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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Dated: 8th December, 2016***

+ W.P.(C) 244/2002

UNION OF INDIA & ANR. Petitioners

Through : Mr. R.V. Sinha and Mr. A.S. Singh,
Advocates

versus

THE DEFENCE MARINE ENGINEERING TECHNICAL STAFF
WELFARE ASSOCIATION & ORS. Respondents

Through : Mr. S.S. Sastry and Mr. Rishi
Manchanda, Advocates along with
Respondent no. 2/Mr. V.K. Chawla

+ W.P.(C) 7885/2007

UNION OF INDIA THROUGH THE SECRETARY MINISTRY OF
DEFENCE Petitioner

Through : Mr. Ruchir Mishra, Advocate

versus

SEWA SINGH Respondent

Through : Mr. S.S. Sastry and Mr. Rishi
Manchanda, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J (ORAL)

1. Both the writ petitions arise out of orders passed by the Central Administrative Tribunal (in short '*the Tribunal*'). In W.P. (C) 244/2002 an order dated 31.08.2001 passed by the Tribunal in OA 2403/2000 is impugned; while in W.P. (C) 7885/2007 an order dated 15.05.2007 in

OA 1910/2005 is impugned. While deciding OA 1910/2005, by a short order, the Tribunal held that the applicant was similarly circumstanced with the applicants in OA 2403/2000, wherein the Tribunal had quashed the panel for promotion to Junior Scientific Officer created as per the new recruitment rules and directed the respondents to prepare a fresh panel as per the unamended recruitment rules.

2. The counsel for the parties agree that the basic facts are the same. The point of law which arises for consideration is also the same. Arguments have been advanced in both the matters and with the consent of the parties; both the matters are being decided by a common judgment.
3. For the sake of convenience, the facts of W.P. (C) 244/2002 are being noticed.
4. The respondent no.1 is the Defence Marine Engineering Technical Staff Welfare Association; while respondent no.2/Mr. V.K. Chawla, who at the relevant time, was working as a Senior Technical Assistant (in short 'STA') as was the the respondent in W.P. (C) 7885/2007. The grievance of the respondents before the Tribunal was that despite being eligible for promotion to the post of Junior Scientific Officer (in short 'JSO'), the petitioner herein did not hold a DPC between the period 1994 to 2000, thus depriving the respondents of their lawful promotion from STA to JSO. The common case of the parties is that promotion to the post of JSO, which was a Group 'B' Gazetted Post, was to be filled up by promotion from the feeder cadres of Foremen ('FM'), Senior Scientific Assistant ('SSA'), Senior Technical Assistant ('STA'), and Chief Draughtsmen ('CDM').
5. The submission of the respondents/ applicants before the Tribunal was that as per the unamended Recruitment Rules notified on 02.02.1982, the feeder categories for the post of JSO were Foremen/Senior Scientific

Assistant/Senior Technical Assistant/Chief Draughtsmen. Further, a 20 point roster was to be followed in the chronological order of Foremen, SSA, STA and Chief Draughtsmen. Later, vide OM dated 16.06.1998, on the recommendations of the Board of Arbitration, the petitioner allowed 41% of STAs to be placed in the pay scale of Rs. 2375-3500 w.e.f. 01.01.1988 but, according to the respondents herein this was only a placement and did not amount to promotion, as the benefit of FR 22 (1) (a) was not extended. Later, upon the recommendations of the Fifth Central Pay Commission, STAs in the higher pay grade have been re-designated as 'STA-I' and the remaining have been designated as 'STA-II'. The petitioners had not held any DPC for the post of JSO from 1994 to 2000 which resulted in accumulation of vacancies. In 2000, vide SRO 84 dated 21.03.2000 and notified on 08.04.2000, i.e. the amended Recruitment Rules, the promotion to the grade of JSO was from the feeder cadres of Foreman/SSA/Chief Draughtsman/STA-I in the respective disciplines. While preparing the panel all the vacancies were clubbed and the panel has been formed on the basis of the amended Recruitment Rules. While 15 STAs would have been empanelled as per the old Rules, only 9 STAs were included as per the new Rules as now only STA-I stood as a feeder cadre to the exclusion of the persons now categorised as STA-II. It was also submitted that in the panel impugned, STAs were placed *en bloc* junior to Foremen, Chief Draftsman and SSAs, which is not permissible as per law. The submissions of the respondents before the Tribunal were that the failure of the petitioners herein to follow the old Recruitment Rules, including the 20-point roster, fewer posts have been allotted to STAs. It was incumbent upon the petitioners herein to follow the old Recruitment Rules as the new Rules had no retrospective effect and vacancies occurred prior to the

amendment should have been filled as per the old Rules. It was also submitted that administrative instructions, of the Department of Personnel and Training, Government of India ('DoPT') in the present case, could not override the statutory rules. The respondents herein had relied upon DoPT Instructions dated 10.03.1989; *P. Mohan Reddy v. E.A.A.A. Charles and Others*, 2001 (2) Scale 105; and *Y.V. Rangaiah v. J. Sreenivasa Rao*, AIR 1983 SC 852.

6. Before the Tribunal, the stand of Union of India/ petitioner was that after 01.01.1988, on the basis of the award of Board of Arbitration, 41% of posts each in the grades of SSAs and Chief Draughtsmen ('CDM') were accorded higher revised pay scale of Rs. 2,375-3,500 and classified as 'SSA (HS)' and 'CDM (HS)'. As such, while Group 'B' Gazetted promotional post of JSO was in the Pay Scale of Rs. 2,000-3,500; in May, 1994, few category of Foremen, SSA (HS) and CDM(HS) were also placed in Group B Gazetted at a higher Pay Scale of Rs. 2,375-3,500. The DoPT, being the nodal authority in matters of promotion, advised the petitioners not to hold the DPC for promotion to the post of JSO until rationalization of the cadre structure; which was attained on implementation of the recommendations of the Fifth Pay Commission whereby the post of JSO was fixed in the upgraded scale of Rs. 7500-12000 instead of the normal replacement scale of Rs. 6500-10500. As regards the cadre of STAs, the upgraded scale of Rs. 6500-10500 has been accorded, instead of normal replacement scale of Rs. 5500-9000 w.e.f. 01.01.1996 and the cadre was restructured into two separate grades of STA Grade-I and STA Grade-II. In June, 1998 41% of the posts of STAs were granted higher scale of Rs. 2375-3500 (pre-revised) retrospectively w.e.f. 01.01.1988 and classified as 'STA-I'. At this stage, the DoPT was again consulted, which decided to defer the filling

up of cadre of post of JSO unless the relevant recruitment rules are revised and amended. The petitioners relied upon OM dated 25.05.1998 issued by DoPT providing *inter alia* that in the case of posts granted higher pay scale and not the equated revised scale, the existing recruitment rules were not to be operated pending revision of the rules. Thereafter, the Recruitment Rules were amended, vide SRO 84 dated 21.03.2000, which had come in effect from 08.04.2000. The DPC had met for all the available vacancies of JSO as available on 31.03.2001 and created the impugned panel. According to the petitioners 1982 recruitment rules for the post of JSO had become inoperative after May, 1994 and as such upon the advice of the DoPT, the DPC had not been held from the year 1994 to 2000. After restructuring cadre of STAs in terms of order dated 12.02.1998, the persons holding the erstwhile post of STAs are now designated either as 'STA-II' in the upgraded revised Pay Scale of Rs. 6500-10500 or 'STA-I' in the higher scale of Rs. 7450-11500. The respondents, having accepted the said replacement, could not contend that they have been adversely by the empanelment. The clubbing of vacancies has taken place on revision of 1982 Recruitment Rules. It was stated by the petitioners before the Tribunal that as per the revised recruitment rules, it is the STA-I who along with Foremen, SSAs and CDMs were eligible for promotion and there is an arrangement of a single select panel with reference to their dates of regular appointment in their respective feeder grade. As regards the applicability of the 20-point roster, it was submitted that the same was vague and is no longer applicable.

7. The Tribunal had accepted the contentions of the applicants/ respondents herein and rejected the contention of the petitioners that the holding of DPC were deferred owing to rationalization of the feeder cadres

observing that restructuring could not have taken away the right of the applicants to be considered for promotion as per the old Rules. The Tribunal quashed the panel and directed the creation of a fresh panel as per the unamended Recruitment Rules and as per the 20-point roster for the vacancies from 1994-2000. Being aggrieved by the order of the Tribunal, W.P.(C) 244/2002 was filed. Rule DB was issued in the matter on 17.01.2002; on the same date the operation of the impugned order was also stayed.

8. Mr. Mishra, learned counsel for Union of India, submits that the Tribunal has failed to take into consideration that on account of change in circumstances, the 1982 Rules became inoperative and the promotions could not have been carried out after May, 1994 as three out of the four feeder posts, i.e. SSA (HS), CMD (HS) and Foremen, which were initially Group 'C' posts, were upgraded to Group 'B' Gazetted. Counsel further points out that on the basis of an award of the Board of Arbitration, while the pay scale of the promotional post of JSO remained static, i.e. Rs. 2000-3500, the pay of Foreman, SSA and CDM increased to Rs. 2375-3500. The post of STA was not upgraded to Group 'B' Gazetted post and remained as a Group 'B' Non-gazetted post.
9. Elaborating his arguments further, Mr. Mishra contended that since FM, SSA and CDM were upgraded to Group 'B' Gazetted posts, they no longer remained as feeder posts and thus, in case any promotion was made out of the fourth remaining feeder post, i.e. STA, it would have led to an imbalance because as per the Rules, upon promotion from the four feeder posts a common seniority list is prepared and further as per the 20-point roster introduced in 1987, 11 posts for Foremen, 1 post for SSA, 6 posts for STA and 2 posts for CDM were allotted. The counsel contends that in 1994, the petitioner had written to the DoPT bringing to

their notice the anomaly which had occurred on account of award dated 01.01.1988. It is contended that while necessary action to amend the relevant recruitment rules was accordingly initiated, a reference was made to the UPSC to allow filling the vacant posts in the grade of JSO by promotion in accordance with the proposed provisions of the Recruitment Rules pending their formal notification. Counsel contends that it was only after the implementation of the 5th Pay Commission, that the cadre was rationalized. The counsel has placed strong reliance on a communication dated 28.06.1999 issued by the Ministry of Defence, Government of India to all the parent Departments in question, which reads as under:

“PROMOTION TO THE GRADE OF JUNIOR SCIENTIFIC
OFFICER IN DGQA ORGANISATION”

This Headquarters have of late been receiving a number of representations from individuals employees as also the Associations in regard to the delay in filling vacant posts in the grade of JSO by promotion of the concerned employees. The intent of this letter is to bring out for information of all concerned the constraints in this regard and the efforts being made by this Headquarters to resolve the matter.

2. In accordance with the existing recruitment rules for the post of JSO, the promotion to the post is required to be made from amongst the persons holding posts of Foreman, Senior Scientific Assistant, Chief Draughtsman and Senior Technical Assistant with three years regular service in the respective grades. The pre-revised pay scale of the post of JSO was Rs.2000-3500 whereas the posts of FM and 41% posts each of SSA and CDM (referred to as SSA(HS) and CDM(HS) respectively) were in a higher segment of Rs.2375-3500 of the pay scale of the post of JSO. Promotion to the grade of JSO were being made in accordance with the provisions of the existing recruitment rules till such time FM/SSA(HS)/CDM(HS) were Group ‘C’ categories and STA (Rs.1640-2900) a Group ‘B’ Non-Gazetted post. In 1994, the classification of FM/ SSA(HS)/CDM(HS) was changed

to Group 'B' Gazetted at par with that of their promotional grade of JSO in view of which a ruling was given by DOP&T that their promotion would no longer be permissible. As a result, no promotions could be made in the grade of JSO after 1993.

3. On implementation of the recommendations of the Fifth Central Pay Commission, now-

(a) The post of JSO is in the pay scale of Rs.7500-12000.

(b) The posts of FM/SSA(HS)/CDM(HS) are in the pay scale of Rs.7450-11500.

(c) The cadre of STAs has been restructured whereby 41% posts of the cadre have been granted the pay scale of Rs.7450-11500 and designated as STA-I.

(d) The posts of SSA(HS) and CDM(HS) have been re-designated as SSA and CDM respectively and are to form the feeder, alongwith FM and STA-I for promotion to the grade of JSO.

4. In the light of the aforesaid changes, it has been opined by DOP&T that the post of JSO can still not be filled unless the relevant recruitment rules are suitably framed/amended. While necessary action to frame/amend the relevant recruitment rules was accordingly initiated, a reference was made to the UPSC (JSO being a Group 'B' post) to allow filling the vacant posts in the grade of JSO by promotion in accordance with the proposed provisions of the amendments to RRs pending their formal notification. The matter was pursued with the Commission by holding discussions at the highest levels. The Commission, however, brought out that it was imperative that amendment/finalization of the recruitment rules of the feeder grade posts is settled first.

5. The crux of the situation, therefore, is that promotions to the grade of JSO are dependent on finalization of the recruitment rules for the post as also its feeder categories. These are accordingly being pursued vigorously. Although the matter is being expedited at all the levels, the finalization of the recruitment rules is expected to take some time as their framing involved consultation with and concurrence of DOP&T, UPSC and Law Ministry.”

(Emphasis Supplied)

10. Mr. Mishra has also drawn our attention to a OM issued by the DoPT dated 25.05.1998 with regard to the upgradation of posts, which reads as

under:

“Amendment to Service Rules/Recruitment Rules, consequent on revision of pay scales as recommended by the V CPC

...

...

(iii) Where there is an upgradation of posts

In some cases the Fifth Pay Commission has recommended a higher pay scale and not equated revised scale. Further, in certain cases the recommendations of the Pay Commission are subject to fulfilment of specific conditions, e.g., changes in Recruitment Rules, restructuring of cadres, redistribution of posts, etc. As per guidelines issued by the DoP&T, whenever it has been decided to upgrade any post, action should be taken by the Administrative Ministry/Department concerned to reframe the Recruitment Rules therefor. As the eligibility criteria for direct recruitment or promotion or deputation, etc., to the higher post will be different from those prescribed for a post on a comparatively lower scale, it will be necessary to review the relevant columns of the existing Recruitment Rules for the post for which an upgraded revised scale has been approved and to prescribe age-limits, qualifications, experience and eligibility service for promotion/deputation appropriate to the higher level. Such revision should, however, be undertaken in respect of only those pay scales which have already been approved by the Government and notified or the eligibility as prescribed has undergone a change. Pending revision of the Recruitment Rules with reference to the pay scales as approved by the Government, the existing rules for the lower pay scale may not be operated.”

(Emphasis Supplied)

11. It is further contended by learned counsel for the petitioners that from the period 1994 to 2000, the petitioners struggled to ensure that the anomaly which had occurred was streamlined before the DPC could be held. The explanation rendered as to why the DPC could not be held between 1994 to 2000 as per the Recruitment Rules of 1982 which were amended in 1987 and as can be culled out from the arguments addressed and noticed hereinabove are as under:

12. Mr. Mishra submits that in 1994, the following developments took place:
- (a) 41% SSA post carrying higher pay scale were categorized as Group-
'B' Gazetted post;
 - (b) 41% CDM post carrying higher pay scale were categorized as Group-
'B' Gazetted post;
 - (c) The post of Foreman was categorized as Group-B Gazetted post;
 - (d) As per the above categorization, the post of SSA, Foreman and CDM
ceased to be feeder post for JSO.

The above categorization was the reason due to which DPC could not be conducted as per the Recruitment Rules of 1982 amended in 1987. As three posts were categorized as Group 'B' Gazetted post and only STA remained a feeder post. This rendered the old Recruitment Rules inoperative, dysfunctional and incapable of implementation, even for the post of STA which was continued to be feeder post. Accordingly, DoPT in the year 1994 itself advised for restructuring of the cadre in order to rationalize the same. However, the cadre could be restructured only after the implementation of the recommendations of the 5th Pay Commission. The recommendations were implemented w.e.f. 01.01.1996, pursuant to which JSO post was upgraded to the pay scale of Rs.7500-12000 and was Group 'B' Gazetted post, whereas the four post posts were placed as under:

- | | | |
|-----------------------------------|---------------|---------------|
| (a) Foreman | Group 'B' Gaz | Rs.7450-11500 |
| (b) Sr. Scientific Assistant[SSA] | Group 'B' Gaz | Rs.7450-11500 |
| (c) Sr. Technical Assistant[STA] | Group 'B' NG | Rs.7450-11500 |
| (d) Chief Draftsman[CDM] | Group 'B' Gaz | Rs.7450-11500 |

13. Learned counsel for the petitioners submits that after the implementation of the recommendations of the 5th Pay Commission, all the Foreman post were kept in Rs. 7450-11500, whereas only those posts of SSA which

carried higher pay scale were kept in the pay scale of Rs. 7450-11500 and the rest carrying lower pay scale were kept in Rs. 6500-10500 and similar was the case for the post of CDM. Thereafter, the cadre was restructured in the year 1998. Pursuant to restructuring, STA was divided in two categories STA-I (Rs.7450-11500) and STA-II (Rs.6500-10500). After restructuring of the cadre, the Recruitment Rules were revised and implemented w.e.f. 08.04.2000. It is clear from the above that categorization of feeder posts as Group 'B' Gazetted posts, three posts ceased to be feeder posts and restructuring of the cadre became necessary due to which the Recruitment Rules of 1982, as amended in 1987, ceased to be workable; therefore, the DPC was not conducted and it was conducted after the Recruitment Rules were revised. Accordingly past accumulated vacancies, for the period during which the Recruitment Rules were unworkable, dysfunctional and inoperative, were clubbed with the vacancies of subsequent years and were accordingly filled in as per the revised Recruitment Rules.

14. Learned counsel for the petitioner has also relied upon on a decision of this Court, in which one of us (G.S. Sistani, J.) was a member, in the case of ***Pradeep Kumar & Ors. v. Govt. of NCT of Delhi & Ors.***, 2016 SCC OnLine Del 4599 to submit that while accepting that there was justification in the delay in holding the DPC, the entire law on the subject was analysed and various judgments of the Supreme Court were taken into consideration. Reliance is also placed on another judgment of a coordinate bench of this Court in the case of ***Union of India & Anr. v. K.L. Taneja and Anr***, 2013 Lab IC 2108, more particularly para 21.
15. The sum and substance of the argument of Mr. Mishra is that the DPC could not be conducted between 1994 to the year 2000 due to the administrative reasons and the Rules being inoperative and not on

account of malice, much less legal malice or inaction on the part of the Department. Attention of the Court is also drawn to the communication dated 28.06.1999, more particularly paragraph 4, which has been reproduced in paragraph 9 foregoing to show that an attempt to hold the DPC was repelled by the UPSC and DoPT.

16. Mr. Sastry, the learned counsel appearing for the respondents, and Mr. Chawla who appears in person as well, have strongly opposed the present writ petitions. It is contended that the petitioners have failed to show any ground much less a cogent ground which requires interference in proceedings under Article 226 of the Constitution of India. The submissions made before the Tribunal and reproduced by us in paragraph 5 foregoing are reiterated. Learned counsel submits that the petitioners were not restrained by either by the instructions of DoPT or the UPSC from holding the DPCs. It is contended that merely because after the award, there was change in the pay structure or after May, 1994 there was re-categorisation and three out of the four feeder post had become Group 'B' Gazetted post would not come in the way of the promotion of the respondents. It is contended that it was not the pay of a particular post, but the status attached to the post which was to be considered by the petitioners. In case the DPC was held in the years 1994 to 2000, the Mr. Chawla/ respondent no. 2 in W.P. (C) 244/2002 and Mr. Sewa Singh/ respondent in W.P. (C) 7885/2007 would have stood promoted. Accordingly, on account of the fact that DPC was not conducted between 1994 and 2000, great prejudice has been caused to the respondents as they have not been considered for promotion although they were eligible for promotion and this was solely on account of delay in action and non-application of mind by the petitioners.

17. Learned counsel for the respondents submits that although the petitioners

have relied upon a communication of the DoPT, but no such a communication has been placed on record and thus, reliance on this communication is misplaced; to which Mr. Mishra, learned counsel for the petitioners submits that the Tribunal has taken note of this communication and no such plea was raised before the Tribunal and it should be rejected at this belated stage. Learned counsel for the respondents has placed strong reliance on the decision of the Supreme Court in the case of ***Y.V. Rangaiah and Others v. J. Sreenivasa Rao and Others***, AIR 1983 SC 852. Reliance is placed upon the case of ***U.O.I. through Govt. of Pondicherry and Another v. V. Ramakrishnan and Others***, AIR 2005 SC 4295, more particularly paragraphs 26 and 28, which read as under:

“26. The Rules did not become inoperative only because the two scales of pay of the Superintending Engineer and the Chief Engineer became same in terms of revised pay scales. A rule does not become inoperative only because UPSC says so. A rule validly made even if it has become unworkable unless repealed or replaced by another rule or amended, continues to be in force. As regards scale of pay, the matter should have been referred to the anomaly removal committee. In terms of the new rules, the criteria prescribed under the old rules were modified. Thus, till the new rules were given effect to, no promotion to the post of Chief Engineer could be effected in derogation to the criteria prescribed under the existing Rules.

...
28. Valid rules made under proviso appended to Article 309 of the Constitution operate so long the said rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion, when Rules to the contrary are holding the field. It can safely be assumed that the principle in Abraham Jacob [(1998) 4 SCC 65 : 1998 SCC (L&S) 995] , Vimal Kumari [(1998) 4 SCC 114 : 1998 SCC (L&S) 1018] and Gujarat Kishan Mazdoor Panchayat [(2003) 4 SCC 712 : 2003 SCC (L&S) 565] that draft rules can be acted upon, will apply where there are no rules governing the matter and where recruitment is governed by departmental instructions or

executive orders under Article 162 of the Constitution.”

(Emphasis Supplied)

18. Mr. Sastry submits that this judgment would apply to the facts of the present case and contends that a rule does not become inoperative merely because UPSC says so. He further contends that a rule validly made, even if it has become unworkable, unless repealed or replaced by another rule or amended, would continue to remain in force. He also contends that the Supreme Court in the case of **V. Ramakrishnan (Supra)** (paragraph 28) has held that valid rules would continue to operate so long till the said rules are not repealed or replaced.
19. We have heard the learned counsel for the parties and considered their rival submissions. The issue which arises for our consideration in the present matter is whether the delay in holding DPCs for the post of JSO until the revision of Recruitment Rules is sustainable in law?
20. It is no longer *res integra* that the department can postpone holding of DPC, if there are cogent reasons to defer promotions and a conscious decision is taken not actuated by *mala fides* or merely owing to administrative lapses. The issue was exhaustively dealt in a recent judgment of a coordinate bench of this Court, in which one of us (G.S. Sistani, J.) was a member, in **Pradeep Kumar (Supra)**, wherein it was held as under:

“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 Shamsheer 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.”

21. Another Division Bench of this Court in *K.L. Taneja (Supra)* had summarized the law as under:

“21. The cornucopia of case law above noted brings out the position:

(i) Service Jurisprudence does not recognize retrospective promotion i.e. a promotion from a back date.

- (ii) *If there exists a rule authorizing the Executive to accord promotion from a retrospective date, a decision to grant promotion from a retrospective date would be valid because of a power existing to do so.*
- (iii) *Since mala fides taints any exercise of power or an act done, requiring the person wronged to be placed in the position the person would find himself but for the mala fide and tainted exercise of power or the act, promotion from a retrospective date can be granted if delay in promotion is found attributable to a mala fide act i.e. deliberately delaying holding DPC, depriving eligible candidates the right to be promoted causing prejudice.*
- (iv) *If due to administrative reasons DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.”*

(Emphasis Supplied)

22. The present case is to be decided on the touchstone of the law laid down by the Apex Court. The facts of the present case are that the respondents, at the relevant period, were working as STAs and were eligible for promotions to the post of JSO as per the erstwhile Recruitment Rules. The old Recruitment Rules, being Directorate General of Inspection (DGI) Organisation (Junior Scientific Officer) Recruitment Rules, 1982 as amended in 1987 (hereinafter ‘1982 Rules’), governed the promotion to the post of JSO. As per the Rules, the posts of Foreman, SSA, STA and CDM were feeder posts for JSO. In 1987, by means of an amendment, a 20-point roster was introduced, which assigned 11 posts for Foremen, 1 post for SSA, 6 posts for STA and 2 posts for CDM.
23. Upon implementation of the recommendations of the 4th Pay Commission w.e.f. 01.01.1986, the pay scale of Foreman was increased to a higher pay than the promotional post of JSO itself. Thereafter, by the implementation of the award of the Board of Arbitration, w.e.f. 01.01.1988, 41% of the posts of SSA and CDM were given accorded a

higher pay scale equivalent to that of the Foreman and higher than JSO. The posts with higher pay scale of SSA and CDM were classified as SSA (HS) and CDM (HS) respectively. In 1994, the posts of Foreman, CDM (HS) and SSA (HS) were categorized as Group ‘B’ Gazetted posts. At the same time, it is pertinent to notice that the promotional post of JSO was also a Group ‘B’ Gazetted post and having lower pay scales than the feeder posts of Foreman, CDM (HS) and SSA (HS). In this background, the petitioners have contended that the three posts no longer remained as feeder posts for the post of JSO and accordingly the 1982 Rules were rendered inoperative.

24. Thereafter, the cadres could be rationalized only after the implementation of the recommendations of the 5th Pay Commission in 1998 w.e.f. 01.01.1996. After the implementation of the recommendations, cadre was rationalized as the promotional post of JSO was given a higher pay scale than the feeder posts. Further in June 1998, pursuant to restructuring, the post of STA was also divided into STA-I and STA-II on similar lines as division of 41% of SSA and CDMs on the recommendation of Board of Arbitration.
25. The following table would render clarity:

<u>Post</u>	<u>Before 1986</u>	<u>01.01.1986</u> <u>(4th CPC)</u>	<u>01.01.1988</u> <u>(Award)</u>	<u>May 1994</u>	<u>01.01.1996</u> <u>(5th CPC)</u>	<u>June 1998</u>
JSO	650-1200 Grp ‘B’ Gz	2000-3500 Grp ‘B’ Gz	2000-3500 Grp ‘B’ Gz	2000-3500 Grp ‘B’ Gz	7500-12000 Grp ‘B’ Gz	7500-12000 Grp ‘B’ Gz
FM	840-1040 Grp ‘C’ Gz	2375-3500 Grp ‘C’ Gz	2375-3500 Grp ‘C’ Gz	2375-3500 Grp ‘B’ Gz	7450-11500 Grp ‘B’ Gz	7450-11500 Grp ‘B’ Gz
SSA	550-900 Grp ‘C’ Gz	1640-2900 Grp ‘C’ Gz	2375-3500 Grp ‘C’ Gz SSA (HS) (41%)	2375-3500 Grp ‘B’ Gz SSA (HS)	7450-11500 Grp ‘B’ Gz SSA	7450-11500 Grp ‘B’ Gz SSA

<u>Post</u>	<u>Before 1986</u>	<u>01.01.1986</u> <u>(4th CPC)</u>	<u>01.01.1988</u> <u>(Award)</u>	<u>May 1994</u>	<u>01.01.1996</u> <u>(5th CPC)</u>	<u>June 1998</u>
			1640-2900 Grp 'C' Gz SSA	1640-2900 Grp 'C' Gz SSA	6500-10500 Grp 'C' Gz SSA Grade-I	6500-10500 Grp 'C' Gz SSA Grade-I
CDM	700-900 Grp 'C' Gz	2000-3200 Grp 'C' Gz	2375-3500 Grp 'C' Gz CDM (HS) (41%)	2375-3500 Grp 'B' Gz CDM (HS)	7450-11500 Grp 'B' Gz CDM	7450-11500 Grp 'B' Gz CDM
			2000-3200 Grp 'C' Gz CDM	2000-3200 Grp 'C' Gz CDM	6500-10500 Grp 'C' Gz CDM Grade-II	6500-10500 Grp 'C' Gz CDM Grade-II
STA	550-900 Grp 'B' NG	1640-2900 Grp 'B' NG	1640-2900 Grp 'B' NG	1640-2900 Grp 'B' NG	6500-10500 Grp 'B' NG	7450-11500 Grp 'B' Gz STA-I (41%)
						6500-10500 Grp 'B' NG STA-II

Key- Gz: Gazetted; NG: Non-gazetted; Grp: Group (Amounts in Rs.)

26. In order to justify the deferring promotions beyond rationalization in 1998, the learned counsel for the petitioners has relied upon an OM dated 25.05.1998 issued by the DoPT and communication dated 28.06.1999 issued by the Ministry of Defence, Government of India as reproduced by us in paragraphs 9 and 10 foregoing. In our view, the OM and communication clearly show that based on the opinion of the DoPT, it was conscious decision on the part of the petitioners not to effect promotions till the Recruitment Rules were revised.
27. Subsequently in the year 2000, the Recruitment Rules were revised and notified vide SRO 84 dated 21.03.2000 and published on 08.04.2000 (hereinafter '2000 Rules'). As per the 2000 Rules, the posts of Foreman, SSA, CDM and STA-I remained feeder posts to the post of JSO. SSA

(Grade-I), CDM (Grade-II) and STA-II were no longer feeder posts to the post of JSO. Further, a ratio was to be fixed between the disciplines on the basis of relative strength of the feeder categories in each discipline. Thereafter, the panel, impugned before the Tribunal, was created as per the 2000 Rules.

28. In view of the foregoing, we are of the view that there were valid and cogent reasons for the petitioners not holding DPCs from 1994-2000.
29. In respect of the contention of the respondents in respect of the communication of the UPSC not being on record; we note that the same has been recorded by the Tribunal in its order and even otherwise, the absence of the communication makes no difference as it has been held in *State of Punjab v. Arun Kumar Aggarwal*, (2007) 10 SCC 402 (paragraph 20) and *Pradeep Kumar (Supra)* (paragraph 28) that reasons may be gathered from the background and circumstances in which the decision was taken. Even the judgment of the Apex Court upon *Y.V. Rangaiah (Supra)* does not come to the aid of the respondents as, in that case, the department had failed to take any decision at all and the delay in promotions was owing to administrative lapses; this has also been held by a Full Bench of the Supreme Court in *Dr. Ramulu and Anr. v. Dr. S. Suryaprakash Rao and Ors.*, (1997) 3 SCC 59.
30. The last contention of the respondents was that the 1982 Rules do not become inoperative only because the UPSC says so. Mr. Sastry had relied upon the decision of the Supreme Court in *V. Ramakrishnan (Supra)*. According to us, reliance upon the judgment of *V. Ramakrishnan (Supra)* is misplaced as the Supreme Court was dealing with a case wherein the services of one employee, deputed as Chief Engineer, were terminated and another employee (R. Sundar Raju) was promoted to the post on *ad hoc* basis as per the draft rules in derogation

of the erstwhile rules. Accordingly, the observations in paragraph 26 and 28 quoted by us in paragraph 17 aforegoing were in the background wherein the Government had decided to promote one person in derogation of the erstwhile recruitment rules and does not deal with a scenario where no promotions are being affected pursuant to a conscious decision. We may note the following observations therein:

“31. In terms of Article 16 of the Constitution, the employees similarly situated cannot be discriminated. Employees having the same qualification, thus, must be considered by a duly constituted DPC consisting of the Chairman/Member, UPSC, Chief Secretary and Secretary (Works). It is unfortunate that the Government of Pondicherry instead and in place of asking UPSC to constitute a DPC for consideration of the cases of all eligible candidates, passed the order (vide letter dated 28-9-2005) on the same day on which the new rules came into effect, requesting UPSC to regularise the services of R. Sundar Raju as Chief Engineer from the date of his ad hoc promotion. Such an act betrays a lack of bona fides on the part of a State which is required to be performed in a fair and reasonable manner. It smacks of favouritism. Having regard to the unauthorised purpose for which the action has been taken, the same would attract the principle of malice in law. (See Punjab SEB Ltd. v. Zora Singh [(2005) 6 SCC 776].)”

(Emphasis Supplied)

31. In the present case, there is no allegation of *mala fides* and accordingly, reliance of the counsel for the respondents on **V. Ramakrishnan (Supra)** is misplaced.
32. In the light of the above discussion, we find that a conscious decision was taken to defer promotions until revision of Recruitment Rules as the 1982 Rules had become inoperative. Accordingly, the present writ petitions are allowed, the orders of the Tribunal are set-aside.

33. No costs.

G.S.SISTANI, J.

VINOD GOEL, J.

DECEMBER 08, 2016

//pst

