

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2942 OF 2018

The Director of Accounts and
Treasuries (M.S.), Mumbai and ors. ... Petitioners.
V/s.

Mrs. Suvarna Umesh Sant and ors. ... Respondents.

Mr. A.A. Kumbhakoni, Advocate General a/w. Mr. Akshay Shinde,
AGP-B Panel for the Petitioners.

Mr. B.A.Bandiwadekar a/w. Mr. G.A.Bandiwadekar for Respondent
Nos.1,3 to 5, 7,10,11,13,15,19,20 and 23.

CORAM : A.S. OKA AND M.S. SONAK, JJ.

DATE OF RESERVING THE JUDGMENT : 24th October 2018.

DATE OF PRONOUNCING THE JUDGMENT : 2nd November 2018.

JUDGMENT: (Per M.S. SONAK, J.)

1] Heard Mr. A.A.Kumbhakoni, learned Advocate General along with Mr. Akshay Shinde, the learned AGP, B-Panel counsel for the petitioners and Mr. G.A. Bandiwadekar, the learned counsel for the respondent Nos.1,3 to 5, 7, 10, 11, 13, 15, 19, 20 and 23.

2] By order dated 5th September 2018, we had issued notice for final disposal to the respondents returnable on 1st October 2018. On 1st October 2018, since the petition was amended in the meanwhile, we once again permitted service of private notice for final disposal to all the respondents, who were by that

date unserved. There is no dispute that all the respondents have been duly served in the matter. In fact, the contesting respondents are represented by Mr. G.A. Bandiwadekar. Accordingly, the petition was finally heard on 24th October 2018.

3] The challenge in this petition is to the judgment and order dated 14th September 2017 made by the Maharashtra Administrative Tribunal (MAT), Mumbai allowing Original Application No.764 of 2015 instituted by the respondents declaring that the respondents were Group 'C' employees and immune from the Revenue Division Allotment for appointment by nomination and promotion to the posts of Group 'A' and Group 'B' (Gazetted and Non-Gazetted) of the Government of Maharashtra Rules, 2015. The impugned judgment and order further directs the petitioners - State to act in accordance with such declaration within a period of eight weeks from the date of said judgment and order.

4] In the present case, we are concerned with the promotions and postings to the post of Assistant Accounts Officers (said

post) in the Directorate of Accounts and Treasury. By order dated 6th August 2015, 87 Officers from the Feeder cadre were promoted to the said post on the basis of results of competitive examinations and by associating Maharashtra Public Service Commission (MPSC) with the process.

5] From out of 87 appointees to the said post, 27 appointees instituted O.A. No. 764 of 2015 before the MAT seeking the following substantive reliefs:

“a] By a suitable order, this Hon'ble Tribunal may be pleased to set aside the order dated 6.8.2015 issued by the Respondent No.1 (EXHIBIT-A) to the extent of allotment of place of posting of the Petitioners on appointment by selection in the cadre of the Maharashtra Finance and Accounts Services Group-B [Non Gazetted] and accordingly, the Petitioners be granted all the consequential service benefits, as if the impugned order had not been passed.

b] By a suitable order, this Hon'ble Tribunal may be pleased to direct the Respondents to decide the pending common representation of the Petitioners dated 14.8.2015 in the light of the G.R. dated 11.8.2014 all within a period of 4 weeks from the date of the order and to communicate the reasoned/speaking order thereon to the Petitioners.

c] In the alternative and without prejudice to above, by a suitable order, this Hon'ble Tribunal may be pleased to hold and declare that the matter regarding the posting on appointment of the Petitioners to the post of the Maharashtra Finance and Accounts Services Group-B [Non

Gazetted] stood governed by 'the Divisional Cadre Structure and the Divisional Cadre Allotment for appointment by Nomination to the posts of Group-A and Group-B [Gazetted and Non Gazetted] of the Government of Maharashtra Rules, 2010' dated 8.6.2010 [EXHIBIT-E] and not retrospectively by the latest Rules called as "the Revenue Division Allotment for appointment by way of nomination and promotion to the post of Group-A and Group -B [Gazetted and Non Gazetted] of the Government of Maharashtra Rules, 2015" dated 28.4.2015 [EXHIBIT-G] and accordingly, the Petitioners be granted all the consequential service benefits.

d] By a suitable order, this Hon'ble Tribunal may be pleased to hold and declare that the matter regarding the posting on appointment by selection of the Petitioners to the post of the Maharashtra Finance and Accounts Services Group-B [Non Gazetted] did not fall within the ambit of the Rule 14 of the aforesaid Rules of 2015, since their case was not pending for the allotment of the Revenue Divisions on 28.4.2015, when the Rules of 2015 came into force and accordingly, the Petitioners be granted all the consequential service benefits".

6] In effect, the challenge of the respondents-appointees was obviously not to their appointments but to their postings as indicated in the order dated 6th August 2015. It was the case of the respondents – appointees that in matters of postings, they were governed by *'the Divisional Cadre Structure and the Divisional Cadre Allotment for appointment by Nomination to the posts of Group-A and Group-B [Gazetted and Non Gazetted] of the Government of Maharashtra Rules, 2010 dated 8.6.2010*

(2010 Rules) and not 'the Revenue Division Allotment for appointment by way of nomination and promotion to the post of Group-A and Group-B [Gazetted and Non Gazetted] of the Government of Maharashtra Rules, 2015 dated 28.4.2015 (2015 Rules' and therefore, their postings in pursuance of appointment order dated 6th August 2015, ought to be at places of their own choice such as Mumbai, Navi Mumbai and Konkan Division. The respondents-appointees were therefore, basically aggrieved by their postings in Revenue Divisions such as Nagpur, Amravati, Aurangabad and Nashik.

7] There is no dispute that from out of 27 appointees who had instituted O.A. No. 764 of 2015, at least 7 appointees, i.e., present respondent Nos.8,9,12,16,18,24 & 25 accepted the postings and withdrew themselves from O.A. No. 764 of 2015. Therefore, only 20 respondents-appointees prosecuted O.A. No. 764 of 2015 before the MAT. There was in fact, no necessity of even impleading these respondents to the present proceedings.

8] The learned Advocate General pointed out that the order dated 6th August 2015 appointing 87 Officers to the said posts

had made it clear that the appointees must join within 30 days, failing which their appointments were liable to be cancelled. He pointed out that out of 87 appointees referred to in the order dated 6th August 2015, almost 37 appointees, including 27 applicants before the MAT failed to join within 30 days period. Therefore, by communication dated 22nd September 2015, such 37 appointees were called upon to join the respective places of postings in terms of the order dated 6th August 2015. Since, 37 appointees failed to join by order dated 21st October 2015 their appointments in terms of the order dated 6th August 2015 were in fact cancelled. The order dated 21st October 2015 was duly published on the Government website. The learned Advocate General points out that the order dated 21st October 2015 was never challenged by any of the 37 appointees, including 27 applicants before the MAT.

9] The learned Advocate General also pointed out that in pursuance of fresh selection process, by yet another order dated 10th August 2017, almost 207 Officers were appointed to the said posts, which included 37 appointees in terms of the original order dated 6th August 2015. In this order also, it was stipulated

that the appointees must join within 30 days, failing which their appointments were liable to be cancelled.

10] The learned Advocate General pointed out that in response to the fresh order of appointment dated 10th August 2017, 19 out of the original 27 applicants before the MAT joined at the respective places to which they were posted, unconditionally and without any demur. However, 8 applicants before the MAT from out of 27 who refused to join and in that sense were the real contesting applicants before the MAT when it came to prosecution of O.A. No. 764 of 2015.

11] The learned Advocate General also pointed out that by order dated 30th May 2018 the appointments of 47 out of 207 Officers who were appointed to the said post by order dated 10th August 2017 came to be cancelled on account of failure of such 47 Officers to join the appointed posts. This includes the respondent Nos.3,4,5,6,10,12, 17 and 18, i.e., the 8 applicants before the MAT, who, as noted earlier, were the real contesting applicants before the MAT when it came to prosecution of O.A. No. 764 of 2015.

12] The learned Advocate General pointed out that even this order dated 30th May 2018 remains unchallenged till date.

13] The learned Advocate General submits that in terms of Rule 6 of Maharashtra Finance and Accounts Service, Group - C posts (Recruitment) Rules 1996 (1996 Rules) upon which the respondents themselves rely, a person appointed to the post shall be liable for transfer anywhere in the State of Maharashtra. Resultantly, the insistence on the part of the respondents that they be appointed to a particular Revenue Division or at a particular place had no statutory backing. The MAT, by acceding to such prayers of the respondents has defeated the provisions of Rule 6 of 1996 Rules, upon which the respondents themselves relied. To that extent, the impugned judgment and order made by the MAT warrants interference.

14] The learned Advocate General submits that in fact the appointments in the present case were governed by 2015 Rules and the only consequence of such appointments is that an appointee stays in a particular Revenue Division to which he is appointed for a period of six years, though, he is transferable

within that Revenue Division, but not beyond the same. The learned Advocate General points out that even otherwise an employee, is liable for transfer after completion of three years at a particular posting, in terms of the General Rules of policies relating to transfer. Therefore, insistence on the part of the respondents that they are not governed by the 2015 Rules, was *ex-facie* untenable, besides being unjustified.

15] The learned Advocate General pointed out that the MAT misconstrued the decision of this Court in case of ***Dinesh S. Sonawane v/s. The State of Maharashtra and ors. (Writ Petition No. 5440 of 2009 decided on 5th February 2010)*** as the said decision did not pertain to the post of Assistant Accounts Officers and in any case, was made in the context of grant of compassionate appointments. The issue in the present matter was entirely different and therefore, the MAT erred in relying upon *Dinesh Sonawane (supra)*. The learned Advocate General submitted that from the inception of recruitment process, the respondents were fully aware or in any case, were fully informed that the said posts were Group-B and not Group-C posts. At no stage, did the respondents raise objection to this

position, but rather, they took part in the selection process. The appointment orders issued to the respondents also clearly stated that the post to which they were appointed were Group-B posts and that their appointments were governed by 2015 Rules. At this stage also, none of the respondents, objected to this position. The learned Advocate General pointed out that the principle of acquiescence and estoppel was clearly attracted and the MAT exceeded jurisdiction in granting reliefs to the respondents.

16] Finally, the learned Advocate General placed on record the Maharashtra Accounts and Finance Services, Assistant Accounts Officer, Group-B (Gazetted) (Recruitment) Rules 2018 (2018 Rules) to submit that it is these Rules which will in supersession of all existing Rules govern appointments to the posts of Assistant Accounts Officers (said post). He pointed out that these Rules, which are legislative in character, have been given a retrospective effect from 6th January 2017. He points out that by Government Resolution (G.R.) dated 6th January 2017 already the posts of Assistant Accounts Officer had been designated as Group-B post. He points out that in terms of the 2018 Rules, the

posts of Assistant Accounts Officers have been specifically designated as Group-B post w.e.f. 6th January 2017. He submits therefore, that on 10th August 2017, when the respondents were appointed to the said post, their appointments were clearly governed by the 2018 Rules which had designated the posts of Assistant Accounts Officer as Group-B post. In view of such subsequent development, the very foundation of the impugned judgement and order made by MAT falls and the same is therefore, liable to be set aside.

17] Mr. G.A. Bandiwadekar countered the submissions of the learned Advocate General and pointed out that since the respondents were first appointed to the said post vide order dated 6th August 2015, the 2018 Rules will not apply. He pointed out that the orders dated 21st October 2015 or 30th May 2018 purporting to cancel the respondent's appointments made vide orders dated 6th August 2015 and 10th August 2017 were never personally served upon the respondents. He points out that the order dated 21st October 2015 was not even pointed out to the MAT before it made the impugned judgment and order dated 14th September 2017. He points out that the order dated 30th

May 2018 is *ex-facie* illegal, inasmuch as it has been made in the teeth of directions in the impugned judgment and order dated 14th September 2017 made by the MAT. He, therefore, submits that the orders dated 21st October 2015 or 30th May 2018 can never be held against the contesting respondents. He submits that such orders are required to be ignored whilst considering whether the impugned judgment and order made by the MAT indeed warrants interference.

18] Mr. Gaurav Bandiwadekar submits that in terms of the 1996 Rules the post of Assistant Accounts Officer was clearly designated as a Group-C post. Therefore, when it came to posting in terms of the appointment order dated 6th August 2015, the respondents ought to have been given a choice and the postings ought to have been made according to the choice so indicated. Instead, the petitioners incorrectly invoked the 2015 Rules and posted the respondents to places other than those opted by the respondents. This action of the petitioner was clearly *ultra vires* their own Rules and Regulations and therefore, the same was rightly interfered with by the MAT. Mr.Gaurav Bandiwadekar submits that there is absolutely no

error in the view taken by the MAT and this petition, therefore, deserves dismissal.

19] Mr. Gaurav Bandiwadekar pointed out that the issue of posts carrying the pay scale of Rs.5500-Rs.9000/- be classified as Group-C post stands concluded by the decision of the Division Bench of this Court in *Dinesh Sonawane (supra)*. He points out that this decision has been confirmed by the Apex Court and even followed by the Division bench in yet another matter i.e. Civil Writ Petition (ST) No. 1820 of 2018 decided on 10th April 2018 (***The State of Maharashtra v/s. Abhijeet Mulik***). He submits that such judicial decisions cannot be set at naught by framing fresh Recruitment Rules and purporting to give them retrospective effect. He pointed out that this contention is without prejudice to his basic contention that the 2018 Rules do not apply to the case of the respondents.

20] Mr. Gaurav Bandiwadekar, again, without prejudice to his basic contention that the 2018 Rules do not apply to the case of the respondents, submitted that certain rights were already vested in the respondents and the same could not have been

taken away by the 2018 Rules being given any retrospective effect. He relied on ***State of Madhya Pradesh and ors. v/s. Yogendra Shrivastava - (2010) 12 SCC 538*** and ***Narharrao B. Deshpande v/s. State of Maharashtra and ors. - [2002 (5) Mh.L.J. 265]*** in support of this contention.

21] Mr. Gaurav Bandiwadekar also made reference to an order dated 31st May 2018 (page 563-A of the paper book) to urge that a policy decision has already been taken by the State not to question the decisions of the MAT in connection with classifying posts carrying the pay scale of Rs.5500-9000 as Group-C post. On this basis, Mr. Bandiwadekar urged that very institution of the present petition is contrary to the State's own policy of not contesting such issues. He relies on the decision of the Division Bench of this Court in ***State of Maharashtra v/s. Smt. Meena A. Kuwalekar (Writ Petition No.9051 of 2013 and connected matters decided on 28th April 2016)*** to submit that the State cannot adopt a pick and chose policy when it comes to its own employees.

22] Mr. Gaurav Bandiwadekar pointed out that some of the respondents to whom he represents may have unconditionally joined and reported for duties at place of posting assigned to them by order dated 10th August 2017. However, some of the respondents to whom he represents have still not joined. He submits that the principles of acquiescence and estoppel will not apply even to the respondents who may have joined in pursuance of order dated 10th August 2017 because the portion of the orders dated 6th August 2015 and 10th August 2017 relating to their posting constitutes a glaring illegality to which such principles of acquiescence and estoppel do not apply. He relies on ***Raj Kumar and ors v/s. Shakti Raj and ors. - 1997 SCC (L& S) 1029*** in support of this contention. For all these reasons, Mr. Gaurav Bandiwadekar submits that the present petition is liable to be dismissed.

23] The rival contentions now fall for our determination.

24] At least two developments have rendered the impugned judgement and order dated 14th September 2017 made by the MAT, quite untenable. They are as follows:

- (i) The orders dated 21st October 2015 and 10th August 2017; &
- (ii) The 2018 Rules which have entered into force retrospectively with effect from 6th January 2017.

25] The respondents were appointed to the said post vide order dated 6th August 2015 which had clearly stipulated that they must join the appointed posts within 30 days failing which their appointments shall liable to be cancelled. By communication dated 22nd September 2015, i.e., the respondents were called upon to join their respective places of postings, since they had failed to do so within 30 days from the service of the order dated 6th August 2015. Despite this, almost 37 Officers, which included the 27 respondents who had instituted O.A. No. 764 of 2015 before the MAT failed to join. Therefore, by order dated 21st October 2015, which was duly published on the Official Website of the State Government, the appointments of such 37 Officers which included 27 applicants before the MAT were cancelled. None of the 27 applicants before the MAT even bothered to challenge the order dated 21st October 2015.

26] Later on, by order dated 10th August 2017, the State, along with several other Officers, reappointed 37 Officers, whose appointments had been cancelled vide order dated 21st October 2015 to the said post. Again, in the order dated 10th August 2017, there was a stipulation that the appointees must join within 30 days, failing which their appointments were liable to be cancelled. On this occasion, almost 19 out of 27 applicants before the MAT, unconditionally accepted the order dated 10th August 2017 and even joined at the respective places of their positing. Excluding the applicants, who specifically withdrew from the prosecution of the O.A. No. 764 of 2015 before the MAT, respondent Nos.1,7,11,13,14,15,19,20,21,22, 23 and 26 belong to this class of applicants who unconditionally accepted the fresh appointment order dated 10th August 2017 and even joined their respective places of postings.

27] According to us, the aforesaid respondents who unconditionally accepted the fresh appointment order dated 10th August 2018 and joined their respective places of postings were not entitled to any relief from the MAT applying the principles of both acquiescence and estoppel. Admittedly, these respondents

did not even record that they were accepting the benefits under the order dated 10th August 2017 under protest or without prejudice to their contention in O.A. No. 764 of 2015 which was pending on the said date. Already, their appointments to the said post had been cancelled vide order dated 21st October 2015 which they had not bothered to challenge. Though, the State may not have been bound, the State, once again appointed the respondents who had failed to join in pursuance of the appointment order dated 6th August 2015. In a sense, therefore, this was a concession extended by the State to such Officers. This concession, was accepted without any protest or demur by the aforesaid respondents. Thereafter, they were clearly not entitled to any further relief from the MAT on the principle of acquiescence and estoppel.

28] The principle in *Raj Kumar v/s. Shakti Raj (supra)* was clearly not applicable to the facts of the present case. In *Raj Kumar v/s. Shakti Raj (supra)*, the Apex Court, concluded that the entire selection process, by which, the posts in question were taken out of the purview of SSS Board after the examinations were conducted and even results were announced

by the Board was obviously illegal. In such a fact situation, the Apex Court observed that the principles in ***Madan Lal v/s. State of J& K - (1995) 3 SCC 486*** wherein it was held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge the constitution of the Selection Board, will not apply. The Apex Court observed that since this was the case of glaring illegalities, the principle of estoppel by conduct or acquiescence will have no application.

29] In the present case, at least insofar as the order dated 10th August 2017 was concerned, no illegality, much less any glaring illegality has been demonstrated. By then, vide G.R. dated 6th January 2017, the said post had already been classified as a Group-C post. Even accepting that the Recruitment Rules of 1996 would not stand amended by G.R. dated 6th January 2017, the 2018 Rules, which entered into force with retrospective effect from 6th January 2017, certainly impart validity to the order dated 10th August 2017. In any case, this was certainly not some case of glaring illegality as was found in case of *Raj Kumar*

(*supra*) so as to exclude the application of principle of estoppel by conduct or acquiescence. Clearly, therefore, the impugned judgment and order, to the extent it grants relief to the respondent No.1,7,11,13,14,15,19,20,21,22,23 and 26 warrants interference, applying the principle of estoppel by conduct and acquiescence.

30] Insofar as respondent Nos.3,4,5,6,10,12,17 & 18 who have not accepted the order dated 10th August 2017 are concerned, the principle of estoppel by conduct or acquiescence will not apply and therefore, their case is required to be considered independently.

31] To the case of the aforesaid respondents, however, the impact of the order dated 21st October 2015 , if not the order dated 30th May 2018 is quite relevant. As noted earlier, vide order dated 21st October 2015, the appointments of these respondents in terms of the order dated 6th August 2015 came to be cancelled. This order dated 21st October 2015 was never challenged by these respondents on the specious plea that the

same was not personally served to them. Admittedly, this order was published on the Official Website of the State Government.

32] Further, since these respondents failed to join the said post despite offer of yet another chance vide order dated 10th August 2017 in terms of the specific stipulation in the said order, even this appointment was liable to be cancelled within 30 days from the date of such order. Ultimately, vide order dated 30th May 2018, even this appointment of the respondents came to be cancelled.

33] Even if we were to agree with Mr. Gaurav Bandiwadekar that the order dated 30th May 2018, which was made after the MAT's impugned judgment and order dated 14th September 2017 be ignored, still these respondents cannot escape the impact of the order dated 21st October 2015 or the consequences of failure to join within 30 days from the order dated 10th August 2017. No doubt, these respondents, could have always joined under protest and without prejudice to their rights and contentions. However, admittedly, the respondents, simply failed to join the

appointed posts and therefore, cannot escape the impact of the previous orders.

34] The entire fulcrum of the respondent's case was that the post of Assistant Accounts Officer (said post) to which they were appointed was a Group-C post and therefore, their posting ought to have been according to the choices or options indicated by them. There is no necessity to go into the merits or de-merits of such contentions, now that the State, in supersession of the existing Rules has enacted 2018 Rules, which have entered into force retrospectively from 6th January 2017.

35] In terms of the 2018 Rules, very clearly, the post of Assistant Accounts Officer has been classified as a Group-B (Gazetted post). There is no dispute whatsoever that once the post of Assistant Accounts Officer is classified as a Group-B post, there is no question of the Officers who are appointed to this post insisting upon postings as per their choices or as per the options that may have been exercised by them.

36] The foundational basis of the impugned judgement and order dated 14th September 1997 was the 1996 Rules which had classified the post of Assistant Accounts Officer as a Group-C post. The 2018 Rules which supersedes all existing Rules including the 1996 Rules and classifies the post of Assistant Accounts Officer as Group-B post. The foundational basis for the impugned judgment and order, therefore, no longer survives.

37] Mr. Gaurav Bandiwadekar, without even challenging the 2018 Rules has however, advanced two contentions in the context of the 2018 Rules:-

a] Firstly, he contends that the 2018 Rules will apply only to vacancies which arise after the 2018 Rules came into force and since, the respondents were appointed to vacancies which had arisen earlier, the 2018 Rules will not apply; and

b] The 2018 Rules, even though, they may have been given retrospective effect, cannot take away vested rights of the respondents. He submitted that the right to postings

as per choices or options exercised by the respondents was their vested right and the same could never have been taken away by the 2018 Rules.

38] In the facts of the present case, we are unable to see any merit in either of the contentions. The principle that vacancies have to be normally filled-in on the basis of the Recruitment Rules in force on the date such vacancies arise can, in a given case, be departed from particularly when Rules are amended with retrospective effect or fresh Rules are enacted in supersession of the existing Rules with retrospective effect.

39] In ***Deepak Agarwal and anr. v/s. State of Uttar Pradesh and ors. - (2011) 6 SCC 725***, the Apex Court has explained the legal position in the following terms:-

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

the applicable rule, as in *Y.V. Rangaiah case*¹ lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. **Thus, it cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment.**

27. The judgments cited by the learned counsel for the appellants, namely, *B.L. Gupta v. MCD*², *P. Ganeshwar Rao v. State of A.P.*³ and *N.T. Devin Katti v. Karnataka Public Service Commission*⁴ are reiterations of a principle laid down in *Y.V. Rangaiah case*. All these judgments have been considered by this Court in *Rajasthan Public Service Commission v. Chanan Ram*⁵. In our opinion, the observations made by this Court in SCC paras 14 and 15 of the judgment are a complete answer to the submissions made by Dr. Rajeev Dhavan. In that case, this Court was considering the abolition of the post of Assistant Director (Junior) which was substituted by the post of Marketing Officer. Thus the post of Assistant Director (Junior) was no longer eligible for promotion, as the post of Assistant Director had to be filled by 100% promotion from the post of Marketing Officer. It was, therefore, held that the post had to be filled under the prevailing rules and not the old rules.

28. In our opinion, the matter is squarely covered by the ratio of the judgment of this Court in *Dr. K. Ramulu*⁶. 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* 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)

1 *Y.V. Rangaiah v. J. Sreenivasa Rao* – (1983) 3 SCC 284

2 (1998) 9 SCC 223

3 1988 Supp SCC 740

4 (1990) 3 SCC 157

5 (1998) 4 SCC 202

6 *K.Ramulu (Dr.) V. Dr. S. Suryaprakash Rao* – (1997) 3 SCC 59

40] In **State of Tripura and ors. v/s. Nikhil Ranjan Chakraborty and ors. - (2017) 3 SCC 646**, the Apex Court followed its earlier dictum in *Deepak Agarwal (supra)*. At paragraphs 9 and 10 observed thus:

“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 *Deepak Agarwal* 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.

10. In our view, the instant case is fully covered by the law laid down by this Court in *Deepak Agrawal* and the High Court was completely in error in allowing the writ petition and in dismissing the writ appeals. We, therefore, allow these appeals, set aside the judgment⁷ under appeal and dismiss Writ Petitions (Civil) Nos. 104, 105, 106, 153 and 181 of 2012.

(emphasis supplied)

7 Nikhil Ranjan Chakraborty v. Brajendra Tripura – 2012 SCC OnLine Gau 806

41] Besides, in the present case, it cannot be said that the respondents had a vested right in classification of the post of the Assistant Accounts Officer as a Group-C post or that the respondents had some vested right to insist upon postings at the place of their choice or in terms of options exercised by them. In fact, even the 1996 Rules upon which the respondents as well as the MAT relied upon, in terms provides that a person appointed to the post of Assistant Accounts Officer shall be liable for transfer anywhere in the State of Maharashtra. Therefore, the State by enacting the 2018 Rules or by giving the 2018 Rules any retrospective effect cannot be said to have taken away any vested rights of the respondents in the present case.

42] In the aforesaid regard, reference is necessary to the legal position explained by the Apex Court in ***CMD/Chairman, Bharat Sanchar Nigam Limited and ors v/s. Mishra Lal and ors - (2011) 14 SCC 739***, in which, the Apex Court has explained that Rules under Article 309 of the Constitution of India can be changed even during the subsistence of the old

rules. As held in ***Raj Kumar v/s. Union of India - (1975) 4 SCC 13***, “rules made under the proviso to Article 309 of the Constitution are legislative in character, and therefore can be given effect retrospectively”. Thus, the rules under the proviso to Article 309 are *constitutional rules*, not like rules under a statute. Hence, they have the same force as a statute, though made by the executive. Further, the Apex Court has held that it is well settled that the legislature can legislate retrospectively vide ***M.P.V. Sundararamier & Co. v/s. State of A.P. - AIR 1958 SC 468***, ***J.K. Jute Mills Co. Ltd. v/s. State of U.P. - AIR 1961 SC 1534***, ***Jadao Bahuji v/s. Municipal Committee, Khandwa - AIR 1961 SC 1486***, ***Govt. of A.P. v/s. Hindustan Machine Tools Ltd. - (1975) 2 SCC 274***, and ***Nandu Mal Girdhari Lal v/s. State of U.P. - 1993 Supp (1) SCC 338***, etc.

43] The contention that vested rights cannot be taken away by amendment of the Rules was answered by the Apex Court in the following terms:

“15. No doubt in some decisions it was held that a vested right cannot be taken away by amendment of the rules.

But what does this really mean? Since a rule under the proviso to Article 309 is legislative in character vide Raj Kumar v. Union of India⁸ the rule can be amended, even with retrospective effect, just as a legislation can be amended with retrospective effect.

16. *In our opinion the expression “vested right” could only mean a vested constitutional right, since a constitutional right cannot be taken away by amendment of the rules. This is evident from the Constitution Bench decision of this Court in Railway Board v. C.R. Rangadhamaiah⁹. It was held therein that pension is no longer treated as a bounty but was a valuable constitutional right under Articles 19(1)(f) and 31(1) of the Constitution, which were available on 1-1-1973 and 1-4-1974 (that is, before the 44th Constitution Amendment). Since this was a constitutional right it could not be taken away by amendment of the rules. The Constitution is the supreme law of the land, and hence a constitutional right can only be taken away by amending the Constitution, not by amending the rules or even by amending the statute.*

17. *Hence, in view of the aforesaid Constitution Bench decision the other decisions of this Court of smaller Benches must be understood to mean that a vested constitutional right cannot be taken away by amendment of the rules. It follows that if the vested right is not a constitutional right it can be taken away by retrospective amendment of the rules. A legislative act can destroy existing rights (unless it is a constitutional right). Thus, even a taxing statute can be made retrospectively, and this usually affects existing rights vide Union of India v. Madan Gopal Kabra¹⁰, Jawaharmal v. State of Rajasthan¹¹ (p. 770), TISCO Ltd. v. State of Bihar¹², D.G. Gose & Co. (Agents) (P) Ltd. v. State of Kerala¹³ (SCC para 53 : AIR*

8 (1975) 4 SCC 13

9 (1997) 6 SCC 623

10 AIR 1954 SC 158

11 AIR 1966 SC 764

12 AIR 1958SC 452

13 (1980) 2 SCC 410

para 16) and Shetkari Sahakari Sakhar Karkhana Ltd. v. Collector¹⁴ (SCC paras 13-14 : AIR paras 6-7), etc.

18. *A rule made under the proviso to Article 309 is a legislative act (though made by the executive). It is not a piece of delegated legislation like a rule made under a statute. Hence it can be amended retrospectively.”*

44] In *Yogendra Shrivastava (supra)* relied upon by Mr. Gaurav Bandiwadekar, certain financial benefits, i.e., non practising allowance had already been earned or acquired by the employees under the existing Rules. It is in this fact situation that the Apex Court held that benefit which had already been earned or acquired under the existing Rules could not have been taken away by amending the Rules with retrospective effect. This decision is therefore, distinguishable and not applicable to the facts of the present case.

45] *Narharrao Deshpande (supra)* relied upon by Mr. Gaurav Bandiwadekar, was also a case where certain pensionary benefits were already accrued and it is in this context that an observation was made that such benefits could not have been taken away on the basis of retrospective amendment of the

14 (1980 1 SCC 381

Rules. Again, this is not the fact situation in the present case and therefore, *Narharrao Deshpande (supra)* can be of no assistance to the respondents.

46] In *Dinesh Sonawane (supra)* the issue was whether the post of Craft Inspector in the pay scale of Rs.5500-9000/- would be covered in Group-B category in terms of G.R. dated 2nd July 2002. The G.R. dated 2nd July 2002 had stipulated that in cases where pay scale was not less than Rs.9000/- and not more than Rs.11,500/-, the post concerned would be categorised as Group-B. In the context of such G.R., the Division Bench held that the post of Craft Inspector in the pay scale of Rs.5500-9000 could not have been categorised as a Group-B post but the same was a Group-C post. Again, this was in the context of claim for compassionate appointment. To the same effect is the ruling in *Abhijeet Mulik (supra)*.

47] In the present case, we are not concerned with the categorisation in terms of the G.R. dated 2nd July 2002, but the categorisation in terms of 2018 Rules, which supersede the 1996

Rules which had categorised the post of Assistant Accounts Officer as a Group-B post. Besides, in the present case, we are not even remotely concerned with the issue of compassionate appointment, where, perspectives, can differ considering the context. Therefore, the decisions in *Dinesh Sonawane (supra)* or *Abhijeet Mulik (supra)* can no longer form the basis for sustaining the impugned judgement and order.

48] Reliance on the order dated 31st May 2018 (at page 563-A of the paper book) by Mr.Gaurav Bandiwadekar is quite misplaced. The order deals with a particular case of compassionate appointment. The order, in any case, relates to the issue of classification of the posts carrying pay-scale of Rs.5500-9000 in the context of compassionate appointment. The order, in any case, excludes the present writ petition, inasmuch as the order very clearly states that the opinion is subject to the decision in the writ petition which is to be filed by the Finance Department against the judgment and order dated 14th September 2017 in O.A. No. 764 of 2015, i.e., present petition. Based upon the order dated 31st May 2018, we cannot say that

the State in instituting the present petition, has acted contrary to its own policies or that this is a case of pick and choose, as was found in the *State of Maharashtra v/s. Meena Kuwalekar (supra)*.

49] For all the aforesaid reasons, we are satisfied that the foundational basis for the impugned judgment and order, no longer survives and consequently, the impugned judgement and order is liable to be set aside.

50] As noted earlier, respondent Nos.3,4,5,6,10,12,17 and 18 failed to join the appointed post despite offer of second chance by the State vide its order dated 10th August 2017. Accordingly, the State, vide order dated 30th May 2018 has cancelled the appointments of such respondents to the said post.

51] Since such cancellation was during the pendency of the proceedings in this Court, we enquired from the learned Advocate General as to whether the State would consider the withdrawing the order dated 30th May 2018 and extending time for such respondents to join at their respective places of posting

in terms of the order dated 10th August 2017 or to such other places of postings as the exigencies of the service may require.

52] The learned Advocate General has, very graciously made a statement that the order dated 30th May 2018 would be withdrawn and the appointments of such respondents in terms of the order dated 10th August 2017 would be revived. He also stated that fresh posting orders would be issued to these respondents to join at such places as exigencies of service would require, within stipulated period. If the respondents join within the stipulated period, then, consequential benefits with effect from 10th August 2017 will be extended to them. We accept this statement and direct the petitioners- State to act accordingly within a period of four weeks from today.

53] Therefore, though we are allowing this petition and setting aside the impugned judgment and order dated 14th September 2017 made by the MAT in O.A. No. 764 of 2015, we note that the interests of the contesting respondents will also be protected in terms of the aforesaid statement of the learned Advocate General and the directions issued on the basis thereof.

54] Accordingly, we dispose of the writ petition with the following order:

a] The judgment and order dated 14th September 2017 made by the MAT in O.A. No. 764 of 2015 is hereby set aside;

b] We also accept the statement made by the learned Advocate General as recorded in paragraph no.52 of this judgment and order and direct the petitioners- State to issue necessary orders concerning the appointments and postings of the respondent Nos.3,4,5,6,10,12,17 and 18 within four weeks from today. If these respondents join the appointed post at the places of their respective postings within the stipulated period, then, all consequential benefits with effect from 10th August 2017 are directed to be extended to them;

c] Rule is made absolute in the aforesaid terms. There shall, however, be no order as to costs;

d] Pending civil applications, if any, do not survive and the same are disposed of accordingly.

(M. S. SONAK, J.)

(A.S.OKA, J.)