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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment dated: 4th August, 2016.

+ W.P.(C) Nos. 19087-91/2006 & CM Nos.15854/2006, 3374/2015

PRADEEP KUMAR & ORS. Petitioners
Through : Mr. S.K. Gupta, Advocate.

versus

GOVT. OF N.C.T. OF DELHI & ORS Respondents
Through : Mr. Sanjoy Ghose, Additional
Standing Counsel for GNCTD/R1
with Mr. Vikramaditya, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE I.S.MEHTA

G.S.SISTANI, J (ORAL)

1. Petitioners are aggrieved by the Orders of the Central Administrative Tribunal (*briefly 'the Tribunal'*) dated 01.08.2005 in O.A. No. 162/2005 and 29.09.2006 in R.A. 188/2005, whereby the plea of the petitioners/ applicants therein seeking promotion as per existing rules has been dismissed.
2. Some necessary facts which are required to be noticed for the disposal of this writ petition are that the petitioners, at the relevant time, were working as 'Head Constables' in the Communication Unit of the Delhi Police and are working as 'Fitter Electricians' in broader term. They are aggrieved by the non-consideration for their case for promotion to the post of Radio Technicians (ASI/SI) when certain vacancies arose in the year 2003.
3. It is not in dispute that at the time when the vacancies arose, the old recruitment rules, being the Delhi Police (Appointment and Recruitment) Rules, 1980 as amended by the Delhi Police (Appointment and Recruitment) (Amendment) Rules, 1986 (*briefly '1986 Rules'*) were prevalent. Rule 17-

B(vii) governs the promotions to the post of Radio Technicians (ASI/SI). As per the said rule, the Head Constables as a Fitter Battery/Fitter Electrician with five years service in the grade and having passed the B.R.T. Course conducted by the D.C.P.W. were eligible to be considered for promotion. The petitioners contend that they were eligible for the posts when the vacancies arose as they had the requisite experience as well had passed the B.R.T. Course.

4. The petitioners had sent representations to the respondent no. 3/ Joint Commissioner of Police in 2004 pleading that their case may be considered for promotion to the post of Radio Technicians (ASI/SI) as they were eligible and vacancies were available. The request of the petitioners was rejected by means of an Order dated 30.12.2004, whereby they were informed that amendment to the recruitment rules for the post of Radio Technicians (ASI/SI) was under consideration with the respondent no. 1/ Government of NCT of Delhi and therefore, they should wait until the finalization of the same. The said Order bearing No. 12700/Estt. (II) DCP-Comm. reads as under:

“The applications dated 24/9/2004 & 27/10/2004 submitted by HC (Fitter Electrician) Pradeep Kumar, No.96/Comm. Regarding promotion to the rank of ASI (RT) has been considered in PHQ. The matter regarding amendment in Recruitment Rules for the post of ASI (RT) is under consideration for approval with Govt. of NCT of Delhi. Hence the applicant may be asked to wait till the finalisation of Recruitment Rules.”

(Emphasis added)

5. Being aggrieved by the Order dated 30.12.2004, the petitioners had approached the Tribunal in O.A. No. 162/2005, *inter alia*, seeking a direction to the respondents for filling up the vacancies to the posts of Radio

Technician (ASI/SI) as per the existing rules, without waiting for the proposed amendment to the same.

6. The Tribunal dismissed the O.A. and the review application of the petitioners which has led to the filing of the present writ petition.

7. We may also note that the amendment to the recruitment rules has already taken place during the pendency of the present writ petition by means of Delhi Police (Appointment and Recruitment) (Amendment) Rules, 2005 on 22.12.2005 (*briefly '2005 Amendment'*). There is no doubt that the 2005 Amendment is prospective in nature as Rule 1 (2) of the same clearly states that the said amendment was to come into effect from their publication in the Gazette. The same were notified in January, 2006.

8. Mr. Gupta, learned counsel for the petitioners, has strenuously urged before us that at the time when the vacancies arose, as per the existing recruitment rules/ 1986 Rules, all the petitioners should have been considered for promotion. In any case, Mr. Gupta contends that the petitioners cannot be blamed or penalized, if at all there are any ambiguities in the existing recruitment rules and that the right of petitioners to promotion cannot be curtailed.

9. Learned counsel for the petitioners has placed reliance on the decision of the Supreme Court of India in the case of ***Y.V. Rangaiah & Ors. v. J. Sreenivasa Rao & Ors.***, AIR 1983 SC 852, wherein the Supreme Court held that a panel, which was mandated to be created every year, should be prepared and vacancies occurring prior to amendment to the rules will have to be filled up as per the old rules. Relying upon the same, the learned counsel for the petitioners submits that the petitioners cannot be deprived of their promotion when they were eligible as per the existing recruitment rules. In this regard, Mr. Gupta contends that the Tribunal has failed to consider the law in the right perspective. The Tribunal has exceeded its jurisdiction which

has resulted in grave injustice to the petitioners who were eligible and due for promotion.

10. Learned counsel has also drawn our attention to the Guidelines issued by the Department of Personnel and Training, Government of India dated 10.04.1989 (amended upto 08.02.2002) to buttress his argument that the DPC meetings need not be delayed or postponed on the ground that the recruitment rules are being reviewed or amended. Mr. Gupta has also urged that the Guidelines provide that vacancies are to be filled up in accordance with the existing rules in force, unless the amendment to the rules is to have a retrospective effect.

11. Learned counsel contends that the amendments carried out are prospective in nature and thus cannot apply to the vacancies which occurred prior to the enforcement of the same. It is also contended that the ambiguities sought to be urged by the respondents are in fact not ambiguities. The 1986 Rules have to be applied in the manner they have been notified and merely terming them as ambiguous can be of no avail to the respondents.

12. Per contra, Mr. Sanjoy Ghose, learned Additional Standing Counsel for the Govt. of NCT of Delhi, contends that there is no infirmity in the order passed by the Tribunal which would require interference under Article 226 of the Constitution of India. Mr. Ghose contends that the order is a well reasoned order based on settled law and thus, requires no interference. It is further submitted that the petitioners have failed to point out that the order passed by the Tribunal is illegal, perverse or unreasonable. Mr. Ghose submits that there were cogent reasons as to why the vacancies were not being filled up. Mr. Ghose further submits that on account of ambiguities in the rules, it was deemed necessary to amend them. It is further contended that the anomalies and the ambiguities in the recruitment rules were not fictitious, but were also subject matter in the case of ***Sudhir Kumar and Ors.***

v. Union of India and Ors., O.A. No. 64/2004 before the Tribunal. The OA was filed by persons, who were seniors to the petitioners herein and posted as 'ASI (Workshop Assistant)'; but on account of the ambiguities/ lacunas in existing recruitment rules/ 1986 Rules, they were not entitled for promotion to the post of Radio Technician (ASI/SI). At the same time persons lower to them in seniority, serving as Head Constables, were eligible for the post.

13. Learned counsel contends that when the O.A. No. 64/2004 was taken up for hearing, the respondents herein had taken up a fair stand and informed the Tribunal that the respondents were in the process of amending the recruitment rules. They had shared with the Tribunal that they were aware of the ambiguities. Rejecting the claim of the applicants therein for promotion, the Tribunal considering that the amendment had been pending for numerous years granted them six months time to take a final decision on the proposed amendment.

14. The learned counsel further contends that since the present petitioners were aggrieved by the act of the respondents in not filling up the vacancies to the post of Radio Technicians (ASI/SI) which arose in the year 2003, when the first representation was made, the respondents had given a personal hearing to the petitioner and thereafter, passed an order stating that the matter was under consideration and the petitioners must wait until the finalization of the recruitment rules.

15. Learned counsel for the respondents submits that the Tribunal has rightly differentiated and distinguished the judgments sought to be relied upon by the petitioners/ applicants therein, as the ratio laid down by the Supreme Court in the case of **Dr. Ramulu and Anr. v. Dr. S. Suryaprakash Rao and Ors., (1997) 3 SCC 59** would in fact be applicable. Learned counsel submits that the respondents have in fact taken a conscious decision not to fill up the vacancies and postpone the grant of promotions till the

recruitment rules were amended and the ambiguities were pressed out. In this regard, Mr. Ghose has relied upon *Dr. Ramulu (supra)*; *Shankarsan Dash v. Union of India*, (1991) 3 SCC 47; *State of Punjab and Ors. v. Arun Kumar Aggarwal and Ors.*, (2007) 10 SCC 402; *Commandant Shamsher Singh Malik v. Union of India and Ors.*, ILR (2011) Supp. (4) Delhi 822; and *Deepak Agarwal and Anr. v. State of Uttar Pradesh*, (2011) 6 SCC 725 in support of his submission.

16. We have heard learned counsel for the parties, considered their rival submissions and have also examined the order passed by the Tribunal. The O.A. No. 162/2005 was dismissed by the Tribunal holding that in light of the fact that a conscious decision was taken by the respondents, the applicants/petitioner herein could not claim promotion as per the old recruitment rules. Thereafter, the petitioners/ applicants had filed a review application, being R.A. 188/2005 before the Tribunal, wherein the Tribunal had refused to interfere with its previous order.

17. The respondents had placed the following ambiguities before the Tribunal in the 1986 Rules which had warranted a conscious decision to defer further promotions:

“1. There is no provision for the promotion of directly recruited ASI (Workshop Assistant) to the post of ASI (Radio Technician) whereas ASI (Workshop Assistant) promoted from the feeder cadre of Fitter Electrician (HC) Fitter Engine (HC), Fitter Battery (HC) with B.R.T. Course conducted by DCPW, New Delhi, can be promoted to the post of ASI (Radio Technician).

2. Mast Lasker (HC) and Draftsman (HC) can be directly promoted to the post of ASI (Radio Technician). But in case they are promoted as ASI (Workshop Assistant) in the absence of vacancy for the post of ASI (RT) or as the case may be, then they cannot be promoted to the post of ASI (Radio Technician) even though they are senior from HC's in the feeder line and as such all their future

promotion avenues are blocked. Further there is no provision for giving option by [sic] them for reversion from the rank of ASI (WSA) to the rank of HC (Mast Lasker) or HC (Draftsman) as the case may be for gaining promotion to the rank of ASI (RT).

3. There is also a clerical variation in the English version and Hindi version of the existing rules about qualifying service required for Fitter Battery (HC), Fitter Engine (HC) and Fitter Electrician (HC) for promotion to the post of ASI (RT) and the same is 5 years and 3 years respectively.”

18. The above ambiguities had also led to the filing of an OA before the Tribunal, being O.A. No. 64/2004, wherein certain persons being ASI (Workshop Assistant) were claiming a right to be promoted to the post of Radio Technician (ASI/SI). The Tribunal had dismissed the OA observing that no person can claim promotion *de hors* the rules. At the same time, the Tribunal had granted six months time to take a final decision upon the proposed amendment to the Recruitment Rules. We deem it appropriate to reproduce the operative portion of the Order of the Tribunal dated 13.08.2004:

*“4. The settled principle in law is that no person can seek a promotion *dehors* the rules. When the rules for the post of ASI (RT) does [sic] not provide promotion from ASI (WSA), who are direct recruits, necessarily, the applicants cannot claim it as of right that they must be promoted on the basis of the said rules. To that extent, the claim as for present, must be rejected.*

5. However, once the proposal is under consideration for amendment of the recruitment rules for ASI (RT) and it is stated that it is under consideration for past three years, it would be in the fitness of things that a final decision is taken by the respondents in this regard preferably within a period of six months from the date of receipt of a certified copy of this order.

(Emphasis added)

19. We also note that the applicants in O.A. 64/2004 had approached this Court in ***Sudhir Kumar and Ors. v. Union of India and Ors., W.P. (C) 2209/2005***, again seeking promotion during the currency of the 1986 Rules. The writ petition has been dismissed as the order of the Tribunal was found to be in conformity with law.

20. In view of the above, the short question which arises for our consideration is whether the vacancies which arose in the year 2003 are to be filled up by the prevalent recruitment rules/ 1986 Rules or as per the new recruitment rules/ 2005 Rules made applicable from 2006; especially when the new recruitment rules are prospective in nature.

21. In ***Y.V. Rangaiah (Supra)***, the petitioners therein were aggrieved by the failure of the department to prepare a panel for making appointments to the grade of Sub-Registrars Grade II by transfer. There was no decision by the department to defer the creation of a panel, the deprivation of promotion was due to delay occasioned by the department. By the time, the panel was created, the relevant rules had been amended, by which the petitioners therein were no longer eligible for the post they desired. The Supreme Court ordered that the vacancies which had occurred prior to the amendment of the rules shall be governed by the old rules only. The relevant part reads as under:-

“9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than Respondents 3 to 15 would not have been deprived of their right of being considered for promotion. The

vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.

(Emphasis added)

22. Thereafter, the Supreme Court in **Shankarsan Dash (Supra)** held that qualified candidates have no right to be appointed against vacancies and the State is under no legal duty to fill up the vacancies when they occur or are notified. The State may take a decision *bona fide* not to fill up the vacancies. At the same time, the Supreme Court had struck a cautionary note saying that the same will not enable the State to act in an arbitrary manner. The relevant part reads as under:

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by

this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165] , Neelima Shangla v. State of Haryana [(1986) 4 SCC 268 : 1986 SCC (L&S) 759] , or Jatinder Kumar v. State of Punjab [(1985) 1 SCC 122 : 1985 SCC (L&S) 174 : (1985) 1 SCR 899] .”

(Emphasis added)

23. In *State of Bihar and Ors. v. Md. Kalimuddin and Ors.*, [1996] 1 SCR 314, the Government of Bihar had taken a conscious decision to defer the appointments of wait-listed candidates until the decision to revise the policy in respect to reservation was finalized. The Government had decided that further appointments will only be made as per the revised rules. The High Court had condemned the decision of the Government by expressing a “serious doubt” in the objective of the policy of the Government. The Supreme Court reversed the decision of the High Court holding that since the Government decided to defer appointments for proper reasons and there was no *mala fide* on the part of the Government.

24. A Full Bench of the Supreme Court in *Dr. Ramulu (Supra)* took into consideration all the ertswhile judgments, including *Y.V. Rangaiah (Supra)* and held that if the department takes a conscious policy decision to stop further promotion as per existing rule and the same is backed by proper reasons, then the eligible employees cannot claim as a right the preparation of a panel as per the old rules. The relevant paragraphs read as under:

“12. The same ratio was reiterated in Union of India v. K.V. Vijeesh [(1996) 3 SCC 139 : 1996 SCC (L&S) 683] (SCC paras 5 and 7). Thus, it could be seen that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. Shri H.S. Gururaja Rao, contends that this Court in Y.V. Rangaiah v. J.

Sreenivasa Rao [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] had held that the existing vacancies were required to be filled up as per the law prior to the date of the amended Rules. The mere fact that Rules came to be amended subsequently does not empower the Government not to consider the persons who were eligible prior to the date of amendment. It is seen that the case related to the amendment of the Rules. Prior to the amendment of the Rules two sources were available for appointment as Sub-Registrar, namely, UDCs and LDCs. Subsequently, Rules came to be amended taking away the right of the LDCs for appointment as Sub-Registrar. When the vacancies were not being filled up in accordance with the existing Rules, this Court had pointed out that prior to the amendment of the Rules, the vacancies were existing and that the eligible candidates were required to be considered in accordance with the prevailing Rules. Therefore, the mere fact of subsequent amendment does not take away the right to be considered in accordance with the existing Rules. As a proposition of law, there is no dispute and cannot be disputed. But the question is whether the ratio in Rangaiah case [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] would apply to the facts of this case. The Government therein merely amended the Rules, applied the amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force. It is true, as contended by Mr H.S. Gururaja Rao, that this Court has followed the ratio therein in many a decision and those cited by him are P. Ganeshwar Rao v. State of A.P. [1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] , P. Mahendran v. State of Karnataka [(1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727] , A.A. Calton v. Director of Education [(1983) 3 SCC 33 : 1983 SCC (L&S) 356] , N.T. Devin Katti v. Karnataka Public Service Commission [(1990) 3 SCC 157 : 1990 SCC (L&S) 446 : (1990) 14 ATC 688] , Ramesh Kumar Choudha v. State of M.P. [(1996) 11 SCC 242 : (1996) 7 Scale 619] In none of these decisions, a situation which has arisen in the present case had come up for consideration. Even Rule 3 of the General Rules is not of any help to the respondent for the reason that Rule 3

contemplates making of an appointment in accordance with the existing Rules.

...

15. Thus, we hold that the first respondent has not acquired any vested right for being considered for promotion in accordance with the repealed Rules in view of the policy decision taken by the Government which we find is justifiable on the material available from the record placed before us. We hold that the Tribunal was not right and correct in directing the Government to prepare and operate the panel for promotion to the post of Assistant Directors of Animal Husbandry Department in accordance with the repealed Rules and to operate the same.

(Emphasis added)

25. After the pronouncement of the Supreme Court in **Dr. Ramulu (Supra)**, the law is well-settled that the Government may take a conscious decision to not effect promotions to existing vacancies as per the prevalent rules and wait until the revision/ amendment to the rules is carried out. At the same time, such a decision must be based upon proper reasoning and should not be actuated by *mala fide*. In this regard, the the Supreme Court in the case of **Arun Kumar Aggarwal (Supra)** observed as under:

“18. Per contra Dr. Dhawan contended that the vacancies arose during 2000-01 under 1941 Rules and, therefore, these should be filled up under the 1941 Rules. He further contended that the vacancies so arisen under 1941 Rules be filled up according to the instructions issued on 1.10.1999, 29.12.2000 and 25.9.2003. He further contended that there was no conscious decision arrived at by the Government. According to him, such conscious decision, if any, must be based on deliberations. According to him, there was no such deliberation. He further contended that the conscious decision of the Government, if any, cannot unsettle the Rules.

...

20. While it is true that there appears to be no definite decision arrived at based on deliberations, the intendment

of the authorities can be gathered from various background and circumstances.

...

30. There is no quarrel over the proposition of law that normal rule is that the vacancy prior to the new Rules would be governed by the old Rules and not by the new Rules. However, in the present case, we have already held that the Government has taken conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case.

...

38. We hold that the Government has taken a conscious decision not to fill up the posts under the old 1941 Rules. The impugned order of the High Court is set aside. We may at this stage point out that the problem seems to have been compounded by the inaction/casual approach of the Government detrimental to public interest. The State Government shall now fill up the vacant posts in accordance with the 2004 Rules within a period of three months from today. All the eligible candidates who satisfy the criteria laid down under the 2004 Rules shall be considered. The entire process of recommendation and appointment shall be completed within three months from today.”

(Emphasis added)

26. Further in the case of **Deepak Agarwal (Supra)**, it has been held as under:

“26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the “rule in force” on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible

candidates. Unless, of course, the applicable rule, as in Y.V. Rangaiah case [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment.”

(Emphasis added)

27. The law in this regard was summarized by this Court in **Commandant Shamsher Singh Malik (Supra)** as under:

“25. From a conjoint reading of the afore-noted judicial decisions, the legal principle which emerges is that the normal rule is that the vacancy which had arisen prior to amendment of the rules would be governed by the un-amended Rules and not by the amended Rules unless the amending rule is made retrospective in operation or a conscious decision is taken to fill up existing vacancies as per the amended Rule.”

(Emphasis added)

28. In view of the foregoing, it is clear that law in this regard is no longer *res integra*. The general rule is that vacancies occurring should be filled up as per the prevalent recruitment rules. The same is subject to two exceptions, i.e. when the rules are under consideration for amendment or revision and the authority has taken a conscious decision to defer further promotions until the changes are carried out or that the proposed new rules are to be made applicable retrospectively. Further, the decision to defer promotions should not be actuated by *mala fides* and must be based on proper reasons. Such a reason may be gathered from the background and circumstances in which the decision was taken. The right of an employee to be considered for promotion accrues only on the date of consideration of eligible candidates by the department and not before or if the rules provide for a particular time-frame

in which the selection process is to be concluded. No right accrues to the candidates upon the occurrence of vacancies.

29. Having regard to the aforesaid principle of law, what is to be considered is, as to whether the vacancies were not filled up on account of a conscious decision or not. Such a decision may also be gathered from the background and circumstances. In this regard, the Original file has been produced in Court (which has been seen and returned). In the original file, we find a detailed note dated 21.10.2014, relevant portion of which reads as under:

“The case is submitted for favour of perusal and orders as to whether we may keep the case reg. filling up the vacant posts of ASI (WSA) (12 posts) and ASI (RT) (24 posts) pending for the present and fill up these vacant posts after finalisation of pending recruitment Rules or otherwise.”

30. It would also be useful to reproduce the comments written by the Officers of Delhi Police on the noting dated 21.10.2004:

“In view of glaring anomalies in Existing Promotion Rules and the matter being sub judice we may wait for the proposed amendment Rules, if approved.

May pl. see noting Para 26/N onwards. Concerned dealing hands of GNCTD were also present. We are processing the matter early and may not fill the posts till then.”

(Emphasis supplied)

31. A perusal of the above notings, leaves no room for doubt that the respondents had taken a conscious decision not to fill up the existing vacancies till the amendment in the recruitment rules. The reasons are cogent, as reproduced by us in para 17 foregoing. Identical stand was taken by the respondents in the O.A. No. 64/2004, which was filed by persons aggrieved by then prevalent rules/ 1986 Rules. In view of above, we find no

infirmity in the impugned order passed by the Tribunal, which would require interference.

32. Resultantly, the writ petition stands dismissed.

33. In view of the order passed in the writ petition, all the pending applications have been rendered infructuous and are disposed of as such.

G.S.SISTANI
(JUDGE)

I.S. MEHTA
(JUDGE)

AUGUST 04, 2016
j/msr

