

AFRCourt No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****O.A. No. 248 of 2011**Monday, the 08<sup>th</sup> day of January, 2018**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**Mohammad Arif (736957-F Ex Sgt), House No 538K/442-I, Tulsipuram,  
Triveni Nagar First, Lucknow-226020 (UP)

.... Applicant

Ld. Counsel for the : **Shri Shailendra Kumar Singh, Advocate.**  
Applicant

Verses

1. Union of India, Through Secretary Ministry of Defence, New Delhi.
2. The Chief of the Air Staff, Air HQ (VB), New Delhi-11.
3. Air Officer Commanding, Air Force Record Office, Subroto Park, New Delhi-10.
4. 738958 B Sunil Nair Through AOC, AFRO, Subroto Park, New Delhi-10

...Respondents

**Shri Amit Jaiswal and Ms Amrita Chakraborty**, learned counsel for the respondents, assisted by **Wg Cdr Sardul Singh**, OIC Legal Cell.**ORDER (Oral)**

1. Being aggrieved with the denial of promotion to the substantive rank of Sergeant, the applicant has preferred the present O.A. under Section 14 of the Arms Forces Tribunal Act, 2007.

2. We have heard Shri Shailendra Kumar Singh, Ld. Counsel for the applicant and Shri Amit Jaiswal and Ms Amrita Chakraborty, Ld. Counsel for the respondents assisted by Wg Cdr Sardul Singh, OIC Legal Cell and perused the records.

3. So far as factual position is concerned, it has not been disputed by the respondents that the applicant was enrolled in Indian Air Force as Airman on 23.07.1990. He was promoted to the substantive rank of Cpl on 30.07.1995 in pursuance to provisions contained in AFI 12/S/1948 issued by Government of India, Ministry of Defence. From August 1996 to March 1998 the applicant had passed Sgt promotion examination. He had completed 08 years of service on 22.07.1998 on the rank of Cpl which is a condition precedent to be considered for promotion to the rank of Sergeant. According to the applicant's counsel after completion of 04 years of service or even 08 years the applicant was entitled to be considered for substantive rank of Sergeant in terms of AFI 12/S/1948. However, he was appointed to the rank of acting Sergeant on 01.02.2004. Submission is that since substantive post was available he should have been promoted substantively instead of promoting him as acting Sergeant in pursuance to AFI 12/S/48. Later on applicant passed JWO promotion examination between January 2006 to June 2006. On 01.02.2008 applicant had completed more than 16 years of service out of which, four years' service in the rank of Sergeant. He became eligible for promotion to the substantive rank of JWO in terms of AFI 12/S/48. In the years 2008 to 2009 juniors to the applicant were promoted to the rank of JWO in terms of Air Force Promotion Policy. It is also argued that during the years 2009-10 juniors to him were promoted to the rank

of JWO in terms of Air Force Promotion Policy. However, applicant was granted promotion to the substantive rank of Sgt after completion of 18 years and 11 months of service in terms of AFI 12/S/48. It is also argued that persons junior to him were promoted to the rank of JWO in terms of AFI 12/S/48 between 2010-2011. On 30.07.2010 the applicant was placed ROG under Section 26 of the Air Force Act, 1950 and thereafter he was discharged after completion of his initial engagement on 30.07.2010. Representations submitted by the applicant in this regard were rejected by the impugned order dated 18.02.2011, by which he was claiming the substantive rank of Sgt after completion of 08 years. Feeling aggrieved against which the applicant has filed the present O.A.

4. Ld. Counsel for the applicant has invited our attention to paras 15 and 16 of AFI 12/S/48, relevant portion of which is reproduced as under:-

*“15. Substantive Promotion. Groups I to IV (reconstituted from earlier groups I to V)-Service for the Purpose of promotions will reckon from the date of commencement of ab-initio course in which an airman successfully passes out. Enrolment date will, however, reckon for all purposes other than seniority for promotion, such as pay, allowances, pension, gratuity etc. In the case of airmen reporting late for the course, the seniority for promotion will reckon from the actual date of reporting, except that the following categories of airmen joining the ab-initio training after the basic phase will be deemed to have joined that training from the date of its commencement for the purpose of reckoning seniority for promotion.*

*(a) Airmen who were initially selected and detailed for training in technical trades, but are subsequently re-allotted non-technical trades on being found unsuitable for technical trades after they have successfully undergone the basic phase.*

*(b) Airmen who are remustered to non-allied trade in higher trade/groups. Provided the airmen are otherwise considered fit, the normal periods of substantive promotion will be as under:-*

*(i) Promotion to Corporal will be confined to LACs who served in that classification for 3 years or have*

completed 5 years total service and have passed the appropriate tests.

(ii) Promotion to Sgt will be made by selection within the authorized establishment and will be confined to Corporals who have served in that rank for 4 years or have completed 8 years total service.

(iii) Promotion to JWO will be made by selection within the authorized establishment and will be confined to Sgts who have served in that rank for 4 years or have completed 16 years total service whichever is later.

(iv) Promotion to WO will be made by selection within the authorized establishment will be confined to JWO with two years service as such.

16. Acting (paid) Promotions

(i) Acting paid promotions will be made when establishment vacancies exist but individuals of requisite ranks are not available for substantive promotion. Acting rank will not become paid acting rank until it has been held for a continuous period of 28 days, when it will be converted into paid acting rank with retrospective effect. Provided the airmen are otherwise fit and until further orders the minimum qualifying period which will be rendered and airmen eligible for consideration for acting (paid) promotion to higher ranks will be as given below:-

Group I, II and III-1 year's minimum service in each rank (substantive, temporary or acting).

Example- An individual who has completed one year's service as a Corporal (Substantive, temporary or acting) may be promoted to Acting (paid) Sergeant.

GROUP IV AND V

LAC TO CPL 1 ½ years service as LAC.

CPL TO SGT 1 ½ YEARS SERVICE AS CPL  
(Substantive, temporary or acting)

SGT TO JWO 1 year's service as Sgt (substantive,  
temporary or acting)

JWO to WO 1 year's service as Flt Sgt  
(Substantive, temporary or acting).

(ii) In exception cases, the above period may, however, be relaxed at the discretion of the Officer i/c R.I.A.F Records, in the case of airmen of the rank of Sgt and below and by Air Headquarters in the case of Flt Sgt and above.

(iii) An airman, who has been granted acting (paid) rank will retain it during leave, sickness or temporary duty, unless it found essential in the interest of the service to post

another airman of that rank in his place in which case the absentee airman will relinquish his acting rank.

(iv) An airman is, however, to relinquish the acting (paid) rank, if he is posted to a vacancy established in a lower rank.

(v) If the airman is posted to another unit unless he is posted to fill a similar establishment vacancy at his new unit, in which case the draft note will be endorsed to state that the acting rank is retained on posting, he shall relinquish the acting rank held. Grant of the rank of the new appointment will be subject to the conditions specified in clause (i) above.

(vi) (I) Absence due to sickness (excluding wounds and attributable injuries): Retention of acting. An airman, whose sickness is not due to his own fault will retain his acting paid rank for a maximum period of two months as under:-

(a) Whilst in India. Against the unit establishment for the first 28 days and supernumerary to establishment for the balance of two months.

(b) Whilst on duty ex-India. Supernumerary to the establishment for the entire period of his sickness from the first day of absence from duty.

(II) Absence on account of wounds or injuries. If an airman ceases to perform his duty on account of wounds or injuries attributable to Air Force service he will retain without counting against the establishment of his unit for formation, his acting paid rank from the date of first absence from duty for a period of four months or until re-posted to duty, whichever is earlier.

(vii) The acting rank will also be relinquished if there ceases to be a vacancy in the establishment owing to the posting of his unit of an airman of appropriate acting or substantive rank or to a reduction in the establishment of the unit.

(viii) If the airman is considered by his CO to be unsuitable to continue to hold the acting rank, he will be reverted to his substantive rank. In such cases, the authority of the AOC Group concerned is to be obtained before reversion is effected.

(ix) If the airman ceases to perform the duties of the acting rank through being placed in open or close arrest (including being placed in custody by the civil power), he will immediately revert to his substantive rank. If, however, he is subsequently acquitted, or for any reasons is not brought to trial, he may be re-appointed to fill the establishment vacancy with effect from the date of acquittal.

*Note: When under the provisions of sub-para (ix) above an airman relinquished his acting rank on ceasing to perform the duties of that rank, another airman who succeeds him during the period of arrest should be given acting rank appropriate to the post held by him subject to, however, to fulfillment of conditions specified in clause (i) above. In the event of the conviction of the former the later may continue in his paid acting rank from the date he assumed his duties but in the event of his acquittal, the airman granted acting rank for the intervening period, will revert to his substantive rank from the date the arrested airman is acquitted.*

(x) (a) Courses of Less than 10 weeks duration

*Airmen including WOs and MWOs proceeding on a course of instruction of less than 10 weeks duration will remain on the strength of their units and retain any acting rank and no acting promotion being made in their place.*

(b) Courses of 10 weeks duration or more

*Airmen including WOs and MWOs proceeding on courses of instruction of 10 weeks duration or more, other than commissioning courses, will be carried supernumerary to the units authorized establishment with effect from the date of joining the course.*

*Any paid acting rank held may be retained by such WOs and airmen for the duration of the course, provided that :-*

(i) *It has been held continuously for a period of one month immediately before the date of joining the course, and*

(ii) *The acting rank is not higher than the minimum rank for the appointment for which the course is designed as preparation.*

*Airmen including WOs and MWOs will relinquish their acting rank when proceeding on commissioning courses.*

(c) Acting promotion in replace of airman proceeding on course of instruction of 10 weeks duration or more

*Acting promotion in replacement will be permissible to all ranks in respect of airmen proceeding on commissioning courses. In other cases, acting promotion will be permissible only upto the rank of WOs.*

(xii) *On substantive promotion to a higher rank, the periods already served in that rank in acting paid or temporary capacity will count collectively for determining the initial pay of the airmen in that rank.*

*Example : Cpl (Acting Sergeant) Joseph, Fitter IIA (Group I) promoted to A/Sgt on 14.12.14*

*Relinquished acting paid rank on 31.5.45          6 months*  
*Promoted again A/Sgt on 1.8.45                      6 months*  
*Relinquished Acting paid rank on 31.1.46*  
*Promoted substantive Sgt on 1.2.47*  
*Initial pay fixed as Sergeant at Rs 165/- p.m. ”*

5. The Government of India, Ministry of Defence in para 16 of the AFI 12/S/48 made rule that “acting paid promotion will be made when establishment vacancies exist but individuals of requisite rank are not available for substantive promotion”

6. Emphasis has been given to aforesaid provision of AFI 12/S/48 which at the face of record indicates that an acting promotion can be done only on the availability of substantive vacancies that too if individual of requisite ranks are not available. It is vehemently argued since applicant was available with requisite criteria he should have been promoted on the substantive rank of Sgt whereas promotion have been made on acting rank by the respondents. Ld. Counsel for the applicant has invited our attention to three Apex Court judgments reported in AIR 1981 SC 947 **Capt Virendra Kumar vs Union of India**, AIR 1987 SC 212, **CaptRachpal Singh vs Union of India** and AIR 1992 SC 763, **Lt Gen RK Anand vs Union of India & Anr** and certain other cases wherein their Lordships of Hon’ble Supreme Court held that Air Force Instructions (supra) have got statutory force. While opposing this argument, it has been vehemently argued by Ld. Counsel for the respondents Ms Amrita Chakraborty assisted by Wg Cdr SardulSingh, OIC Legal Cell that AFI 12/S/48 lacks statutory force and is not mandatory. Learned counsel for the respondents has relied upon a judgment of Delhi High Court in WP © No. 6943/ 2003 **JWO AK Singh vs. Union of India and others** and other connected matters therewith, a special leave petition against which has been dismissed by the Hon’ble Supreme Court. On the compilation of AFI from

1947 to 1956 it has been submitted by the learned counsel for the respondents that it may be inferred that AFI was issued by the Government of India, Ministry of Defence even after enforcement of Indian Constitution. It shall be appropriate to reproduce certain portions of introductory portion of the AFI No.9/S dated 25.07.1947, AFI No.1/S dated 10.01.1948 and AFI No.4/S dated 01.04.1948 followed by AFI No.8/S dated 11.06.1948, AFI No. 11/S dated 18.06.1948 and AFI No. 5/S/56 dated 27.11.1956, which are as under:-

“AIR FORCE INSTRUCTION (INDIA)

No.9/S

New Delhi, the 25<sup>th</sup> July 1947

9/S. Hospital Stoppages- R.I.A.F. Officers and their families

With effect from the 1<sup>st</sup> July 1947 the rates of hospital stoppages in respect of R.I.A.F. Officers and their families will be as follows:-

.....”

“AIR FORCE INSTRUCTION (INDIA)

No.1/S

New Delhi, the 10<sup>th</sup> January 1948

1/S. Re-enrolment of R.I.A.F. Non-Combatants (Tech.) personnel as combatants- terms and conditions of service

It has been decided to abolish the category of Non-combatant (enrolled) Technical Personnel. Serving Non-Combatant (enrolled) Technical personnel will have the option of electing:-

.....”

“AIR FORCE INSTRUCTION (INDIA)

No.4/S

New Delhi, the 1<sup>st</sup> April 1948

4/S. Grant of advances to Government servants, who have lost their personal effects during transfer from West Pakistan to India, to enable them to reequip themselves.

The provisions of Government of India, Ministry of Finance Office Memo. No.F. 43 (46)- Est. V/47 dated 20<sup>th</sup> November 1947 (reproduced as an Annexure to this Instruction), will also apply to the corresponding staff paid from the Defence Services Estimates.

.....”

“AIR FORCE INSTRUCTION (INDIA)

No.8/S

New Delhi, the 11<sup>th</sup> June 1948



8/S. Treatment of overstayal of leave due to the disturbances in respect of civilians of Defence Services

All cases of overstayal of leave by the civilian personnel of Defence Services (to whatever community they may belong) owing to disturbances subsequent to 1<sup>st</sup> August 1947 will be deal with as indicated below:-

.....”

“AIR FORCE INSTRUCTION (INDIA)

No.11/S

New Delhi, the 18<sup>th</sup> June 1948

11/S. Grant of Advances to Air Force Personnnel including non-combatants (enrolled) who have lost their personal effects during transfer from West Pakistan to India to enable them to re-equip themselves.

.....”

“AIR FORCE INSTRUCTION (INDIA)

No.5/S/56

New Delhi, the 27<sup>th</sup> November 1956

5/S. Regulation of pensionary awards under the new pension code in certain types of cases

.....”

7. Attention has been invited on behalf of the respondents to the promotion policy dated 23.09. 2002. A perusal of the aforesaid promotion policy shows that it has been issued by Air Headquarters, Vayu Bhawan, New Delhi and not by Government of India, Ministry of Defence. According to which prior to issuance of this promotion policy promotions for personnel below officer rank in the Indian Air Force were based on specific minimum length of service, seniority, minimum performance criteria, medical fitness and passing of relevant promotion examinations. It also indicates that the new promotion policy is merit based, hence all airmen, must endeavour to fulfil the required conditions and pre-requisites of eligibility for promotion to the next rank. Para- 6 of promotion policy dated 23.09.2002 deals with distribution of vacancies. For convenience Paras- 1 to 6 of promotion policy dated 23.09.2002 are reproduced as under :-

1. Presently promotions for Personnnel Below Officer Rank in the IAF are based on specific minimum length of service, seniority7, minimum performance criteria, medical fitness and passing of relevant promotion exam. The aim of this policy is to bring about a competitive/

healthy work culture, in which hard work and merit with due weightage to seniority would be the criteria for promotions to a higher rank. Since this New Policy is merit based, all airmen, must endeavour to fulfil the required conditions and pre- requisites of eligibility for promotion to the next rank.

**“ Eligibility Criteria for Promotion.**

2. All airmen who have completed the minimum length of service as mentioned below for promotion to next higher rank (except to the rank of Sgt) as on 30 Jun of the year, preceding the promotion panel year would be considered for promotion (e.g. 30 Jun 03 for promotion year 2003 - 04): -

<u>Rank</u>	<u>Min length of service</u>
(a) Sgt to JWO	17 Yrs
(b) JWO to WO	23 Yrs
(c) WO to MWO	28 Yrs

3. Promotions in the following trades will be governed by AFIs as indicated against each. However, other eligibility conditions such as merit, distribution of vacancies, promotion examinations, medical fitness etc would be governed by this policy :-

(a) Flt Eng	: AFI 19/62 (Amended vide Corr 3/95)
(b) Flt Gun	: AFI 2/ 98
(c) Flt Sig	: AFI 9/56 (Amended vide Corr 4/95)
(d) P J I	: AFI 147/50
(e) Edn Inst	: AFI 19/69
(f) GTI (S)	: Relevant Policy Letter.

**Minimum Service in Present Rank**

4. Minimum service in present rank would be governed as per AFI 12/S/48. The minimum service of one year in present rank is required to be completed as on 30 Jun of the year preceding the promotion panel for the next promotion. For example, an airman who gets promoted to the rank of JWO on 01 Aug 02 and is meeting the criteria for promotion to WO rank, would not be considered for promotion in the promotion year 01 Jul 03 since the subject JWO would not have held the present rank of JWO for complete one year, as on 30 Jun 03.

**Time-Frames for Promotion**

5. Time-frames for promotion for the purpose of redistribution of vacancies would be under the following categories, rank wise: -

Grade III	Grade II	Grade I
(a) Sgt to JWO 17-19th Yr	20th-23rd Yr	Above 23

- (b) JWO to WO 23-25<sup>th</sup>Yr                      26<sup>th</sup> -29<sup>th</sup>Yr Above 29 Yr  
(c) WO to MWO 28-30<sup>th</sup>Yr                      31<sup>st</sup> -34<sup>th</sup>Yr Above 34 Yr

Notes: 17-19<sup>th</sup>Yr implies 17 yrs of service to less than or equal to 19 yrs of service. 20<sup>th</sup> -23<sup>rd</sup>yr implies 19 yrs one day of service to less than or equal to 23 yrs of service.

Eg. If DOE is 01 Jul 84

Length of service as on 30 Jun 2003 is 18 yrs 11 months 29 days, therefore, airman will be eligible for promotion form Sgt to JWO in Grade III.

### **Distribution of Vacancies**

6. The vacancies would be allotted in the proportion of 1:3:6 for Grade 3: Grade 2: Grade1: respectively. Thus, 60% of the vacancies would be for the senior most groups, 30% for the middle level and 10% for the relatively junior level. A similar method would be employed for promotion to WO and MWO ranks. If the total vacancies are less than 10 in a year, the distribution of vacancies for a particular rank and trade between Grade III, Grade II and Grade I categories would be in the ratio of 0:1:2. However, if the total trade-wise/rank wise vacancies for a year are equal to or more than 10, then the ratio would be 1:3:6. For any trade and rank, if the number of eligible airmen are less than the number of available vacancies, then the excess vacancies would be distributed as under:-

(a) If Grade I vacancies are in excess, redistribution between Grade III: Grade II would be 1:3.

eg. Trade =AF Fit                      :                      Rank = Sgt

No. of Grade I eligible airmen                      = 6

No. of Grade I vacancies                      = 85

Excess vacancies (85-6)                      = 79

Redistribution of excess vacancies Grade II and Grade III would be as follows:-

Grade III: Grade II (at 1:3)                      = 20:59

(b) If Grade II vacancies are in excess, distribution between Grade III: Grade I would be 1:6.

(c) If Grade III vacancies are in excess, distribution between Grade II: Grade I would be 1:2. ”

8. A perusal of aforesaid policy shows that it is acting promotions policy without taking into account promotion as per AFI 12/S/48, according to which acting promotion shall be made according to merit. Attention has been invited to another promotion policy dated 15.05.2007, followed by promotion policy

dated 14.01.2015. According to Para-40 of promotion policy dated 14.01.2015 the Air Head Quarters has changed the promotion policy, making 15 years substantive service necessary for promotion to the rank of Sergeant. For convenience Para- 40 is reproduced as under :-

40. The eligibility for substantive promotion to the rank of Sgt, JWO, WO and MWO will be determined through a Board of Officers convened twice in a year at AFRO. Generally, seniority of an airman for grant of substantive promotion may remain same as drawn previously while considering relevant acting paid promotion. However, an airman's eligibility may change, if he has incurred any conduct entry including censure during the intervening period (i.e. after grant of acting paid rank and prior to release of substantive rank). Hence, the BOO is to ascertain the following: -

(a) MPC will be 297 and 416 marks for substantive promotion to the rank of Sgts and JWO / WO / MWO respectively. This will be determined by taking into account total AR marks, weightage for Honours & Awards and negative marks for conduct entries including censures, if any, as stipulated for acting paid promotions in this policy.

(b) Conduct entries including censures incurred, if any, during intervening period, i.e. from date of acting promotion and date due for substantive rank, by an airman is to be confirmed from his parent unit. To ascertain the same, the eligibility list is to be hosted on AFRO website and a confirmation be sought through a K Broadcast from all concerned field units.

(c) In case of confirmation, if any, from parent unit that an airman has incurred conduct entry including censure during such intervening period, his eligibility for release of substantive promotion is to be ascertained afresh after factoring appropriate negative marking as has been envisaged for corresponding acting paid ranks.

(d) If after factoring negative marking also the airman meets MPC criteria for promotion, his substantive promotion will be released as per his seniority.

(e) In case, after factoring negative marking, the airman concerned does not meets MPC criteria for promotion, weightage for Honours and Awards received during intervening period shall be factored. If still an airman does not meets MPC criteria, feasibility for release of substantive promotion of such airman is to be ascertained in next considerations until he makes merit for same.

(f) Negative marking for a conduct entry including censure will be considered only once either in acting or substantive promotions.”

9. Attention has been invited to impugned policy dated 15.05.2007. According to impugned policy the minimum period for promotion to the rank of Sergeant is 8 years. For convenience Para 4 is reproduced as under :-

**“ 4. Times Frames for Promotion**

Times frames for promotion for the purpose of redistribution of vacancies would be under the following categories, rank wise:-

(a) All trades except Aircrew, EdnInstr & GTI (S)

	<u>Grade III</u>	<u>Grade II</u>	<u>Grade I</u>
(i)	Sgt to JWO 17-19 <sup>th</sup> Yr	20 <sup>th</sup> -23 <sup>rd</sup> Yr	Above 23 Yr
(ii)	JWO to WO 23-25 <sup>th</sup> Yr	26 <sup>th</sup> -29 <sup>th</sup> Yr	Above 29 Yr
(iii)	WO to MWO 28-30 <sup>th</sup> Yr	31 <sup>st</sup> -34 <sup>th</sup> Yr	Above 34 Yr

Notes: 17-19<sup>th</sup>Yr implies 17 yrs of service to less than or equal to 18yrs of service  
20<sup>th</sup>-23<sup>rd</sup>yr implies 19 yrs one day of service to less than or equal to 23 yrs of service.

**E.g.** If DOE is 01 Jul 84, Length of service as on 30 Jun 2003 is 18 yrs 11 months 29 days; therefore, airman will be eligible for promotion from Sgt to JWO in Grade III.

(b) Flt Eng Flt Gun & Flt Sig

	<u>Grade III</u>	<u>Grade II</u>	<u>Grade I</u>
(i)	Sgt to JWO Elig to (Elig +2 <sup>nd</sup> Y)	(Elig+2Y)to Elig+ 6 <sup>th</sup> Y	>(Elig+6Y)
(ii)	JWO to WO Elig to (Elig +2 <sup>nd</sup> Y)	(Elig+2Y)to (Elig+6 <sup>th</sup> Y)	>(Elig+6Y)
(iii)	WO to MWO Elig to (Elig+ 2 <sup>nd</sup> Y)	(Elig+2Y)to (Elig+6 <sup>th</sup> Y)	>(Elig+6Y)

(c) EdnInstr

	<u>Grade III</u>	<u>Grade II</u>	<u>Grade I</u>
(i)	Sgt to JWO Elig to (Elig +2 <sup>nd</sup> Y)	(Elig+2Y)to Elig+ 6 <sup>th</sup> Y	>(Elig+6Y)
(ii)	JWO to WO Elig to (Elig +2 <sup>nd</sup> Y)	(Elig+2Y)to (Elig+6 <sup>th</sup> Y)	>(Elig+6Y)
(iii)	WO to MWO Elig to (Elig+ 2 <sup>nd</sup> Y)	(Elig+2Y)to (Elig+6 <sup>th</sup> Y)	>(Elig+6Y)

(d) GTI (S)

	<u>Grade III</u>	<u>Grade II</u>	<u>Grade I</u>
(i)	Sgt to JWO Elig to (Elig +2 <sup>nd</sup> Y)	(Elig+2Y)to Elig+ 6 <sup>th</sup> Y	>(Elig+6Y)
(ii)	JWO to WO (Elig+6Y) (Elig +8 <sup>th</sup> Y)	(Elig+8Y)to (Elig+12 <sup>th</sup> Y)	>(Elig+12Y)
(iii)	WO to MWO Elig+ 11Y (Elig+13 <sup>th</sup> Y)	(Elig+13Y)to (Elig+to 17 <sup>th</sup> Y) ”	>(Elig+17Y)

10. While arguing the present controversy, learned counsel for the applicant has vehemently argued that even at later stage the period of 8 years has been changed by another policy dated 14.01.2015. The period of 8 years has been substituted by 13 years. Para- 38 of promotion policy dated 14.01.2015 is reproduced as under :-

“38. Eligibility for Substantive Promotion. The minimum eligibility criteria for grant of substantive promotion for different ranks subject to accrual of establishment vacancies are given below:- (a) Promotion to the rank of Sub Cpl will be confined to LAC, who has passed appropriate tests and attested in the IAF, provided he has served in that classification for three years or has completed five years service. (b) Promotion to the rank of Sub Sgt will be made to Sub Cpls. The promotion shall be on selection basis within the authorised establishment and will be confined to Cpls who have served in that rank for four years or have completed 13 years service. (c) Promotion to the sub rank of JWO will be made to Sub Sgts on selection basis within the authorised establishment. The promotion shall be confined to those who have served in that rank for six years (acting or substantive) and holding acting paid rank of JWO. (d) Promotion to the Sub rank of WO will be made to Sub JWOs on selection basis within the authorised establishment. The promotion shall be confined to those who are holding acting paid rank of WO and completion of two years from the date of promotion to the rank of JWO. (e) Promotion to the Sub rank of MWO will be made to Sub WOs on selection basis within the authorised establishment. The promotion shall be confined to those who are holding acting paid rank of MWO and completion of two years from the date of promotion to the rank of WO. 16 (f) The criteria stipulated above at sub para (c) to (e) shall be applicable to Edn Inst tradesmen also. ”

11. This policy of 2015 has also been issued by the Air Headquarters Vayu Bhawan, New Delhi and not by Ministry of Defence, Government of India. It shall be appropriate to add that the policy dated 14.01.2015 was not produced by the respondents but has been produced by the learned counsel for the applicant though we directed the respondents to produce entire policies dealing with the subject matter.

12. It is further argued by the learned counsel for the respondents that the applicant was given concession while granting promotion though senior to him

were available. Argument raised on behalf of the respondents beyond the pleadings is not sustainable. Otherwise also it is not open to the respondents to grant promotion to a junior at the cost of senior. Since there is no pleading on record that applicant's promotion was made in accordance with the rules under the pretext that no person was available in view of policy of 1948.

13. Now question crops up whether subsequent policy as contained in clause-b could have been added in the policy of 2015 as has been done by the policy of 2007 under the teeth of order of Ministry of Defence, Government of India (supra) ?

14. Undoubtedly AFI of 1948 was issued by the Government of India before enforcement of Indian Constitution. Article 313 of Constitution protects all laws made before the promulgation of present constitution and shall continue till the Union of India makes any other law pertaining to the subject. For convenience Article 313 of the Constitution is reproduced as under :-

“313. Transitional provisions Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.”

15. A plain reading of Article 313 of Constitution shows that all the laws made by the States or Union of India shall remain in force so far as consistent with the provisions of the Constitution. In the present case AFI of 1948 was issued to regulate the service conditions of Corporal and Sergeant by Government of India through Ministry of Defence. Accordingly, no other person or authority has right to modify or rescind the instructions issued by the Government of India till the Government itself modifies it. Any decision taken by subordinate authority shall amount to exceeding jurisdiction, which will be a nullity in law. Undoubtedly the Army Instruction 12/S/48 is a

subordinate legislation issued by the Government of India while regulating the service conditions. In hierarchy of system it can be modified only by same authority. Needless to say that the provisions contained in AFI 12/S/48 not only deals with service conditions but it co-relates with the promotional right of to consider for promotion after the period of 4 years or 8 years of service, as the case may be, which is the fundamental right as held by Constitution Bench of Hon'ble Supreme Court in **Ajit Singhand others (II)vs. State of Punjab and others** (1999) 7 SCC 209. The relevant portion of Ajit Singh's case is reproduced as under :-

23. Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of "seniority-cum-suitability", the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the seniormost person at the basic level is to be considered first and then the others in the line of seniority.) That is how right to be considered for promotion and the "seniority" attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1). Right to be considered for promotion is not a mere statutory right 24. The question is as to whether the right to be considered for promotion is a mere statutory right or a fundamental right. 25. Learned Senior Counsel for the general candidates submitted that in *Ashok Kumar Gupta v. State of U.P.* ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299) it has been laid down that the right to promotion is only a "statutory right" while the rights covered by Articles 16(4) and 16(4-A) are "fundamental rights". Such a view has also been expressed in *Jagdish Lal (Jagdish Lal v. State of Haryana,*



(1997) 6 SCC 538 : 1997 SCC (L&S) 1550) and some other latter cases where these cases have been followed. Counsel submitted that this was not the correct constitutional position. 26. In this connection our attention has been invited to para 43 of Ashok Kumar Gupta ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299). It reads as follows : (SCC p. 239) "43. It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as fundamental right where they do not have adequate representation consistently with the efficiency in administration. ... before expiry thereof (i.e. 5 years rule), Article 16(4-A) has come into force from 17-6-1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right." A similar view was expressed in Jagdish Lal (Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550) and followed in some latter cases. In the above passage, it was laid down that promotion was a statutory right and that Articles 16(4) and 16(4-A) conferred fundamental rights. 27. In our opinion, the above view expressed in Ashok Kumar Gupta ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299) and followed in Jagdish Lal (Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550) and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the **right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta ((1997) 5 SCC 201 : 1997 SCC (L&S) 1299) right from 1950.**"

16. The first judgment relied upon by the learned counsel for the applicant is a case reported in AIR 1981 SC 947 **Capt Virendra Kumar vs. Union of India** decided on 22.04.1980. Question cropped up in the case of Capt Virendra Kumar as to whether AFI Instruction, in that case Instruction 9/5/62 dated November 24, 1962 shall have statutory force or not ? It was argued before the Hon'ble Supreme Court that Instruction does not have statutory status, therefore, it does not bind the Air Force. This argument has been raised and referred to in Para-3 of the judgment. The judgment has been delivered by Hon'ble Mr. Justice V.R. Krishna Iyer on behalf of the Bench,

consisting of Hon'ble Mr. Justice O.C. Reddy. Para-3 of the judgment is reproduced as under :-

“3. Going to back to the facts, constitutive of the grievances of the appellant, we may state that the Army Act and the rules and regulations and instructions thereunder govern the fate of commissioned officers including those on emergency commissions like the appellant. When in emergency commissioned officer has to be released on grounds which are proved for Army Instruction 9/5/62 dated November 24, 1962 applies. This Instruction, according to the appellant, does not have statutory status and, therefore, does not bind him. We do not agree. On the other hand, the technical gloss put by the appellant legalistic and does not appeal to us and we concur with the High Court in the view taken that the said instruction governs Emergency Commissioned Officers. Sections 21, 23, 27, and 191 to 193 together with the residuary executive power cannot be done by technical trunextlon of the sense and sweep of the rules. That, indeed, is the submission made by Shri Francis, appearing for the Union of India and we accept it. On that footing, paragraph 15 of the said Instructions is attracted.”

17. After recording the aforesaid argument advanced for Government of India, Court proceeded to record its opinion in Para-8 holding that these instructions have got statutory force and are binding for the reason that it govern the service conditions, in that case Emergency Commissioned Officers. Para-8 of the judgment (supra) is reproduced as under :-

“ 8. In accordance with the intention expressed in para 15(c) of the A.I. 9/S/62 that an officer granted emergency commission if eligible and suitable in all respects may be considered at the appropriate time for permanent regular commission in the Regular Army, Army Instruction 13/S/65 was issued. The relevant paras are reproduced below :

1. Serving Emergency Commissioned Officers granted Commission under A.I. 9/S/62 will be eligible for the grant of Permanent Commissions under the terms and conditions of service as given in the succeeding paragraphs.

## 2. ELIGIBILITY

(a) xx xxxxxxxxxxxx (b) xx xxxxxxxxxxxx

(c) Must be in medical Category AVE one (A 1) Those who have been placed in Medical category 'A-2' 'B-1' and 'B 2' as a result of enemy action may also be considered on merits of each individual case.”

18. The other case relied upon by the applicant is that of **Lt Gen R.K. Anand vs. Union of India and another** reported in AIR 1992 SC 763, which relates to Indian Army where the question with regard Regulation framed by Central Government under the Act was considered by Hon'ble Supreme Court, though in accordance with Army Act Regulation was not placed before the Parliament but their Lordships held that the Regulation has got statutory force. Para-3 of the judgment is reproduced as under:-

“3. A few facts relevant for the disposal of this appeal may be noticed at this stage. The appellant joined the Infantry on 6th June, 1954 and in due course rose to the rank of Lieutenant General. The terms and conditions of his service were governed by the Army Act, 1950 (hereinafter called 'the Act') and the Rules made thereunder. Section 191 of the Act empowers the Central Government to make rules for the purpose of carrying into effect the provisions of the Act. Sub-section (2) of Section 191 enumerates the various matters in respect of which rules may be framed by the Central Government. Clause (a) of that sub-section deals with the question of retirement from service. Therefore, the age of superannuation for officers governed under the provisions of the Act could be prescribed by the rules made under Section 191 of the Act. Section 192 empowers the Central Government to make regulations for all or any of the purposes of the Act other than those specified in Section 191 which would include the matter regarding determination of the age of superannuation. Section 193 next provides that all rules and regulations made under the Act shall be published in the official gazette and on such publication shall have effect as if enacted under the Act. Section 193A was inserted in the Act by an amendment which came into force w.e.f. 15th March, 1984. It inter alia provides that every rule and every regulation made by the Central Government under the Act shall be laid before each House of Parliament. It is not in dispute that the regulations on which reliance is placed were not placed before each House of Parliament as required by this provision. Secondly, the regulation could not cover the area covered by Section 192(2)(a) which deals with the question of prescription of age of superannuation. Counsel for the appellant realising these difficulties could not carry his submission based on the regulations any further. But it is stated that the regulations give an insight in how the authorities understood the relevant letters of instructions dated 9th May, 1985 and 9th September, 1986. We will presently come to these two documents on which either side places reliance but before we do so we think it necessary to notice Rule 16A introduced by the Army (Amendment) Rules, 1979 (hereinafter called 'the Rules'). By the said rules the Army Rules, 1954 came to be amended. Rule 16A deals with the question of

compulsory retirement of officers of the Armed Forces. Clause (1) (a) of the said Rule provides that officers shall be liable to be compulsorily retired from service by order of the Central Government or the authorities specified in Sub-rule (2). With effect from the afternoon of the last date of the month in which they attain the age limits specified in Sub-rule (5). Sub-rule (5) next provides that the officers of Armoured Corps, Artillery, Engineers, Signals, Infantry, Army Service Corps, Army Ordnance Corps, Electrical and Mechanical Engineers and Pioneer Corps shall retire at the ages mentioned immediately thereunder. So far as Lt.General is concerned the retirement age is mentioned to be between 56 years and 58 years. In other words the minimum age of retirement of a Lt.General is 56 years and the maximum 58 years. **This rule has statutory force. It may be noticed that the appellant belongs to the Infantry and having been promoted to the post of Lt.General was liable to be retired between 56 and 58 years of age under Rule 16A(5) of the Rules.”**

19. The other case relied upon by the applicant is the case of **CaptRachpal Singh vs. Union of India** decided on 04.12.1986, reported in AIR 1987 SC 212. Hon’ble Supreme Court relying upon the earlier case of **Capt Virendra Kumar vs. Union of India** (supra), reiterated in it that the Air Force Instruction has got statutory force. For convenience Para-8 of the judgment is reproduced as under :-

“ 8. The Army Act, the Rules & Regulations and Instructions thereunder govern the service conditions of the commissioned officers including those on Emergency Commission, like the appellant before us. Termination of Emergency Commission is provided in Rule 15 of the Army Instruction. A contention was raised in Virendra Kumar's case that the Army Instruction did not have any statutory status and could not therefore bind the service conditions of the Emergency Commissioned Officer. This contention was repelled by this Court. We respectfully agree.

Termination of Commission is provided in para 15 of the Army Instruction which reads as follows:

#### 15. TERMINATION OF COMMISSION

(a) The commission of an officer may be terminated at any time by the Government of India-

(i) For misconduct, or if services are found to be unsatisfactory; or

(ii) On account of medical unfitness; or

(iii) If his services are no longer required; or

(iv) If he fails to qualify at any prescribed test or course.

(b) An officer may on giving three months notice be permitted to resign his commission on compassionate grounds of which the Government of India will be the sole Judge. An officer who is permitted to resign his commission on compassionate grounds will not be eligible for terminal gratuity.

(c) An officer granted this commission, if eligible and suitable in all respects may be considered at the appropriate time for Permanent Regular Commission in the Regular Army.”

20. The only hurdle pointed out by Shri Amit Jaiswal, learned counsel for the respondents relying upon the judgment reported in (2001) 3 SCC 97 **Union of India and others vs. Mahesh K. Nag and another** is that before the Hon'ble Supreme Court the question was not with regard to the statutory nature of AFI and hence judgment of Mahesh K. Nag and another is not applicable. It is further submitted that the statement made therein and opinion referred to lacks binding effect since issue was not before the Hon'ble Supreme Court. However, argument advanced by Shri Amit Jaiswal seems to be misplaced. It is well settled proposition of law that the finding recorded by Hon'ble Supreme Court, whether it is raised or not is binding. It is not for subordinate court or even for High Court not to comply with the judgment on the ground that the issue was not raised under Article 142 read with Article 144 of the Constitution. Highest Court has right to lay down law in every matter. Once finding is recorded and law is laid down undoubtedly, we are no one to overlook the judgment of Supreme Court. Needless to say that even in some cases obiter dicta is binding in case the observation of Hon'ble Supreme Court has got relevance to any issue on record.

21. The other judgment relied upon by learned counsel for the respondents is that of **V.T. Khanzode and others vs. RBI and another**, reported in (1982) 2 SC. The aforesaid case of V.T. Khanzode relates to labour and service

matter and does not say even a whisper regarding Air Force, Army or Navy Act, hence from respondents' own argument shall not come in the way of applicant, which deals with different facts and circumstances with regard to labour matter.

22. In **Union of India vs. S.L. Dutta** reported in (1991) 1 SCC 505 relied upon by learned counsel for the respondents Hon'ble Supreme Court held that arbitrariness cannot be inferred from subsequent acceptance of change in policy after initially rejecting it. The Hon'ble Supreme Court held the right to be considered in terms of service conditions. However, the judgment in **S.L. Dutta** under the teeth of Ajit Singh's case (supra) does not seem to be applicable under the facts and circumstance of the present case. Much water has flown over the rivers Ganga and Yamuna after the judgment of S.L. Dutta, relied upon by learned counsel for the respondents. Learned counsel has not referred to any judgment against the aforesaid proposition of law or so far ratio of aforesaid judgment is concerned.

23. The other case cited by learned counsel for the respondents is of **P.U. Joshi vs. Accountant General**, reported in (2003) 2 SCC 632. The judgment in P.U. Joshi also relates to service conditions of Government servants of the State. It may be noted that the policy of the Government with regard to civil employment may stand differently than the policy with regard to defence services where the Government of India is all in all and final authority to frame the policy. It is Government of India who delegates power to Chief of Army Staff and other Chiefs of Armed Forces. No power can be claimed by the Chief of any Armed Forces, unless they are delegated under the statute by the competent authority to do so. It is basic concept of law that there should be a source of law under which it has been made, vide AIR 1972 1302**Raj Narain vs. Smt. Indira Nehru Gandhi**(Para 34A)..

24. One another case relied upon by the learned counsel for the respondents is of **WO A.K. Singh vs. Union of India and others**. Learned counsel for the respondents has invited attention in above case to a Delhi High Court judgment dated 02.06.2008 in WP © No. 6943 of 2003 **JWO A.K. Singh vs. Union of India and others** and other connected matters, wherein Delhi High Court held that AFI lacks statutory force and the Chief of Army Staff has got power to make policy. In the aforesaid judgment Delhi High Court relied upon a judgment of Gauhati High Court in the case of Parath Singh Gour SMO No. S9/2 vs. Union of India & others. For convenience relevant portion of Delhi High Court judgment (supra) contained in Paras- 29 and 30 is reproduced as under :-

“29. We may not at this state that this very policy came under attack before the Rajasthan High Court in the case of **JWO S.K. Karfa v. Union of India &Ors**, which was dismissed by the said Bench vide its judgment dated 17.05.2004. This policy was also challenged before the Gauhati High Court in the case of **Parath Singh Gour SMQ No. S9/2 v. Union of India &Ors**, which was dismissed vide judgment dated 13.03.2008. Though the judgment of the Gauhati High Court is by a learned Single Judge, after carefully examining the same we agree with the conclusion therein. We would also like to reproduce paras 9 to 11 from the said judgment;-

*“9. The rival cases as set out above have received the due and anxious consideration of the Court. From the Air Force Regulations framed in the year 1964 as made available to the Court it appears that the said Regulations have been issued by the government of India in supersession of the earlier Regulations holding Indian Air Force’ and Regulations for the Indian Air Force-Instructions by His Excellency the Commander-in-Chief of India’. The preamble to the said Regulations does not state that the same have been issued under Section 190 of the Air Force Act, 1950. Chapter XVII, Section 7, Regulation 915 prescribes that all Government of India Orders of general nature or those that affect an appreciable number of units, individuals or classes of individuals are to be published as Air force Instructions. Air Force Instruction 12/S/1948, therefore, appears to have been issued under the aforesaid provisions of the Regulations and are not statutory in character, as contended by the petitioner. The projections of the petitioner that the circular dated 23.09.2002 being contrary to the Air Force Regulations and Air Force Instruction 12/S/1948 are non-est in law and the*

*promotions made on that basis are illegal, therefore, will have no legal force.*

*“10. Regardless of what has been held above, there is no denial to the fact that the Regulations and the Air Force Instructions lay down norms including norms for promotion which must be adhered to by the respondent while performing their duties and exercising their powers. Departures from the existing norms, though permissible, will have to be judged on the touchstone of the proximity or relevance of such departures to the needs of the institution as well as to the needs of reasonableness, fairness, and rationality.*

*“11. In the present case, as already noticed, both under the 1964 Regulations, and the Air Force Instructions 12/S/1948, promotion to the rank of Junior Warrant Officer is required to be made by selection. The detailed parameters by which selection is required to be made are not laid down either in the Regulations or in the Air Force Instructions. The stand taken by the respondents in the affidavit filed is that to keep pace with the changing times and to make the Indian Air Force more responsive to the needs of time, it was felt necessary that merit which had earlier played a less prominent role should now come to the forefront for deciding the fitness for promotions. At the same time,. Some role to seniority should also be assigned. It is the above conceptualization that has found manifestation in the circular dated 23.09.2002 if that be so and in a situation where the circular dated 23.09.2002 is not in conflict with any statutory prescription, the same must be understood by the Court to be in the realm of policy which the decision maker is always competent to take even by altering the existing policy. The reason for the change in the policy, in view of the grounds assigned in the affidavit, cannot be understood by the Court to be wholly unconnected with the institutional needs of the Air Force keeping in mind the ever increasing challenges that the Air Force is required to meet. The materials on record also indicate that the case of the petitioner was successively considered for promotion to the rank of Junior Warrant Officer but on such consideration he was found not to possess the requisite merit in comparison to his juniors to earn the promotion in question. Accordingly, the same has been refused to him. Such refusal, in the backdrop of the facts noticed above, appears to the Court to be justified. The petitioner, as the respondent have stated, will continue to be considered in each successive promotion in the future. He must, therefore, make an Endeavour to improve his performance if he is inclined to continue in service and to earn promotion on the basis of the wholesome principle of merit.”*

30. We are in respectful agreement with the aforesaid observations. The net result of the aforesaid discussion is that these petitions are without any merit.”



25. Special leave petition preferred against the aforesaid judgment of Delhi High Court dated 02.06.2008 by Sergeant Prasanta Kumar Mahapatra, who was one of the petitioners, in WP(C) No. 7094/2002 before the Delhi High Court, has been dismissed by Hon'ble Supreme Court by a non speaking order at the admission stage on 07.09.2009. The order of Supreme Court dismissing the special leave petition is reproduced as under :-

“Delay condoned.

The Special Leave Petition is dismissed.”

26. Apart from the above, no other cases have been cited by the respondents nor any other documents produced, hence we proceed to consider the three Apex Court judgments cited by the learned counsel for the applicant.

27. We have noticed that Lawyers sometime are citing cases which are not all relevant to the facts and circumstances of the case. Hence it is nothing but creates a tricky situation.

28. It is well settled law that the judgment will have binding effect in case it is fit in under the facts and circumstances of the case in dispute before the court. The expression ‘Judgment’ has been defined in section 2(9) of C.P.C. as “judgment means the statement given by the Judge on the ground of a decree or order.” Thus the essential element in any ‘judgment’ is the statement of grounds of decision, meaning thereby the Court has to state the ground on which it bases its decision. It must be intelligible and must have a meaning. It is distinct from as order as the latter may not contain reasons. Unless the judgment is based on reason, it would not be possible for an Appellate/ Revisional Court to decide as to whether the judgment is in accordance with law. (Vide: **Surendra Singh v. State of Uttar Pradesh**, AIR

1954 SC 194: SCJ 12: 1954 SCR 330; and **Arjan Dass Ram Lal v. Jagan Nath Sardari Lal**, AIR 1966 Punj 227).

29. The expression 'judgment means a final adjudication by the Court of the rights of the parties; an interlocutory judgment, even if it decides an issue or issues without finally determining the rights and liabilities of the parties, is not a judgment, however cardinal the issues may be (Vide: **Tarapore Co. Madras v. Tractors Export Moscow**, AIR 1970 SC 1168: (1969) 2 SCR 699: 1970 (1) SCJ 514). Judgment is statement of reason given by the Judge. {Vide: **Vidyacharan Shukla v. Khubchand Baghel**, AIR 1964 SC 1099: (1964) 2 SCA 505: (1964) 6 SCR 129 (CB)}. Judgment without reason should not be given if given then it is liable to be stayed. {Vide: **State of Punjab v. Jagdev Singh Talwandi**, IR 1984 SC 444: 1984 Cr LJ 177: (1984) 1 SCC 596}. A judgment is the expression of the opinion of the Court arrived at after due consideration of the evidence and the arguments, it means a judicial determination, (Vide **U.J.S. Chopra v. State of Bombay**, AIR 1955 SC 633: 1955 SCJ 603: (1955) 2 SCR 94; and **State of Bihar v. Ram Naresh Pandey**, AIR 1957 SC 389: (1957) SCC 282: 1957 Cr LJ 567.

30. In **Ghourwal Mitra v. Smt Hara Sundari Paul**, AIR 1974 Cal 331, it was held that 'judgment means a decision which affects the merits of the question between the parties by determining some right or liability and such decision might be either final, preliminary or interlocutory.

31. Whether a particular order becomes a judgment or not would depend upon the facts, circumstances and nature of the decision in each case. Where an issue is finally determined like in a case the issue of limitation is determined, that may become a judgment, but the judgment must finally decide the right of the parties as has been held in **Kanpur Singh v. Union of India**, AIR 1957 Pun 173:59 Pun LR 331: ILR 1957 Punj 873 (FB); and **Union**

**of India v. AinkumarKaluram**, Air 1962 MP 190: 1962 MPLJ 159: ILR 1962 MP 391. In **Draupadi Devi v. S.K. Dutta**, AIR 1957 all 48, the Court observed that although decree follows a judgment that does not means that 'decree' and judgment are synonymous terms. See also: **Inda Devi v. Board of Revenue U.P., Allahabad**, AIR 1957 All 116; 1956 ALL LJ 601: 1956 All WR (HC) 480.

32. Judgment is the adjudication of proceedings or the suit, as the case may be. Final order means an order which finally decides any matter or that which is directly an issue in the case in respect of the parties. The words judgment, decree and final order have a different connotation, though all of them refer to adjudication, determination or disposal of proceedings, suit or right of the parties **Union of India v. Kanhaiya Lal Shyam Lal**, AIR 1957 Raj 117: Punj LR 150: ILR 1957 Punj 255.

33. In **RadheyShyam v. ShyamBehari Singh**, AIR 1971 Sc 2337: 1971 (1) SCJ 650: (1971) 1 SCR 783, the Supreme Court examined the issue as to whether an appeal arising out of proceedings under Order XXI, rule 90, CPC could be said to be a judgment and held that an order in such proceeding is a judgment in as much as the proceeding raises a controversy between the parties therein affecting their valuable rights the order allowing the application certainly debars the purchaser of rights accrued, as a result of the auction sale, therefore, the order would fall within the definition of judgment and would be appealable. While deciding the said case, the apex Court approved the (Full Bench) judgment of the **Delhi High CourtInBegum Aftab Zamani v. Lal Chand Khanna**, AIR 1969 Del 85: 71 Punj LR (D) 75: ILR 1969 Del 34, wherein it was held that any order which affects the merits of controversy between the parties by determining some

disputed rights or liability would mean judgment. In **Shanti Kumar R. Chanji v. Home Insurance Co. of New York**, AIR 1974 SC 1719: 1975 (1) SCJ 187: (1975) 1 SCR 550, while dealing with the similar issue, the apex Court observed as under:-

*“In finding out whether the order is a judgment within the measuring of clause 15 of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability.”*

34. Thus, in view of the above, the law can be summarized that the ‘judgment’ means a decision adjudicating upon the legal rights and liabilities of the parties after appreciating the evidence on record in a particular fact-situation, and that has to be duly supported by reason.

35. In view of above, since none of the judgments referred to by the learned counsel for the respondents except Delhi High Court judgment are fit in under the facts and circumstances of the case, we need not make our judgment bulky.

36. The last judgment of Delhi High Court also hardly adjudicates the question. Against the judgment of the Delhi High Court SLP has been dismissed by Hon’ble Supreme Court but a perusal of the order passed by Hon’ble Supreme Court dismissing the SLP shows that no reason has been assigned or order has been passed at admission stage without expressing opinion by Hon’ble Supreme Court. Judgment being non-speaking without deciding the issue of Apex Court lacks its binding effect. Only those judgments are binding in which an issue has been decided or opinion has been expressed on question of law by Supreme Court (supra).

37. In view of above, we do not feel that the judgment of Delhi High Court (supra) lacks binding effect under the teeth of three Apex Court judgments referred to in herein above. Otherwise also judgment of Apex Court (supra) referred by the applicant's counsel, expresses opinion, hence have binding effect. Once Supreme Court in three judgments (supra) has held that Policy/Instruction made by Government has got statutory force, it becomes law of the land and is binding on all the authorities, courts and tribunal and no one has right to disown the opinion of Supreme Court, except to approach Hon'ble the Supreme Court for correction, modification or prefer an appeal. Some other cases cited by both the sides of Hon'ble Supreme Court and of different High Courts are on different issues, which we do not feel to refer under the teeth of aforesaid three judgments, which do not seem to have been over ruled and still occupy the field.

38. One of the arguments advanced by the respondents' counsel that even AFI instructions lay down qualifying service, undoubtedly minimum qualifying service is 4 years, may be 8 years under the Instructions referred to herein above. The condition contained in Rule 16 of AFI of 1948 provides that acting promotion shall be done against the substantive post only when no person is available. We feel afraid to sustain the argument of respondents. In case no person was available having requisite qualification against the substantive post then applicant could have been promoted in 2004 on acting rank, which is the admitted fact. In case respondents have followed the Rules of 1948, applicant would have a chance for promotion to the substantive rank of Sergeant in 1998 itself. But it has not been done and his right for substantive promotion has been violated by the respondents in view of **Ajit Singh's** case (supra).

39. Argument advanced on behalf of the respondents that in case applicant would have been promoted to the substantive rank of Sergeant in 2004 then seniors to him would have been superseded. The argument advanced is of no avail in the absence of pleading.

40. Hon'ble Supreme Court while dealing with an issue in **Kalyan Singh Chouhan vs. C.P. Joshi**, AIR 2011 SC 1127 after placing reliance on a very large number of its judgments including **Trojan & Co. vs. RM. N.N. NagappaChettiar**, AIR 1953 SC 235, **Om Prakash Gupta vs. Ranbir B. Goyal**, AIR 2002 SC 665, **Ishwar Dutt vs. Land Acquisition Collector**, AIR 2005 SC 3165 and **State of Maharashtra vs. Hindustan Construction Company Ltd.**, (2010) 4 SCC 518 held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in absence of the pleadings in that respect. No party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.

41. In **Bachhaj Nahar vs. Nilima Mandal**, AIR 2009 Supreme Court 1103, the Supreme Court held that a case not specifically pleaded can be considered by the Court unless the pleadings in substance contain the necessary averments to make out a particular case and issue has been framed on the point. In absence of pleadings, the Court cannot make out a case not pleaded, suomotu. Hence, we direct the respondents to grant promotion to the applicant without affecting their rights. Keeping in view Ajit Singh's case, we are of the view that since the applicant was promoted to the acting rank of Sergeant in 2004 and much water has flown since then, clock

cannot be turned back after 14 years and hence in the fitness of things applicant should have been given seniority of substantive rank of Sergeant from the date he was promoted on acting rank in the year 2004. Though it is submitted that impugned policy is still continuing and has not been amended or re-framed but since admittedly applicant has already been granted acting rank, he must be granted substantive vacancy as applicant has got a fundamental right followed by civil right of livelihood, which are being violated. Argument raised by the respondents is rejected.

42. Further since the policy condition (b) of para-38 Air Force Promotion Policy of the year 2015 is contrary to the AFI 12/S/48, which admittedly has not been amended by the Government of India, we struck down the same with liberty to the respondents to reframe a new policy within its competence in accordance with rules thorough the competent authority.

43. In view of settled proposition of law of Hon'ble Supreme Court in case for any reason, whatsoever, litigants are compelled to enter into litigation then payment of cost is must and it shall be exemplary in case there is some high handedness on the part of the authorities while dealing with the matter without application of mind to the statutory instructions, rules or regulations, vide **Ramrameshwari Devi and others V. Nirmala Devi and others**, (2011) 8 SCC 249, **A. Shanmugam V. AriyaKshetriyaRajakulaVamsathuMadalayaNandhavanaParipalana Sangam represented by its President and others**, (2012) 6 SCC 430. Hon'ble Supreme Court in the case of **A. Shanmugam** (supra) Hon'ble the Supreme considered a catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. **Indian Council for Enviro-Legal Action V. Union of India**, (2011) 8 SCC 161;
2. **Ram Krishna Verma V. State of U.P.**, (1992) 2 SCC 620;

3. ***Kavita Trehan V. Balsara Hygiene Products Ltd.*** (1994) 5 SCC 380;
4. ***Marshall Sons & CO. (I) Ltd. V. SahiOretrans (P) Ltd.,*** (1999) 2 SCC 325;
5. ***Padmawati V. HarijanSewak Sangh,*** (2008) 154 DLT 411;
6. ***South Eastern Coalfields Ltd. V. State of M.P.,*** (2003) 8 SCC 648;
7. ***Safar Khan V. Board of Revenue,*** 1984 (supp) SCC 505.

44. Applicant has been granted acting promotion in 2004, which could not have been done in the absence of substantive vacancy under Rule. His matter has been kept pending for about 15 years against Policy/ Instructions issued by the Government of India. Nothing has been produced or pointed out by the respondents that the Government has delegated power to the Chief of the Air to issue instruction or frame policy contrary to policy framed by the Government of India. Respondents have acted arbitrarily while dealing with the source of livelihood of the applicant affecting the fundamental right guaranteed to the applicant under Article 21 of the Constitution. It is a fit case where exemplary cost should be imposed (supra), which is being quantified to Rs.50,000/-.

### **ORDER**

45. In view of above O.A. is allowed and impugned order No. Air HQ/C 40698/4/PA (CPC dated 18.02.2011 passed by the respondent no.2 is set aside. The policy dated 14.01.2015 issued by Air Headquarters Vayu Bhawan New Delhi to the extent its clause (b) of para- 38 provides minimum period i.e. four years in that rank or have completed 13 years' service for promotion to the rank of Substantive Sergeant is also struck down with liberty to the respondents to frame fresh policy in accordance with law. We further direct the respondents to accord seniority to the applicant on the substantive rank of



Sergeant w.e.f. 2004 with all consequential benefits and further promotion in accordance with law. Let all consequential benefits be provided to the applicant within six months by the respondents with due communication to the applicant.

Cost is quantified to Rs.50,000/- (rupees fifty thousand), which shall be deposited by the respondents in the Tribunal within three months from today and shall be released by the Registry to the applicant through cheque.

Dated:08 January 2018

**(Justice Devi Prasad Singh)  
Member (J)**

Brother Air Marshal B.B.P. Sinha, Member (A) being not agreed with the view taken and findings recorded, reserved the judgment fixing 17.01.2018.

**(Air Marshal BBP Sinha)  
Member (A)**

Dated:08 January 2018

**(Justice Devi Prasad Singh)  
Member (J)**

**In continuation –**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**

**O.A. No. 248 of 2011**

Wednesday, the 18<sup>th</sup> day of January, 2018

**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

Mohammad Arif (736957-F Ex Sgt)

.... Applicant

Ld. Counsel for the  
Applicant

: **Shri Shailendra Kumar Singh, Advocate.**

Verses

Union of India, Through Secretary & others

...Respondents

**Shri Amit Jaiswal and Ms Amrita Chakraborty**, learned counsel for the respondents, assisted by **Wg Cdr Sardul Singh**, OIC Legal Cell.

**ORDER**

Since there is difference of opinion among the members of the present Bench over the finding recorded in the present judgment, we refer the matter to Hon'ble Chairperson, Armed Forces Tribunal, Principal Bench, New Delhi for a reference to other Member in accordance with the rules in pursuance to provisions contained in Section 28 of the Armed Forces Tribunal Act, 2007. The questions required to be adjudicated upon in pursuance to Section 28 of the Armed Forces Tribunal Act, 2007 amongst others are framed as under:-

- (I) Whether the Policy framed by the Government of India in the form of Air Force Instruction has got statutory force and is mandatory.
- (II) Whether Army Head Quarters or Chief of the Air Staff has been conferred power to frame policies affecting the service conditions of the Air Force Personnel in contravention of Policy framed by the Government of India ?
- (III) Whether while framing the Policy dealing with the service conditions, Chief of the Air Staff or Air Head Quarters may travel beyond the four corners of Policy framed by the Government of India, Ministry of Defence ?

**(Air Marshal BBP Sinha)**  
**Member (A)**  
 Dated:18<sup>th</sup> January 2018

**(Justice Devi Prasad Singh)**  
**Member (J)**

Let the record be sent to the Chairperson, Armed Forces Tribunal, Principal Bench, New Delhi within a week for appropriate order in accordance with Section 28 of the Armed Forces Tribunal Act, 2007.

**(Air Marshal BBP Sinha)**  
**Member (A)**  
 Dated:18<sup>th</sup> January 2018

**(Justice Devi Prasad Singh)**  
**Member (J)**