

(2023) 03 CAT CK 0032
In the Central Administrative Tribunal
Case No : Original Application No. 809 Of 2022

Nitish Kumar Tripathi & Ors

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 14-03-2023

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Constitution Of India, 1950 — Article 309, 315

Citation : (2023) 03 CAT CK 0032

Hon'ble Judges : Om Prakash VII, Member (J); Dr. Sanjiv Kumar, Member (A)

Bench : Division Bench

Advocate : N.P. Singh, Neeraj Singh, Rajnish Kumar Rai, Rajnikant Rai

Final Decision : Allowed

Judgement

Dr. Sanjiv Kumar, Member (A)

1. This OA, under Section 19 of the AT Act, 1985 is filed seeking relief to issue direction in the nature of mandamus commanding the respondent No. 2 to furnish the left out vacancies of 2018 for the post of Assistant Works Manager alongwith the vacancies of 2019, 2020, 2021 and 2022 as reflected in letter dated 17.12.2021 to the respondent No. 3 and to direct the respondent No. 3 not to convene the DPC till the inclusion of left out vacancies of 2018 alongwith left out vacancies earmarked in letter dated 17.12.2021 and any other direction deem fit and to award cost on the ground that DPC proposal impugned has violated the SRO No. 227 dated 01.10.2002.

2. The applicants states that SRO 227 clause 6, established on the face of records that ratio of direct and promotional quota should be 50%, while dealing the aforesaid clause the respondent No. 2 has deviated the norms of SRO 227 because they have appointed 748 Assistant Work Managers by direct recruitment between the year 2002 to 2018 and only 425 posts have been filled from promotional quota, meaning thereby they have already given 323 post in favour

of direct recruitment by violating the SRO Clause 6. They aver that, the respondents have already left out 68 vacancies under the promotional quota upto 2018 and they have issued a circular in respect of vacancies assessed for the year 2019, 2020, 2021 and 2022, and if the vacancies from 2019 to 2022 are clubbed it comes to 197 vacancies and if the left out vacancies added, it comes to total 265 vacancies, which the respondents should have considered. The respondents have filled up the 748 vacancies from the year 2002 to 2018 under the direct recruitment quota through Engineering Services Examinations and Civil Services Examinations conducted by the UPSC. Whereas, in the same period since 2002 to 2018 only 425 officers were given promotion under the promotional quota.

3. The facts of the applicants is that the applicant No. 1 has been appointed through UPSC to the post of JWM (Junior Works Manager) on 12.08.2010 and since then he is discharging his duties satisfactorily. As per SRO No. 227 the applicant No. 1 is eligible for promotion to the post of AWM (Assistant Works Manager) after completion of three years since 11.08.2013 in the respondent organization's. The applicant No. 2 also was appointed through UPSC to the post of JWM on 20.05.2010, and is working satisfactorily, and he is eligible as per SRO 227 to get promotion to the post of AWM since 19.05.2013, which is the date on which the applicant No. 2 has completed three years in respondent organization. The applicant No. 3 also was appointed through UPSC as JWM on 18.09.2010, and has worked satisfactorily, and is eligible for promotion to the post of AWM since 17.09.2013.

4. Due to non-convening of the regular DPC since 2002 for the post of AWM the ratio of promotional quota and direct recruits has been disrupted. Between 2002 to 2018 only three DPCs have been convened, which is against the letter and spirit of the DOPT Circular dated 10.04.1989 Clause 3.1. A letter has been issued from the office of respondent No. 2 dated 17.12.2021 indicating the total 197 vacancies of different years from 2019 to 2022 and 68 left out vacancies of 2018 against the promotional quota, which may be added alongwith the vacancies mentioned by the respondent No. 2 vide letter dated 17.12.2021. So, as per the applicants, the total available vacancies will be 265 for the promotional quota, whereas, only 71 vacancies has been requisitioned, and sent to the respondent No. 3, UPSC, and the same is against the spirit of SRO 227. The applicants have sent their representations through proper channel addressed to the respondent No.2 regarding the curtailment of vacancies pertaining to promotional quota as per SRO 227 issued by the Ministry of Defence (Department of Defence Production), New Delhi. As the respondents have left out 68 vacancies under promotional quota upto 2018 and the vacancies assessment circular for 2019, 2020, 2021 and 2022 if clubbed together, then the total promotional vacancy will come to $68 + 197 = 265$ vacancies.

5. Contentions of the applicants is that, there is clear 265 vacancies for promotional quota and so instead of sending 71 vacancies to respondent No. 3

the Department should send 265 vacancies.

6. Respondents have filed counter affidavit on 06.12.2022, wherein they say that according to SRO 227 dated 26.10.2002 it is clear that the method for the Post/Grade/Time scale of Junior Time Scale Assistant Director/Assistant Works Manager is prescribed as 50% by promotion and 50% by direct recruitment on the basis of Engineering Service Examination and interview, and the respondents followed the same scrupulously every year. Applicants are misleading this Tribunal. In para 5 of the counter affidavit they have given details of DPC which has been conducted in various years and they say that the panel of 2015-16, 2016-17, 2017-18 and 2018 have been already utilized. The UPSC has recommended total 240 officers for those years through DPC held on 10.12.2019. However, promotion orders were issued in respect of those officers only who were still in service at the time of issue of the promotion orders dated 20.12.2019. Therefore, only 178 officers could be actually promoted against 240 vacancies notified, and other 62 officers who had either already superannuated, expired or had taken voluntary retirement or resigned could not be given promotion. The details are tabulated on page 5 of the counter affidavit and no further vacancy upto 2018 remains to be utilized, and 2018 vacancies are wrongly projected by the applicant. They further emphatically say that mere placement in the seniority list of a cadre does not automatically gives the applicant a right of promotion. They also aver that, it is well settled law and have been emphasized in various judgment of Hon'ble Supreme Court, that promotion cannot be treated as a matter of right and existence of vacancies does not give a legal right to a candidate to be selected to a promotional post. Even when there is a vacancy, the State is not bound to fill up such vacancy, nor is there any corresponding right in an eligible employee to demand that such vacancies be filled up. This is because the decision to fill up a vacancy or not to fill up vests with the employer who for good reasons, be it administrative, economical or policy, can decide not to fill up such posts. Further, it has also been ruled that when vacancies are advertised, there is no right in a candidate to seek increase of such number of posts through judicial review. The respondents cite the judgment delivered on 02.05.1973 in the case of State of Haryana vs. Subash Chandra Marwaha and other reported in 1973 AIR 2216, 1973 SCR (1) 165, where in the Hon'ble Supreme Court has observed as follows:-

"The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect..... There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence..... This Court has pointed out in Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College that in order that mandamus may issue to compel an authority to do something, it must be

shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance...”

7. They further state that, from the facts and submission made above it is clear that the respondents have not committed any illegality or infirmity in the case of the applicants, and so, under the circumstances it is just and expedient to dismiss the OA filed by the applicants.

8. Respondent No. 3 has also filed short reply wherein he says that he is advisory body setup under Article 315 of the Constitution of India and the Commission has a Constitutional obligation to ensure that all the selections made for regular appointments to the service / posts of the Union of India, as falling under the purview of the Commission, are made strictly in accordance with the statutory recruitment rules and the relevant instructions issued by the Government of India from time to time. He submits that the department had reported 39 and 63 vacancies for the year 2019 and 2020 respectively under promotion quota. The proposal was examined and it was observed that the department had diverted unfilled vacancies from STS towards JTS w.e.f. 01.01.2017 without keeping in view the instructions contained in para III of DoE OM No. 752985/2018/E.Coord.I dated 13.04.2018, which prescribes that total number of sanctioned posts in the feeder cadre (JTS in this case) and in the higher grade (STS in this case) in a cadre should not exceed the combined sanctioned strength of two grades where such operation of posts at lower level is considered. Further, the department had added 100 reserve posts as mentioned in the RRs to the sanctioned strength of JTS, whereas, as per Memorandum 2010 issued on Cadre Review by DOPT and the OM No. I-11019/2/2013-CRD dated 11.02.2013, the reserve posts do not represent net additions to the cadre. Accordingly, the department was requested to revise the DPC proposal. Subsequently, after taking into account DoE OM dated 13.04.2018 and DOPT OM dated 11.02.2013 the department has submitted revised DPC proposal for promotion to the post of Assistant Works Manager (JTS), for the years 2020, 2021 and 2022, and nil vacancies has been reported by respondent No. 2 for the vacancy year 2019 on the ground that the strength of Assistant Works Manager (JTS) for the 2019 is running in excess to that of the sanctioned strength of 275. The DPC proposal for the promotion to Assistant Works Manager (JTS) for the years 2020, 2021 and 2022 is under process of examination in the Commission. In view of this there is no grievance in the matter and so he is not necessary party and he should be discharged from the instant OA.

9. Rejoinders have been filed by the applicants on 08.12.2022 and 22.12.2022 and supplementary affidavit dated 18.09.2022 and 09.09.2022 where they have reiterated their facts as stated in the OA and brought on record certain other fact. Further, supplementary affidavit was filed on 08.11.2022 on behalf of the applicants. List of officers against the sanctioned strength from the website of the Department is also presented.

10. The case came up for final hearing on 25.01.2023. Shri N.P. Singh and Shri

Neeraj Singh, learned counsel for the applicants and Shri D. Tiwari holding brief of Shri Rajneesh Kumar Rai and Shri Rajnikant Rai, learned counsel for the respondents were present and argued the case. On 19.01.2023 respondents were asked to furnish answer to five questions and they have submitted following:-

"1. How many vacancy under particular year under promotion quota?

Reply : The number of vacancies in particular year under promotion quota in Junior Time Scale (JTS) as submitted in UPSC is given below:

Vacancy Year

Promotional quota

vacancy

2019

00

2020

34

2021

25

2022

10

Total

69

2. How to calculate the vacancy for DPC in particular year?

Reply: A DPC year is reckoned from 1st January to 31st December of a Calendar year. Accordingly, the vacancies in a grade are calculated calendar year wise based on the wastage viz. Superannuation Voluntary Retirement. Promotion to Higher Grade Resignation, Deputation beyond a year, and Death etc.

3. How to reckon promotional quota vis-a-vis direct quota? Reply : SRO 3\227 dated 26.10.2002 stipulates that the method of recruitment of the Post/Grade/ Times Scale of Junior Time Scale, Assistant Directory/Assistant Works Manager or equivalent shall be 50% by promotion, 50% by direct recruitment on the basis of Engg Services Exam./Recruitment through interview.

4. How to assess backlog vacancy and rules to calculate and include in subsequent year DPC?

Reply: Backlog vacancies arise when vacancies in a year are not filled due to non

availability of eligible Officers. The same are accordingly carried forward to the next DPC year. However, these vacancies cannot be carried forward beyond a period of two years as per the Department of Expenditure OM No. 7(1)/E.Coord-I/2017 dated 12.04.2017.

5. The fault of inclusion of reserve vacancy and inclusion of lowering post of senior time scale to Junior Time Scale.

Reply: The question is not clear. However, it is stated that the matter of exclusion of reserved posts and the already sanctioned posts in JTS against the higher post of STS has been elucidated in reply to para 4.7 of the OA as under:-

"With regard to the averments made in this para it is stated that since the last DPC for the grade of JTS held on 20.12.2019, the vacancy position projected by the department was not accepted by the UPSC. UPSC had requested to modify the vacancies assessed catering to the following.

(i) 200 posts in JTS against vacancies in the higher sanctioned vide MoD ID No. 7(9)/2013-D (IOFS) dated 02.05.2013. (Out of this 200 posts in JTS vacancies were distributed 100 each for promotion and direct recruitment quota).

(ii) 200 posts in JTS against vacancies in the higher sanctioned vide MoD ID No. 7(1)/2016-D (IOFS) dated 12.02.2016. (Out of this 200 posts in JTS vacancies were distributed 100 each for promotion and direct recruitment quota).

(iii) The sanctioned strength of JTS is 275 posts with reserve of 100 JTS posts. These 100 reserve posts do not represent net additions to the cadre in line with DOPT OM No. I-1109/2/2013-CRD dated 11.02.2013.

Accordingly the additional posts sanctioned had to be subsumed and the vacancies had to be reduced while assessing the vacancies from the year 2019 to 2022. Thus the unfilled vacancies of 2019 DPC could not be carried forward and the revised calculation provides for the 69 vacancies for the recruitment year of 2020, 2021 and 2022".

11. We have carefully gone through the record, and rival submissions and contentions. As per the rival contention following are the preliminary issues to be decided. As respondents have raised a contention with a ruling from the Hon'ble Supreme Court, as to whether promotion is a right and whether this Tribunal can entertain the case of the applicants seeking details of promotional vacancies? And if it is a justiciable right then, whether this Tribunal may adjudicate such case by grant of relief asked for, to direct the respondents to furnish the left out vacancies of 2018 for the post of Assistant Works Manager alongwith the vacancies of 2020, 2021 and 2022 as reflected in letter dated 17.12.2021 and to command the respondent No. 3 not to convene the DPC till the inclusion of left out vacancies and issue any other direction?

12. Coming to the first issue whether promotion is a right for a Government employee or not. It is difficult to understand the contention of the respondents

that promotion is not a right, and that they are at liberty to give or deny promotion at their sweet will; even though an employee is eligible and there are promotional vacancies available in the cadre? To substantiate their point the respondents quote the case of *State of Haryana vs. Subash Chandra Marwaha* and other reported in 1973 AIR 2216, 1973 SCR (1) 165. On simple reading of the case, one can find out that it is about the competitive examination and eligibility of certain particular candidate for consideration to be offered job, if they were in the selection list and the ratio of ruling was that, 'mere fact that the candidates name appears in the list does not entitled him to be appointed'. Hence, subject matter of the cited case is irrelevant for the purpose of substantiating that promotion is not a right for an employee if he is eligible otherwise and vacancies are available. Further, in the said judgment, another judgment is quoted which is also cited and relied by the respondents, which is in the case of, *Dr. Rai Shivendra Bahadur vs. The Governing Body of the Nalanda College* reported in 1962 AIR 1210, which ruled, "That in order that mandamus may be issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived".

13. From the cursory examination of the said citation, it is evident that it does not say anything about any promotion as a right or otherwise but it only makes a limited point that mandamus may be issued to compel an authority to do something only in a situation where it is shown that some statute imposes legal duty on that authority, and the aggrieved party has a legal right under the statute has prerogative to enforce its specific performance. Hence, this ruling also is in no way disproving the case of the applicants that they are having some right to claim promotion when they are eligible as well as there are vacancies available in their cadre. Hence, both cited rulings by the respondents are out of context for the present case.

14. There is a large catena of judgments of various Courts which recognized right to promotion in Government service as statutory rights. Although, right to promotion is not recognized as fundamental right, but right to be considered for promotion, however, is considered as a fundamental right. (i) *Dhanpat Lal Sharma vs. Bhakra Beas Management Board* CWP No.7957 of 2010 (Hon'ble Himanchal Pradesh High Court dated 13.08.2019), (ii) *Ajit Singh and other (II) vs. State of Punjab and others* reported in (1999) 7 SCC 209 (Hon'ble Supreme Court dated 16.09.1999), (iii) *Anil Kumar Gupta vs. The Oriental Insurance Company Limited – Civil. Misc. Writ Petition No. 52516 of 2003 connected with Civil Misc. Writ Petition No. 6201 of 2004* (07.07.2006 Hon'ble Allahabad High Court), (iv) *Union of India vs. Manpreet Singh Poonam – Civil Appeal Nos. 517-518 of 2017* (08.03.2022 Hon'ble Supreme Court), (iv) *S. Arasu vs. State of Tamilnadu W.P.(MD) No.8104 of 2021 and W.M.P (MD) Nos. 6184 and (vi)*

(04.07.2022 Hon'ble Madras High Court), Devendra Kumar vs. State Of Punjab And Others – CRWP 10941-2020 (28.12.2020 Hon'ble Punjab and Haryana High Court).

15. The ratio of judgments in these cases are very clear; that although getting promotion is not a fundamental right but being considered for promotion is the fundamental right and delayed DPC and consequent delayed promotions and bunched promotions of several batches together is certainly an aberration and a bad practice which should be shunned by the departments with immediate effect. Department must strictly adhere to the OM on Departmental Promotion Committees of Department of Personnel and Training dated 10.04.1989 and formulate their own time table, and adhere to them to enable those who are eligible for promotion if vacancies are available for the said promotion. It is an onerous responsibility caste on the authorities that no employee is aggrieved on this count, and statutory rights of the employees to get promotion and their fundamental rights for consideration for promotion when due is fully met. In the instant case, we find that there is considerable delay in affording promotion in the department, and from the averments, of either side, it is also clear that presently promotions are pending since 2019.

16. In the instant case it is not disputed that there is existing service rules; which elaborates the service condition of the applicants and one of the important service condition being that at certain points of their career they are eligible for promotion, if they fulfills the conditions of the rule. The rule laid down also clearly gives as to how many vacancies have to be earmarked for the promotional quota out of total vacancies available during the year. Notification No. Kartika 4, 1924 No. 23 dated 26.10.2002 published in the Gazette of India, Ministry of Defence, Department of Defence Production and supplies, New Delhi dated 01.10.2002 is very relevant. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Indian Ordnance Factories Service (Group ?A?) Recruitment Rules, 1972 published on 03.01.1973 are also relevant. These rules were framed and named as the Indian Ordnance Factories Service (Group ?A?) Recruitment Rules, 2002, which is at page 26 (Annexure A-1) of the OA, wherein clearly the recruitment and promotion rules are defined and it may be a misconception and erroneous understanding to say that these rules do not confer any right on the incumbent officials to whom these rules apply. In those rules it is very clearly mentioned that appointment to the Assistant Works Manager or equivalent posts will be 50% by promotion and 50% by direct recruitment on the basis of Engineering Service / Civil Service Exam. In its schedule II rule 16 and 17 it is mentioned as under:-

Sl. No.

Name of the Post/ Grade/ Time Scale

Method of Recruitment

Field of selection and the minimum qualifying service for promotion

1.

Junior Time Scale Assistant Director/ Assistant Works Manager or equivalent
(Rs. 8,000-275-13,500)

%50% by promotion, 50% by direct recruitment on the basis of Engg. Service Exam./Civil Services Exam./Recruitment through interview as specified in Part III and Part IV

1. Junior Works Manager (Tech) with 3 years regular service in the grade of Rs 74,450- 11,500. 2. Junior Works Manager (Non-Tech/Stores) with 3 years regular service in the grade of Rs. 7,450- 11,500/-

17. Existence of this rule is not denied and disputed by the respondents. This makes it amply clear that these rules are in the nature of rights and are justiciable, and any contention otherwise is erroneous and misconceived. Once we consider promotion as justiciable right with certain conditions to be fulfilled, we have to come to other points of the applicants who are aggrieved, as inspite of them being otherwise eligible for promotion, and there being vacancies for promotion in different years, they were kept waiting for long years together without promotion.

18. Let us first examine the averments of the respondents which are relevant. In the counter affidavit at para 5 on page 4 they state as under:

Vacancy year

Date of holding DPC

2002-03

2/4.6.2002

2003-04

2/4.6.2002

2004-05

5/7.10.2004

2005-06

26/27.9.2005

2006-07

21.9.2006

19.1.2006

2007-08

22.9.2008

2008-09

27.5.2009 and 28.05.2009

2009-10

4.7.2013

2010-11

4.7.2013

2011-12

4.7.2013

2012-13

9.6.2014 and 10.6.2014

2013-14

9.6.2014 and 10.6.2014

2014-15

9.6.2015

2015-16

10.12.2019

2016-17

10.12.2019

2017-18

10.12.2019

2018

10.12.2019

19. A cursory examination of this table regarding details of DPC for promotion to the post of Assistant Works Manager, it is amply clear that DPC has seldom happened regularly, and off and on for 2 years, 3 years, 4 years as and when it was convenient to the respondents they have benevolently decided to conduct the DPC. However, they have not explained, why there was such considerable and persistent delay in conducting the DPC of the relevant year?

20. Now let us examine the Department of Personnel and Training of Ministry of Public Grievances and Pension, Govt. of India OM dated 10.04.1989 on the subject, Departmental Promotion Committee and related matter, ?consolidated

instructions?. The preamble says following:-

"The undersigned is directed to say that instructions on the constitution and functioning of Departmental Promotion Committees and the procedure to be following in proceeding and implementing the recommendations of DPCs were issued in a consolidated form, vide this Department's OM No. 22011/6/75-Estt. (D), dated 30th December, 1976. Instructions have also been issued subsequently clarifying/ modifying certain aspects of the procedure. The various instructions have been updated and consolidated in the form of "Guide Lines on Departmental Promotion Committee"..."

21. In Part II of the said memorandum under the heading frequency of Departmental Promotion Committee Meetings at para 3.1 and 3.2, it reads:-

"3.1 The DPCs should be convened at regular annual intervals at which DPC to draw panels which could be utilised on making promotions should meet 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 could be convened every year if necessary on a fixed date i.e. 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 in force on the date of vacancy, unless rule s 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.

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."

22. Further, the applicants have relied on the documents filed at page 443 to 46 of their OA, and the respondents have neither denied the existence of the contents of those papers, nor have they come up with any alternative scheme of Departmental Promotion Committee meetings which their department has put in place and is following in practice. Respondents have also not satisfied us with any evidence that they are not bound by this OM of the Department of Personnel and Training of Ministry of Personnel and Public Grievances and Pensions of Govt. of India dated 10.04.1989. Hence, we have no hesitation to say that the respondents are bound by it.

23. On cursory perusal of this document, it is very evident that since long, and much earlier than 1976, when earlier consolidated instructions on the subject was issued vide this OM dated 10.04.1989; the Government had envisaged that the DPC should be convened at regular intervals by every Department in the Government to draw panels which could be utilized on making promotions against the vacancies occurring during the course of the year and it mandated for this purpose, concerned appointing authority 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. The memorandum also prescribes that DPC should be convened every year and if necessary on a fixed date e.g. 1st April or 1st May and the Ministry and the department should lay down a time schedule for holding DPC in 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. This being the case if the respondents have not shown that they have any alternative scheme or dates for their DPC, they should have conducted a DPC regularly, as per the DOPT instruction every year on 1st April and 1st May, and followed all the instructions in the said memorandum in word and spirit. From the state of affairs reported in their own submission, we have no doubt to say that respondent authorities have failed to convene and conduct regular DPC as was required by the DOPT memorandum dated 10.04.1989.

24. The memorandum further says that holding of DPC meeting need not be delayed or postponed on the ground that recruitment rules for the post of being reviewed or amended, a vacancy shall be filled in accordance with the recruitment rules in force on the day 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. Clearly respondents have not followed these instructions in the memorandum and have failed to conduct DPCs regularly. Further in para 3.2 of this memorandum clearly enjoins, "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 promotion during the year in question". Respondents have not furnished any such details of certificates recorded regarding each year of delay in DPC which is very evident from their own admission in para 5 of the short counter affidavit dated 06.12.2022, wherein for the year 2002-03 and 2003-04 the DPC was held only on 02/04.06.2002, for 2009-10, 2010-11 and 2011-12 the DPCs were held on 04.07.2013, for the year 2012-13 and 2013-14 the DPCs were held on 09.06.2014 and for the year 2015-16, 2016-17, 2017-18 and 2018 the DPCs were held on 10.12.2019. Again on the dates of DPCs, there is no consistencies, although the instructions clearly stipulated, it should have been either on 1st of April or 1st of May of the year or any specified date which the concerned

department had predetermined. Inconsistencies in holding the DPCs and giving no reasons for such delay, which they were bound to disclose as per para 3.2 of the memorandum which required them to record in writing a certificate which had to be 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, before dispensing with the convening of such annual DPC meetings could have been dispensed with shows the department in poor light. This amounts to arbitrary and un-judicious convening of DPCs by the respondents at their own sweet will. As DPC results in promoting someone and affects the seniority of the promotees vis-à-vis the direct recruits, hence, non convening of DPC regularly has certainly curtailed the rights of all the eligible candidates in various years and they have been deprived of not only a promotion in time but also all the consequential benefits which flow out of the said promotion, including monthly emoluments and other benefits associated with the promotional posts including holding relatively more responsible and higher position which instills self esteem, fulfillment and satisfaction in the employees.

25. It is evident from para 5 of the short reply filed by the UPSC dated 15.12.2022, in which they have mention that department had reported 39 and 63 vacancies for the 2019 and 2020, respectively under promotion quota and the proposal was examined by them and they observed that the department had diverted unfilled vacancies from STS to JTS w.e.f. 01.01.2017 without keeping in view the instructions contained in Para III of DoE OM No. 752985/2018/E.Coord.I dated 13.04.2018, which prescribes that total number of sanctioned posts in the feeder grade (i.e. JTS in this case) and in the higher grade (STS in this case) in a cadre should not exceed the combined sanctioned strength of two grades where such operation of posts at lower level is considered. They further mentioned that the department had added 100 reserved posts as mentioned in the RRs to the sanctioned strength of JTS, whereas as per Memorandum (2010) issued on Cadre Review by DOPT and the OM No. I-1109/2/2013-CRD dated 11.02.2013, the reserved posts do not represent net additions to the cadre. Accordingly, the department was requested to revise the DPC proposal, and this shows further short comings in the regular conduct of DPC in this Department. Subsequently the department sent revised proposal and for the promotion of AWM (JTS) for the year 2020, 2021 and 2022, and the proposal is under examination by the Commission. These facts further buttresses the finding that there is consistent delay in promotion of the AWM (JTS) cadre and the proposals are not properly and timely processed so that UPSC can assist the department and ensure that promotions are completed strictly as per the guidelines of the DOPT.

26. The applicants have filed at page 82 (Annexure A-5) where in indicative promotion status dealt by PER/GB Section [DoO (C&s) Kolkata] is shown as following: (paga 82 of OA)

Promotion to the post of

Vacancy Assessed for the year

Status

AWM

2019 – 39

2020 – 63

2021 – 76

2022 – 19

Proposal for the vacancy year 2019 and 2020 have been submitted to UPSC on 01.10.2021 and some observation raised by UPSC have also been replied on 10.12.2021. Preparation of proposal for the vacancy year 2021 and 2022 will be intimated shortly.

27. The above appears to be internal note of the department dated 17.12.2021 in file No. DPC/2021/PER/GB which shows that there are certain vacancies which are assessed for the year 2019 (39), 2020 (63), 2021 (76) and 2022 (19) totaling 197 vacancies. Respondents have not denied the same anywhere in their averments. This further shows the delay in filling up promotional vacancy for four years, the promotion of the cadre where the applicants have to get their promotions have not been done since 2019 at regular intervals, which is not a very healthy state of affair.

28. Considering the above facts and circumstances which are not denied, the respondents were asked to bring on record and furnish certain facts as to how many vacancies in various years under promotional quota was available and how they arose in the respective years. They were also asked to give details of guidelines, as to, how to calculate the promotional vacancies for DPC in a particular year, and how to reckon promotional quota vis-à-vis direct quota and how to assess backlog vacancy and clarify the rules to calculate backlog vacancies to include them in the subsequent year's DPC. They were asked to elaborate the consequence and effect of vacancies shifted to other cadre. Tribunal further wanted to know as to how the vacancies for DPC have been arrived at for a particular year, and while arriving a vacancy, how it has been apportioned to promotional and direct recruitment quota. The department has replied the same through their written submission on 21.01.2023. The department was expected to give full details of every years, how vacancy arose by superannuation, voluntary retirement, promotion to higher grade, resignation, deputation beyond the year and death etc. and how much of it was notified as promotional and direct recruitment quota and how much they were used as promotional and for direct recruitment purposes and if promotional quotas were not filled how it was carried forward as they have themselves mentioned that for two years left over vacancies could have been carried forward, if there were no eligible officers for promotion, and such vacancy would have fallen as backlog. They were also asked to furnish details about how many officers are at present eligible to be promoted to the cadre of JTS to Assistant Works Manager. This

information has not been furnished. But, however, the respondents have not denied that the applicants are eligible for their respective dates of eligibility asserted by them in the OA. The quality of information supplied by the department shows that respondents have not taken pain to assist the Tribunal to come to a conclusion about actual number of promotional vacancies which are available at present under the category of AWM (JTS) in the organization and how many persons are eligible and waiting in line to be promoted? To get more clarity on the above points case was again taken up under the heading, 'for being spoken to?' on 28.02.2023, but the respondents failed to shed any further light on the same.

29. Whereas, the OM of the DOPT dated 10.04.31989 referred earlier clearly required every authority to be ready with these information as is clear from part II para 3.1 on Frequency of Departmental Promotion Committee meetings that the DPC should be convened at a regular annual intervals to draw panels which could be utilized on making promotions against the vacancy 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. Clearly these are not readily available with the respondents as they have not made necessary preparations for the DPC every year as mandatorily required to be made by every department regularly.

30. Coming to the contention of applicants about the vacancies; as before us, they are challenging the proposal of DPC which doesn't take into account all the vacancies of 2019 (39), 2020 (63), 2021 (76) and 2022 (19) assessed earlier. In para 4.6 of the OA the applicants contends that from 2019 to 2022 there were 197 vacancies which are also borne out from Annexure A-5 page 82, which now vide their report dated 24.01.2023 the respondents have brought it down to 2019 (0), 2020 (34), 2021 (25) and 2022 (10) totaling only 69 vacancies. However, the respondents have failed to give the details as to how they have arrived at those numbers, and how earlier referred vacancy assessment for the year (Annexure A-5 at page 82 dated 17.12.2021) is erroneous. Hence, these details given subsequently does not convince us that it is the correct and reasonable picture of the vacancy position available for promotion in the cadre in question.

31. In para 4.6 of the OA the applicants argued that there was 68 left over vacancies of 2018 against promotional quota which the respondents have not taken into account and vide their letter dated 17.12.2001 they have notified only 71 vacancies, which is erroneous. To which the respondents have replied in their parawise reply that left over 68 vacancies were factored in and last DPC for the grade of JTS was held on 20.12.2019 and subsequent vacancy position projected by the department was not accepted by the UPSC. This averment is far from satisfactory or convincing.

32. Further, applicants have contended that there was certain diversion of vacancies, and 200 new posts of JTS was notified out of which 100 for direct recruitment and 100 for promotional quota was to be notified, and there are 104 persons who were promoted from the grade of AWM on 07.10.2022 further creating 104 vacancies in their cadre, out of which 52 should have come to them as promotional quota. We find that there is no counter argument from the respondents on this point and this 52 additional vacancies is created as per their own admission of the formula as to how they reckon promotional and direct quota and how to calculate the vacancy for DPC in a particular year. Furthermore, on page 5 of the counter affidavit the respondents have given some details of utilization of some vacancies for promotion on various years as following:-

Year

Total number of

vacancy

Number of officers promotion order issued those who were in service at the time of issue of promotion order

Empanelled but promotion order not issued due to superannuation/ expired/ Voluntary retirement and resigned

2015-16

125

83

42

2016-17

35

25

10

2017-18

23

20

03

2018

57

50

7

Total

240

178

62

33. cursory examination of this table shows that there were total number of 240 vacancies, 125 in 2015-16, 35 in 2016-17, 23 in 2017-18 and 57 in 2018, out of which in various year 178 vacancies were filled by promoting officers and orders were issued as they were still serving and for other 62 vacancies officers were empanelled but promotion order were not issued due to superannuation/expired/voluntary retirement and resignation etc. Respondents were asked question on these 62 vacancies as how they considered it filled and not vacant because filling can only be when someone is offered a promotion and the same is not availed and declined. In the instant case the officers had already retired or expired or voluntarily retired or resigned, and they were not given deemed promotions (proforma promotion) post retirement, hence, they were neither offered nor given opportunity to avail of the benefit of promotion. Hence, these pseudo promotions should not have been considered as filled and utilized vacancies and should have been utilized to give promotions to others who were otherwise eligible in those years or should have been carried forward as backlog vacancies for two years as per their own Departmental rules and submissions in their document dated 24.01.2023.

34. In paragraph No. 4.5 of the OA it is asserted by the applicants that between 2002 to 2018, the respondents have done 748 direct recruitments, whereas only 425 promotions were given, which is contrary to the cadre rules as 50% of the available vacancies have to be year marked for direct recruitment and 50% for promotion. The respondents have not countered this with any details and facts except that they vaguely denied it, and say that against 240 promotional vacancies 178 were given promotion for 2015-16, 2016-17, 2017-18 and 2018 and they assert that there is no legal right for promotion and quote the Hon'ble Supreme Court case in State of Haryana vs. Subash Chandra Marwaha and other reported in 1973 AIR 2216, 1973 SCR (1) 165 and the case Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College reported in 1962 AIR 1210 but these rulings are irrelevant to the context and it was expected of the respondents, who are custodian of the details of information, that they should have furnished all details as to how vacancies arose in different years, and how they had apportioned promotional and direct recruitment vacancies between 2002 to 2018 and utilized them, and why between those years direct recruitments were 748 and promotions were only 425 whereas both should have been equal in numbers, unless in any year they had clearly given written certificate that there was no one eligible for promotion inspite of there being vacancies. Moreover the case quoted above goes in favour of the applicants, as

the first judgment specified that there was no right to appointment to those who were not still taken in the department through direct recruitment, and applicants having perfected right for being considered for promotion, in any case conclusion of optimizing intake to a cadre they should have not done direct recruitments, and they should not have curtailed the right to being considered for promotion of such eligible employees who have been already working in the department who had a right to be considered for promotion.

35. Applicants are afraid that their department is under going fast restructuring and the next DPC will be the last DPC in all probability, hence they should not be left in the lurch.

36. From the above discussions it is very clear that vacancy positions shown by the respondents in their document dated 24.01.2023 or in their proposal for DPC dated 17.12.2021 where they have shown 71 vacancies only are erroneous and incomplete. By not maintaining proper vacancy position for promotional quota and that also in a transparent manner, in showing every vacancy as to how it arose, and their respective source, how were these divided for appointment or promotion, and how many of them were effectively utilized and how many were left as backlog and carried forward in various years etc. Further, by not conducting DPC in time, the respondents have shown arbitrary and injudicious application of existing rules causing irreparable damage to the applicants denying them their rule based right to promotion and their fundamental rights to be considered for promotion, the respondents have been lacking in strict adherence to existing rules. Hence, we pass following orders:-

"a. The OA is allowed and the competent authority amongst the respondents is directed to first notify a list of all candidates who are eligible for promotion in the grade of Junior Time Scale Assistant Director/ Assistant Works Manager or equivalent (Rs. 8,000-275-13,500) alongwith their individual date / year of eligibility date for promotion to that grade, within a period of 4 weeks from the date of receipt of a certified copy of this order. All such eligible candidates should be considered for promotion after due consultations, and a panel of such DPC cleared empanelled candidates shall be notified and maintaining within six weeks thereafter.

b. For each year of such eligibility of the incumbents in the present list supra, review the availability of vacancies which arose in those respective years (and two years before to ascertain back log vacancies) by various means i.e. wastages like superannuation, voluntary retirement, promotion to a higher grade, resignation, deputation beyond a year and death etc., and how it is apportioned between 50% promotional quota to the above grade and ascertain how many were actually filled in those years substantively, and if there are still vacancies left, including the vacancies which were considered as empanelled but promotion order not issued due to superannuation, expired, voluntary retirement and resigned as in para 32 above to be taken as clear vacancies and ensuring that all such clear vacancies are filled by eligible candidates from the list above, if they

were eligible on that date and giving them promotion as well as consequential benefits within a period of four months thereafter. For each year if any vacancy remained unfilled after exhausting all eligible candidates available for actual promotion, a certificate to that effect shall be made in writing, and such unfilled vacancies should be carried forward for two years as per the rules quoted earlier. This should be carried out in strict adherence of the DOPT guidelines and Departmental guidelines mentioned supra within the time frame envisaged above. Department to develop a close monitoring mechanism to adhere to this Directive, and identify a fairly senior nodal officer to coordinate the whole process for these promotions in time, and who shall be held responsible for adhering to the time lines and getting sorted out any issues arising in the process of implementing this order. The activities under para 36 (a) and (b) can proceed simultaneously strictly adhering to the timeline provided.

37. There is no order as to costs.