

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

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Reserved on: 02.05.2017

Decided on: 14.07.2017

+ **W.P.(C) 11660/2015 and C.M. No. 30977/2015**

UNION OF INDIA AND ANR.

.... Petitioners

Through: **Mr. Ruchir Mishra and Mr. Mukesh Kr
Tiwari, Advocates.**

Versus

JAI SINGH & ANR.

..... Respondents

Through: **Ms Harvinder Oberoi, Adv.**

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE DEEPA SHARMA

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1. Vide the present writ petition, the petitioners have challenged the order of the Central Administrative Tribunal dated 01.11.2013, passed in the Original Application No. 1845/2012 filed by Jai Singh, the respondent No.1.
2. The brief facts of the case are that Shri Jai Singh was appointed initially by the Staff Selection Commission in NSSO (FOD) under Directorate of Statistics with effect from 05.03.1984 in the pay scale of 380-

640 revised to Rs.5000-8000 in 05th Pay Commission. On the formulation of the Subordinate Statistical Service (SSS) on the basis of 05th Pay Commission, the respondent was absorbed/appointed in the Statistical Investigator Grade-III in the pay scale of Rs.5500-9000 with effect from 01.04.2004. The SSS initially had following four tier of grades:-

- (i) Statistical Investigator Grade I (Non Functional)
- (ii) Statistical Investigator Grade II (Functional)
- (iii) Statistical Investigator Grade III (Non Functional)
- (iv) Statistical Investigator Grade IV (Functional)

3. The rules were notified with effect from 12.02.2002 governing the service. The method of recruitment to SI Grade I was by promotion from SI Grade-II with two year regular service while promotion to SI Grade-II was (i) 50% by direct recruitment through examination conducted by UPSC and (ii) 50% by promotion from SI Grade III with 3 years regular service. The total sanction strength of Group D post (SI Grade-I and SI Grade-II) was 1536 out of which 1075 posts were in SI Grade II and 461 in SI Grade I. Upon recommendation of 06th Pay Commission and its acceptance vide Office Memorandum dated 05.09.2008, the services of SSS were restructured. As a result of restructuring, all the Grade I and Grade II Statistical Investigators in

pre revised scales of Rs.7450-11500 and Rs.6500-10500 respectively and holding such posts as on 01.01.2006 were placed in the revised pay band/scale of Rs.9300-34800 (PB-II) Plus Grade Pay of Rs.4600/- and re-designated as Statistical Investigator Grade-I. As a result of this, the old SI Grade-II and I were merged and became SI Grade-I and earlier SI Grade-III and SI Grade IV were merged and re-designated as SI Grade-II. After the merger as on 01.11.2008, the vacancy position in SI Grade-I and Grade II are as under:-

	Sanction Post	In Position	Vacancy
SI Grade I	1568	1044	524
SI Grade II	2339	1941	398

Post merger the petitioners vide office order dated 30.01.2009 promoted 520 SI Grade-II officers of SSS to SI Grade-I in PB-2 with Grade Pay of Rs. 4600/- on *ad hoc* basis which included the respondent as well whose name appeared at serial No. 283 against seniority number 284.

4. The new recruitment rules were proposed, wherein it was recommended that the vacancies of SI Grade-I to be filled through promotion, 70% by seniority and 30% by holding Limited Departmental Competitive Examination (LDCE) to the extent of 50% and 50% by direct recruitment as

per old Recruitment Rules (RRs). Pending approval and notification of the proposed RRs, the *ad hoc* promotees in SI Grade I were granted benefit of MACP vide order dated 19.02.2010 and 13.11.2009. The RRs were, however, not finalized and the respondent No.1 filed the original application. He sought directions directing the petitioners herein to frame the RRs expeditiously or within a time bound frame, and also to regularize his appointment from the date of *ad hoc* promotion, i.e., 30.01.2009. The said prayers of the respondent No.1 were granted by the Tribunal. Since during the pendency of the OA, the RRs were finalized, it was so noted by the Tribunal in its order. As regards the relief sought by the respondent No.1 for regularization of his *ad hoc* promotion, the Tribunal issued the following directions:-

“5. With the issuance of notification of the amended Recruitment Rules, the prayer made in clause 8 (A) of the Original Application stands granted to the applicant and only left out grievance is that he is not yet considered for regularization with effect from the date of his ad hoc promotion, i.e., 30.1.2009. It is settled position of law that a post need to be filled up in accordance with the Recruitment Rules in vogue at the time of occurrence of vacancy.....

6. When the respondents had 524 vacant posts of Statistical Investigator Grade I since 12.11.2008, they could have processed to fill up the same in accordance with the Recruitment Rules in vogue...

8. In the existing circumstances, the direction, we can take, is that if the ad hoc promotion of the applicant made in

terms of O.M. No.12011/2/2010-SSS dated 30.1.2012 was made after following the procedure prescribed in the Recruitment Rules in vogue, then he would be deemed regular promotee from the date of his ad hoc promotion, otherwise the respondents would convene a regular DPC within four weeks from the date of receipt of a copy of this order and consider him for his regular promotion. In case the meeting of the DPC is delayed for any reason and held after retirement of the applicant, he would not be denied regular promotion on the ground that the retired government servants are though considered for promotion but are not given actual promotion and in the event of being found fit, he would be entitled to his regular promotion from the date of expiry of four weeks from the date of receipt of a copy of this order.”

5. The challenge to the aforesaid directions by the petitioners is promised on the submission that the respondent No.1 was duly apprised, when promoted, that his promotion was purely on temporary basis and a stopgap arrangement and could be withdrawn/cancelled at any time without assigning any reasons, and that it did not bestow on him any claim for regular appointment and his *ad hoc* services would not be counted for the purpose of seniority in that grade and for eligibility for promotion, etc. The respondent, well aware of these conditions enumerated in the letter of his *ad hoc* promotion, accepted his promotion and, so now is estopped from seeking regularization from the date of ad hoc promotion. It is further submitted that the Tribunal has erred in not appreciating that on restructuring of the cadre

with effect from 01.01.2006, old RRs of 2002 became obsolete and were not operative and the petitioners could not have acted under it. Even the DoPT in its reply letter to the petitioner-seeking clarification, so advised. The posts, therefore, had to be filled as per the new RRs which were in the process of finalization. It is further submitted that there was no material on record to show that the vacancies in SI Grade-I as on 01.11.2008 could be held to be belonging to the period when old RRs were in vogue, therefore, the Tribunal has erred in issuing such directions. It is further contended that the vacancies had arisen because of restructuring and, therefore, could not have been regularized by applying old RRs. It is further contended that since the first MACP in grade pay of Rs.4600/- in PB-2 and 2nd MACP in grade pay of Rs.4800/- in PB-2 has been granted to the respondent with effect from 01.09.2008, he has not suffered any financial loss. It is further submitted that the said order is not tenable and is liable to be set aside.

6. We have heard the arguments of the learned counsels for the parties. The order dated 16.12.2015 shows that the petitioners confined their case only in respect of the directions of the Tribunal *“if the ad hoc promotion of the applicant made in terms of O.M. No.12011/2/2010-SSS dated 30.1.2012 was made after following the procedure prescribed in the Recruitment Rules*

in vogue, then he would be deemed regular promotee from the date of his ad hoc promotion....”

7. During the hearing before this Court, the petitioners argued that the said *ad hoc* promotion with effect from 30.01.2009 was purely a temporary measure and stop gap arrangement which could be withdrawn/cancelled at any time without assigning any reason and that the said promotion had not conferred any right of regular appointment to the respondent. It was further contended that such a direction of the Tribunal would amount to granting regular promotion to the respondent on the basis of the old RRs which were not in operation after merger, and there were no vacancies. It is argued that after the restructuring of the services and merger of several grades, the old RRs of 2002 had become obsolete and thus were not governing the service conditions of respondent No.1 and no regular promotion could be done under old RRs of 2002. However, due to exigencies of service and since as a result of merger, several posts in SI Grade-I were lying vacant, the *ad hoc* promotions were done and at the time of such promotion, the respondent and all others were duly informed that their promotion was purely temporary and *ad hoc* and no rights of regular appointment to the post had accrued to them. As per the DoPT guidelines, *ad hoc* promotions were initially considered for

one year by the CCA. However, keeping in view the exigency of work and other factors, it were extended with the approval of DoPT from time to time and the revised orders were issued. The opinion of DoPT for regular appointment to these posts was also sought, however, the DoPT advised that since on restructuring of the service, the old RRs have become obsolete, the regular promotions could not be done under old Rules and it was under these circumstances that petitioner did not make any regular appointment to these posts. The same contentions were raised by the petitioners before the Tribunal as well, and the Tribunal had relied on the ratio laid down by the Supreme Court in the case of ***Y.V. Rangaiah & others v. V.J. Sreenivasa Rao & others***, (1983) 3 SCC 284 and ***Sunil Kumar Mehra v. M.C.D. & Another*** (W.P. (C) No.2059/2012) decided on 8.5.2013 by this Court, while rejecting the arguments of the petitioners. The Supreme Court in ***Y.V. Rangaiah*** (*supra*), has settled the proposition of law relating to the applicability of old rules to the post available that time and 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-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 the respondents Nos. 3 to 15 would not

have been deprived of their rights 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 Statewide basis and therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.”

(emphasis supplied)

8. As to the validity of old RRs on merger of posts, the Supreme Court in ***Government of Pondicherry & Anr. vs V. Ramakrishnan***, AIR 2005 SC 4295, has clearly held as under:-

“26. The rules did not become inoperative only because the two scales of pay of the Superintending Engineer and the Chief Engineer became same in terms of revised pay scales. A rule does not become inoperative only because the UPSC says so. A rule validly made even if it has become unworkable unless repealed or replaced by another rule or amended, continue to be in force.”

27. In ***Dr. Rajinder Singh Vs. State of Punjab and Others*** [(2001) 5 SCC 482], this Court held:

"7. The settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so

far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a government order and ignoring the mandate of Article 309 of the Constitution."

28. Valid rules made under proviso appended to Article 309 of the Constitution of India operates so long the said rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion, when Rules to the contrary is holding the field. It can safely be assumed that the principle in Abraham Jacob (supra), Vimal Kumari (supra) and Gujarat Kisan Mazdoor Panchayat (supra) that draft Rules can be acted upon, will apply where there are no rules governing the matter and where recruitment is governed by departmental instructions or executive orders under Article 162 of the Constitution of India."

(emphasis supplied)

9. It is thus, the settled proposition of law that the RRs which are rules notified under proviso to Article 309 of the Constitution of India or under any specific statute for post(s) cannot be held obsolete or non-operative unless so notified under Article 309 of the Constitution of India. The RRs can either be amended or nullified only by a valid notification. In this case, till the new RRs were framed, the old RRs were operative and binding and petitioners cannot take the plea that on restructuring of the cadre, the RRs governing the parties had become obsolete. Thus, the old RRs of 2002 were operative and

binding upon the parties. It is also apparent that the petitioners wanted to make the regular appointments to the posts on merger of cadres, but it did not do so on the advice of DoPT, and, instead made *ad hoc* promotions.

10. The learned counsel for the petitioners has relied on the decisions in the case ***Union of India and Anr. vs. The Defence Marine Engineering Technical Staff Welfare Association and Ors.*** W.P.(C) No. 244/2002, decided on 08.12.2016 of this Court, and also on the decision in ***Pradeep Kumar and Ors. vs. Govt. of N.C.T. of Delhi & Ors.*** W.P.(C) No. 19087-91/2006 and argued that in these cases this Court has taken the view that the employer was not bound to fill the posts under the old RRs, and if he decides not to fill the posts in terms of old RRs and decides to fill the posts under new RRs, such decision of the employer cannot be said to be *mala fide* or tainted. It is argued that the petitioners have also acted *bona fide* by not making any regular appointments to the post under 2002 RRs pending finalization of the new RRs and hence the directions of the Tribunal are against the law.

It is apparent that the decisions in these two cases were given on different sets of facts. In both these cases, the employer had taken the conscious decision of not filling the post till the finalization of the RRs and no promotions were made under old RRs. The Supreme Court in the case of

Dr. Ramulu and Anr. v. Dr. S. Suryaprakash Rao and Ors., (1997) 3 SCC 59, has laid the proposition of law that where the Department takes a conscious policy decision to stop further promotion as per existing rule and the same is backed by proper reasons, then the eligible employees cannot claim as a right the preparation of a panel as per the old rules. This, however, is not the situation in this case. The petitioners did not take any conscious decision of not making any promotion under old RRs. Rather, they had made the *ad hoc* promotions. The Supreme Court has further reiterated the principle in the case of ***State of Punjab and Ors. vs. Arun Kumar Aggarwal and Ors., (2007) 10 SCC 402*** and observed as under:-

“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.”

(Emphasis added)

11. Also, in the case of ***Commandant Shamsheer Singh Malik v. Union of India and Ors., ILR (2011) Supp. (4) Delhi 822***, the Court has held as under:-

“25. From a conjoint reading of the afore-noted judicial decisions, the legal principle which emerges is that the normal rule is that the vacancy which had arisen prior to amendment of the rules would be governed by the

unamended Rules and not by the amended Rules unless the amending rule is made retrospective in operation or a conscious decision is taken to fill up existing vacancies as per the amended Rule.”

(Emphasis added)

12. The Court in the case of **Pradeep Kumar and Ors.**(*supra*) has summarized the case law:

“28.....The general rule is that vacancies occurring should be filled up as per the prevalent recruitment rules. The same is subject to two exceptions, i.e. when the rules are under consideration for amendment or revision and the authority has taken a conscious decision to defer further promotions until the changes are carried out or that the proposed new rules are to be made applicable retrospectively. Further, the decision to defer promotions should not be actuated by mala fides and must be based on proper reasons. Such a reason may be gathered from the background and circumstances in which the decision was taken....”

13. In the present case, the petitioners have taken conscious decision to promote the respondent and several others on the existing post as per old RRs by issuing an *ad hoc* promotion orders. The promotion as well as the terms and conditions of the employment of the respondent and others continued to be governed under the old RRs of 2002 till replaced by new RRs. Also, if the argument of the petitioner is accepted that there were no operative RRs after merger of posts as per 6th Pay Commission, it would mean, there were no RRs

governing the parties and thus a vacuum existed, which cannot be filled. Thus, the contention of the petitioners has no merit. Also, RRs 2002 contains deeming provision. Note of Rule 12 reads as under:-

“Note:

For the purposes of these rules, “Regular basis” means

(1) where a person is appointed in accordance with the procedure laid down in sub-rule (2) against a regular vacancy, then he shall be deemed to have been appointed to any grade or post on a regular basis.”

These rules defines appointment on regular basis and includes the employees who were:-

- (i) Appointed against a regular vacancy
- (ii) Appointed as per procedure in sub-rule (2)

14. If the appointment made fulfills these two conditions, the appointment so made is considered to have been made on regular basis. It is immaterial if it is given the nomenclature of *ad hoc*, temporary or otherwise. We, in the light of above, find that the direction of the Tribunal to consider the *ad hoc* promotion of the respondent, if made, after following the procedure prescribed in the RRs in vogue, as regular promotion from the date of his *ad hoc* promotion, to be in consonance with the RRs governing the parties. The

petitioners, therefore, have failed to point out any illegality in the order of the Tribunal.

15. The petition has no merit and the same is dismissed.

**DEEPA SHARMA
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

**JULY 14, 2017
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