

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 6559 of 2014

Anil Kumar Shukla S/o Late Ganesh Prasad Shukla Aged About 58 Years
Posted As Electrician In Municipal Corporation Ambikapur P.S. Kotwali, Civil
& Revenue District Surguja C.G.

---- Petitioner

Versus

1. State Of Chhattisgarh Through The Secretary, Department Of Urban
Administration Mantralaya Mahanadi Bhawan New Raipur C.G.
2. The Municipal Corporation Through The Commissioner, Ambikapur Distt.
Sarguja Chhattisgarh

---- Respondents

For Petitioner	:	Shri Sandeep Dubey, Advocate
For State/Res. No.1	:	Shri S.P. Kale, Dy.A.G.
For Res. No.2	:	Shri Kishan Lal Sahu, Advocate appears under instructions from Shri Bhupendra Singh, Advocate

S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

15/09/2017

Heard.

1. The petitioner is aggrieved by order dated 15th April 2011 by which
petitioner's promotion has been cancelled by the State Government.
2. Facts necessary for decision of controversy involved in the petition are that
while petitioner was working as Electrician in the services of Municipal
Corporation, Ambikapur, a vacancy of Sub Engineer became available
against which the petitioner was entitled to be considered. However, the
matter remained pending for quite some time. Finally, the departmental
promotion committee of the Corporation convened its meeting on 4.1.2007
to consider petitioner's case for promotion against the available vacancy of

Sub Engineer (Electrician) in accordance with the then existing rules governing promotion, known as Madhya Pradesh Municipal Corporations (Appointment and Conditions of Service of Officers and Servants) Rules, 2000 (in short "*the Rules of 2000*"). The DPC resolved and recommended for promotion. The proposal of the DPC was approved by the Mayor-in-Council (MIC) vide its resolution passed on 19.2.2007. Thereafter, an order was passed by the Corporation granting promotion to the petitioner on 14.6.2007. However, as there existed a requirement of prior permission under proviso (iii) to Section 58 (1) of the Madhya Pradesh Municipal Corporation Act, 1956 (in short "*the Act of 1956*") the petitioner's case was also forwarded to the Government which remained with the State without any decision. The petition then approached this Court by filing petition and after direction issued by this Court for consideration of his case, finally, impugned order came to be passed by which the State Govt. declined to grant approval for promotion. It is this order which is under challenge in the instant petition.

3. Learned counsel for the petitioner submits that the petitioner was eligible and qualified for being considered for promotion against available vacancy of Sub Engineer (Electrician) on which he was considered and found fit by DPC and approved by MIC, much prior to coming into the force of new Rules, known as Chhattisgarh Municipal Corporation (Appointment and Conditions of Service of Officers and Servants) Rules, 2007 (in short "*the Rules of 2007*"), which came into force w.e.f. 28.1.2008. In the matter of promotion, against vacancy which became available prior to coming into force of new Rules, the petitioner's right of being considered for promotion could not be taken away as the right to be considered for promotion accrued and could not be taken away by a subsequent Rule which was neither given nor intended to be given retrospective effect. Therefore, the Government was under an obligation to grant permission as petitioner's promotion was in accordance with the provision of the then existing Rules.
4. Per contra, learned counsel for the State argues that at the first place, no

promotion could be granted to the petitioner without prior permission as mandated under proviso (iii) of Section 58 (1) of the Act of 1956. He submits that whether or not the petitioner was entitled to be promoted, no promotion order could be issued without prior permission. The second limb of submission is that though the petitioner may have been considered and found fit for promotion by the DPC and approved by the MIC, for one reason or the other, the approval could not be granted by the Govt. and in the meanwhile new Rules came into force and effect from 28.1.2008. Under the new Rules of 2007, post of Sub Engineer could be filled up only by way of direct recruitment. The earlier policy of promotion against 25 % of post was given up by the rule making authority. According to learned counsel for the State, the petitioner was not qualified to be promoted even under the old Rules.

5. I have considered the rival submissions made by learned counsel for the parties and perused the record.
6. From the records of DPC, it is clear that much prior to coming into force of Rules of 2007 i.e. prior to 28.1.2008, vacancy of Sub Engineer became available in the Corporation. Under the Rules of 2000, 25% of the duty posts of Sub Engineer were to be filled up by way of promotion. The records further shows that the petitioner was the only Electrician available in the Corporation. The DPC found the petitioner fit and qualified for being appointed after having made enquiry from the department of public works with regard to channel of promotion on the post of Sub Engineer in view of provision contained in Clause 16 of Schedule-II of the Rules of 2000. Therefore, prior to coming into force of the new Rules 2007, not only vacancy was available but the petitioner was actually considered and found fit for promotion. However, the Corporation proceeded to issue order of promotion without there being any prior permission of the Government as required under proviso (iii) to Section 58 (1) of the Act of 1956, which could not be done even though the petitioner was entitled to be promoted.
7. Once the petitioner was considered and found fit for promotion against the

vacancy which had arisen prior to coming into force the new Rules of 2007, the right to be considered for promotion against the vacancy could not be taken away by promulgation of new Rules of 2007 but then, promotion order could not be issued without prior permission as required under Section 58 of the Act of 1956.

8. In the case of **Y.V. Rangaih & Ors. Vs. J. Shreenivasa Rao & Ors.** (1983) 3 SCC 284, it was held 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-Register Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondents Nos. 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.”

The aforesaid decision was quoted with the approval of a subsequent decision in the case of **State of Punjab & Ors. Vs. Arun Kumar Aggarwal & Ors.** (2007

LAB. I.C. 2510), wherein the Supreme Court held as under:

"29. Dr.Dhawan also contended that the vacancies are to be filled up in accordance with the contemporary Rules. In this connection he has referred to Y.V. Rangaiah v J.Sreenivasa Rao,(1983) 3 SCC 284 at para 9:

".....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- wise 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."

30. There is no quarrel over the proposition of law that normal Rule is that the vacancy prior to 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."

The Supreme Court in the aforesaid decision also took note of its earlier decisions in the cases of *B.L. Gupta*, *A.A. Calton* as also *N.T. Devin Katti*, as below :-

"32. He has also referred to *B.L. Gupta vs M.C.D.*, (1988) 9 SCC 223 at para 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 the case of *N.T. Devin Katti v. Karnataka Public Service Commission*. In that case after referring to the earlier decisions in the cases of *Y.V. Rangaiah v. J.Sreenivasa Rao*, *P. Ganeshwar Rao v. State of A.P.* and *A.A. Calton v. Director of Education* 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 vs. State of Karnataka*, (1990) 1 SCC 411 at para 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 confined to those cases. Reference is made to *AA Calton vs. Director of Education*, (1983) 3 SCC 33 at para 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 the U.P. Act 26 of 1975 should have been followed in the present case."

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

36. Dr. Dhawan further argued that the diploma-holders outstanding merit candidates have vested rights under 1941 Rules and that rights under new Rules are saved and not repealed by 2004 Rules. Reference is made to N.T.Devin Katti vs. KPSC, (1990) 3 SCC 157 at para 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)

In a subsequent decision in the case of **Deepak Agarwal & Anr. Vs. State**

of Uttar Pradesh & Ors. (2011) 6 SCC 725, the appellants were technical officers who along with Assistant Excise Commissioner were eligible to be considered for promotion to the post of Deputy Excise Commissioner but before the DPC was scheduled to consider cases of eligible officers for promotion, the rule concerned were amended and Technical Officer stood excluded as the feeder post for the next promotional post of Deputy Excise Commissioner. The challenge to said exclusion was taken to Supreme Court and it was held as under:

“23. Could the right of the appellants, to be considered under the unamended 1983 Rules be taken away? The promotions of the 12 vacancies have been made on 26th May, 1999 under the amended Rules. The High Court rejected the submissions of the appellants that the controversy herein is squarely covered by the judgment of this Court in the case of *Y.V. Rangaiah*. The High Court has relied on the judgment of this Court in *Dr. K. Ramulu*.

24. We are of the considered opinion that the judgment in *Y.V. Rangaiah's* case (supra) would not be applicable in the facts and circumstances of this case. The aforesaid judgment was rendered on the interpretation of Rule 4(a)(1)(i) of the Andhra Pradesh Registration and Subordinate Service Rules, 1976. The aforesaid Rule provided for preparation of a panel for the eligible candidates every year in the month of September. This was a statutory duty cast upon the State. The exercise was required to be conducted each year. Thereafter, only promotion orders were to be issued. However, no panel had been prepared for the year 1976. Subsequently, the rule was amended, which rendered the petitioners therein ineligible to be considered for promotion. In these circumstances, it was observed by this Court that the amendment would not be applicable to the vacancies which had arisen prior to the amendment. The vacancies which occurred prior to the amendment rules

would be governed by the old rules and not the amended rules.

25. In the present case, there is no statutory duty cast upon the respondents to either prepare a year-wise panel of the eligible candidates or the selected candidates for promotion. In fact, the proviso to Rule 2 enables the State to keep any post unfilled. Therefore, clearly there is no statutory duty which the State could be mandated to perform under the applicable rules. The requirement to identify the vacancies in a year or to take a decision how many posts are to be filled under Rule 7 cannot be equated with not issuing promotion orders to candidates duly selected for promotion. In our opinion, the appellants had not acquired any right to be considered for promotion. Therefore, it is difficult to accept the submissions of Dr. Rajeev Dhawan that the vacancies, which had arisen before 17th May, 1999 had to be filled under the unamended rules.

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's case (supra) 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 can not be accepted that any accrued or vested right of the appellants have been taken away by the amendment.”

9. In a recent decision in the case of **State of Tripura & Ors. Vs. Nikhil Ranjan Chakraborty & Ors.** (2017) 3 SCC 646, earlier decision in the case of *Deepak Agrawal* was again referred and it was held as under :

“9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, “rules in force on the date” the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in the case of *Deepak Agarwal* (supra), in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended. Secondly, the process to amend the Rules had also begun well before the Notification dated 24.11.2011.

In the aforesaid decision, adherence to new Rules for filling up vacancy under old Rules was upheld as that was not a case for total exclusion from consideration but certain additional posts were included in the feeder

cadre, thereby expanding the zone of consideration.

10. The survey of aforesaid decisions and the principles propounded therein that where by virtue of governing Rules, the employee has already acquired right to be considered for promotion, in which case, it would be a right vested in the employee or where an employee was actually considered for promotion and found fit for promotion, which would be a case of a right having accrued to be promoted subject to any other statutory requirement if any, as against the vacancy existing at that point of time, such right could not be taken away by a subsequent Rule altogether taking away the right to be considered for promotion to the next higher post which was earlier available under the old Rules i.e. Rules of 2000. Rules of 2000 provided for scheme for promotion as contained in Rule 10 thereof as below:

“10. Promotion. - (1) Subject to the provisions of Rule 4, the Committee specified in Schedule IV shall select candidates for departmental promotion on the posts as shown in column (2) of Schedule III.

(2) When a post to be filled by promotion falls vacant and in the opinion of the appointing authority the filling up the vacant post is necessary in the interest of the Corporation, then the Commissioner, shall prepare the seniority list of officers/employees shown in column (3) of Schedule III, their character rolls, the details of award/punishment given to such officers/employees and submit before the Committee specified in Schedule IV.

(3) Subject to the provisions of sub-rule (4), the Committee shall consider the cases of all persons, who on the 1st January of that year has completed such number of years of service (whether officiating or substantive) as specified in column (4) of Schedule III on the posts specified in column (3) of Schedule III from which promotion is to be made and are within the zone

of consideration in accordance with the provisions of sub-rule (4) :

Provided that no junior person shall be given preference over his senior merely on the ground of having completed the prescribed number of years of service.

(4) (a) The selection of candidates eligible for promotion shall be made on the basis of merit-cum-seniority in respect of class I officers and seniority subject to fitness in respect of class II, III and IV officers/employees.

(b) The reservation for the posts of Scheduled Castes, Scheduled Tribes and Other Backward Classes and zone of consideration shall be in accordance with the provisions of rules made or instructions issued in this behalf by the State Government from time to time for the Government Servants.

(5) The Committee shall prepare a list of such persons who fulfill the conditions prescribed in sub-rule (3) and to whom the Committee considers to be suitable for promotion to the service. The list shall be sufficient to cover the anticipated vacancies on account of retirement and promotion during the course of one year from the date of preparation of select list.

(6) The names of persons included in the list shall be arranged in order of seniority on the post as specified in column (3) of the Schedule III.

(7) The Committee shall submit the select list to the appointing authority within one week from the date of meeting of the Committee.

(8) Appointment by promotion shall be made by the

appointing authority in the order in which the names appear in the select list :

Provided that if the appointing authority is not agreed with any name in the list then such name may be removed from the list after giving sufficient and clear reasons in writing."

11. In the present case undisputed facts are that even prior to coming into force of new Rules of 2007, which came into force with effect from 28th January 2008, the petitioner's case was not only considered but he was found fit. The Corporation thereafter proceeded to pass order of promotion also in favour of the petitioner on 14.6.2007. True it is that the order of promotion was issued without obtaining prior permission of the State as required under proviso (iii) to Section 58 (1) of the Act of 1956, the fact remains that the petitioner was considered in accordance with Rules against existing vacancy, by duly constituted selection committee which was duly approved by the MIC vide its resolution dated 19.2.2007. Therefore, whatever was done prior to coming into force of the new Rules up to the stage of actual consideration of petitioner's case for promotion against available vacancy, he having been found fit by the selection committee and the same approved by the MIC vide its resolution dated 19.2.2007, the petitioner's promotion was subject only to prior approval of the State Govt. under Section 58 of the Act of 1956.

12. Saving clause contained in Rules 2007 provide as below:

"17. Repeal and Saving. - All Rules corresponding to these rules and in force immediately before the commencement of these rules are hereby repealed in respect of matters covered by these rules:

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules."

In view of aforesaid provision, the petitioner's case for promotion having been duly considered and approved by the MIC prior to coming into force of new Rules was required to be taken to its logical conclusion by sending the matter for approval of the State Govt. as required under Section 58 of the Act of 1956 instead of straightway issuing promotion order.

13. The operative reason for refusing to grant approval is that under the new Rules of 2007, the post of Sub Engineer is to be filled up only by way of direct recruitment and not by way of promotion. In view of consideration made herein-above, as against the vacancy which was available for consideration of petitioner's case for promotion prior to promulgation of the Rules of 2007, the provision contained in Rules of 2000 would be applicable and not the Rules of 2007. Therefore, I am of the view that reason assigned by the State for refusing grant of permission is not justified in law.

14. As a result of aforesaid discussions, though it is found that earlier promotion order issued in favour of the petitioner was illegal because it was without any prior permission of the Government, nevertheless in the matter of grant of approval, the provision of the Rules of 2000 would apply and not the Rules of 2007. Therefore, the impugned order is set aside and the matter is remitted to the Government for consideration afresh in accordance with the Rules of 2000 which were in force on the date of vacancy and consideration of petitioner's case for promotion in the DPC held on 4.1.2007.

15. The petition is accordingly allowed to the extent and in the manner indicated above. No order as to cost.

Sd/-
(Manindra Mohan Shrivastava)
Judge