

UNION OF INDIA & ANR.

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v.

K. P. S. RAGHUVANSHI & ORS.

(Civil Appeal Nos. 13776-13777 of 2015)

MAY 11, 2017

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[ARUN MISHRA AND NAVIN SINHA, JJ.]

*Service law – Promotion – Departmental Promotion Committee (DPC) – Recommendations of – Challenge to – Respondent no. 1, DIG in Indian Coast Guard Service – Promotion sought to the post of Inspector General – Recommendations of the DPC – Writ petition by respondent no. 1 challenging the said recommendations as illegal, arbitrary and conducted on the basis of selection policy, framed a month prior to the holding of the Selection Board, CGO 02/09 superseding CGO 02/05; and that the Director General endorsed ACR of respondent no.1, for the period from 01.02.2008 to 31.01.2009, in spite of not having observed the performance of the incumbent for a mandatory period of 90 days – High Court held that it was illegal to conduct the DPC on the basis of the ACRs criterion reflected in CGO 02/09; and that as three months had not been completed by respondent no.2, the DGICG was not competent to write the ACR and to act as Reviewing officer – High Court ordered promotion to the rank of IG on “Relative Merit Based Selection” within the eligible batch of officers – On appeal, held: Rules which were in existence, when the vacancies arose, should be taken into consideration until and unless otherwise specifically so decided – Posts in question had been created only in the year 2009 – There was no delay in calling DPC – CGO 02/09 which was issued after exercise of 4 years was in force – Thus, the High Court erred in holding that the CGO 02/05 should be applied and complied with, particularly, when the date of DPC was 23.07.2009 – It is the date of DPC which matters and the procedure which is prevalent on the date on which the DPC is held is applicable – Thus, the provisions contained in CGO 02/09 would hold the field and DPC was rightly held as per instructions relating to ACRs contained in CGO 02/09 – Furthermore, the previous incumbent had retired and thus, was not available to write the review – Review could be undertaken in the-*

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A facts of the case by DGICG before completion of 90 days mandatory period – Thus, the officer DGICG, who had not completed 90 days, was competent as apparent from the notings of Secretary – High Court erred in law in holding otherwise – Notings, made, does not show any prejudice on the part of the DGICG – Order passed by the High Court is set aside – As and when occasion arises, appellants would consider case of respondent no. 1 in accordance with law for promotion to the post of IG – Coast Guard (Seniority & Promotion) Rules, 1987 – Government of India (Transaction of Business) Rules, 1961 – Rule 11(i)(c) – Coast Guard (General) Rules, 1986 – Coast Guard Order 02/05 and Coast Guard Order 02/09.

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C Constitution of India – Art. 136 – Special Leave Petition – Maintainability of – Withdrawal of SLP, with liberty to file review application before the High Court, without taking permission to file SLP afresh – Thereafter, review application filed and the same was dismissed – Maintainability of fresh SLP – Held: In the facts and circumstances of the case, when the leave to file appeal has been granted, it is appropriate to modify the order passed by this Court, to the effect that liberty is granted to assail the order passed by the High Court in a fresh SLP, in case review application is dismissed – Since the order is modified, appeals are maintainable.

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E *Y.V. Rangaiah v. J. Sreenivasa Rao* (1983) 3 SCC 284 – distinguished.

*Sandhya Educational Society and Anr. v. Union of India and Ors.* (2014) 7 SCC 701; *Khoday Distilleries Ltd. and Ors. v. Mahadeshwara S.S.K. Ltd.* (2012) 12 SCC 291 – referred to.

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#### Case Law Reference

(1983) 3 SCC 284	distinguished	Para 19
(2014) 7 SCC 701	referred to	Para 28
(2012) 12 SCC 291	referred to	Para 34

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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 13776-13777 of 2015.

From the Judgment and Order dated 04.09.2014 of the High Court of Delhi at New Delhi in WP No. 10726 of 2009

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WITH

I. A. No. 1 of 2015 (For Modification)

In

Special Leave Petition (C) No. 30380 of 2014 and C. A. No. 13778 of 2015.

P. S. Patwalia, ASG., Amol Chitle, Shanker Divate, Rajat Singh, M. K. Maroria, Advs. for the Appellants.

Badri Prasad Singh, Abhishek Singh, Parmanand, Advs. for the Respondents.

The following Order of the Court was delivered:

**ORDER**

1. The Union of India and Anr. has preferred the appeals, aggrieved by the judgment and order dated 4<sup>th</sup> September, 2014, passed by the High Court of Delhi and also dismissal of the review application, vide order dated 19.12.2014.

2. A Writ Petition (C) No.10726/2009 was filed on 06.08.2009 before the High Court of Delhi by DIG K.P.S. Raghuvanshi-Respondent No.1, posted in the Coast Guard services. He had questioned the recommendations of the Departmental Promotion Committee (in short 'DPC') for promotion to the rank of Inspector General, held on 23.07.2009, as illegal, arbitrary and conducted on the basis of selection policy, which was framed a month prior to the holding of the Selection Board. The respondent had also questioned the action of the Director General (Coast Guard) in endorsing the Annual Confidential Report (in short 'ACR') of Respondent No.1, for the period from 01.02.2008 to 31.01.2009, in spite of not having observed the performance of the incumbent for a mandatory period of 90 days, as contained in the policy in Coast Guard Order (in short 'CGO') No.04/2005. Prayer was also made to call for the ACRs for the aforesaid period and to quash the entry made for the year 2008-2009. Prayer was also made to quash CGO No.02/09.

3. The facts in short, indicate that K.P.S. Raghuvanshi joined the Indian Coast Guard services in January, 1984. He claimed to have rendered unblemished service and had an outstanding career, as apparent

A from the fact that he was promoted to the various ranks as per the ACR gradings. The Respondent No.1 was promoted to the rank of DIG in 2005 and was holding the rank of Deputy Inspector General ('DIG' for short) at the relevant time when he was due for consideration for promotion to the post of Inspector General ('IG' for short). There was creation of four posts in the rank of IG.

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4. It was averred that Respondent No.1 was placed first in the merit list during the DPC held in the year 2005 for promotion to the rank of DIG. He is an alumni of Naval War College (USA). He was the first Coast Guard Officer to be selected for this course, based on outstanding performance and his position vis-a-vis other officers in the panel. The respondent was awarded the "Tatrakshak Medal" by the President of India on 15<sup>th</sup> August, 2007 for meritorious service and was also commended on two separate occasions by the Director for his exceptional work. In May, 2006, he was the first in merit among DIGs and was shortlisted for National Command College (NCC) Korea. Subsequently, in September, 2008 he once again stood first in merit amongst the 5<sup>th</sup> Batch officers for National Defence College (NDC) Course, New Delhi.

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5. It was further averred that on 16.02.2009, in the wake of 26.11.2008 attack on Mumbai, the Cabinet Committee on Security ('CCS' for short) approved one post of Additional Director General, three posts of IG (GD) and one post of IG (Tech) and communicated the same to the Coast Guard Headquarters through the letter of Ministry of Defence dated 24.02.2009. Since new posts were sanctioned, holding of DPC was necessitated to fill the posts. The relevant selection year commenced from 1<sup>st</sup> April to 31<sup>st</sup> March of the following year. A proposal dated 01.04.2009 for conducting DPC on 18.04.2009 for one post of IG (GD) with restricted zone of consideration i.e. 4<sup>th</sup> batch of General Duty, was forwarded to the Ministry of Defence ('MoD' for short). The said proposal was rejected by the MoD at the level of Director (Navy-II) on 02.04.2009. Again on 13.04.2009, a proposal for composition of DPC, reiterating the earlier proposal of 01.04.2009, along with two amendments to CGO 02/2005 was forwarded to CGHQ to MoD. The MoD rejected the proposal again on 16.04.2009, but this time, at the level of Defence Secretary. The MoD once again directed CGHQ to follow the CGO 02/05 and to conduct the DPC expeditiously. Following is the extract of the aforesaid minutes dated 16.4.2009:

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“Noting dated 15<sup>th</sup> April, 2009 -

“7. In view of the above, it is proposed that CGHQ may be advised to constitute Coast Guard Promotion Board No.1 for promotion to the rank of Inspector General as per the existing provisions of SRO 133 and CGO 02/05 to fill up the newly sanctioned posts of Inspector General, approved by CCS. The Zone of consideration may kindly be decided as per the extant guidelines mentioned at Para 7(d) of CGO-02/2005.”

Sd/-

V.K. Tiwari  
Director(Navy II)  
15<sup>th</sup> April, 2009.

Notings dated 16<sup>th</sup> April, 2009 -

“We may ask DGCG to go ahead with the DPC based on existing guidelines on the subject. This may also be done expeditiously.

Sd/-

Defence Secretary  
16.04.2009.”

6. It was further averred in the petition that the IG had noted on 27<sup>th</sup> April, 2009 that the post be filled as per the existing provisions of amended Coast Guard (Seniority & Promotion) Rules, 1987 and CGO 02/05. It was further averred that in accordance with the provisions existing in the amended Coast Guard Rules, 1987 and CGO 02/05, all vacancies existing at the time of DPC are to be considered. Vide order dated 27.04.2009 of Deputy Director General (‘DDG’ for short), it was further observed that restricting the release of vacancies for IG promotion may amount to deviation from the said provisions and lead to legal complications at a later stage.

7. Thus, the directive of Ministry of Defence was clearly understood by the respondent that the posts were required to be filled as per CGO 02/05 not as per CGO 02/09 which was approved on 19.6.2009 i.e. one month prior to the scheduled date of DPC (23.07.2009). It was submitted that DPC was conducted erroneously with selective change of ACR criteria to manipulate merit. The ACR of respondent was reviewed for the period 2008 to 2009 by Vice Admiral Anil Chopra, the then Director General, despite not having observed the officer for a mandatory period of 90 days, as prescribed in para 54 of CGO 04/05.

A 8. It appears that the MoD and the Cabinet Committee on Security  
(CCS) took a decision of 16.02.2009, in its meeting for creation of one  
post of additional Director General Coast Guard in Higher Administrative  
Grade, one post of Commander, Coast Guard Region (North West) in  
the rank of IG and three posts of Deputy Director General (Acquisition,  
B Technical and Coastal Security) in the rank of IG in Coast Guard  
Headquarters.

9. As apparent from the letter of Joint Secretary, MoD, dated  
24.02.2009, written to the DG Coast Guard, it was submitted by the  
respondent before the High Court that final sanction for the posts was  
C approved and granted by the CCS in February, 2009. Thus, these posts  
were required to be filled up in accordance with the CGO 02/05, not in  
accordance with the order, promulgating CGO 02/09. The case set up  
by the respondent with respect to the remarks made by the reviewing  
officer, i.e., Director General Coast Guard, was that he took into  
consideration the event that took place prior to the period to which ACR  
D was made, i.e., from 01.02.2008 to 31.01.2009. It was not upon him to  
write an ACR for the relevant period, as the officer had not completed  
90 days under him.

10. CGO 02/09 was issued in order to benefit IG-K.C. Pande, as  
he was not completing the requisite criteria as specified under CGO 02/  
E 05. Thus, in order to illegally extend the benefit to IG-K.C. Pande, the  
CGO 02/09 came to be issued. The DPC could not have been held as  
per the changed criteria of zone for consideration of ACR introduced by  
CGO 02/09.

11. The case set up by the department before the High Court was  
F that the case of the respondent was considered for promotion to the  
rank of IG, he was not found fit. The CGO No.02/05 pertaining to  
composition of promotion Board, release of vacancies, increase of number  
of looks, criteria for consideration of ACR etc. and after due deliberations,  
the CGO 02/09 was promulgated superseding CGO 02/05. The CGO  
G 02/09 approved by the DGICG was forwarded to the Ministry by the  
Department on 18.5.2009, for conducting the DPC for the four posts of  
IG in July, 2009, as per the revised guidelines notified vide CGO 02/09  
and the Joint Secretary also signed it on 19.06.2009.

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12. It was further averred that ACR criteria was revised in accordance with Government instructions (DOP&T Guidelines), which provides that ACR for last five years including ACRs in the lower rank, if necessary, be taken into consideration for the purpose of promotion. Hence, to bring promotion guidelines in consonance with it CGO 02/09 was promulgated by revising the provisions of CGO 02/05, with a view to enhance promotion prospects, morale and efficiency of Coast Guard Officers and it was not done malafidely, as averred by the respondent. Process was initiated in 2005. The Promotion Board, convened on 23.07.2009, was conducted as per the revised guidelines contained in CGO 02/09.

13. It was further contended that guidelines for the endorsements in ACRs on Coast Guard Officers are contained in CGO 04/05. As the Director General had retired, it was open to Director General Coast Guard to write the ACRs, without observing the performance of the officer for 90 days, as provided in para 54 of CGO 04/05.

14. The Rules of 1987 were taken into consideration and para 7 of the CGO 02/09 provided that suitability for promotion shall be based on the relevant service records and performances, as reflected in the last report in the current rank, if they are not available, the 5 ACRs including previous rank ACRs, were to be considered. Notation was not required to be made, as Director General had sought permission to write the ACRs of large number of officers, as predecessor Director General had retired.

15. The respondent No. 2 reviewed the ACRs of 36 officers in the rank of Deputy Inspector General, including Respondent No.1 and 155 officers of the rank of Commandant for the period 2008, to all of whom Respondent No.2 had not observed for a minimum period of three months and the review made, had not been questioned by any other officer, except by Respondent No.1. Representation dated 02.05.2011 made by the respondent with respect to grading given by the Reviewing Officer, had been rejected by the MoD on 23.03.2012.

16. In all, 15 officers were considered by the DPC held in July, 2009 for the post of IG. 15 officers, out of which 9 officers were of senior batches than that of Respondent No.1, had 5 ACRs in the current rank of DIG. The respondents' batch comprised of 5 officers including him, and all did not have 5 ACRs in the current rank of DIG. Respondent

A No.2, IG-K.C. Pande had only 4 reports, i.e., for the years 2004 to 2006  
and 2008 in the rank of DIG. Thus, for all the 5 officers of the  
respondents' batch, Commandant reports for the years 2004 and 2005  
and IG-K.C. Pande's ACR for 2003 in the rank of Commandant, were  
considered in accordance with para 7 of CGO 02/09. Respondent No.2  
had maintained the numerical grading of his predecessor. It was also  
B denied that the pen picture contents referring to the incidents are outside  
the purview, being contrary to para 27(e) of CGO 04/05.

17. Respondent No.1 had been subsequently considered twice  
for promotion to the rank of IG in the promotion Boards, convened in  
October, 2011 and December, 2012, but was not found fit for promotion  
C by those DPCs. Till date, no officer from a junior Batch than that of the  
respondent No.1, has been promoted to IG.

18. The High Court by the impugned judgment and order held that  
the existing ACR criteria as set out in CGO 02/05 was amended  
clandestinely and approval of the Joint Secretary (Navy), MoD, was  
D obtained on 19.06.2009. Since the proposal was originally rejected at  
the level of Defence Secretary on 16.04.2009, the approval granted by  
the Joint Secretary on 19.06.2009 was without any authority. As such, it  
was illegal to conduct the DPC on the basis of the ACRs criterion reflected  
in the context of promulgation of CGO 02/09 superseding CGO 02/05.

E 19. The High Court has also held that the vacancies for the 4  
posts of Inspector General had occurred prior to the amendment of CGO  
02/05 and the said posts were created and sanctioned on 16.02.2009.  
Reliance has been placed on a decision reported as Y.V. Rangaiah Vs.  
J. Sreenivasa Rao<sup>1</sup>. The High Court has opined that the normal vacancy,  
F which had arisen, would be governed by the unamended Rules and not  
by the amended Rules. The Government had taken the decision not to  
fill the vacancies under the old Rules. The various notings made by the  
MoD were referred to by the High Court. The High Court has opined  
that promotions were made without due deliberations with the concerned  
Ministry. Apart from that, the High Court has also observed that as  
G three months had not been completed by Respondent No.2, the DGICG  
was not competent to write the ACR and to act as Reviewing officer.  
The prayer, which was made to write ACRs by new incumbent, was  
categorically refused by MoD vide communication dated 23.04.2009.

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<sup>1</sup> (1983) 3 SCC 284



20. The High Court also observed that the respondent has succeeded in establishing his case of selective change of ACR criteria to manipulate merit by the appellants, smacking of arbitrariness. The respondent has also succeeded in establishing that the review of his ACR for the period of 2008-2009 by the then DGICG was in violation of Para 27(e) and Para 54 of CGO 04/05, which resulted in his being punished twice for the same incident. The vacancies which had occurred for the post of IG on 06.02.2009 were governed by the unamended Rules, i.e., CGO 02/05 read with Rule 7 (3) of the Coast Guard (Seniority and Promotion) Rules, 1987, as amended in 2004. The High Court held that the ACR review of the respondent by the appellant, in violation of para 54 of CGO 04/05 read with para 55 (fvd), para 38 and para 27(e) of the said CGO, was both illegal and arbitrary and deserves to be ignored. The High Court has ordered promotion to the rank of IG shall be made on "Relative Merit Based Selection" within the eligible batch of officers. Review DPC should be held on the basis of ACR criteria as per CGO 02/05. If Respondent No.1 is selected for promotion, he shall be promoted on the same date, when three other persons were promoted, as per recommendation of DPC dated 23.07.2009. The respondent would be entitled to all notional benefits including security. It would be open to the Department to create supernumerary post to accommodate the respondent.

21. Initially, the order dated 04.09.2014 passed by the High Court of Delhi, was questioned by filing SLP(C)No.30380/2014, which was withdrawn with liberty to file review petition before High Court. It was clarified that this Court had not considered the merits of the petition..

22. The review application was preferred, which had been dismissed by the High Court vide order dated 19.12.2014. Thereafter, the present Civil Appeals have been filed, questioning the decisions of the main petition as well as the review petition.

23. An application being I.A. No.1/2015 in SLP (C)No.30380/2014, was filed for modification of Court's order dated 21.11.2014. This Court granted leave to file appeal registered as Civil Appeal Nos.13776-13777/2015 and kept alive I.A.No.1/15 to be decided at the time of final hearing of the present civil appeals.

24. Shri P.S. Patwalia, learned Additional Solicitor General appearing on behalf of the appellants, has urged that the order passed by

A the High Court is patently illegal. The posts were created not on 16.02.2009 but later on, one post was sanctioned by the President of India whereof letter was issued on 22.05.2009 and 3 other posts were sanctioned by the President of India, for which communication was issued on 23.06.2009. The DPC was held in the instant case in July, 2009. Thus, it is not a case where the provision of CGO 02/05 could have been applied. The High Court has gravely erred in law while holding that the provisions contained in CGO 02/05 would apply, not that of CGO 02/09. The date of DPC would be relevant date for consideration of prevailing administrative criteria for that purpose and it would not be the date on which the CCS met and approved the posts.

C 25. He submitted that it is not the case of amendment in the Rules. The Director General of the Coast Guard is competent to issue Coast Guard Order, as provided in Rule 2(d) of the Coast Guard (General) Rules, 1986 (in short 'Rules of 1986'). The said CGO did not require any approval of MoD and the amendment had been made in 02/09 which was in order to bring the instructions in tune with the Department of Personnel & Training ('DOPT' for short) for consideration of 5 years ACRs, in case they were not available in the rank in question from which promotion is to be made, the ACR of lower rank could have been taken into consideration. There was no malafide behind promulgating CGO 02/09. Several officers have been benefited by CGO, including respondent who was also one of the beneficiaries of the revised CGO for consideration, as his 5 ACRs in the post of DIG were not available for the post of IG. It was not to benefit IG-K.C Pande nor malafide, as has been held by the High Court.

F 26. It was further urged by learned Additional Solicitor General that the provisions contained in CGO 04/05 had been misconstrued by the High Court. As a matter of fact, the MoD had permitted to act as per the provisions contained in CGO 04/05. The decision is based upon misreading of para 54 and other provisions of CGO 04/05. The Director General Coast Guard was thus authorised to write ACR, as the previous incumbent had retired and was not available to act as a Reviewing Officer and he had written the ACRs of 32 officers of the DIG rank and 155 officers of the Commandant rank. Thus, the High Court has erred in law in setting aside the DPC held for the post of promotion to the IG. None of the juniors than the batch of the respondent had been promoted. Respondent No.1 had not been found fit in the subsequent DPCs held in H 2011-2012 and in those years also, none of his juniors had been promoted.

27. Shri B.P. Singh, learned counsel appearing on behalf of Respondent No.1, contended that once an SLP was filed in this Court and had been withdrawn, without liberty to file fresh SLP in this Court after dismissal of the review application, it is not open to the appellants to file the appeal. The same cannot be said to be maintainable. He has placed reliance on the decision of this Court in *Sandhya Educational Society and Anr. Vs. Union of India and Ors.*<sup>2</sup>.

28. It was further submitted by the learned counsel for the Respondent No. 1 that CCS was competent to approve and sanction the posts. Posts had been finally sanctioned on 16.02.2009. CGO, holding field at the relevant time, would hold good and DPC was required to take into consideration the ACRs, as contained in CGO 02/05. It was also strenuously contended that DGICG was not competent to act as Reviewing Officer and to write his report for the year 01.02.2008 to 31.01.2009, as the officer had not completed the required period of three months under him. Besides, the Reviewing Officer had taken into consideration the event of November, 2007. Thus, it is a case of going beyond the instructions contained in CGO 04/05 with respect to writing ACR. Thus, the ACR for the year 2008-2009 could not have been taken into consideration. The same stood vitiated. As such, the DPC held in July for the posts of IG had been rightly quashed by the High Court.

29. Besides, the counsel urged that the DPC was held on impermissible, inapplicable instructions. The instructions contained in CGO 02/09 were not applicable and directive of MoD had been violated. Earlier, the file had travelled to Defence Secretary when he had made the notings on 16.04.2009 that DPC be held as per instructions contained in CGO 02/05. Thereafter, the matter had not travelled to the Defence Secretary level and approval had been obtained from Joint Secretary for holding the DPC as per the changed criteria of ACR consideration, in CGO 02/09 which was promulgated on 23.06.2009 and it was not in force when the vacancies arose on 16.02.2009. Thus, it could not have been taken into consideration. The entire exercise of framing revised instructions, contained in CGO 02/09, was in order to benefit K.C. Pande, who was not fulfilling the criteria as per CGO 02/05, and the respondent would have stood superior in the merit on the basis of relevant gradings under the Head of the rank of DIG, which he was possessing at the

<sup>2</sup> (2014) 7 SCC 701

A relevant point of time.

30. The first question for consideration is whether the fresh Special Leave Petition can be said to be maintainable, in view of the withdrawal of the previous Special Leave Petition vide order dated 21.11.2014, which is extracted hereunder:

B “The learned counsel for the petitioners seeks leave to withdraw this Special Leave Petition with permission to file Review petition before the High Court.

Permission is granted. The Special Leave Petition is accordingly dismissed as withdrawn.

C It is clarified that we have not considered the merits of this petition.”

D 31. After dismissal of the review application before the High Court, a Special Leave Petition was filed afresh. Against the dismissal of the main Writ Petition and against the dismissal of the Review Application, Special Leave Petitions were filed and leave has been granted after hearing Respondent No.1 and two appeals have been preferred (C. A. Nos.13776-13777 of 2015). Though it was urged on behalf of appellant by ASG that it was earlier conceded by Shri Guru Krishna Kumar, learned senior counsel appearing on behalf of the respondent No.1 that the Special Leave Petitions would be maintainable and be considered on merits and they will not question the maintainability of Special Leave Petition on the technical ground. We are unable to accept the aforesaid contention raised on behalf of the appellant, as it was disputed by Shri B.P. Singh, learned counsel appearing on behalf of Respondent No.1. Even otherwise, the concession on legal aspect is of no utility. However, we find that leave was granted by this Court vide order dated 27.11.2015 in the Special Leave Petitions. Apart from that, we find that the application being I.A. No.1/15 had been filed on behalf of the appellants for modification of the order passed by this Court on 21.11.2014 and a prayer was made to modify the said order and to grant liberty to file Special Leave Petition afresh challenging the main order in case of dismissal of review application. For grant of such liberty in the present IA No.1/15, reliance has been placed on a decision of this Court dated 10.4.2015 in I.A No.3 in SLP(C)No. 25293/2013, in which this Court had modified a similar order dated 05.08.2013, so as to permit the petitioner to assail the main impugned order dated 20.12.2012, as also the order passed on review, in case the petitioner is unsuccessful in the review petition.

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32. In the facts and circumstances of the present case, when the leave to file appeal has been granted, we deem it appropriate to modify the order dated 21.11.2014 passed by this Court, to the effect that liberty is granted to assail the order passed by the High Court on 04.09.2014 in a fresh Special Leave Petition, in case Review application is dismissed. A

33. Though, reliance has been placed by the respondent on a decision of this Court in *Sandhya Educational Society's case* (supra), wherein it has been laid down that once Special Leave Petition has been withdrawn with liberty to file review application, without taking permission to file the Special Leave Petition afresh, main order cannot be questioned again. We need not enter into the question, as this question is referred to a larger Bench in "*Khoday Distilleries Ltd. and Ors. Vs. Mahadeshwara S.S.K. Ltd.*"<sup>3</sup>. However, as we have modified the order, the appeals are maintainable. B C

34. Coming to the merits of the case, the question to be considered is with respect to the date when the posts, in fact, can be said to be created in the instant case, i.e. on 16.2.2009, or when the President of India had sanctioned the posts on 22.05.2009 and 23.06.2009, the reliance has been placed by the respondent on the Government of India (Transaction of Business) Rules, 1961 (hereinafter referred to as '1961 Rules'), which have been framed in exercise of the powers conferred by Clause (3) of Article 77 of the Constitution of India. The respondent had relied upon the provisions contained in First Schedule of Rule 6(1) of the 1961 Rules, relating to Standing Committee on Security by which it has been given the power to deal with certain matters. D E

The relevant portion of the Schedule is extracted hereunder :

"8. Cabinet Committee on Security. F

(i) xx xx

(ii) xx xx

(iii) xx xx G

(iv) xx xx

(v) to review the manpower requirements relating to national

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<sup>3</sup> (2012) 12 SCC 291

A security including proposals concerning creation of posts carrying the pay scale or pay band plus Grade Pay equivalent to that of a Joint Secretary to the Government of India and higher and setting up new structures to deal with Security related issues;”

B 35. On the other hand, learned Additional Solicitor General appearing on behalf of the appellant has relied upon the communication dated 22.05.2009, conveying sanction of the President of India, creating one post of Commander, Coast Guard Region (North West) in the rank of Inspector General (General Duty) in the Pay Band Rs.37,400-67,000 plus Grade Pay Rs.10,000/-, by the Under Secretary to Government of India, written to Director General, Indian Coast Guard, Coast Guard C Headquarters, New Delhi and also communication dated 23.06.2004 with respect to 3 posts.

36. He has further relied upon Rule 11 to Delegation of financial Powers Rules, 1978, which lays down as follows :

D “11. Creation of posts:

(1) Notwithstanding anything contained in these rules, no post shall be created –

(a) xx xx

E (b) xx xx

(c) On a permanent basis, save with the previous consent of the Finance Ministry, unless savings in the succeeding years can be established for this purpose. xx xx”

F Reliance has also been placed on Office Memorandum dated 30.05.1985 of Ministry of Finance, Department of Expenditure, with respect to creation of posts following portion has been relied upon:

“Creation:

G (1) Proposals for creation of non-plan posts of Secretaries, Special Secretaries, Additional Secretaries, Joint Secretaries or equivalent require the approval of the Cabinet (after offering matching savings by abolition of posts of the same group or in immediate line of promotion) and for this purpose administrative Ministries are required to prepare a draft Note for the Cabinet and refer the same to the Department of Expenditure for examination and

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getting approval of the Finance Minister before the same is submitted by the administrative Ministry (after incorporating views of Finance Ministry) to the Cabinet for approval.” A

Thus, it was submitted on the aforesaid Office Memorandum and sanction of the Finance Ministry was supposed to be there when the matter came up for consideration, before CCS. B

37. It is apparent from the aforesaid Rule 11(i)(c) and the Office Memorandum dated 30.05.1995, which has been referred to by the learned counsel for the parties, that financial sanction is necessary for creation of posts. In the instant case, it was not the case set up by the respondent that the financial sanction was already granted before the matter was placed before CCS. The High Court has also not found that financial sanction was granted before the matter was placed before CCS. In our opinion, posts can be said to be created finally when President’s approval was conveyed vide communications dated 22.05.2009 and 23.06.2009 as provided under Article 77 of the Constitution of India. Be that as it may, even if we assume for the sake of argument that sanction had been granted by the Finance Ministry before the matter was placed in CCS and CCS had finally created posts on 16.02.2009 that would not tilt the matter in the instant case in favour of Respondent No.1 for the reasons to be mentioned hereafter. C D

38. Firstly, it is not the case of the change of any Rules and where appointment procedure had been initiated by issuance of an advertisement and Rules had been amended subsequently or the procedure for promotion had been delayed, this Court has taken the view that the Rules which were in existence, when the vacancies arose, should be taken into consideration until and unless otherwise specifically so decided. In the case of Y.V. Rangaiah (Supra), there was a delay in preparing list for promotion which was required to be prepared by September, 1976. It was prepared in 1977 after amendment of Rules for promotion. By virtue of amendments, original rule for considering LDCs with UDCs for promotion was deleted. The amendment affected promotional chances of the LDCs, Hence, the vacancies which arose in 1976 were ordered to be filled from eligible persons including LDCs. Situation in the instant case is different, there is no amendment made in the Rules for promotion and only ACR criteria has been changed. Thus, ratio of Y.V. Rangaiah (supra) is not attracted. In our considered opinion, the posts in question had been created only in the year 2009. They were not in existence E F G H

A earlier. There was no delay in calling DPC. Thus, determinative date for applicability of procedure would be the date of DPC. The CGO 02/09 which was issued after exercise of 4 years was in force. Thus, the High Court has committed grave error in law in holding that the CGO 02/05 should be applied and complied with, particularly, when the date of DPC was 23.07.2009. It is the date of DPC which matters in the instant case and the procedure which is prevalent on the date on which the DPC is held is applicable. Thus, the provisions contained in CGO 02/09 would hold the field and DPC was rightly held as per instructions relating to ACRs contained in CGO 02/09.

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C 39. There is yet another aspect which is required to be taken into consideration. The Coast Guard (General) Rules, 1986 defined meaning of Coast Guard Order to mean:

“Rule 2(d). “Coast Guard Order” means the order issued by the Director General.”

D When the CGO is issued by the Director General, it does not require any approval of Ministry of Defence, as no such approval is provided under Rules of 1986 and bare reading of the aforesaid provision makes it clear that the Director General Coast Guard can issue such an order like CGO 02/09. Otherwise also, it is clear from communication of Coast Guard, that matter was sent to MoD for information. In the copy of the notings of Inspector General dated 18.5.09, filed by the respondent as Annexure R-20, para 5 indicates that the revised CGO had been sent to the MoD only for the purpose of information. Para 5 is extracted below:

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F “5. Further, various provisions of CGO 02/2005 relating to guidelines for promotion to various ranks of CG officers have been revised as per current service requirements and with a view to boost the morale of officers. A copy of revised CGO is placed opposite for information.”

G 40. The CGHQ notings dated 16.06.2009 to MoD, indicating changes in procedure reads thus,

“3. It is pertinent to mention here that the provisions of CGO 02/2005 regarding number of looks/release of vacancies only were approved at the level of JS (Navy) prior promulgation of the aforesaid CGO. The changes in these provisions of CGO 02/

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2005 as incorporated in CGO 02/2009 have been brought to the notice of MoD prior its promulgation vide note 13 ante. A

4. It is intimated that the revised guidelines for promotion as incorporated in CGO 02/2009 will be made applicable for promotion to various ranks during 2009 onwards. CGO 02/2009 will be promulgated to all regions prior conducting the DPCs for various ranks as per the revised guidelines.” B

41. Ministry has mentioned in notings of 17.06.2009 that matter of promotion was submitted for approval of the Defence Secretary and Defence Secretary has earlier approved the filling up of all posts as per instruction 02/05. However, in our opinion, CGO 02/09 did not require approval of MoD. It was not sent for the purpose of approval but it was sent only for the purposes of information. C

42. The respondent had also relied upon the Government of India's Ministry of Defence Delegation of Administrative Powers by Coast Guard Headquarter's order dated 17.08.2001. The Same is extracted hereunder D

“ No. 11(15)/2001/US(Pers)/D(Navy-II)  
Government of India  
Ministry of Defence  
New Delhi, the 17<sup>th</sup> August, 2001

To,

The Director General Coast Guard,  
Coast Guard HQrs.  
New Delhi.

Subject:-Delegation of Administrative Powers to Coast Guard Hqrs.

Sir,

1. In supersession of all previous orders, sanction of the President is hereby conveyed to the delegation of administrative powers to Coast Guard HQs in respect of the subjects listed in Annexure 'A' to this letter. The delegated powers which have financial implications will be exercised in consultation with Integrated Finance of MoD i.e. Ministry of Defence (Finance). G

2. Necessary amendments to existing rules/regulations on the subject will be made in due course of time. The authentication H

A Authority referred to in Annexure-A to this letter would need clearance from Ministry of Home Affairs.”

B 3. This issues with the concurrence of the Ministry of Defence(Finance) vide their UO No.613/NB/2001 dated 17<sup>th</sup> August, 2001.

(Anjani Kumar)  
Deputy Secretary to the  
Government of India

C Delegation Of Administrative Powers To  
Director General Coast Guard.

Sl. No.	Subject	Approving Authority	Authenticative Authority
1-17	....	....	....
18	Promotions of officers up to the rank of DIG	DG Coast Guard	Dy Dir/ Asstt. Dir

*(emphasis added)*

F It is apparent from the aforesaid delegation of powers that Ministry of Defence has to be consulted only when there are financial implications while issuing CGO, not otherwise.

G 43. Since there was financial implications for the creation of posts, administrative clearance had already been granted and by virtue of grant of sanction by the President of India, posts came to be created and before that, matter must have travelled to Ministry of Finance. The order dated 17.08.2001 is with respect to Delegation of Administrative Powers putting the rider of consultation of MoD(finance), when matter has financial implication and not with respect to issuance of CGO 02/09,

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pertaining to ACR criteria, which had no financial implication for issuance of which DGICG was fully competent under the Rules of 1986. Thus, it was not necessary for the CGO, not having financial implications, to travel for approval to the Ministry of Defence (Finance). A

Be that as it may, the fact remains that earlier when the Secretary of MoD considered the matter on 16.04.2009, the CGO 02/09 was not promulgated. Once the CGO 02/09 has been promulgated, it would hold the field, not the order dated 16.04.2009 of Secretary, MoD. The promotion is required to be considered as per law not as per the decision of administrative authorities. The DPC which was held in the month of July, 2009, in our opinion, was required to be held as per CGO 02/09 and it was rightly so held. B C

44. Coming to another unsavory comment made by the High Court with respect to violation of CGO 04/05 and notings of Secretary with respect to review of ACR for 2008-2009. The High Court has clearly misread not only the notings made by the Secretary, MoD, but also the provisions of para 54 of the CGO order 04/05. First, we extract the provisions contained in para 54 of CGO 04/05 hereunder: D

“54. Section VI and VII. Authorities who are required to endorse these sections are given in Appendix ‘A’ to this Order. These sections have been provided for the remarks of the reviewing officers and senior reviewing officers. They are also to enter their assessment of the promotion potential of the officer in the box provided. In the event present RO/SRO has not observed an officer for a minimum period of three months such reports be reviewed by previous incumbent RO/SRO provided he is still in service. In case where previous RO/SRO may have retired or is otherwise not available for reviewing the report, a notation to that effect be made by IO/RO in the relevant column to enable the present RO/SRO review such reports.” E F

A bare reading of the aforesaid provisions in para 54 makes it clear that if the Reviewing Officer has not observed an officer for a minimum period of three months, review can be done by previous officer provided he is still in service. It is not disputed in the instant case that, Shri R.F. Contractor, the previous incumbent, who was holding the post of DGICG, had retired on 30.11.2008 and on 01.12.2008 the present incumbent came to hold the said post who had not completed 90 days. It G

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A is apparent, in case previous incumbent had retired or is otherwise not available to review report a notation remarks to that effect, has to be made by the RO in the relevant column to enable the present RO to review such report. No doubt, such notation was required to be made so as to reflect the competence of officer to write review as general permission was sought in this case to write review of ACRs of large number of officers that amounted to notation for purpose of reviewing the ACRs. Admittedly, previous incumbent had retired. He was not available to make the said notation in the relevant column and not making the notation in the relevant column by present incumbent would be inconsequential since, admittedly, the previous incumbent had retired and thus was not available to write the review. Obviously, the review could be undertaken in the facts of the case by DGICG before completion of 90 days mandatory period. Thus, the officer DGICG, who had not completed 90 days, was competent as apparent from the notings of Secretary.

D The following matter was placed for consideration before the Ministry of Defence :

“File Note 3 of MoD dated 16.04.2009 also states as under:

E “Vice Admiral Anil Chopra AVSM has taken over as DGICG on 1<sup>st</sup> December, 2008 Vice Admiral RF Contractor, retired on superannuation. The review of ACRs of Coast Guard Officers from whom the report is due as on 1<sup>st</sup> February 2009 need not be carried out by the incumbent DGICG as has not rendered 3 months of service to observe their workings on the date of the report due.”

F File notings dated 21.04.2009 by Shri R.K. Sharma, Deputy Director (Personnel), OA&R, Coast Guard Headquarters at para 2 is also significant, which reads as under:-

G “In this connection, it is intimated that there has been no precedent where special dispensation has been sought from MoD on the subject matter.”

The Under Secretary (CG)/MoD in his note dated 22.04.2009 states that:-

H - In view of the above, we may inform CGHQ to follow the instructions contained in CGO 04/05.”

45. Thereafter, the matter travelled to Ministry of Defence and Defence Secretary and the Director. The Ministry of Defence communication dated 23.4.09 is as extracted below: A

“Ministry of Defence  
D (CG-R)

Subject: Review of ACRs – Coast Guard Officers B

CGHQ may kindly refer to their Note No. OF/0303/ACR dated 13<sup>th</sup> April, 2009 on the subject mentioned above.

2. Review of ACRs by the Officer who has not observed the CG Officers for three months may be completed as per provisions of the CGO 04/2005. C

(V.K.Tiwary)  
Director (N-II)  
DDG/CGHQ

M of D ID No.472/D(CG-R)09 dated 23<sup>rd</sup> April, 2009” D

It is apparent from the aforesaid note dated 22.04.2009, that review of the officers, who has not observed, may be completed as per provisions of 04/05, i.e., in accordance with para 54 of the CGO 04/05.

46. The High Court has misread the decision of the MoD and the order of Secretary. In fact, the Secretary, Ministry of Defence has also said in the notings that ACRs be completed as per CGO 04/05. CGO 04/05 authorized the current incumbent the DGICG to write the ACRs. Thus, the High Court has gravely erred in law in holding otherwise by misreading the notings as well as the provisions of para 54 of the CGO 04/05. There was no question of violation of the direction issued by the Secretary, MoD. CGO 04/05 was final, which hold field, and the action was in terms of the order as well as in accordance with said notings of Secretary, MoD. E F

47. Thus, in our opinion, the High Court ought not to have cast aspersions on the bonafide of DGICG, particularly, when he has reviewed not only the ACR of the concerned officer but 36 officers of the DIG rank and of 155 officers of Commandant rank. The observations made by the High Court about unauthorized exercise of power were totally uncalled for. G

48. Coming to the question of correctness of remarks made by H

A the reviewing officer, it appears that the period of ACR was 01.02.2008 to 31.01.2009, the DGICG had mentioned that -

B “the officer has put in a creditable performance at sea. His Ship accomplishment have been a trifle diluted by a few accidents and incidents. A hardworking, dedicated officer, who is articulate and sincere to his profession. Somewhat over assessed by the IO. I have maintained the numerical grading of my predecessor.”

C We do not find anything adverse in the aforesaid comments made by the reviewing officer with respect to any particular incident of November 2007. One of the incidents relating to ship had taken place in November, 2007 with respect to that show cause was pending and was finalised later on. Other incident relating to ship, which was mentioned in the appraisal report, was of the year 2008, which was of the relevant period. Be that as it may, the notings, which have been made, does not show any prejudice on the part of the DGICG, in particular when he has maintained the numerical gradings made by his predecessor. It is apparent from the facts that there were 3 posts of general duty branch and the respondent was placed at serial No.4, among the general duty branch and thus, was left out. It is also apparent that criteria has not been changed in order to oblige IG-K.C. Pande as apparent from the fact that DPC had considered the cases of DIGs of the ranks, seniority up to 31.10.2005. The batch of the respondent comprised of 5 officers including him, which had completed 5 ACR of DIG. Respondent IG-K.C. Pande had only three reports, i.e., for the years 2005, 2006 and 2008 in the rank of DIG. Thus, all the 5 officers of the respondent batch were considered in accordance with para 7 CGO 02/09, which is extracted hereunder :

F

CGO 02/2009

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“7. The suitability for promotion shall be based in relevant service records and performance as reflected in the last five years confidential reports in the current rank. If sufficient ACRs are not available in current rank, consecutive 05 ACRs including those of previous rank will be considered. However, in case of Commandant (JG) the ACR years in the current rank will only be considered.”

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49. The High Court has misdirected itself in attributing uncalled for malafide, behind promulgation of the CGO 02/09. As already held, it was in order to bring the same in tune with the instructions issued by the Department of Personnel and Training. Earlier too, similar provision as that of para 7 of CGO 02/09 existed in CGO 14/02 before issuance of CGO 02/05. The process was initiated for issuance of CGO 02/09 w.e.f. 2005, it was not that all of a sudden the exercise had been undertaken in order to oblige any particular officer. We find no merit in the appeal preferred by DIG K.P.S. Raghuvanshi. We allow the appeals of Union of India and the appeal preferred by DIG K.P.S. Raghuvanshi is dismissed.

50. Resultantly, we set aside the impugned order passed by the High Court. However, we clarify that aspersions made by Respondent No.1 against the higher officers, shall not be taken into consideration and though, it appears that his performance was good but he had not been found fit on the basis of comparative merit. As and when occasion arises, the appellants shall consider the case of Respondent No.1 sympathetically, in accordance with law, for further promotion to the post of IG. He shall not be victimized for filing the petition and be given his due, as per merits.

51. The Civil Appeal Nos. 13776-13777/2015 and I.A.No. 1/ 2015 in SLP(C) No. 30380/2014 are, accordingly, allowed. The appeal preferred by DIG K.P.S. Raghuvanshi, Civil Appeal No.13378/2015 is dismissed.

All pending applications shall stand disposed of.  
No costs.