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IN THE HIGH COURT OF DELHI AT NEW DELHI

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LPA 727/2012

UNION OF INDIA &amp; ANR

..... Appellant

Through

Mr. Sameer Aggarwal, Advocate.

versus

AMIT RAI &amp; ORS.

..... Respondent

Through

Mr. Ashok Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

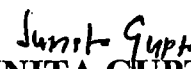
HON'BLE MS. JUSTICE SUNITA GUPTA

ORDER

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21.11.2016

For detailed order see LPA No.726/2012, *Union of India &**Anr. Vs. D.P. Singh & Ors.* pronounced today.
  
 SANJIV KHANNA, J.

  
 SUNITA GUPTA, J.

NOVEMBER 21, 2016

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

+ **LPA No.726/2012**

% **Reserved on:** 10<sup>th</sup> August, 2016  
**Date of Decision:** 21<sup>st</sup> November, 2016

UNION OF INDIA & ANR ..... Appellant  
Through Mr. Sameer Aggarwal, Advocate.

versus

D.P. SINGH & ORS ..... Respondent  
Through Mr. Ashok Singh, Advocate.

**LPA 727/2012**

UNION OF INDIA & ANR ..... Appellant  
Through Mr. Sameer Aggarwal, Advocate.

versus

AMIT RAI & ORS. .... Respondent  
Through Mr. Ashok Singh, Advocate.

**CORAM:**  
**HON'BLE MR. JUSTICE SANJIV KHANNA**  
**HON'BLE MS. JUSTICE SUNITA GUPTA**

**SANJIV KHANNA, J.**

These two intra-Court appeals impugn the common order and judgment dated 30<sup>th</sup> July, 2012 passed in W.P. (C) No.4351/2010, ***D.P. Singh & Ors. Vs. Union of India & Ors.*** and W.P. (C) No. 4886/2010, ***Amit Rai & Ors. Vs. Union of India & Ors.***

2. The writ petitioners having succeeded before the Single Judge are the respondents in the present appeals, preferred by the Union Of India and the Executive Director, Building Materials and Technology Promotion Council.

3. The Building Materials and Technology Promotion Council (Appellant No.2, for short) is a society registered under the Indian Societies Registration Act, 1860. The principal promoter of the appellant No. 2 was the erstwhile Ministry of Urban Affairs and Employment. As per the Memorandum of Association of the appellant No. 2, the Board of Management/Executive Council is to be constituted by the Ministry of Housing and Urban Poverty Alleviation, Government of India. The Minister in charge of the same Ministry is the ex-officio President and the Minister of State is the Vice President of the appellant No.2 Council. Any alteration or change in the Memorandum of Association and rules and regulations of the appellant No.2 Council requires the approval of the Ministry. The budget of the appellant No.2 Council is sanctioned quarterly by the Ministry. The appellant No.2 is a State and to this extent, there is no dispute or lis.

4. The respondents are employees of the appellant No.2 Council, who were appointed on different dates. They had filed the aforesaid writ petitions in the year 2012 praying for the implementation of the time-bound promotions under the old bye-laws, professing that the new bye-laws which were brought into effect from 16<sup>th</sup> June, 2009 cannot be made applicable with retrospective effect. The respondents had argued that they had acquired vested right to be considered for and granted time-bound promotion under the old bye-laws after they had rendered regular service for specified years at their respective posts.

5. The impugned judgment accepts the plea of the respondents relying on the decision of the Supreme Court in **Grid Corporation of Orissa & Ors. Vs. Rasanand Das**, (2003) 10 SCC 297. The appellant No.2 Council had not

uniformly followed either the old or the new bye-laws. Further, there was delay in holding meetings of the Departmental Promotion Committee (DPC) for implementing time bound promotions under the old bye-laws as the last meeting was held in 2003 and the amended bye-laws were enforced with effect from 16<sup>th</sup> June, 2009. The conditions of service could not have been altered to the disadvantage of the respondents-employees, who had joined the service keeping in view their future prospects and chances of promotion as per the old bye-laws mandating time-bound promotion. The respondents' service conditions would be governed by the old bye-laws and not by the new bye-laws. Directions have been issued to immediately constitute a DPC to examine the case of the respondents and grant them promotion with retrospective effect from the dates when the time-bound promotions were due with consequential benefits.

6. The Court while issuing notice in the present Letters Patent Appeals had stayed the operation of the impugned judgment.

7. We would first like to refer to the facts that have led to the present dispute. The respondents herein, as noticed above, are employees of the appellant No.2 Council i.e. Building Materials and Technology Promotion Council, a society registered under the Indian Societies Registration Act, 1860. As per the Memorandum of Association, the rules of the Government of India mutatis mutandis apply to the appellant No.2 Council. The relevant cause of the Memorandum of Association reads as under:-

"The General Financial Rules and Fundamental Rules of the Govt. of India shall be applicable mutatis-mutandis to the Council, the Board of Management (BOM) shall have the power to frame amend or repeal bye-laws not in consistence with these rules for the administration and management of affairs of the council."

The old bye-laws of the appellant No.2 were contrary and repugnant to the Rules of the Government of India, on the question of promotion/placement. The old bye-laws as originally framed had stipulated as under:-

“6.4 Promotion/Placement of Council’s Staff based on performance appraisal

6.4.1 To encourage proficient and efficient working in the Council, all officers and staff members of the Council will be provided an opportunity for assessment of their performance and work after they have put in sufficient number of years of service in their scale under the Council. The scheme will provide opportunities to different categories of employees for placement in next higher scale if found suitable through an interview for performance by a duly constituted Committee of Experts. The scheme will cover all categories of employees. Staff members working on deputation will not be entitled to be considered under this scheme. The recommendation of their performance will be made through interview/test by a Committee of Experts relating to the discipline of the concerned officer or staff of the Council. The eligibility for assessment and constitution or Committee will be governed as given below:

| Category of Staff                                       | Eligibility for Assessment                                             | Authority to constitute Committee of Experts                           |
|---------------------------------------------------------|------------------------------------------------------------------------|------------------------------------------------------------------------|
| 1. Miscellaneous & supportive staff upto Rs.950/- basic | 5, 6, 7 years and at maximum of scale                                  | Executive Director                                                     |
| 2. Administrative upto Rs.3700/- basic                  | 3, 4 , 5 years and at maximum of scale                                 | Executive Director                                                     |
| 3. Technical upto Rs.3700/- basic                       | 3, 4 , 5 years and at maximum of scale                                 | Executive Director                                                     |
| 4. Technical/Administrative above Rs. 3700/- basic      | 4, 5, 6 years and after remaining for one year at the maximum of scale | Chairman, EC for staff upto level of Chief and President in case of ED |

Note: Staff members under technical and miscellaneous categories and working in a specific/special trade may also be required to undergo practical test when desired by the Committee.

6.4.2 Executive Director will be one of the members of the Committee of Experts, except in case of his own assessment. The

employees shall be promoted or placed in the next higher scale from the date of eligibility based on the recommendations of the Expert Committee.”

The old bye-laws had provided and stipulated time-bound promotion which was not relatable to a vacancy in the promotional post. There was, therefore, a marked disconnect and contradiction between bye-law 6.4 and the rules of the Government of India which are applicable to the appellant No.2 Council.

8. In these circumstances, the rules and provisions governing promotions were re-examined. The appellant No. 2 took steps to amend the bye-laws and correct the anomalies in the rule position. With effect from 16<sup>th</sup> June, 2009 the earlier bye-law 6.4 was omitted and substituted with the following clause:-

#### **“6.4 Promotion**

6.4.1 The promotions of employees in the Council to the next promotional posts shall be according to the vacancies in the sanctioned posts in the promotional grades in accordance with the Recruitment & Promotion Rules of BMTPC.

6.4.2 The suitability for consideration for promotion of an employee to the next higher grade shall be based on the benchmark performance of the employee concerned as reflected in his/her Annual Confidential Reports for last 5 proceeding years and interview by the Departmental Promotion Committee in accordance with BMTPC Recruitment & Promotion Rules and recruitment rules for the relevant post. The Departmental Promotion Committee shall ordinarily meet once in a year.

6.4.3 The benchmark to be obtained for promotion in the Annual Confidential Reports for consideration to the next higher grades are given below:

For promotion below Grade Pay of Rs.7600-Good  
For Promotion above Grade Pay of Rs. 7600 onwards-Very Good.

6.4.4 The Council Shall adopt formats for Annual Confidential Reports and evaluation criteria as applicable to the Central Government employees with suitable modifications keeping in view the nature of work in the Council.

#### 6.4.5 **Assured Career Progression Scheme**

6.4.5.1 In order to deal with the problem of genuine stagnation and hardship faced by the employees due to lack of adequate promotion avenues, the Council shall adopt the Assured Career Progression Scheme as applicable to the Central Government employee from time to time.

6.4.5.2 Screening Committees shall be constituted in the Council to consider the cases for grant of financial upgradations under the ACP scheme. The relevant Screening Committee shall consist of a Chairperson and two members. The members of the Committee shall comprise officers holding posts which are at least one level above the grade in which the ACP is to be considered and not below the Scale of Pay of Under Secretary equivalent in the Government. The Chairperson should generally be a grade above the members of the Committee.

9. The appellants have filed before us a chart or table which gives details of the year of appointment, the pay scale in which a particular employee was appointed, and the promotions granted under the old and new bye-laws. For the sake of convenience, we would like to reproduce the said chart/table in entirety:-

| Srl. No. |                     |                                                                  | Qualification                       | Scale of Pay at the maximum Date of Eligibility Period (Pre-revised Scale) | Working in the scale since | Next Higher Grade /Pay Band (as per 6 <sup>th</sup> Pay Commi ssion | Eligibility Period for Assessment as per old Byelaws | Qualification required for next Grade as per old Byelaws                                                                                                                                                                                          | Details of Regular Promotions granted as per New Byelaws |                     |                   |
|----------|---------------------|------------------------------------------------------------------|-------------------------------------|----------------------------------------------------------------------------|----------------------------|---------------------------------------------------------------------|------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------|---------------------|-------------------|
|          | Name of Employee    |                                                                  |                                     |                                                                            |                            |                                                                     |                                                      |                                                                                                                                                                                                                                                   |                                                          |                     |                   |
|          |                     | Designation                                                      |                                     |                                                                            |                            |                                                                     |                                                      |                                                                                                                                                                                                                                                   |                                                          |                     |                   |
|          |                     |                                                                  |                                     |                                                                            |                            |                                                                     |                                                      |                                                                                                                                                                                                                                                   |                                                          |                     |                   |
|          |                     |                                                                  |                                     |                                                                            |                            |                                                                     |                                                      |                                                                                                                                                                                                                                                   | Grade Pay/Pay Band                                       | Designation         | Date of Promotion |
| 1        | Shri D.P. Singh     | Development Officer (Demonstration, Construction and Exhibition) | B.E. (Civil Engg.) M.Tech (Polymer) | 10000-325-15200                                                            | 5 <sup>th</sup> Oct 2001   | 7600<br><br>PB-3<br>15600-39100                                     | 3,4,5 years and at maximum of scale                  | Degree from a recognized University or equivalent in any of the following:<br><br>a)Civil Engineering<br><br>b)Mechanical Engineering<br><br>c)Chemical Engineering<br><br>d)Industrial Production Engineering<br><br>e)Architecture<br><br>f)MBA | 7600<br><br>15600-39100 (PB-3)                           | Development Officer | 13.4.2011         |
| 2        | Shri Alok Bhatnagar | Library Officer                                                  | B.Sc., M. Lib. & Information        | 8000-275-13500                                                             | 5 <sup>th</sup> Oct 2001   | 6600<br><br>PB-3                                                    | 3,4,5 years and at maximum                           | Degree from a recognized University or equivalent in                                                                                                                                                                                              | 6600<br><br>15600-                                       | Sr. Field Officer   | 8.4.2011          |



|  |  |  |     |  |  |             |          |                                                                                                                                                                                 |              |  |  |
|--|--|--|-----|--|--|-------------|----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|--|--|
|  |  |  | Sc. |  |  | 15600-39100 | of scale | any of the following:<br>a)Civil Engineering<br>b)Mechanical Engineering<br>c)Chemical Engineering<br>d)Industrial Production Engineering<br>e)Architecture<br>f)B.Sc/M.Sc./MBA | 39100 (PB-3) |  |  |
|--|--|--|-----|--|--|-------------|----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|--|--|



|   |                         |                                    |                                                                                  |                |                            |                             |                                     |                                                                                                                                                                                                                                                                                       |                            |                   |          |
|---|-------------------------|------------------------------------|----------------------------------------------------------------------------------|----------------|----------------------------|-----------------------------|-------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|-------------------|----------|
| 3 | Shri Akash Kumar Mathur | Field Officer (Product Evaluation) | B.E. (Mech. Engg.)                                                               | 8000-275-13500 | 1 <sup>st</sup> Jan 2002   | 6600<br>PB-3<br>15600-39100 | 3,4,5 years and at maximum of scale | Degree from a recognized University or equivalent in any of the following:<br>a)Civil Engineering<br>b)Mechanical Engineering<br>c)Chemical Engineering<br>d)Industrial Production Engineering<br>e)Architecture<br>f)B.Sc/M.Sc./MBA                                                  | 6600<br>15600-39100 (PB-3) | Sr. Field Officer | 8.4.2011 |
| 4 | Shri Pankaj Gupta       | Assistant Accounts Officer         | M.Com                                                                            | 6500-200-10500 | 1 <sup>st</sup> Mar 2000   | 4600<br>PB-2<br>9300-34800  | 3,4,5 years and at maximum of scale | Graduate in Commerce/Eco/Statistics/Maths with at least 5 years experience as Account Assistant in Govt./Quasi Govt./autonomous bodies                                                                                                                                                | 5400<br>15600-39100 (PB-3) | Personnel Officer | 5.5.2011 |
| 5 | Shri Parveen Suri       | Personal Assistant                 | MA (Political Science), Dip. In Private Secretary, Dip. In Human Resource Mangt. | 6500-200-10500 | 5 <sup>th</sup> Sept. 2000 | 4600<br>PB-2<br>9300-34800  | 3,4,5 years and at maximum of scale | Graduate having minimum of 8 years experience in Govt./reputed organisations with minimum 3 years experience in handling independent correspondence. Should have a minimum speed of 120-100/50 w.p.m. in English/Hindi shorthand/Typing respectively. Knowledge of computer operation | 5400<br>15600-39100 (PB-3) | System Analyst    | 5.5.2011 |
| 6 | Shri Sukhpal Singh Rana | Assistant Field Officer            | B.Sc. Dip. In DTP                                                                | 6500-200-10500 | 1 <sup>st</sup> Apr. 2001  | 4600<br>PB-2<br>9300-       | 3,4,5 years and at maximum of scale | Degree from a recognized University or equivalent in any of the following:                                                                                                                                                                                                            | 5400<br>15600-39100 (PB-   | Library Officer   | 5.5.2011 |

|  |  |  |  |  |  |       |  |                                                                                                                                                        |    |  |  |
|--|--|--|--|--|--|-------|--|--------------------------------------------------------------------------------------------------------------------------------------------------------|----|--|--|
|  |  |  |  |  |  | 34800 |  | a)Civil Engineering<br>b)Mechanical Engineering<br>c)Chemical Engineering<br>d)Industrial Production Engineering<br>e)Architecture<br>f)B.Sc/M.Sc./MBA | 3) |  |  |
|--|--|--|--|--|--|-------|--|--------------------------------------------------------------------------------------------------------------------------------------------------------|----|--|--|



| Srl. No. |                      |                                                              | Qualification                                         | Scale of Pay at the maximum Date of Eligibility Period (Pre-revised Scale) | Working in the scale since | Next Higher Grade /Pay Band (as per 6 <sup>th</sup> Pay Commission) | Eligibility Period for Assessment as per old Byelaws                 | Qualification required for next Grade as per old Byelaws                                                                                                                                                                                                  | Details of Regular Promotions granted as per New Byelaws |             |                   |
|----------|----------------------|--------------------------------------------------------------|-------------------------------------------------------|----------------------------------------------------------------------------|----------------------------|---------------------------------------------------------------------|----------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------|-------------|-------------------|
|          | Name of Employee     | Designation                                                  |                                                       |                                                                            |                            |                                                                     |                                                                      |                                                                                                                                                                                                                                                           | Grade Pay/ Pay Band                                      | Designation | Date of Promotion |
|          |                      |                                                              |                                                       |                                                                            |                            |                                                                     |                                                                      |                                                                                                                                                                                                                                                           |                                                          |             |                   |
| 1        | Dr. Amit Rai         | Development Officer (Building Materials-Product Development) | B.Sc., M.Sc. (Physics) Ph.D.                          | 12000-375-16500                                                            | 05.11.2001                 | 8700<br>PB-4<br>37400-67000                                         | 4,5,6 years and after remaining for one year at the maximum of scale | Degree from a recognized University or equivalent in any of the following:<br>a)Civil Engineering<br>b)Mechanical Engineering<br>c)Chemical Engineering<br>d)Industrial Production Engineering<br>e)Architecture<br>f)ICWA, MBA, CA<br>g)Computer Science | 8700<br>PB-4,<br>37400-67000                             | Dy. Chief   | 13.4.2011         |
| 2        | Shri Chandi Nath Jha | Development Officer (Building Materials-Product Evaluation)  | B.Tech. (Civil Engineering), M. Tech (Rock Mechanics) | 12000-375-16500                                                            | 09.09.2002                 | 8700<br>PB-4<br>37400-67000                                         | 4,5,6 years and after remaining for one year at the maximum of scale | Degree from a recognized University or equivalent in any of the following:<br>a)Civil Engineering<br>b)Mechanical Engineering<br>c)Chemical Engineering<br>d)Industrial Production Engineering                                                            | 8700<br>PB-4,<br>37400-67000                             | Dy. Chief   | 13.4.2011         |

|   |                   |                                                                      |                                                     |                 |            |                             |                                                                      |                                                                                                                                                                                                                                                           |                                                                |           |           |
|---|-------------------|----------------------------------------------------------------------|-----------------------------------------------------|-----------------|------------|-----------------------------|----------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|-----------|-----------|
|   |                   |                                                                      |                                                     |                 |            |                             |                                                                      | e)Architecture<br>f)ICWA, MBA, CA<br>g)Computer Science                                                                                                                                                                                                   |                                                                |           |           |
| 3 | Shri Pankaj Gupta | Development Officer<br>(Engineering Design & Performance Evaluation) | B.E. (Civil Engineering),<br>PG Dip. In Intl. Mktg. | 12000-375-16500 | 14.10.2002 | 8700<br>PB-4<br>37400-67000 | 4,5,6 years and after remaining for one year at the maximum of scale | Degree from a recognized University or equivalent in any of the following:<br>a)Civil Engineering<br>b)Mechanical Engineering<br>c)Chemical Engineering<br>d)Industrial Production Engineering<br>e)Architecture<br>f)ICWA, MBA, CA<br>g)Computer Science | 8700<br>PB-4,<br>37400-67000                                   | Dy. Chief | 13.4.2011 |
| 4 | Mukesh Kumar      | Jr. Technical Assistant                                              | BA                                                  | 4000-100-6000   | 01.11.2002 | 4200<br>PB-2<br>9300-34800  | 3,4,5 years and at maximum of scale                                  | Graduate from recognised University with atleast 4 years experience in Govt. and/or Private concerns of repute                                                                                                                                            | Could not be considered due to non-availability of vacant post |           |           |

| Srl. No. |                    |                        | Qualification         | Scale of Pay at the maximum Date of Eligibility Period (Pre-revised Scale) | Working in the scale since | Next Higher Grade /Pay Band (as per 6 <sup>th</sup> Pay Commi ssion | Eligibility Period for Assessment as per old Byelaws | Qualification required for next Grade as per old Byelaws                                                                                                                                                                                                        | Details of Regular Promotions granted as per New Byelaws       |                      |                   |
|----------|--------------------|------------------------|-----------------------|----------------------------------------------------------------------------|----------------------------|---------------------------------------------------------------------|------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|----------------------|-------------------|
|          | Name of Employee   | Designation            |                       |                                                                            |                            |                                                                     |                                                      |                                                                                                                                                                                                                                                                 |                                                                |                      |                   |
|          |                    |                        |                       |                                                                            |                            |                                                                     |                                                      |                                                                                                                                                                                                                                                                 |                                                                |                      |                   |
|          |                    |                        |                       |                                                                            |                            |                                                                     |                                                      |                                                                                                                                                                                                                                                                 | Grade Pay/Pay Band                                             | Designation          | Date of Promotion |
| 7        | Shri Ashwini Kumar | Technical Assistant    | 12 <sup>th</sup> Pass | 5500-175-9000                                                              | 1 <sup>st</sup> Jan 2002   | 4600<br><br>PB-2: 9300-34800                                        | 3,4,5 years and at maximum of scale                  | Graduate from a recognized University or Diploma in Civil/Mechanical Engineering with atleast 3 years experience in technology extension, organisation of exhibitions, trade fair etc. and construction projects using new building materials and technologies. | 4600<br><br>9300-34800 (PB-2)                                  | Asstt. Field Officer | 5.5.2011          |
| 8        | Shri Rajeev Pant   | Jr. Accounts Assistant | M.Com                 | 4000-100-6000                                                              | 1 <sup>st</sup> Nov 2002   | 4200<br><br>PB-2: 9300-34800                                        | 3,4,5 years and at maximum of scale                  | Graduate from recognised University with atleast 4 years experience in Govt. and/or Private concerns of repute.                                                                                                                                                 | Could not be considered due to non-availability of vacant post |                      |                   |
| 9        | Shri Suresh        | Hindi Typist-cum-      | B.A.                  | 3050-75-3950-80-                                                           | 1 <sup>st</sup> Nov        | 2400                                                                | 3,4,5 years and at                                   | Graduate from recognised University, Knowledge of                                                                                                                                                                                                               | 2400                                                           | Jr.                  | 5.5.2011          |

|    |                              |                           |                      |                              |                              |                                     |                                              |                                                                                                                                                                     |                                                                    |                |          |
|----|------------------------------|---------------------------|----------------------|------------------------------|------------------------------|-------------------------------------|----------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------|----------------|----------|
|    | Kumar                        | Admn. Clerk               |                      | 4590                         | 2002                         | PB-1:<br>5200-<br>20200             | maximum<br>of scale                          | English/Hindi shorthand.<br>Shorthand speed 80 w.p.m.<br><br>Typing 40 w.p.m.                                                                                       | 5200-20200<br>(PB-1)                                               | Stenographer   |          |
| 10 | Shri Ram Giani<br>Rawat      | Xerox Operator            | 8 <sup>th</sup> Pass | 3050-75-<br>3950-80-<br>4590 | 3 <sup>rd</sup> Aug<br>2003  | 2400<br><br>PB-1:<br>5200-<br>20200 | 3,4,5 years<br>and at<br>maximum<br>of scale | Graduate from recognised<br>University                                                                                                                              | 2400<br><br>5200-20200<br>(PB-1)                                   | Draftsman      | 5.5.2011 |
| 11 | Shri Chander<br>Pal Singh    | Diary Clerk               | High School          | 3050-75-<br>3950-80-<br>4590 | 3 <sup>rd</sup> Aug<br>2003  | 2400<br><br>PB-1:<br>5200-<br>20200 | 3,4,5 years<br>and at<br>maximum<br>of scale | Graduate from recognised<br>University                                                                                                                              | 2400<br><br>5200-20200<br>(PB-1)                                   | Library Asstt. | 5.5.2011 |
| 12 | Shri Mohan<br>Kumar          | Jr. Hindi Steno<br>Typist | BA, LL.B.            | 3050-75-<br>3950-80-<br>4590 | 30 <sup>th</sup> Jan<br>2004 | 2400<br><br>PB-1:<br>5200-<br>20200 | 3,4,5 years<br>and at<br>maximum<br>of scale | Graduate from recognised<br>University, Knowledge of<br>English/Hindi shorthand.<br>Shorthand speed 80 w.p.m.<br><br>Typing 40 w.p.m.                               | Could not be considered due to non-<br>availability of vacant post |                |          |
| 13 | Shri Lal<br>Bahadur<br>Mahto | Peon cum<br>Messenger     | High School          | 2650-65-<br>3300-70-<br>4000 | 3 <sup>rd</sup> Aug<br>1999  | 1900<br><br>PB-1:<br>5200-<br>20200 | 5,6,7 years<br>and at<br>maximum<br>of scale | 10 <sup>th</sup> class from Board or its<br>equivalent recognised by<br>Govt. Proficient in<br>English/Hindi Typing with a<br>speed of 40/30 w.p.m.<br>respectively | Could not be considered due to non-<br>availability of vacant post |                |          |
| 14 | Shri D Chenna<br>Kesavalu    | Peon cum<br>Messenger     | High School          | 2650-65-<br>3300-70-<br>4000 | 4 <sup>th</sup> Oct<br>2003  | 1900<br><br>PB-1:<br>5200-          | 5,6,7 years<br>and at<br>maximum             | 10 <sup>th</sup> class from Board or its<br>equivalent recognised by<br>Govt. Proficient in<br>English/Hindi Typing with a                                          | 1900<br><br>5200-20200                                             | LDC            | 5.5.2011 |

|    |                     |                         |                      |                      |                          |                          |                                     |                                                                                                                                                                                                   |                                                                                                                                                                                                                  |  |  |
|----|---------------------|-------------------------|----------------------|----------------------|--------------------------|--------------------------|-------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|
|    |                     |                         |                      |                      |                          | 20200                    | of scale                            | speed of 40/30 w.p.m. respectively                                                                                                                                                                | (PB-1)                                                                                                                                                                                                           |  |  |
| 15 | Shri Bijender Kumar | House Keeping Karmchari | 9 <sup>th</sup> Pass | 2650-65-3300-70-4000 | 1 <sup>st</sup> May 2000 | 1800<br>PB-1: 5200-20200 | 5,6,7 years and at maximum of scale | 8 <sup>th</sup> Class from Board or its equivalent recognised by Govt. Ability to read Hindi and English Desirable Matriculation examination of a Board or its equivalent recognised by the Govt. | Could not be considered due to lack of qualifications. But upgraded to Grade Pay of Rs.1800 in the PB-1:5200-20200 after providing due training as per the recommendations of the 6 <sup>th</sup> Pay Commission |  |  |
| 16 | Shri Dhir Singh     | Peon                    | 9 <sup>th</sup> Pass | 2550-55-2660-60-3200 | 1 <sup>st</sup> Jan 2001 | 1650<br>1S: 4440-7440    | 5,6,7 years and at maximum of scale | 8 <sup>th</sup> Class from Board or its equivalent recognised by Govt. Ability to read Hindi and English Desirable Matriculation examination of a Board or its equivalent recognised by the Govt. | Could not be considered due to lack of qualifications. But upgraded to Grade Pay of Rs.1800 in the PB-1:5200-20200 after providing due training as per the recommendations of the 6 <sup>th</sup> Pay Commission |  |  |



10. A reading of the aforesaid chart/table would indicate that most of the respondents were last promoted under the old bye-laws between the years 2000 and 2004. The table indicates that the respondents have been granted promotions under the new bye-laws. It appears that in certain cases, promotions have been granted even where the employees possibly did not meet the eligibility requirement. One of the respondents, Lal Bahadur Mehto, however, has been working as a Peon-cum-Messenger since 1999. Some of the respondents do not fulfill or meet the minimum eligibility qualifications stipulated for the post to which they were appointed. For example, respondent-Ashwani Kumar, working as Technical Assistant is not a graduate from a recognized university and does not have either a diploma in civil/mechanical engineering, nor the requisite three years' experience. The case of Ram Giani Rawat, Xerox Operator and Chander Pal Singh, Diary Clerk is similar. It is even alleged that Dr. Amit Rai who is a Doctorate, does not possess a degree from a recognized university in the concerned field.

11. The above observations and narration of facts reflect the appointments and upgradations or promotions made were at times contrary to the rules. The Council, though promoted by and financially dependent on the Ministry, was not following the rules of the Government of India applicable *mutatis mutandis* to them.

12. The legal issue before us, which is rather narrow and limited, has to be answered in the aforesaid backdrop. The first question is whether in the given facts the respondent-employees have a vested right to be considered for time-bound promotion on completion of the requisite period under the old bye-laws. The second question, which would arise, is whether the appellant No.2 Council could have amended and modified the bye-laws i.e. terms of service and made the same applicable to the existing employees.

13. We would first take up the legal issue pertaining to the amendment of the Bye-Laws. It is always open to an employer to adopt a new policy to fix, change or alter the conditions of service of the employees. An employer

would be acting within his right in doing so. Conditions of service, for this purpose, would include promotion and seniority. An employee cannot claim a vested right or static applicability of the conditions of service which were in existence when he had joined the service. The power to amend or change the conditions of service is subject to the provisions of the Constitution and the amendment or change cannot offend Articles 14 and 16 and the Fundamental Rights guaranteed by the Constitution, or be arbitrary, unreasonable or otherwise objectionable on account of being contrary to any applicable statute. In the present case, the respondents have not questioned the amendment of the bye-laws or contended that the same are arbitrary or invalid. The impugned judgment also does not record any finding to this effect. The contention of the respondents, which has been accepted by the impugned judgment, is that the appellant No.2 Council could not have changed the rules or conditions of service to the perceived detriment of the respondents after they had joined and were appointed in the service of the appellant No.2 Council. This precept which is a foundation of the impugned judgment is unacceptable and contrary to law. The new bye-laws have to be assessed and analysed on merits, and not on the basis of the old rule position.

14. We now turn to the first issue. An amendment to the service conditions normally operates prospectively, unless it is made retrospective by express provision or necessary intendment. Retrospectivity is not to be inferred by way of surmises and conjectures. Retrospective amendment taking away the benefits already acquired under the old service conditions can be challenged under Articles 14 and 16 of the Constitution, as being arbitrary and unconstitutional. Lastly, an employee cannot claim a vested right to promotion. He has a right to be considered for promotion. When a chance of promotion is affected, it does not mean denial of consideration,

for the employee is considered for promotion under the new rules. Mere chance of promotion is not a condition of service.

15. Relevant judgments on the aforesaid dictums have been referred to and examined below.

16. Keeping the aforesaid dictums as the basis, we now examine the question whether the respondents-employees had acquired a vested right under the old bye-laws after they had completed the requisite years of service to be eligible for time-bound promotion under the old bye-laws. This, we would observe, is key to the present determination and judgment. In our opinion, the question regarding whether or not any vested rights had accrued to the respondents to be considered for and granted promotion under the old Bye-Laws, is to be answered in favour of the appellant No.2. We would elucidate and give our reasons for the same, which are primarily predicated on the findings pertaining to the first and second legal issues.

17. Learned counsel for the appellants had relied on *State of Punjab and Others Vs. Arun Kumar Aggarwal and Others*, (2007) 10 SCC 402 wherein the Supreme Court had examined the question whether the old 1941 Rules or the 2004 Rules effective from 9<sup>th</sup> July, 2004 should be applied to the vacancies, which had arisen during the year 2000-01 for promotion to the post of SDO (Irrigation Department) in the State of Punjab. Under the old Rules, there was no provision for quota in promotion for diploma holders. However, there was a provision for grant of relaxation to diploma holders with outstanding merit. Under the 2004 Rules, the diploma holders were entitled to 25% posts out of 40% promotional quota. The Supreme Court noticed that DPCs for diploma holders with outstanding merit fixed on different dates in 2001 and 2002, were not held as the Government was aware and had in mind that the new Rules of 2004 would be made applicable. A conscious decision was taken not to conduct the DPCs for

promotion to the post of SDO till the new recruitment rules were enforced. The Supreme Court, answering the questions raised, had held:-

**“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.**

**31.** Dr. Dhavan has also referred to *P. Ganeshwar Rao v. State of A.P.* [1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] , SCC at p. 746, para 11:

**“11. In view of the foregoing we are of the view that the observations made by the Tribunal to the following effect, namely:**

**‘In this case the rules for recruitment have been changed on April 28, 1980. Hence, prima facie it would not be legal to make direct recruitment against temporary vacancies, even if the vacancies were at an earlier date earmarked for direct recruits.... In these circumstances, there is, in my opinion, no scope for direct recruitment against temporary vacancies after April 28, 1980 i.e. the date on which the Rules were amended as stated above.’ are unsustainable. We hold that the amendment made on April 28, 1980 does not apply to the vacancies which had arisen prior to the date of the amendment.”**

**32.** He has also referred to *B.L. Gupta v. MCD* [(1998) 9 SCC 223 : 1998 SCC (L&S) 532] , SCC at p. 226, para 9:

**“9. When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr Mehta to a decision of this Court**

in *N.T. Devin Katti v. Karnataka Public Service Commission* [(1990) 3 SCC 157 : 1990 SCC (L&S) 446 : (1990) 14 ATC 688] . In that case after referring to the earlier decisions in *Y.V. Rangaiah v. J. Sreenivasa Rao* [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] , *P. Ganeshwar Rao v. State of A.P.* [1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] and *A.A. Calton v. Director of Education* [(1983) 3 SCC 33 : 1983 SCC (L&S) 356] it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules. Though the High Court has referred to these judgments, but for the reasons which are not easily decipherable its applicability was only restricted to 79 and not 171 vacancies, which admittedly existed.”

**33.** He further submitted that rights of candidates that are eligible under the unamended Rules cannot be taken away by subsequent amendment. In this connection, he referred to *P. Mahendran v. State of Karnataka* [(1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727] , SCC at p. 416, para 5:

“5. ... Since the amending Rules were not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force, the amended Rules could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject-matter.”

**34.** He further contended that the power of appointing authority for the post-amendment cases was confined to those cases. Reference is made to *A.A. Calton v. Director of Education* [(1983) 3 SCC 33 : 1983 SCC (L&S) 356] , SCC at p. 37, para 5:

“5. ... Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the

amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by U.P. Act 26 of 1975 should have been followed in the present case.”

**35.** All the decisions referred to above are related to amendment of the Rules. We have already held that the 1941 Rules were repealed by the 2004 Rules. The facts of those cases are, therefore, not applicable to the facts of the present case.

**36.** Dr. Dhavan further argued that the diploma-holder outstanding merit candidates have vested rights under the 1941 Rules and those rights under the new Rules are saved and not repealed by the 2004 Rules. Reference is made to *N.T. Devin Katti v. Karnataka Public Service Commission* [(1990) 3 SCC 157 : 1990 SCC (L&S) 446 : (1990) 14 ATC 688] , SCC at p. 165, para 11:

*“11. ... Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature.”*

(emphasis supplied)

**37. These decisions are of no assistance to the diploma-holder outstanding category, in the view that we have taken.**

**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.....**

(emphasis supplied)"

The above quoted portion refers to several decisions of the Supreme Court which were distinguished and held to be inapplicable. In the said cases, the Supreme Court had observed that vested right had accrued in respect of the vacancies which had arisen during the operation of the old rules. However, in *Anil Kumar Aggarwal* (supra), the Government had taken a conscious decision not to fill up posts under the old rules and had decided to fill up the vacant posts according to the new Rules when enforced, and, therefore, the challenge was rejected. The question was answered referring to the intent and object of the new Rules to make them applicable to the earlier vacancies.

18. On the other hand, learned counsel for the respondents had drawn our attention to the decision of the Supreme Court in *State of Uttar Pradesh and Ors. Vs. Mahesh Narain and Ors.* (2013) 4 SCC 169, wherein it has been observed as under:-

“14. The learned counsel for the respondents in support of this position has also cited the authority of this Court in *Nirmal Chandra Bhattacharjee v. Union of India* [1991 Supp (2) SCC 363 : 1992 SCC (L&S) 236 : (1992) 19 ATC 302] wherein this Court observed as under: (SCC p. 366, para 3)

“3. ... No rule or order which is meant to benefit employees should normally be construed in such a manner as to work hardship and injustice specially when its operation is automatic and if any injustice arises then the primary duty of the courts is to resolve it in such a manner that it may avoid any loss to one without giving undue advantage to other.”

The Court further observed that the mistake or delay on the part of the Department should not be permitted to recoil on the appellants, more

so since the restructuring order in the said case itself provided that vacancies existing on 31-7-1983 should be filled according to procedure which was in vogue before 1-8-1983. This Court, therefore, restored the promotion order of the employees to which they were entitled prior to the change of service rules as it was held that the change of service rules cannot be made to the prejudice of an employee who was in service prior to the change. The Court further went on to hold that if the delay in promotion takes place at the instance of the employer, an employee cannot be made to suffer on account of intervening events.

15. The principle laid down in *Nirmal Chandra case* [1991 Supp (2) SCC 363 : 1992 SCC (L&S) 236 : (1992) 19 ATC 302] aptly fits into the facts and circumstances of this case as the subsequent amendment of 1990 laying down to fill in all the posts of Assistant Director, Forensic Science by direct recruitment could not have been applied in case of the respondents who were already holding the post of Scientific Officer and hence were eligible to the promoted quota of 25% posts of Assistant Director after completion of five years of service as Scientific Officers in terms of the Rules of 1987 and, therefore, their experience of five years on this post could not have been made to go waste on the ground that the amendment came into effect in 1990 making all the posts of Assistant Director to be filled in by direct recruitment. In support of this view, the counsel for the respondents also relied on the decision of this Court in *B.L. Gupta v. MCD* [(1998) 9 SCC 223 : 1998 SCC (L&S) 532] wherein this Court had held that any vacancy which arose after 1995 was to be filled up according to the rules but the vacancies which arose prior to 1995 should have been filled up according to the 1978 Rules only.”

19. Reference was also made to the decision dated 5<sup>th</sup> October, 2010 of a Division Bench of this Court in W.P. (C) No. 14263/2004, *S.K. Murti Vs. Union of India & Ors.* In the said case, it has been held that Flexible Complimenting Scheme for in situ promotion of scientific technical



personnel, which was modified vide office memorandum dated 17<sup>th</sup> July, 2002, would be applicable prospectively. It was observed:-

“5. Suffice would it be to state that the memorandum requires Flexible Complementing Scheme in situ promotions to be effected each year **and for which the circular mandates that the assessments should be made well in advance keeping in view the crucial dates being 1st January and 1st July with effect wherefrom the Flexible Complementing Scheme in suit promotions have to be effected.**

6. The last sentence of para 20 is relied upon by the respondents to urge that the office memorandum clearly states that no promotion should be granted with retrospective effect. To this the answer by the petitioner is that the preceding two sentences makes it very clear that the Assessment Boards have to be constituted well in advance keeping in view the fact that 1st January and 1st April of each year are crucial dates to effect promotions.

7. Now, nobody can take advantage of his own wrong. Nothing has been shown to us by the respondents to justify not constituting the Assessment Board/Selection Committee in time.

8. That apart, instant case of promotion is not one where promotion has to be effected upon a vacancy arising. Subject to being found suitable the petitioner was entitled to be promoted in situ. The situation would be akin to granting a selection scale to a person and the date of eligibility would be the date wherefrom the benefit has to be accorded.”

(emphasis supplied)

The aforesaid observations were relied on to meet the submission of the appellant No.2 Council that they did not deliberately hold meetings of the DPC for time-bound promotion. It was contended that the appellants cannot

take advantage of their own wrong. Paragraph 5 of the aforesaid decision, in our opinion, is the distinguishing factor.

20. Before referring to other judgments, we would like to reiterate that the new bye-laws relating to promotions are in consonance with the Government of India Rules. Their constitutional validity is not challenged. Secondly, a conscious and a well-considered decision was taken not to grant time bound promotions after 2004 under the old bye-laws and it was decided that promotions would be made in terms of the new bye-laws, once the same were notified and brought into effect. Formulation and completion of new bye-laws took time and these were enforced with effect from 14<sup>th</sup> June, 2010. Consequently, in the given background, we would hold that the old bye-laws had not conferred or created a vested right for promotion.

21. In *S.S. Bola & Ors. Vs. B.D. Sardana and Ors.* (1997) 8 SCC 522, the majority decision has held that chances of promotions depending upon the position in the seniority list within the cadre were not an accrued or vested right of the Government servant even if chances of promotion get delayed in the future. A rule or provision, which merely affects the chances of promotion cannot be regarded as varying conditions of service and to this extent, chances of promotions were not conditions of services. A similar ratio is also accorded in the dissenting opinion of K. Ramaswamy J. at page 634. The said three Judges Bench are also the authors of the decision in *Dr. K. Ramulu and Another Vs. Dr. S. Suryaprakash Rao and Others*, (1997) 3 SCC 59, wherein it has been held that omission to prepare and operate the panel for promotion in the year 1995-96 on facts was not arbitrary, for the Government had taken a conscious decision to amend 1977 Rules in the year 1988 and not fill up any vacancy till such amendment. The Supreme Court noticed that as per the old rules, the panel was to be prepared by the month of September every year on the basis of estimated vacancies. The decision

of the Tribunal was reversed after referring to the decision in *Shankaran Dash Vs. Union of India* (1991) 3 SCC 47. On the question of an indefeasible right of successful candidates to seek appointment, except when the State has denied appointment in an arbitrary manner, it was held that the administrative decision not to fill up vacancies can be interfered with by the Courts when the same is not bona fide and reasonable. Reference was also made to the decision in *State of Haryana Vs. Subhash Chander Marwah*, (1974) 3 SCC 220, on the question whether the new or amended rules should apply. The Government's decision not to fill up old vacancies till the rules were amended was upheld in *Dr. K. Ramulu* (supra) observing:-

**“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 Choudhary 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.

**13. It is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the Rules, Rule 3 of the General Rules is not of any help to the respondent.** The ratio in the case of *Ramesh Kumar Choudhary v. State of M.P.* [(1996) 11 SCC 242 : (1996) 7 Scale 619] is also not of any help to the respondent. Therein, this Court had pointed out that the panel requires to be made in accordance with the existing Rules and operated upon. There cannot be any dispute on that proposition or direction issued by this Court. As stated earlier, the Government was right in taking a decision not to operate Rule 4 of the General Rules due to their policy decision to amend the Rules. He then relies on para 14 of the unreported judgment of this Court made in *Union of India v. S.S. Uppal* [(1996) 2 SCC 168 : 1996 SCC (L&S) 438 : (1996) 32 ATC 668] . Even that decision is not of any help to him. He then relies upon the judgment of this Court in *Gajraj Singh v. STAT* [(1997) 1 SCC 650 : (1996) 7 Scale 31] wherein it was held that the existing rights saved by the repealed Act would be considered in accordance with the Rules. The ratio therein is not

applicable because the existing Rules do not save any of the rights acquired or accruing under the Rules. On the other hand, this Court had pointed out (in Scale para 23) thus: (SCC pp. 664-65, para 22)

“Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of Parliament as if it had never been passed; it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances. Therefore, when Section 217(1) of the Act repealed Act 4 of 1939 w.e.f. 1-7-1989, the law in Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed or saved.”

14. X X X X X

**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 supplied)"

A reading of the aforesaid quotation would indicate the distinction drawn by the Supreme Court in cases where the existing bye-laws had mandated that vacancies were required to be filled up and those where such mandate was

absent. The Supreme Court referred to the general principle that where vacancies were existing, then the eligible candidates would normally be considered in accordance with the then prevailing rules, but this principle would not apply when the Government takes a deliberate and conscious decision not to fill up existing vacancies pending amendment of the rules and to fill up the vacancies when the new rules were enforced.

22. In *Delhi Judicial Services Association and Ors. Vs. Delhi High Court and Ors.* (2001) 5 SCC 145, an identical situation had arisen. On 17<sup>th</sup> March, 1987 an amendment was made to the Delhi Higher Judicial Services Rules, 1970. Pursuant thereto, an advertisement for direct recruitment was issued on 6<sup>th</sup> April, 1987, which was objected to by the promotee officers on the ground that the posts were created prior to amendment of the Rules and, therefore, should be filled up as per the unamended Rules. The contention was rejected holding that under the Delhi Judicial Services Rules, there was no requirement to prepare any panel or list of candidates eligible for promotion by a particular date. Therefore, it was not obligatory for the appointing authority to fill up the newly created posts immediately. Reference was also made to the order of the Supreme Court dated 18<sup>th</sup> December, 2006 by which the directions were given to ensure that the draft rules were finalized and notified, which were accepted. These first principles are relevant. The ratio of this decision should be read with caution for it distinguishes the decision in *B.L. Gupta vs. M.C.D* (1998) 9 SCC 223, on the ground of directions in the order dated 18<sup>th</sup> December, 2006, and *albeit* notes that there was no stipulation to prepare a panel by a particular date. This was also the position under the old bye-laws, in the present case, as the old bye-laws gave substantial discretion to the committee of experts to

make assessments and grant promotion after 3 to 7 years in service, as per the "eligibility" for promotion.

23. In *High Court of Delhi and Anr. Vs. A.K. Mahajan and Ors.* (2009) 12 SCC 62, the Supreme Court had decided the contention whether the right to promotion which had already been crystallized could be taken away by retrospective amendment by way of a notification. Reference was made to the following paragraph of the decision in *Railway Board Vs. C.R. Rangadhamaiah*, (1997) 6 SCC 623 to elucidate:-

“19. The High Court has mainly relied on *Railway Board v. C.R. Rangadhamaiah* [(1997) 6 SCC 623 : 1997 SCC (L&S) 1527] and more particularly, para 24 thereof. Shri Misra, learned counsel for the respondents also very heavily relied on *Rangadhamaiah case* [(1997) 6 SCC 623 : 1997 SCC (L&S) 1527]. The said para 24 is as follows: (*Rangadhamaiah case* [(1997) 6 SCC 623 : 1997 SCC (L&S) 1527], SCC p. 638)

“24. In many of these decisions the expressions ‘vested rights’ or ‘accrued rights’ have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in *Roshan Lal Tandon* [*Roshan Lal Tandon v. Union of India*, AIR 1967 SC 1889], *B.S. Vadera* [*B.S. Vadera v. Union of India*, AIR 1969 SC 118] and *Raman Lal Keshav Lal Soni* [*State of Gujarat v. Raman Lal Keshav Lal Soni*, (1983) 2 SCC 33 : 1983 SCC (L&S) 231].”

The learned counsel pointed out as held by the High Court that any provision with retrospective operation, having an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees would be bad in law and would be in breach of Articles 14 and 16 of the Constitution of India. The High Court also proceeded to hold that since one of the writ petitioners, who were invited for the interview in the year 1994 was not invited in the year 1995, the vested right of the writ petitioner had been adversely affected by the retrospective operation of the Rules.”

Interpreting the said paragraph, it was held that when there is an amendment having retrospective effect, it has to be given effect to. However, such amendment can be struck down if discriminatory, arbitrary and violative of the rights guaranteed under Articles 14 and 16 of the Constitution, when they have the effect of taking away the benefit already available. It was clarified that the right of an employee to be merely considered is not a benefit as it may or may not result in selection or promotion. If a mere chance of promotion is affected by the amendment, it is inconsequential. It was observed:-

“22. This Court has time and again held that since promotion is not a right of the employee, a mere chance of promotion if affected cannot and does not invalidate the action on the part of the employer. That right of consideration may accrue at a particular point of time or subsequently thereto. Merely because at a particular point of time the employee is not considered, does not mean the total denial of the consideration of the employee.”

On the question of arbitrariness, noticing the fact that the employees were promoted, it was held:-

“23. In the present case, it is not as if Writ Petitioner 8 concerned was altogether denied the benefit of consideration for ever. He was undoubtedly considered later on and was promoted also. Therefore, it is incorrect to say that the amendment had the effect of denying him the benefit of consideration, which was available to him. He did



continue with that benefit and was actually benefited under the same. This is apart from the fact that the concept of consideration is an uncertain concept. One can understand a pension amount which is already decided or the promotion which is already granted or the seniority which is already conferred upon or the substantive appointment which is already made. If the amendment has the effect of denying this crystallised promotion, seniority or substantive appointment, then certainly the amendment could be held as arbitrary. But that has not happened in the present case. Here, no promotion was already granted or seniority already fixed, or any substantive appointment already made which were affected by the retrospective amendment. The observations in abovequoted para 24 of *Rangadhamaiah case* [(1997) 6 SCC 623 : 1997 SCC (L&S) 1527] have to be understood in that sense.”

24. In *Deepak Aggarwal and Anr. Vs. State of Uttar Pradesh and Ors.* (2011) 6 SCC 725, there was an amendment of the rules as a result of which consideration for promotion was adversely affected for some of the employees. A contention urged by these employees was that vacancies occurring prior to the amendment should be filled as per the old rules. Referring to the decision in the case of *Dr. K. Ramulu* (supra), it was held that the same would be applicable, for the Government had taken a decision not to fill up vacancies on the relevant date in view of the proposed amendment to the rules. Promotions had to be made in accordance with the rules prevalent at the time when the consideration took place and not as per the old Rules. The argument that this conscious decision was not grounded on the relevant facts was also rejected. It was held:-

“28. In our opinion, the matter is squarely covered by the ratio of the judgment of this Court in *Dr. K. Ramulu* [(1997) 3 SCC 59 : 1997 SCC (L&S) 625] . In the aforesaid case, this Court considered all the judgments cited by the learned Senior Counsel for the appellant and held that *Y.V. Rangaiah case* [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] would not be applicable in the facts and circumstances of that case. **It was observed 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. It was also held that when the Government takes a conscious decision and amends the rules, the promotions have to be made in accordance with the rules prevalent at the time when the consideration takes place."**

(emphasis supplied)

25. In *Mohd. Raisul Islam & Ors. Vs. Gokul Mohan Hazarika and Ors.* (2010) 7 SCC 560, it was observed that it was undisputed that as a matter of policy the Government could take a conscious decision not to fill up vacancies for justifiable reasons as was held in *Dr. K. Ramulu* (supra). However, in the said case, this principle was not followed for the selection process had already been started under the existing rules and the list of selected candidates had already been recommended.

26. In *Dhole Gobind Sahebrao & Ors. Vs. Union of India & Ors.* (2015) 6 SCC 727, the Supreme Court considered the question of damage as a result of lost chances of promotion. After referring to several decisions, it was held that mere chances of promotions are not conditions of service. It was elucidated:-

**"39.** It is apparent from a collective perusal of the conclusions recorded in the judgments extracted in the foregoing **paragraphs, that chances of promotion do not constitute a condition of service.** In that view of the matter, it is inevitable to hold that the High Court erred in recording its eventual determination on the basis of the fact that the promulgation of the 2003 TA Rules and the 2003 STA Rules was discriminatory and arbitrary with regard to the fixation of the inter se seniority, since the same seriously prejudiced the chances of promotion of the erstwhile members of the Ministerial Cadre, namely, those members of the original Ministerial Cadre, who had not opted for appointment/absorption into the cadre of Data Entry Operators, with reference to and in comparison with, those members of the original Ministerial Cadre who had opted for appointment/absorption into the cadre of Data Entry Operators.

**40. As a proposition of law it is imperative for us to record that chances of promotion do not constitute conditions of service, and as such, mere alteration of chances of promotion, would not per se call for judicial interference. The above general proposition would not be applicable in case the chances of promotion are altered arbitrarily, or on the basis of considerations which are shown to be perverse or mala fide.**

(emphasis supplied)

27. In an earlier case of *ICAR Vs. Satish Kumar and Anr.* (1998) 4 SCC 219, the Supreme Court was dealing with a dispute between the appellant society and its employees on account of change or amendment of rules affecting the right to be considered for promotion in view of the new scheme. The challenge was rejected for several reasons including the reason that the judgments relied on by the employees were in cases of civil servants governed by the rules framed by the Legislature or under Article 309 of the Constitution. By amending a provision of law, retrospective operation could be given to the Rules but not by merely issuing executive instructions. The society, however, was not governed by the statutory rules or rule framed under Article 309 of the Constitution. It was observed as under:-

**“15. We do not think the law laid down by this Court in the two judgments, relied by the respondent, in any way helps his case. In both the judgments the employees were civil servants governed by statutory rules either framed by the legislature or under Article 309 of the Constitution. By amending the provision of law retrospective operation could be given to the Rules. However, retrospective operation of service rules could not be given by mere executive instructions. In the present case before us the respondent is not governed by any statutory rules. Here it is the competent body of the appellant which frames rules laying down conditions of service of its employees. Rules framed by the Society are not statutory rules and they can be amended by a resolution of a competent body and any legislation or framing of rules under Article 309 of the Constitution is not required.** Scientists of the appellant had been agitating for grant of the UGC pay scales. When a

decision was taken on the basis of reports of the various committees and in consultation with the Ministry of Finance and the UGC scales of pay were granted from 1-1-1986 the challenge to such decision could not be entertained. Moreover, no question of promotion as such is involved. Any Scientist of S-I grade having 12 years' service could go to the next higher grade irrespective of the fact that there is any vacancy in the higher grade or not. Of course, he cannot pick up the higher grade merely on completion of 12 years' service and his work has to be assessed. It is also not the case of the respondent that any Scientist had been treated differently than him after 1-1-1986. To all the Scientists amended rules effective from 1-1-1986 had been applied without any discrimination. Scientists including the respondent are now in a much better position. It cannot be said that action of the appellant has been in any way unreasonable, arbitrary or irrational for the respondent to challenge the same as violative of Articles 14 and 16 of the Constitution.”

(emphasis supplied)

28. This being the legal position and mandate, we do not think that in the given background the respondents herein had a vested or accrued right under the old bye-laws, which the appellant No.2 had decided to keep in abeyance after 2004 in view of the fact that they had decided to formulate new rules. The irregularities and anomalies in the old bye-laws required correction and amendment. The curative process took time possibly because there was resistance and opposition on account of the munificence and largesse being withdrawn. The delay had consequences. The new bye-laws which were in conformity with the Rules as applicable to the Government of India, were notified belatedly. The mandate of the Memorandum of Association, that the rules of the Government of India would apply mutatis mutandis to the appellant No.2, took time to be implemented. The conscious and deliberate decision of the appellants to not consider the employees for time bound promotions under the old bye-laws had a strong and valid rational behind it. The decision was not arbitrary and questionable.

**29.** The old bye-laws did not postulate automatic or immediate promotion on completion of the required years of service. Even as per the old bye-laws, an employee was to be considered for promotion by the committee if found suitable. The old bye-laws postulated promotion upon consideration and not instantaneous promotion as a right accruing to an employee after rendering service for a particular number of years in the lower grade. If an employee was found unsuitable at the end of the prescribed years, he had to be considered for promotion in the next or following year. The contention of the respondents that three Executive Directors of the appellant No. 2 Council were granted promotion after 2004 as per the old bye-laws which entitled them to higher emoluments would not, in our opinion, be a good ground to reverse our decision and ratio expounded above. We are of the opinion that if this was an aberration, it would not justify grant of unwarranted and illegitimate benefits to all employees. Such grant of benefit would be contrary to law.

**30.** For the foregoing reasons, the present intra-Court appeals are allowed and the impugned decision is set aside. Writ Petitions No. 4351/2010 and 4886/2010 filed by the respondents will be treated as dismissed. In the facts of the case, there will be no order as to costs.

**(SANJIV KHANNA)**  
**JUDGE**

**(SUNITA GUPTA)**  
**JUDGE**

**NOVEMBER 21<sup>st</sup>, 2016**  
**NA/ssn**