

(2018) 03 CAT CK 0003

In the Central Administrative Tribunal

Case No : Original Application No. 707 Of 2017, Miscellaneous Application No. 4400 Of 2017, 43 Of 2018

Savitur Prasad

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 22-03-2018

Acts Referred:

Citation : (2018) 03 CAT CK 0003

Hon'ble Judges : Permod Kohli, J; Praveen Mahajan, Member (A)

Bench : Division Bench

Advocate : Mohit Choudhary, Rishabh Jain, Kunal Sachdeva, Garima Sharma, Hanu Bhaskar, Ramjan Khan, Kirtiman Singh, Waize Ali Noon, Prateek Danda, Ravinder Agarwal

Final Decision : Dismissed

Judgement

Permod Kohli, J

1. The applicant who is working as Additional Controller General of Defence Accounts (Addl. CGDA) having been appointed to the said post on 08/11.07.2016 in the pre-revised grade of Rs.24050- 26000, has filed this OA seeking following reliefs:

"(i) to quash and set aside the entire exercise conducted by the DPC, which met in October, 2016 for considering the officers for promotion as CGDA, culminating in the impugned decision of the ACC, as reflected in the Information Note No.AN-1/1201/1/XXIII, dated 02.12.2016 (Annexure A/1),

(ii) consequently, to direct the official respondents to hold a review DPC for consideration of promotion to the vacancies of CGDA and to promote the applicant against the next vacancy as CGDA, which would arise consequent on superannuation of Shri N. Nehisial on 28.02.2017,

(ii) to grant cost of the OA to the applicant herein, and

(iv) to pass such other order or orders as may be deemed fit and proper, in the interest of justice."

2. Necessary averments made in the OA in support of the claim of the applicant are noticed hereinafter. The applicant was selected through Civil Services Examination, 1982 in the year 1983 and joined the Indian Defence Accounts Service (IDAS). He earned promotions as Deputy Controller of Defence Accounts (Dy.CDA), Joint Controller of Defence Accounts (Jt.CDA), Controller of Defence Accounts (CDA), Principal Controller of Defence Accounts (PCDA) and finally Addl. CGDA on 08/11.07.2016 in the pre-revised grade of Rs.24050-26000. It is accordingly stated that as on 01.01.2016, the applicant had to his credit three years and nine months' service in the pre-revised scale of Rs.22400-24500.

3. The dispute in the present case relates to the promotion to the post of Controller General of Defence Accounts (CGDA). The grievance of the applicant is that despite his eligibility according to the recruitment rules, he was not considered for promotion to the post of CGDA in the DPC held in October, 2016. He claims to possess the requisite qualifying service for such promotion as on the crucial date, i.e., 01.01.2016. The applicant has placed on record his complete bio data (Annexure A/6). According to the applicant, respondent No.4, Mr. Atul Kumar Saxena, who retired on 31.05.2016, was not required to be considered for promotion against the vacancy year 2016-17 after his superannuation much before the occurrence of the vacancy. The vacancy of CGDA became available in October, 2016 on demitting office by Mr. S. K. Kohli consequent upon his appointment as Financial Adviser (Defence Services). It is submitted that the respondent No.4 having superannuated on 31.05.2016 could not have been considered against the said vacancy. It is also the case of the applicant that on demitting office by Mr. S. K. Kohli in October, 2016, for the resultant vacancy five times the eligible persons who were within the zone of consideration were entitled to be considered for such promotion. It is mentioned that in the order of seniority Mr. N. Nehisial, the applicant and three officers below him in the seniority who possessed the requisite qualifying service as per the recruitment rules were required to be considered. According to him, respondents 5 to 7 did not possess the qualifying service for promotion as CGDA as on 01.01.2016. The applicant has also mentioned that he has outstanding ACRs ever since 2005 for the last ten years, except for the period 01.04.2011 to 11.12.2013 owing to non-availability of reporting/reviewing officers. It is submitted that the applicant could not have been superseded or ignored from consideration for promotion, and after the superannuation of Mr. N. Nehisial who was to retire on 27.02.2017, the applicant should be at serial number 1 of the extended panel.

4. When this OA was filed on 27.02.2017 and the matter was taken up on 01.03.2017, Shri Sanjay Jain, the learned ASG, who appeared on advance notice on behalf of the respondents, informed the Tribunal that the respondent No.5, Ms. Veena Prasad, had already taken over as CGDA pursuant to her appointment on the same day. In the given circumstances, it was ordered that the

appointment of respondent No.5 would be deemed to be provisional and subject to any order that may be passed by the Tribunal at any later stage or final hearing. Thereafter the OA was processed for completion of pleadings. In the meantime, the applicant approached the Hon'ble High Court of Delhi by filing writ petition, WP(C) No.9827/2017 and some applications seeking direction for hearing the matter in a time-bound manner. The Hon'ble High Court disposed of the said writ petition vide order dated 14.11.2017 asking the Tribunal to hear the matter finally on the date already fixed, i.e., 06.12.2017. The matter was, however, taken up on 11.12.2017 as the Bench was not available on 06.12.2017. On the aforesaid date the respondents sought adjournment due to non-availability of the learned ASG on that date. The matter was directed to be taken up in the last week of December, 2017. However, counsel for the applicant expressed his personal difficulty and requested for listing the matter in January, 2018. The matter was accordingly heard on 04.01.2018.

5. The main thrust of the applicant in the OA is on the eligibility of the respondent No.5. It is alleged that the respondent No.5 did not have even a single day's service in either of the grades of the feeding service as prescribed under the 2000 recruitment rules for promotion to the post of CGDA. In order to support his contention, reliance is placed upon an order dated 15.01.2016 issued by the office of the respondent No.3 (Annexure A/11). Vide this order, the respondent No.5 who is stated to be approved for promotion as Addl. CGDA in the Indian Defence Accounts Service (IDAS) in the pay scale of Rs.75500-80000 (HAG+) by the Appointments Committee of the Cabinet (ACC), was to be promoted from the date of assumption of the charge. She was also directed to be relieved from central deputation as Additional Financial Advisor & Joint Secretary in the Ministry of Defence (Finance), to enable her to assume the charge of Addl. CGDA. Based upon this order, it is stated that the respondent No.5 assumed the charge on 18.01.2016 and thus, was not having any service in the feeder grade of Addl. CGDA as on 01.01.2016 as required under the recruitment rules for purposes of promotion to the post of CGDA. The applicant made various representations from time to time. Reference is made to representations dated 06.02.2017, 07.02.2017 and 20.02.2017. It is stated that none of these representations have been considered.

6. Regarding other respondents, the only averments made in paras 4 (iii), (vii) and ground (I) of the OA are to the effect that none of the respondents 5 to 7 possess the requisite qualifying service in the pre-revised grade of Rs.22400-24500 or Rs.24050-26000. In sum and substance, the plea of the applicant can be summarized - (i) that the respondent No.4 having superannuated on 31.05.2016, could not have been considered for promotion in the DPC/supplementary DPC held on 16.10.2017; (ii) the respondent No.5 did not possess even a single day's service as Addl. CGDA as on 01.01.2016, i.e., the crucial date; (iii) respondents 6 and 7 also did not possess the requisite qualifying service for promotion to the post of CGDA as on 01.01.2016; and (iv) the applicant who was eligible and possessed the requisite qualifying service, i.e.,

three years and nine months in the pre-revised scale of Rs.22400-24500, was not considered for promotion, despite eligibility.

7. When this matter was heard, learned counsel appearing for the applicant submitted that his main grievance is against the respondent No.5.

8. Separate counter-affidavits have been filed by respondent Nos.1 to 3, respondent No.5 and respondent No.8.

9. Respondent No.8, Union Public Service Commission, i.e., the selection body, in the short affidavit mentioned that the vacancy in the post of CGDA arose w.e.f. 30.09.2016 consequent upon appointment of Shri S. K. Kohli, the then CGDA, as Financial Adviser (Defence Services) vide Ministry of Defence order dated 03.10.2016. It is stated that subsequently, a supplementary DPC was held on 14.10.2016 to consider officers for promotion to the post of CGDA against the vacancy created on account of appointment of Shri S. K. Kohli as Financial Adviser (Defence Services). An eligibility list of five officers was published by the Department comprising (1) Shri Atul Kumar Saxena, Shri N. Neihial, Smt. Veena Prasad, Smt. Madhulika P. Sukul and Smt. Sanhita Kar, in the order of their seniority. On 14.10.2016 the DPC considered the officers in accordance with the existing rules and regulations and eligibility conditions as laid down in the statutory recruitment rules, as well as other related documents such as seniority list, eligibility list etc. It is mentioned that according to the recruitment rules, i.e., Indian Defence Accounts Service Rules, 2000, officers in the posts carrying the pay scale of Rs.67000-79000 with two years' regular service in the grade, including the service, if any, in the posts carrying the pay scale of Rs.75500-80000, would be eligible for promotion as CGDA. The respondent No.5 was holding the post of Addl. FA & Joint Secretary in the Ministry of Defence (Finance) on deputation under the Central Staffing Scheme w.e.f. 02.05.2011. She was granted pro forma promotion under the "Next Below Rule" while serving on central deputation to the grade of Principal Controller of Defence Accounts. It is further mentioned that as per the duly authenticated seniority list furnished by the Department along with the DPC proposal, Smt. Veena Prasad was holding the HAG (Rs.67000-79000) level post w.e.f. 07.03.2012, and HAG+ (Rs.75000-80000) level post w.e.f. 18.01.2016, and was very much eligible to be considered for promotion to the grade of CGDA in accordance with the provisions of the statutory recruitment rules of IDAS. Regarding the applicant, it is stated that he is much junior to Smt. Veena Prasad, respondent No.5, in HAG grade. It is further explained that the respondent No.5 was on deputation and as per para 4.3.2 of DOP&T office memorandum No.22011/5/86-Estt.(D) dated 10.04.1989, she was fully eligible for consideration for promotion, as the period of service rendered by an officer on deputation/foreign service, is to be treated as comparable service in his/her parent department for purposes of promotion as well as confirmation. In respect to the requirement of consideration of Shri Atul Kumar Saxena, respondent No.4, despite his retirement, it is stated that in accordance with the DOP&T office memorandum dated 12.10.1998 and

instructions issued by the DOP&T vide office memorandum dated 14.11.2014, it is considered imperative to identify the correct zone of consideration for the relevant year, and names of retired officers be also included in the panels. However, such retired officers will have no right for actual promotion. It is accordingly mentioned that inclusion of Shri Atul Kumar Saxena within the zone of consideration by the DPC held on 14.10.2016 was a technical formality to identify the correct zone of consideration for the relevant vacancy year, as envisaged under DOP&T office memorandum dated 14.11.2014.

10. Respondents 1 to 3 in their detailed counter-affidavit have raised a preliminary objection that the OA is misconceived as sufficient number of eligible senior persons to the applicant were available and within the zone of consideration. In respect to the eligibility of respondent No.5, it is stated that the said respondent had been granted pro forma promotion under the Next Below Rule w.e.f. 07.03.2012 to the grade of PCDA in the HAG scale of Rs.67000-(AI @ 3%)-79000 vide order dated 16.05.2012, and this period has to be counted for purposes of eligibility and seniority for consideration for appointment to the post of CGDA in terms of para 4.3.2 of the DOP&T office memorandum dated 10.04.1989, as amended from time to time. It is further stated that after joining the Department on 18.01.2016, the pay of respondent No.5 was notionally fixed as PCDA w.e.f. 07.03.2012, and after granting notional increments for the relevant period, her pay was fixed as Addl. CGDA as on 18.01.2016, vide respondent No.3's office order No.82 dated 18.02.2016. The service rendered by respondent No.5 on deputation w.e.f. 07.03.2012 to 17.01.2016 stands qualified in terms of the instructions in vogue. As against the requirement of two years' regular service in HAG, respondent No.5 had actually completed three years ten months and ten days in that grade.

11. Giving details of the occurrence of the vacancy, the official respondents have mentioned that the DPC for promotion to the grade of CGDA against the vacancy which arose consequent upon appointment of Smt. Shobhna Joshi (IDAS:1979), the then CGDA to the post of Secretary (Defence Finance), Ministry of Defence (outside the cadre) w.e.f. 01.06.2016 against the vacancy year 2016-17 (01.04.2016 to 31.03.2017), was held on 02.06.2016. The senior most eligible officer Shri S. K. Kohli was recommended by the DPC for promotion to the grade of CGDA and his promotion was approved by the ACC vide order dated 08.07.2016. Shri Kohli was accordingly promoted w.e.f. the said date against the vacancy which was available from 01.06.2016. Upon retirement of Smt. Shobhna Joshi w.e.f. 31.08.2016, Shri S. K. Kohli, the then CGDA, was appointed as FA (Defence Services) (outside the cadre) w.e.f. 30.09.2016. This unforeseen vacancy was caused against the vacancy year 2016-17 w.e.f. 01.10.2016. It is mentioned that had Shri S. K. Kohli, the then CGDA, continued as CGDA up to August, 2018, his date of superannuation, the applicant would have superannuated in July, 2018. It is stated that in terms of office memorandum dated 30.01.2015, a supplementary DPC for promotion to the grade of CGDA against the vacancy year 2016-17 was held on 14.10.2016. The DPC

recommended the following names:

Sl.No.

Name (S/Shri)

Remarks

1.

A. K. Saxena

Retired on 31.05.2016

Extended Panel

2.

N. Neihisial (ST) (To retire on 28.02.2017)

To be promoted in place of Shri A. K. Saxena (S.No.1) above since retired.

3.

Smt. Veena Prasad

To be promoted on retirement of Shri N. Neihisial (S.No.2) above.

The recommendation of DPC held on 14.10.2016 was approved by the ACC vide approval dated 02.12.2016.

12. Explaining the reasons for consideration of respondent No.4, Atul Kumar Saxena, retired on 31.05.2016, it is stated that it was a technical formality with a view to identify the correct zone of consideration. It is further mentioned that in terms of DOP&T office memorandum No.22011/6/2013-Estt.(D) dated 28.05.2014 the crucial date for determining eligibility for promotion is 1st January where the APARs are written calendar year-wise, and 1st April where the APARs are written financial year-wise. In respect to the service in question, i.e., IDAS, it is stated that the APARs are written financial year-wise, hence the crucial date for determining eligibility in the Department is 1st April and not 1st January, as claimed by the applicant. According to the respondents, respondent No.4 was in service on 01.04.2014. As he was to superannuate on 31.05.2016, he was required to be considered against the vacancy for the vacancy year 2016-2017 (01.04.2016 to 31.03.2017).

13. The respondents have also relied upon DOP&T office memorandum dated 10.04.1989 which inter alia prescribes the procedure for convening of DPCs. Relevant extract of this office memorandum is reproduced hereunder:

"...Vacancies due to death, voluntary retirement, new creations, etc., clearly belonging to the category which could not be foreseen at the time of placing facts and material before the DPC. In such cases, another meeting of the DPC (commonly referred to as supplementary DPC) should be held for drawing up a

panel for these vacancies."

"...the Regular DPC shall, for the purpose of determining the number of officers who will be considered from out of those eligible officers in the feeder grade(s), restrict the field of choice as under with reference to the number of clear regular vacancies proposed to be filled in the year:

No. of vacancies

No. of officers to be considered

1

5

2

8

3

10

4

12

5 and above

Twice the number of vacancies + 4

Further referring to the DOP&T OM No.22011/9/89-Estt.(D) dated 17.10.1994, it is mentioned that the vacancies are calculated financial year-wise. Referring to the appointment of officers from IDAS to various posts (outside cadre), it is mentioned that all such appointments are based upon selection and the occurrence of vacancy is not known, thus no proposal for holding DPC could be made in advance. Further reference is made to DOP&T OM dated 30.01.2015 regarding the zone of consideration in case of holding supplementary DPC. Relevant extract of this OM is reproduced hereunder:

"3 (i) The zone of consideration, in case of holding supplementary DPC, shall be fixed as per provisions in this Department OM No.22011/2/2002-Estt(D) dated 6.1.2006 keeping in view total number of vacancies arising in a particular vacancy year i.e. vacancies accounted for in Original DPC + additional vacancies becoming available subsequently during the same year.

(ii) The eligibility list for supplementary DPC shall be prepared by removing the names of all such officers who have already been assessed by the earlier DPC as fit, unfit or placed in the sealed cover by the original DPC before placing the same for consideration by the supplementary DPC."

14. Respondent No.5 in her separate counter-affidavit mentioned that she joined the IDAS on 01.09.1982. She was holding the post of Addl. FA & Joint Secretary

in the Ministry of Defence (Finance) on deputation under the Central Staffing Scheme after approval of the competent authority w.e.f. 02.05.2011. She was granted promotion to the grade of PCDA in the HAG scale of Rs.67000-79000 vide order dated 16.05.2012 w.e.f. 07.03.2012 under the "Next Below Rule" after the recommendation of the duly constituted DPC and approval of the ACC. Her deputation was to be over in May, 2016 and she joined her parent department on 18.01.2016 on being promoted as Addl. CGDA. 'Next Below Rule' has been interpreted by the Apex Court in case of D. D. Suri v Union of India [(1979) 3 SCC 553]. Relevant observations are reproduced hereunder:

"35. The intention underlying the second proviso to F.R. 30(1) which is commonly known as the 'Next Below Rule' is the principle that when an officer in a post (whether within the cadre of his service or not) is for any reason prevented from officiating in his turn in a post on higher scale or grade borne on the cadre of the service to which he belongs, he may be authorised by special order of the appropriate authority pro forma officiating promotions into such scale of pay and thereupon be granted the pay of that scale or grade, if they be more advantageous to him on each occasion on which the officer immediately junior to him in the cadre of his service draws officiating pay in that scale or grade. The principle behind the so-called rule is evidently that an officer out of his regular line should not suffer by forfeiting acting promotion which he would otherwise have received had he remained in his regular line: State of Mysore v.M.H. Bellary [AIR 1965 SC 868 : (1964) 7 SCR 471 : (1965) 1 SCJ 311] ."

15. The applicant has filed a rejoinder mostly reiterating the averments made in the OA. Further reference is made to OM No.2/13/93-Estt. (Pay-II) dated 26.10.1993 and OM No.2/8/97-Estt. (Pay-II) dated 09.04.2001 issued by the DOP&T, wherein following is stipulated:

"(i) In the case of Group 'A' officers, on deputation to the Central Secretariat under the CSS, who were granted proforma promotion to SAG and above in their parent cadre, the officers would have to exercise an option, either to revert to the parent cadre or continue on deputation, and in case the officer opted to continue on deputation, he would continue to draw the pay of the lower post held on deputation and would have no claim to pay of the higher post, which would only be relevant to the limited extent of counting for initial fixation of pay and increments on the concerned officer reverting to his parent cadre, consequent to completion of deputation.

(ii) As such, entitlement of any such officer would only be to draw the scale of pay applicable to the lower post held on deputation, with no claim to the pay of the higher post.

(iii) This was also in keeping with the well recognized principle that no officer should be allowed the pay of the post, the specified duties and responsibilities of which were not actually discharged by him, and

(iv) In case the officer exercised option to continue on deputation till completion

of his prescribed tenure, he would be permitted to draw pay at the maximum of the pay scale applicable for the lower deputation post with effect from the date he was granted proforma promotion to the higher pay scale in the parent cadre."

Reference is also made to OM No.2/6/2009-Estt.(Pay-II) dated 25.02.2009 and another OM No.6/8/2009-Estt.(Pay-II) dated 17.06.2010 issued by the DOP&T. These OM's inter alia provide that the general guidelines and instructions with respect to deputation issued by the DOP&T were not pro tanto applicable to the officers sent on deputation to posts under CSS in respect of whom separate orders, issued from time to time, would apply. It is accordingly stated that para 4.3.2 of the OM dated 10.04.1989 will not be applicable.

16. We have heard the learned counsel for parties at length and perused the pleadings and the record including the written submissions of parties.

17. Promotion to the post of CGDA is governed and regulated by the statutory rules, namely, the Indian Defence Accounts Service Rules, 2000. Learned counsel appearing for the applicant has referred to following rules:

"2. DEFINITIONS. - In the rules, unless the context otherwise requires:-

xxx xxx xxx

(c) 'Duty Posts' - Duty posts are mentioned in Schedule-I to the rules."

"6. INITIAL CONSTITUTION.- (1) The Service shall, on the date of commencement of these rules consist of officers who have already been appointed on a regular basis to the Indian Defence Accounts Service in the various grades as specified in Schedule-I and the officers so appointed shall be deemed to have been appointed to the respective grades at the initial constitution of the Service.

(2) The regular continuous service of officers mentioned in sub rule (1) in the respective corresponding grades rendered prior to the publication of these rules shall count as qualifying service for the purpose of seniority, confirmation, promotion and pension."

"SCHEDULE-I

(See Rule 4)

Designation, Number and Scale of Pay of posts included in the various Grades of the Indian Defence Accounts Service.

Sl. No.

Grade & Scale of Pay

No. of posts

Xxx

Xxx

Xxx

iii)

Principal Controllers of Defence Accounts and equivalent posts (Rs.22400-525-24500)

12"

"SCHEDULE-II

Sl. No.

Grade

Method of Recruitment

Field of Selection and the minimum qualifying service for promotion

xxx

xxx

xxx

Xxx

2.

Controller General of Defence Accounts

By promotion on the basis of selection

Officers in the posts carrying the pay scale of Rs.22400- 525-24500 with 2 years regular service in the grade, including the service, if any in the posts carrying the pay scale of Rs.24050-650- 26000.

3.

Principal Controller of Defence Accounts and equivalent posts

By promotion on the basis of selection

Officers in the Senior Administrative Grade (Rs.18400-500- 22400) with 3 years' regular service in the grade."

Referring to the statutory rules, it is vehemently argued that the post of CGDA is to be filled up by promotion on the basis of selection from amongst officers in the post carrying the pay scale of Rs.22400-24500 with two years' regular service in the grade, including the service in the post carrying pay scale of Rs.24050-26000, as prescribed under Schedule-II. Referring to Schedule-I, it is mentioned that all these posts are duty posts and the definition of the 'duty posts' under rule 2(c) refers to Schedule-I. Accordingly, the contention is that

unless a person is performing actual duty, he is not eligible for promotion to the post. Referring to rule 6, which deals with the initial constitution of the Service, it is argued that this rule requires a regular continued service of officers in their respective grades to count as qualifying service for purposes of seniority, promotion and pension. The whole submission is that since the respondent No.5 was not having regular continued service in the feeder grades, she having been sent on deputation, she was not eligible to be considered for promotion to the post of CGDA. The expression 'regular service' has also been interpreted by the Hon'ble Supreme Court in case of Union of India & others v K. B. Rajoria [(2000) 3 SCC 562]. Relevant observations of the Apex Court are reproduced:

"6. The High Court held that neither Respondent 1 nor Krishnamoorti were eligible on the cut-off date i.e. 1-7-1997 for promotion to the post of Director General. According to the High Court the words "regular service" in the Rules means actual service and that the fiction of notional promotion could not amount to the two years' experience necessary under the Rules. The High Court was of the view that the notional seniority granted to Krishnamoorti by the order dated 10-6-1998 was no substitute for the requirement of two years' regular service as Additional Director General (Works) which had been laid down in the relevant Rules as the eligibility criterion for promotion to the post of Director General (Works).

9. Third, the High Court erred in construing the words "regular service in the grade" as actual physical service. If that were so, then an ad hoc appointee who actually serves in the post could also claim to be qualified to be considered for the post of Director General. The High Court itself held that "ad hoc service rendered by any of the parties would not count towards eligibility".

11. The word "regular" therefore does not mean "actual" and the first question the High Court should have considered was whether the appointment of Krishnamoorti was regular and in accordance with the Rules or it was irregular in the sense that it was contrary to any principle of law."

18. The applicant has also referred to instructions dated 12.10.1998 which inter alia deal with the consideration of seniors when their juniors are considered. Reference is made to another OM dated 24.09.1997 which provides that seniority alone would not entitle an officer to be considered for promotion unless and until he/she fulfills the requisite eligibility conditions. Reliance is also placed upon a judgment of the Hon'ble Supreme Court in case of R. Prabha Devi & others v Union of India & others [(1988) 2 SCC 233].

Another OM dated 08.02.2002 is relied upon which prescribes that there would be no supersession in promotion to the selection posts amongst officers whose ACRs meet the requisite benchmark.

19. The applicant has referred to the Information Note dated 02.12.2016, which reads as under:

"INFORMATION NOTE (02.12.2016)

The Appointments Committee of the Cabinet (ACC) has approved the proposal for empanelment of the following officers for promotion to the grade of Controller General of Defence Accounts (CGDA) of the Indian Defence Accounts Service in the pay scale of Rs.80000/- (fixed) for the vacancy year 2016-17 w.e.f. the date of assumption of charge of the post and until further orders:

Sl. No.

Name (Shri/Smt.)

1.

A. K. Saxena

Extended Panel

2.

N. Nehisial

3.

Veena Prasad

2. Necessary communication in this regard has been sent to the Ministry of Defence."

20. The issues that need to be decided are - (i) whether the respondent Nos.5 to 7 are ineligible for being considered for promotion to the post of CGDA as on 01.01.2016; (ii) whether the applicant was within the zone of consideration as on 01.01.2016, and on the date of holding of DPC on 14.10.2016; and (iii) whether inclusion of the name of Atul Kumar Saxena, a retired officer in the DPC and the recommendation dated 14.10.2016 would have any impact on the rights of the applicant.

21. Mr. Hanu Bhaskar, learned counsel appearing for respondents 1 to 3, has sought dismissal of the OA firstly on the ground that neither the minutes of the DPC nor the promotion order of respondent No.5 are on record, and there is no challenge to the same. According to him, the information note dated 02.12.2016, part of Annexure A/1, is neither the minutes of the meeting nor an order of promotion. It is only an information note and cannot be a substitute for the promotion order or the minutes of the DPC. Challenge to this information note is totally meaningless. From the perusal of the prayer, we find that there is no challenge to the minutes of the DPC held on 14.10.2016 nor to the promotion order of respondent No.5. What is challenged is only the information note. The information note contains the following endorsement/ disclaimer:

"Anything contained in this document would not lead to any legal claim on part of an individual for any purpose."

This information note merely mentions about the approval of the proposal for empanelment of the officers mentioned therein by the ACC. Para 2 of the information note mentions, "Necessary communication in this regard has been sent to the Ministry of Defence", which clearly means that the order of promotion has to be issued by the Ministry of Defence, and this note merely conveys the approval of the ACC to the proposal for empanelment. The disclaimer at the foot of the aforesaid information note further reads, "Anything contained in this document would not lead to any legal claim on part of an individual for any purpose". Thus, any challenge to this note is meaningless unless the actual minutes of the DPC and the promotion order are challenged. The consequential direction sought in the relief part is for a review DPC for consideration of the promotion to the vacancy of CGDA and to promote the applicant against the next vacancy on superannuation of Mr. N. Nehisial on 28.02.2017. The applicant has challenged the entire exercise by the DPC and the subsequent proceedings. This prayer is totally vague. Be that as it may, the promotion order of the respondent No.5 is not under challenge. When this OA was filed, respondent No.5 had not been promoted and no amendment has been sought after the promotion of respondent No.5, which happened on the retirement of Mr. N. Nehisial on 28.02.2017.

22. As noticed hereinabove, there is no challenge to the eligibility of respondents 6 and 7. The only challenge is to the eligibility of respondent No.5. The admitted facts are that the respondent No.5 went on deputation in the Ministry of Defence (Finance) under the Central Staffing Scheme with the approval of the competent authority w.e.f. 02.05.2011. She was granted promotion to the grade of PCDA in the Higher Administrative Grade scale of Rs.67000-79000 vide order dated 16.05.2012 under the "Next Below Rule". Mr. Hanu Bhaskar has referred to and relied upon office memorandum dated 10.04.2019 issued by the DOP&T. This office memorandum lays down the consolidated instructions in respect to the functions and composition of DPCs, and related matters. It is not disputed even by the applicant that these are the instructions which are applied by the UPSC and other DPCs while performing their functions /duties for promotion etc. Reliance is placed by Mr. Hanu Bhaskar on the following para of the instructions:

"4.3.2 Very often a certain number of years of service in the lower grade is prescribed as a condition for becoming eligible for consideration for promotion to a higher post/grade. In such cases, the period of service rendered by an officer on deputation/foreign service should be treated as comparable service in his parent department for purposes of promotion as well as confirmation. This is subject to the condition that the deputation/foreign service, is with the approval of the competent authority and it is certified by the competent authority that but for deputation/foreign service, the officer would have continued to hold the relevant post in his parent department. Such a certificate would not be necessary if he was holding the departmental post in a substantive capacity."

To the contrary, the applicant also relied upon para 17.4.2 of the same

instructions, which reads as under:

"17.4.2 In case the officer is serving on an ex-cadre post on his own volition by applying in response to an advertisement, he should be required to revert to his parent cadre immediately when due for promotion, failing which his name shall be removed from the panel. On his reverting to the parent cadre after a period of two years he will have no claim for promotion to the higher grade on the basis of that panel. He should be considered in the normal course along with other eligible officers when the next panel is prepared and he should be promoted to the higher grade according to his position in the fresh panel. His seniority, in that event, shall be determined on the basis of the position assigned to him in the fresh panel with reference to which he is promoted to the higher grade. (If the panel contains the name of an officer on study leave, he should be promoted to the higher post on return from the study leave. He should also be given seniority according to his position in the panel and not on the basis of the date of promotion)."

Para 4.3.2 specifically deals with the situation where an officer on deputation/foreign service is required to be considered for promotion to the higher post/grade in the parent department prescribing certain number of years of service in the lower grade as a condition for eligibility for such promotion. This para clearly lays down that the period of service rendered by an officer on deputation/foreign service should be treated as comparable service in his parent department for purposes of promotion as well as confirmation. The only caveat on the applicability of this condition is that the deputation/foreign service is with the approval of the competent authority and certified by the competent authority that but for deputation/foreign service, the officer would have continued to hold the relevant post in his parent department. While the respondent No.5 was on deputation, she was granted pro forma promotion in the grade of PCDA in the HAG scale of Rs.67000-79000 w.e.f. 07.03.2012 vide order dated 16.05.2012 (Annexure R5/1). The order reads as under:

"In pursuance of the Notification No.AN-I/1171/1/PCDA/2010-11, dated 19.03.2012 issued by office of Controller General of Defence Accounts, Palam, Delhi Cantt and as per the provisions contained in the Ministry of Finance, Department of Expenditure O.M. dated 21.07.2009 and 28.08.2009 on her proforma promotion w.e.f. 07.03.2012 to the grade of Principal Controller of Defence Accounts in the HAG scale of Rs.67000-(A1@3%)-79000, the pay of Ms. Veena Prasad, IDAS (1982), Addl. FA(VP) & JS is fixed as under:-

Pay in PB-4 as on 06.03.2012

Pay fixed on proforma promotion w.e.f. 07.03.2012 in PB4

Pay as on 01.07.2012 (including annual increment)

Rs.56,960/- + Rs.10,

Rs.56,960+2000+ 10,000/- (Total Rs.68,960/-)

Rs.63,40/- + 10,000/- (GP) (Total Rs.73,040/-) (DNI: 01.07.2013)

2. Arrears will be admissible.

3. Over payment if any, shall be adjusted in the light of observations of audit."

This order is not under challenge. The inter se seniority amongst the applicant and the private respondents is also reflected in the seniority list in the feeder grade, i.e., PCDA or equivalent posts (HAG) including Addl. CGDA (HAG+), Annexure R-6 placed on record by the applicant along with the rejoinder. The seniority position of the applicant qua the respondents 4 to 7 with their dates of regular appointment to the grade of PCDA is as under:

Sl. No.

Name of the officer

Date of birth

Date of regular appointment to PCDA

UPSC reference in which recommended/ approved

Grade/ post in which confirmed

Remarks

2.

A.K. Saxena

10.05.1956

12.04.2010 16.11.2015

F.1/33(78)/2011 -AP.3

JTS

Promoted to grade of Addl. CGDA w.e.f. 16.11.2015 notionally and actually w.e.f. 13.01.2016. Retired on 31.05.2016.

3.

N. Neihial (ST)

01.03.1957

12.04.2010 16.11.2015 **

F.1/33(78)/2009 -AP.3

JTS

To retire on 28.02.2017

4.

Veena Prasad

26.01.1958

07.03.2012 18.01.2016 **

F.1/33(81)/2011 -AP.3

JTS

5.

Madhuli ka P Suku

04.10.1959

07.03.2012 08.08.2016 **

F.1/33(81)/2011 -AP.3

JTS

On deputation as Addl. Secretary

6.

Sanhita Kar

16.01.1957

09.03.2012

F.1/33(81)/2011 -AP.3

JTS

On deputation till retirement i.e. 31.01.2017

7.

PN Sukul

22.10.1959

07.03.2012 08.08.2016 **

F.1/33(81)/2011 -AP.3

JTS

8.

Savitur Prasad

25.07.1958

14.03.2012

F.1/33(81)/2011 -AP.3

JTS

From the above seniority position, it appears that respondent No.5 was appointed as PCDA on 07.03.2012, whereas the applicant was appointed on 14.03.2012. The applicant never disputed this seniority, not even in the present OA. Thus, the only contention is that the respondent No.5 being on deputation was not holding the duty post and was not thus eligible for promotion. This situation is clarified in the office memorandum dated 10.04.1989 (para 4.3.2 reproduced hereinabove). The validity of this office memorandum is also not questioned in the present OA. The applicant has relied upon office memorandum dated 26.10.1993 referred to hereinabove. From a perusal of the aforesaid office memorandum it appears that it deals with the question of fixation of pay and has nothing to do with the promotion in the parent department. In any case, respondent No.5 had already opted for repatriation to the parent department, and in fact joined her parent department on 18.01.2016, by exercising option, as is evident from Annexure R5/3 dated 18.02.2016 whereby her pay was fixed. The remarks column reads as under:

"The officer promoted in HAG Scale 67000-A.I @ 3%-79000 w.e.f. 07.03.12* (proforma promotion) and promoted in HAG+ Scale (75500-A.I @ 3%-80000) w.e.f. 18.01.2016** (AN). The pay of the officer has been fixed notionally w.e.f. 02.05.11 to 17.01.16 being the period of deputation with actual benefits of promotion w.e.f. 18.01.16 (AN) i.e. the date of taking over the charge of promotional post as Addl. CGDA (HAG+ grade). The pay of the Officer has been fixed as per the Option exercised by the Officer."

The repatriation of respondent No.5 has also not been assailed in any manner. The eligibility has to be seen in accordance with the recruitment rules read with instructions on the subject. The recruitment rules provide for minimum tenure in the feeder grade, which was granted to the applicant vide order dated 07.03.2012 and on her repatriation on 15.01.2016. Further the eligibility is not to be seen as on 01.01.2016 as contended by the applicant, but on 01.04.2016 as the APARs in the Department are written financial year-wise, as is evident from OM dated 28.05.2014 read with OM dated 30.01.2015. Thus the eligibility of respondent No.5 was to be considered as on 01.04.2016, as she had joined as Addl. CGDA on 18.01.2016. Rule 6 of the statutory rules of 2000 only deals with the initial constitution of the Service. These rules came into operation on 28th February, 2000. The respondent No.5 became member of the IDAS at the time of initial constitution of the Service. At the relevant time, respondent No.5 was in the Junior Administrative Grade (Selection Grade). Any subsequent deputation of the respondent after being inducted into the Service would not disqualify her or render her ineligible to be a member of the Service. Deputation is only lending service of a Government servant to another organization of the Government. Here, the respondent No.5 was sent on deputation under Central Staffing Scheme, which is a normal event. It is a tenure deputation and she was repatriated even prior to the completion of the tenure. Office memorandum

dated 10.04.1989 is absolutely clear on the subject. Para 17.4.2 relied upon by the applicant has absolutely no application in the facts of the present case. This deals with the appointment to an ex cadre post where a Government servant applies directly in response to an advertisement. This is not the case of the applicant against the respondent No.5. It is totally misconceived submission. Office memorandum dated 10.04.1989 only supplements the recruitment rules and is not in conflict therewith. The applicant has relied upon a judgment of the High Court of Guwahati in Writ Petition No.4279 of 2005, decided on 30.07.2009 in case of Makam Kishore Kumar v Union of India & others. Perusal of the said judgment clearly indicates that it is more the case of the respondent No.5 rather than the applicant. In this case, interpreting para 17.4.2 of the OM dated 10.04.1989, the claim of the Government servant on deputation for promotion in the parent department when he was found fit, was upheld, and he was not only given promotion, but seniority as well on the basis of the date of promotion. Another judgment relied upon by the applicant is State of Haryana & others v Charanjit Singh & others [(2006) 9 SCC 321] which relates to equal pay for equal work. How this judgment is relevant for purposes of the present OA is not understandable.

23. It is interesting to note that the applicant himself was on deputation. His profile (Annexure A-6) placed on record clearly indicates that he was on deputation from 14.11.2003 to 04.02.2004 as Private Secretary to Minister of Textiles, and again from 28.05.2009 to 15.07.2011 as Managing Director, Sahjahanabad Redevelopment Corporation, Delhi, that means for a period of three years. If the contention of the applicant is accepted, then he himself would not have been entitled to promotion as PCDA on 14.03.2012, as he would not be eligible, having no regular service on a 'duty post'. Taking note of all these facts, we are of the considered view that the respondent No.5 was fully eligible as on 01.04.2016 and when the DPC was held on 14.10.2016.

24. UPSC, respondent No.8, as also respondents 1 to 3 specifically stated that the applicant was not within the zone of consideration when the vacancy occurred on 01.10.2016. UPSC in its counter-affidavit in paras 7 and 7.1 mentioned that the applicant being much junior to respondent No.5 could not have been considered for promotion. Mr. Ravinder Agarwal, learned counsel appearing for UPSC, submitted that since there was only one vacancy, the eligible candidates five times the number of vacancy were to be considered. Not only this, the applicant in para 4 (vii) has mentioned as under:

"...The zone of consideration, being five times the number of vacancies (as per OM No.22011/2/2002-Estt.(D), dated 06.01.2006 issued by the DoPT, a copy of which is annexed hereto as Annexure A-15..."

The seniority list referred to hereinabove also shows that at the time when Shri S. K. Kohli was promoted and when the vacancy became available for the vacancy year 2016-17, the crucial period for the said vacancy year was 01.04.2016 to 31.03.2017. Shri Atul Kumar Saxena, though retired on

31.05.2016, but was in service as on 01.04.2016. he was at serial number 2 of the seniority list. The applicant was placed at serial number 8. Thus only five eligible officers were to be considered, i.e., from serial number 2 to serial number 6. The applicant being at serial number 8 was beyond the zone of consideration. Respondents 1 to 3 in their reply have referred to OM dated 10.04.1989 read with OM dated 06.01.2006 (relevant extract reproduced hereinabove), which clearly indicate that where the vacancy is one, the number of officers to be considered would be five. OM dated 30.01.2015 (reproduced hereinabove) further reveals that the zone of consideration will continue to remain for the vacancy year even in respect to the additional vacancies becoming available during the same year. The claim of the applicant that he was within the zone of consideration is totally fallacious. Even according to the submission of the learned counsel appearing for the applicant, the applicant claims that he was within the zone of consideration if the respondents 5 to 7 were to be excluded from the zone of consideration. Their exclusion is sought on totally baseless and flimsy grounds on account of misrepresentation, misconception and misunderstanding of the recruitment rules and the relevant OMs. The only conclusion which can now be drawn is that the applicant was not within the zone of consideration and thus none of his rights has been infringed in any manner.

25. Coming to the question whether inclusion of the name of Atul Kumar Saxena in the DPC will have any impact on the rights of the applicant, as discussed hereinabove, Atul Kumar Saxena's name was included to determine the zone of consideration for the relevant year and all eligible candidates during the relevant year were to be considered for purposes of determining the zone of consideration. Thus, there is no illegality or violation of any rule or regulation.

26. In the totality of the circumstances, this OA is without any merit and is hereby dismissed.

27. After the matter was heard and judgment reserved, the applicant filed MA No.425/2018 seeking stay of promotion of respondent No.6 and/or respondent No.7 to the post of CGDA, and taking over charge thereof, with further ad interim ex parte stay on the implementation of the decision of the fresh DPC conducted in January, 2018 by respondents 1 to 3 and 8. This MA was disposed of vide order dated 30.01.2018 with the following order:

"The main OA was heard and reserved on 04.01.2018. Judgment is awaited. The prayer of the applicant that the promotion of the respondents 6 & 7 be stayed till the disposal of this OA cannot be acceded to at this juncture as the matter has already been heard for final disposal. However, this MA is disposed of with a direction that the appointment of the respondents 6 & 7 shall remain subject to outcome of the OA. MA is disposed of."

Since, we have dismissed the OA, consequences shall follow.