therefore, in view of the decisions aforesaid we are unable to agree with he learned counsel for the applicant that applicant is entitled to be granted notional promotion especially when there is no case for the applicant that any of his juniors was given promotion during the period from 30.8.2009 till 30.9.2010 on which day he retired on superannuation. As such we find no merit in this Original Application. It is accordingly dismissed. No order as to costs.”

8. Moreover in **State of Uttaranchal & Anr. v. Dinesh Kumar Sharma –**

(2007) 1 SCC 683 the Hon'ble apex court held as under:

“26. Therefore it is clear that unless a selection is made in accordance with the rules and in the absence of rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government and there can be no automatic promotion or appointment to any post on the recommendation of the Public Service Commission, unless the government sanctions such promotion and appointment.

.....

28. It is clear from the above that a person appointed on promotion shall not get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Therefore, in the present fact situation the respondent cannot claim promotion from the date of occurrence of the vacancy which is 1995-96 but can only get promotion and seniority from the time he has been substantively appointed i.e. from 1999. Likewise, the seniority also will be counted against the promotion/appointment in the cadre from the date of issuance of order of substantive appointment in the said cadre, i.e. from 19.11.1999.”

9. Learned counsel for the applicants has relied on the following judgments/orders of Hon'ble apex court, Hon'ble High Courts as well as Tribunal in support of his contentions:

- a) *Union of India etc. v. K.V. Jankiraman etc.* - 1991 AIR 2010
- b) *Union of India & Ors. v. G.D. Goel & Ors.* - WP(C) No. 4657 of 2005 & connected cases.
- c) *Dr. Sahadeva Singh v. Union of India & Ors.* - WP(C) No. 5549 of 2007.
- d) *Mrs. Shashi Kiran Suri v. India Tourism Development Corporation Ltd.& Ors.* - WP(C) No. 9010 of 2007
- e) *Hargian Singh v. Government of NCT & Ors.* Dated 2.9.2008.

10. We find that the subject matter involved in the present case had already been considered by the apex court in the judgment of *Dinesh Kumar Sharma's* case (supra). Unless a selection is made in accordance with the rules and in the absence of rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government and there can be no automatic promotion or appointment to any post on the recommendation of the Union Public Service Commission, unless the government sanctions such promotion and appointment.

11. In the present case the applicants claim for promotion from the date of occurrence of vacancy. However, in view the judgment of the apex court in *Dinesh Kumar Sharma's* case (supra) we find no merit in these Original Applications. Accordingly, both the Original Applications are dismissed. There shall be no order as to costs.

(ASHISH KALIA)
JUDICIAL MEMBER

(E.K. BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

“SA”

Original Application No. 180/00036/2015

APPLICANT'S ANNEXURES

- Annexure A1** – True copy of schedule to the Recruitment Rules for the post of Chief Accounts Officer.
- Annexure A2** – True copy of the 32012/1/2008-Ad.IIA dt. 15.3.2010.
- Annexure A3** – True copy of the letter F. No. A-26011/150/2010-Ad IIA dt. 31.12.10.
- Annexure A4** – True copy of the affidavit filed by the respondents on 12.9.2013.
- Annexure A5** – True copy of the OM No.22011/4/98 Estt(I) dt. 12.10.98 issued by the DOPT.
- Annexure A6** – True copy of the OM No. 22011/1/2014 Estt (D) dt. 14.11.2014.
- Annexure A7** – True copy of the list containing the names included in the zone of consideration for promotion forth year 2009-2010.
- Annexure A8** – True copy of the order dt. 28.1.2013.
- Annexure A9** – True copy of the judgment in OP (CAT) 1801/2013.
- Annexure A10** – True copy of the promotion order No. 26/2014 dt. 12.2.2014.
- Annexure A11** – True copy of the letter No. C.No. II/03/03/2009 Estt.dt. 5.10.2010.
- Annexure A12** – True copy of the representation dt. 1.12.2010.
- Annexure A13** – True copy of the representation dt. 7.8.2013.
- Annexure A14** – True copy of the order F. No. A-32013/3/2011-Ad.IIA, dt. 24.8.12.
- Annexure A15** – True copy of the OM No. 22011/9/1998-Estt(D) dt.8.9.1998 read with OM of even number dt. 13.10.1998.
- Annexure A16** – True copy of the OM No. 22011/9/98-Estt(D) dt.14.12.2000.

Annexure A17 – True copy of the order F. No. A-32012/4/2013-Ad.IIA, dt. 28.11.2014.

Annexure A18 – True copy of the representation dt. 30.11.2014.

Annexure A19 – True copy of the letter F.I/15(13)/2013n-AP-2 dt. 24.6.2013.

Annexure A19(a)–True copy of the dates of birth of those who were found fit by the DPC.

RESPONDENTS' ANNEXURES

Annexure R1(a) –True copy of the OM No. 22011/4/98-Estt.(D) dated 12.10.1998.

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APPLICANTS' ANNEXURES

Annexure A1 – True copy of schedule to the Recruitment Rules for the post of Chief Accounts Officer.

Annexure A2 – True copy of the 32012/1/2008-Ad.IIA dt. 15.3.2010.

Annexure A3 – True copy of the letter F. No. A-26011/150/2010-Ad IIA dt. 31.12.10.

Annexure A4 – True copy of the letter F. No. A-26011/28/2015-Ad IIA dt. 17.6.2015.

Annexure A5 – True copy of the order dt.28.1.2013 in OA No. 996/2012.

Annexure A6 – True copy of the judgment in OP (CAT) 1801/2013 dt. 3.6.2013.

Annexure A7 – True copy of the promotion order No. 26/2014 dt. 12.2.2014 issued by the 4th respondent.

Annexure A8 – True copy of the affidavit filed on 12.9.2013 in CP(C) No. 80/2013 in OA No. 996/2013.

Annexure A9 – True copy of the OM No. 22011/4/98 Estt(I) dt. 12.10.98 issued by the DOPT.

Annexure A10 – True copy of the OM No. 22011/I/2014 Estt(D) dt. 14.11.2014.

Annexure A11 – True copy of the OM No. 22011/9/1998-Estt(D) dt.

8.9.1998 read with OM of even number dt. 13.10.1998.

Annexure A12 – True copy of the OM No. 22011/9/98-Estt(D) dt. 14.12.2000.

Annexure A13 – True copy of the representation 3.9.2015 (1st applicant).

Annexure A14 – True copy of the representation dt. 20.7.2015 (2nd applicant).

Annexure A15 – True copy of the representation dt. 20.7.2015 (3rd applicant).

Annexure A16 – True copy of the representation dt. 20.7.2015 (4th applicant).

Annexure A17 – True copy of the reminder dt. 21.10.2015 (1st applicant)

Annexure A18 – True copy of the reminder dt. 9.9.2015 (2nd applicant)

Annexure A19 – True copy of the reminder dt. 16.9.2015 (3rd applicant)

Annexure A20 – True copy of the reminder dt. 10.9.2015 (4th applicant)

Annexure A21 – True copy of the order No. 4/2012 dt. 24.8.12 issued by the 2nd respondent.

Annexure A22 – True copy of the order No. 4/2014 dt. 28.11.2014 issued by the 2nd respondent.

RESPONDENTS' ANNEXURES

Nil

-X-X-X-X-X-X-X-X-X-