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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 21.09.2017.

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Judgment delivered on: 15.05.2018.

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W.P.(C) 7416/2015 and C.M. Nos. 13673/2015 & 13675/2015

B. KUMARAVEL

..... Petitioner

Through: Ms. Tamali Wad, Advocate.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Jaswinder Singh and Ms.

PallaviShali, Advocates for R-1 & 2.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

J U D G M E N T

REKHA PALLI, J

1. The present Writ Petition assails the order dated 14th July, 2015 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No. 2165 of 2013, whereby the Tribunal has dismissed the said Original Application (hereinafter referred to as 'OA') filed by the Petitioner wherein he had sought restoration of his seniority in the grade of Architect w.e.f. April, 2003.

2. The facts which emerge from the record are that, pursuant to his selection by the Union Public Service Commission in 1994, the petitioner

joined the services of respondent no.2/CPWD as an Assistant Architect on 08.03.1995.

As per the then applicable Central Architects Service Group 'A' Rules, 1989 (hereinafter referred to as the "1989 Rules"), the next promotional post for Assistant Architects was the post of 'Architect'. These Rules provided for filling up the post of Architect from two feeder cadres, namely, Deputy Architect with 4 years of regular service, and Assistant Architect with 8 years of regular service. The vacancies in the post of Architect were to be filled by the operation of Rota Quota principle in the ratio of 1:1 from each of the two feeder cadres.

3. The petitioner completed the qualifying regular service of 8 years in the grade of Assistant Architect on 08.03.2003 and, though the respondent no.2/CPWD had initiated the promotion process in March 2003, no DPC was convened despite the issuance of the provisional seniority list of Architects which as on 01.04.2003, showed four vacancies in the grade of Architects. While the Petitioner was awaiting his promotion to the post of Architect, for which he was fully eligible, the 1989 Rules were superseded by the Central Architect Service Group 'A' Rules, 2004 (hereinafter referred to as the "2004 Rules"), which were notified on 24.02.2004.

4. Since the Petitioner was not being considered for promotion despite his various representations, he approached the Madras Bench of the Tribunal by O.A. No.339/2005 wherein the Tribunal, vide its order dated 19.04.2005, directed the respondent no.2/CPWD to consider his representation for promotion to the post of Architect against the existing vacancy. It is only

then that the petitioner was promoted as an Architect on 19.10.2005 against a vacancy for the year 2002-03 earmarked for Assistant Architects, by considering his case alongwith 12 other Assistant Architects under the 2004 Rules.

5. In the year 2008, the respondent no.2/CPWD issued the seniority list of Architects, wherein the petitioner's name was placed at S. No. 54— above one Shri Ashok Kumar and below one Shri Maruti Kaligi. The petitioner objected to the aforesaid seniority position assigned to him in the said list, whereafter a revised seniority list was issued vide O.M. dated 22.03.2011, wherein the petitioner's name was pushed further below and placed at S.No.58, i.e., below one Smt. Malarvizhi, and above one Mr. Ashok Kumar. The petitioner being aggrieved by the revised seniority list dated 22.03.2011 submitted a representation dated 12.04.2011 to the respondent no.2/CPWD which remained unanswered. In these circumstances, the petitioner preferred an O.A. No.2165/2013 before the Central Administrative Tribunal, New Delhi, which has been dismissed by the Tribunal vide the Impugned Order.

6. The petitioner's contention before the Tribunal was that, he having been promoted against the Assistant Architect quota of vacancies pertaining to the year 2003 in accordance with the 1989 Rules, was entitled to get seniority from 2003 itself—even though his promotion had been inordinately delayed to the year 2005. He had also contended that, in view of the decision of the Supreme Court in *Union of India & Ors. v. N.R Parmar and Ors. 2012 (11) SCALE 437*, his seniority had to be reckoned from the year of initiating the recruitment process against the vacancy year, and not the year of actual promotion.

7. On the other hand, the respondent nos.1 & 2 (hereinafter referred to as the “respondents”) opposed the OA before the Tribunal by contending that once the 1989 Recruitment Rules were amended in 2004, there was no existing provision for promotion from the grade of Assistant Architect to the grade of Architect, and only the Deputy Architects with 4 years of regular service were eligible to be considered for promotion to the grade of Architect. He submits that as this changed method of recruitment adversely affected those Assistant Architects, who had already completed 6 years of qualifying regular service but could not be promoted for want of vacancies, the respondent no.2/CPWD approached the DOP&T seeking one time relaxation in the 2004 Rules, for considering promotion of the 13 Assistant Architects, including the petitioner, directly to the grade of Architect in respect of 50% vacancies in the grade of Architect, which was agreed to by the DOP&T. Accordingly, a DPC meeting was convened by the Union Public Service Commission (UPSC) on 22.8.2005 and the same recommended the names of 13 Assistant Architects, including the petitioner, for promotion to the grade of Architect, which promotion was then granted to them w.e.f.19.10.2005.

8. The Tribunal dismissed the OA by holding that the petitioner having accepted the promotion as an Architect w.e.f. 19.10.2005 without any demur, he could not now contend that he should have been considered against the vacancy of Architect as available on 01.04.2003 under the Assistant Architect promotion quota in accordance with the 1989 Rules. The Tribunal further held that the petitioner, having been promoted as Architect in the year 2005 alongwith 12 other Assistant Architects by way of

one-time relaxation of the provisions of 2004 Rules, could not claim determination of his seniority in the grade of Architect by applying the Rota Quota principle under the 1989 Rules.

9. Impugning the Tribunal's order, Ms. Tamali Wad, learned counsel for the petitioner, submits that once the respondent no.2/CPWD had sent a proposal dated 03.03.2003 to the UPSC seeking advice as to the mode of recruitment for filling up 8 vacancies of Architect (4 each for the years 2002-2003 and 2003-2004) under the Assistant Architect promotion quota, and the UPSC vide its letter dated 30.03.2003 having approved the proposal of respondent no.2/CPWD for filling up those posts of Architects, it was incumbent upon the respondents to immediately convene a DPC and consider all those persons, including the petitioner, who were eligible for being considered for promotion to the post of Architect, against the available vacancies in their quota under the 1989 Rules.

10. Ms. Wad submits that, even though there were vacancies in the year 2003 in the post of Architect under promotion quota for the Assistant Architects, and the petitioner was fully eligible for being promoted in that year, the respondent no.2/CPWD did not promote him in the year 2003 and erroneously promoted him only in the year 2005. She submits that as per the 1989 Rules, the *inter se* seniority in the grade of Architects has to be determined on the basis of rotational quota between the officers promoted from the grade of Assistant Architect, and those promoted from the grade of Deputy Architect in the ratio of 1:1. She contends that the seniority in the grade of Architect has to be fixed in the order of AA1, DA1, AA2, DA2, AA3 and DA3 and so on, and therefore, the private respondent nos. 3 to 12

ought not to have been assigned seniority positions above the petitioner in the seniority list circulated vide O.M. dated 22.3.2011. She further contends that as the petitioner was promoted against the vacancy for Assistant Architect promotion quota which existed in the year 2003, his name should have been placed below Smt. Ritu Kapila (S. No.45) and above Sri Rabindra Kr. Sinha (S.No.46) in the seniority list circulated vide O.M. dated 22.3.2011.

11. In the present case, since the Recruitment Rules admittedly do not provide any timeline, Ms.Wad has placed reliance on administrative instructions by way of OMs issued by the DOP&T, which mandate a timeline to be followed in holding DPCs. She submits that a model calendar for holding DPCs was laid down by the DOP&T as early as in 1989, and the same was reiterated from time to time by issuance of further OMs, including the OM dated 08.09.1998 as also the latest OM on the subject being OM dated 11.03.2011. She submits that the the DOP&T has specifically laid down that all the concerned cadre controlling authorities should ensure strict adherence to the model calendar for holding of DPCs, and that the DPC is to be held at least 2 months before the commencement of the vacancy year. Ms.Wad submits that in the absence of there being any specific provision in the Recruitment Rules, it was these administrative instructions which would guide the manner in which the DPCs were to be held and, therefore, contends that in the face of these OMs issued by the DOP&T laying down a time frame for holding DPCs, the respondent no.2 cannot be allowed to urge that there was no statutory duty cast upon them to hold DPCs in a timely manner.

12. We deem it appropriate to refer to DOP&T's OM dated 11.03.2011, laying down the model calendar for conduct of DPCs, the relevant extract whereof reads as under: -

"1.The undersigned is directed to invite reference to the Department of Personnel and Training Office Memorandum No.22011/5/86-Estt(D) dated 10.04.1989 containing consolidated instructions on DPCs. These instructions inter-alia provide that the DPC's should be convened at regular intervals (by laying down a time-schedule for this purpose) to draw panels which could be utilised for making promotions against the vacancies occurring during the course of a year. This enjoins upon the concerned authorities to initiate action to fill up the existing as well as anticipated vacancies well in advance of the expiry of the previous panel by collecting relevant documents like Seniority List, Annual Confidential Reports (ACRs), etc. for placing before the DPCs.

2. The above instructions have been reiterated vide this Department's O.M. No.22011/9/98-Estt.(D) dated 8.9.1998. In these instructions, it has been further stated that delays in promotions result in considerable frustrations amongst the officers, thereby adversely affecting their morale and overall productivity. As a remedial measure, it has been suggested that all Ministries/Departments provide for a time schedule for convening DPCs. A time schedule for convening DPCs was prescribed with the objective of ensuring that the prepared panel is utilized as and when the vacancy arises during the course of the vacancy year. It has been prescribed that in all cases requiring approval of ACC, administrative action for convening DPCs is initiated at least 8 1/2 months before the commencement of vacancy year and that DPCs are held at least 4 months before the commencement of the vacancy year. In other cases where approval of ACC is not required, it has been prescribed that DPCs should be held at least two months before the commencement of the vacancy year. A model calendar was also prescribed for DPCs. It was expected that this time frame will be followed in letter and spirit for all DPCs.

3. *Instances have come to the notice of this Department where DPCs are not being held in advance of the vacancy year as per the prescribed schedule. Delays in holding DPCs not only affect the manpower planning in various Ministries/Departments, but also impede the career progression across the Board. Administrative delays in holding of DPCs have been viewed adversely by the Courts and is the main reason for litigation before CAT and various High Courts.*

4. *Non-adherence to time frame of DPCs is a matter of serious concern to the Government. Hence, **all concerned cadre controlling authorities are once again counselled to ensure strict adherence to the model calendar for the DPCs as circulated vide this Department's O.M. dated 8.9.1998. Wherever DPCs are yet to be held for the vacancies arising in the year 2011-2012, the same may be completed by 31.3.2011 and for future vacancy years, the time frame referred to in Para 2 above may be strictly complied with.***

5. *All Ministries/Departments are also advised to immediately nominate an officer of the level of Joint Secretary as the designated authority for ensuring timely holding of DPCs and to certify adherence to the model calendar for all DPCs in the Ministries / Departments."* (emphasis supplied)

13. Ms. Wad contends that once the OM's issued by the DOP&T mandate the time schedule for holding of DPC, the respondent no.2/CPWD was enjoined to hold a DPC to fill the available vacancies in 2003. She submits that even though the file for convening of a DPC for considering eligible candidates for promotion to the post of Architect, was moved in March, 2003, there is no reason as to why a DPC was not held till February, 2004. She, thus, contends that the present case is not only squarely covered by the decisions of the Supreme Court in *Y.V. Rangaiah vs J. Sreenivasa Rao And Ors.* (1983) 3 SCC 284, *Union of India v. N.R. Banerjee*, (1997) 9 SCC 287

and *Nirmal Chandra Bhattacharjee v. Union of India* 1991 Supp (2) SCC 363, but also by the decision of this Court in *V.K. Jain V. Union of India & Ors.*[W.P. (C) No. 561/2003].

14. Per contra, Mr.Jaswinder Singh, learned for the respondents while opposing the petition, submits that once the 2004 Rules were notified, the petitioner and other Assistant Architects were no longer even eligible to be promoted as Architects, as under the 2004 Rules only Deputy Architects were eligible to be promoted as Architects. He submits that the respondents had, however, taken a sympathetic view and the petitioner alongwith 12 other Assistant Architects were still promoted in October, 2005 by way of a one-time relaxation of the 2004 Rules. By placing reliance on the decision of the Supreme Court in *Deepak Agarwal v. State of U.P* (2011) (6) SCC 725, and of this Court in the case of *Pradeep Kumar & Ors. v. Govt. of NCT of Delhi & Ors.* [W.P.(C)Nos. 19087-91/2006], Mr. Singh contends that unlike in the case of *Y.V. Rangaiah* (*supra*), in the present case there was no statutory duty cast upon the respondents to make a panel and fill the post every year. He further submits that, even otherwise, the petitioner only had a right to be considered for promotion as and when the respondents decided to hold DPCs, and that he did not have any right to claim promotion immediately upon fulfilling the criteria.

15. We have heard learned counsel for the parties at length and upon consideration of their rival contentions, we find that the sole question arising in the present case is, as to whether or not there was any duty cast upon the respondents to hold a DPC in 2003 as per the then prevailing 1989 Rules, or whether their action in holding the DPC only in August, 2005 as per the

2004 Rules for filling up the existing vacancies in the post of Architect as on 01.04.2003, was justified? A necessary corollary thereof would be as to whether the instant case is covered by the ratio of the decision of the Supreme court in the case of *Y.V. Rangaiah (supra)*, or by the ratio of the decision of this Court in the case of *Deepak Agarwal (supra)*?

16. We find that insofar as the factual position is concerned, there is not much dispute between the parties and the respondents do not deny the fact that 4 vacancies of Architect in the promotion quota of Assistant Architect were existing as on 01.04.2003, on which date, the petitioner was eligible for being promoted as an Architect in accordance with 1989 Rules. The respondents also do not deny that the file for convening DPC for considering eligible candidates for promotion to the post of Architect was moved on 31.03.2003, whereafter no action was taken thereon. It is also an equally admitted position that no conscious decision was taken by the respondent no.2/CPWD from April, 2003 till February, 2004 to fill the posts as per the then prevailing 1989 Rules.

17. Thus, while the respondents contend that the petitioner had no right to claim promotion in 2003 itself, merely because vacancies of Architect were available, the petitioner contends that it was incumbent upon the respondents to hold the DPC in time to fill the vacancies of Architect, as available on 01.04.2003 in accordance with the then prevailing 1989 Rules. Despite this very issue being raised before the Tribunal, the same has been brushed aside by the Tribunal on the ground that the petitioner having accepted promotion in 2005, could not raise the aforesaid issue.

We do not think so. In our view, since the matter of grant of promotions was admittedly, pending consideration with the UPSC in 2003, the petitioner was justified in expecting the respondents to take action as per the availability of vacancies in 2003 and, therefore, he could not be faulted for not rushing to the Court at that stage itself.

18. Before we delve into the issues further, it may be appropriate to refer to the various decisions relied upon by the learned counsel for the parties.

19. We may first refer to the decision of the Supreme Court in ***Y.V.Rangaiah*** (*supra*), which is the primary judgment on which learned counsel for the petitioner has relied. In the aforesaid decision, the Supreme Court has, in paras 8 and 9, held as under:-

“8. The contention on behalf of the appellants herein is that by the time the list was prepared in May 1977 Rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules was amended and the list prepared was in accordance with the rules then prevailing at the time of preparation, and therefore there was nothing wrong with the preparation of the panel. It was further contended that the petitioners in the two representation petitions having not challenged the validity of the amendment to Rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules, it was not open to them to challenge the list prepared in May, 1977 which is in accordance with the rules prevailing at that time.

9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who

ranked higher than Respondents 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.” (emphasis supplied)

Learned counsel for the petitioner has also relied on the decision in **N.R. Banerjee**, (*supra*), wherein the Supreme Court considered the O.M.No.220 11/5/86-Est.(D) dated 10.04.1989 issued by Ministry of Personnel and Training (Deptt of Personnel and Training) and observed that it was imperative that DPCs are convened in a timely manner. Paras 5, 6 and 8 to 10 of **N.R. Banerjee** (*supra*), hold as under:-

"5. Part II of the guidelines relates to the frequency of meeting of the DPC. Para 3.1 indicates that the DPCs should be convened at regular annual intervals to draw panels which could be utilised for making promotions against the vacancies occurring during the course of a year. In other words, the life of the panel is one year. For this purpose, it is essential for the appointing authorities concerned to initiate action to fill up the existing as well as anticipated vacancies well in advance of the expiry of the previous panel, by collecting relevant documents like ACRs, integrity certificates, seniority list etc. for placing before the DPC.

6. DPCs should be convened every year, if necessary, on a fixed date, i.e. 1st of April or May. In the middle of the para, by way of amendment brought on 13-5-1995, it postulates that very often action for holding DPC meeting is initiated after the vacancy has arisen. This results in undue delay in filling up of vacancies and

causes dissatisfaction among those who are eligible for promotion. It may be indicated that regular meeting of DPC should be held every year for each category of posts so that approved select panel is available in advance for making promotions against vacancies arising every year. Under para 3.2, the requirement of convening annual meetings of the DPC should be dispensed with only after a certificate has been issued by the appointing authority that there are no vacancies to be filled by promotion or no officers are due for confirmation during the year in question. It would, thus, be seen that **DPCs are required to sit every year, regularly on or before 1st April or 1st May of the year to fill up the vacancies likely to arise in the year for being filled up.** The required material should be collected in advance and merit list finalised by the appointing authorities and placed before the DPCs for consideration. This requirement can be dispensed with only after a certificate is issued by the appointing authority that there are no vacancies to be filled by promotion, or that no officers are due for confirmation, during the year in question.

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8. Crucial date for determining eligibility has been dealt with thereunder. By an amendment brought w.e.f. 19-7-1989, it is stated that **relevant dates for determining eligibility of the officers for promotion would be, where ACRs are written calendar yearwise, 1st July of the year and where the ACRs are written financial yearwise, 1st October of that year.** The other details prescribed in Chapter IV are not material for the purpose of this case. Para 6.4.1 deals with preparation of yearwise panels by the DPC which reads as under:

“Where for reasons beyond control, the DPC could not be held in year(s), even though the vacancies arose during that year (or years), the first DPC that meets thereafter should follow the following procedures:

- (i) Determine the actual number of regular vacancies that arose in each of the previous year(s) immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.
- (ii) Consider in respect of each of the years those officers only who would be within the field of choice with reference to the vacancies of each year starting with the earliest year onwards.

(iii) Prepare a 'select list' by placing the select list of the earlier year above the one for the next year and so on:"

9. ***It would, thus, be seen that the authorities are required to anticipate in advance the vacancies for promotion on regular basis including long-term deputation posts and additional posts created and then to take the action plan in finalising the ACRs, preparation of the select list and place necessary material before the DPC for consideration of the candidates within the zone of consideration, as are found eligible for the relevant year/years.***

10. The DPC in the present case was directed to consider the cases of all the eligible candidates within the zone of consideration so that there will not be any heart-burning among the eligible persons whose claims have been withheld for consideration for promotion to the higher post. In *Syed Khalid Rizvi v. Union of India*[1993 Supp (3) SCC 575 : 1994 SCC (L&S) 84 : (1994) 26 ATC 192] the mandatory duty of the preparation of the select list of the officers for promotion to the All India Services has been indicated in para 35 of the judgment at p. 605 thus:

"We, therefore, hold that preparation of the select list every year is mandatory. It would subserve the object of the Act and the rules and afford an equal opportunity to the promotee officers to reach higher echelons of the service. The dereliction of the statutory duty must satisfactorily be accounted for by the State Government concerned and this Court takes serious note of wanton infraction."

(emphasis supplied)

20. The Learned Counsel for the Petitioner has also relied upon a decision dated 30.05.2012 passed by a Division Bench of this Court in ***V.K. Jain***(*supra*), which also deals with the issue of holding DPCs in a timely manner. We deem it appropriate to refer to para 5 thereof, which reads as under: -

"5. Recently, we had occasion to deal with the aspect of convening of DPCs and as to whether they are mandatorily to be held annually or not, in the case of **Dr. Sahadeva v. Union of India and Ors., W.P.(C) No.5549/2007** decided on 28.02.2012. In that decision, after considering the entire case law on the subject, we had observed and held as under: -

"13. In the case before this Court, the Recruitment Rules are silent as to at what intervals the DPC should meet and make recommendations for promotion against existing/anticipated vacancies. We are not dealing with a case, where there is no Rule or instruction, fixing a schedule for convening DPC and finalizing the promotions. We have, before us, a case where instructions have been issued by the Government, for making promotions in terms of a particular calendar. In our opinion, in the absence of any rules to the contrary, the OMs issued by DoP&T on the subject, from time to time, including the OM suggesting the Model Calendar for DPCs, became applicable and, therefore, it was obligatory for the respondents to adhere to the time schedule laid down in the Model Calendar circulated by DoP&T, for making promotions against the vacancies occurring during the course of a year. The OM, issued by DoP&T enjoined upon the respondents to initiate action, in advance, to fill up the vacancies arisen during the course of the vacancy year. The obvious purpose behind issue of the OMs is to ensure that the work of the Government does not suffer due to the posts remaining vacant, without any reasonable justification.

14. This is not the case of the respondents that OMs dated 08.09.1998 and 13.10.1998, issued by Government of India are not binding on them. The OMs, which reflect the consistent policy of the Government, require all the Ministries/Departments to take note of the instructions contained therein for strict compliance so that the objective of convening DPC meeting and preparing

approved select panels as per the prescribed time-frame may be achieved. The concern of the Government on account of delay in convening DPC was conveyed to all the Ministries and Departments vide OM No. 22011/9/98-Estt.(D) dated 14.12.2000 and they were also directed that in case of non-adherence to the prescribed time-frame, steps should be taken to fix the responsibility for the lapse in this regard. ***Such instructions issued by the Government are meant for compliance and not for being ignored in an arbitrary manner and unless repugnant to the Recruitment Rules, they supplement the Recruitment Rules and, therefore, have a binding force.*** The mandatory nature of the OMs can also be gathered from the instruction to fix responsibility for non-adherence to the time schedule fixed therein. We also take note of the view taken by Supreme Court in ***N.R. Banerjee*** (supra) that in the absence of a certificate from the appointing authority that no vacancy would arise or no suitable candidate was available, the preparation and finalization of the yearly panel is a mandatory requirement.

15. We are unable to accept the contention that failure of the respondents to adhere to the Model Calendar suggested in the OMs dated 08.09.1998 and 13.10.1998, would not entitle an employee to seek directions for considering him for promotion as per the time schedule stipulated in the Model Calendar, even if there is no justification for not convening the DPC in terms of the Model Calendar. In our view, if the Department is able to justify the delay in convening the DPC as per the schedule laid down in the Model Calendar, an employee would not be entitled to seek a direction to consider him for promotion in terms of the time schedule stipulated in the Model Calendar. But, if there is no explanation given by the Department for not convening the DPC within the time stipulated in the Model Calendar or the explanation given by the Department is not found acceptable, there would be no justification for making the employees suffer merely on

account of inaction or delay on the part of the Department for not convening the DPC and postpone his promotion till the DPC actually met. In our view, in such a case, an employee is entitled to approach the Tribunal or the Court, as the case may be, for a direction to the Department to convene DPC for the relevant vacancy year and in case he is eligible and falls in the zone of consideration, to consider him for promotion, in the year in which the vacancy against which he was eligible, arose. It is true that no employee has no vested right for promotion, but, the respondents cannot act arbitrarily and without any reasonable excuse defer the meeting of DPC and thereby deprive the employee of his legitimate expectations for being considered for promotion to a post to which he is eligible for being promoted. In such a case, the Tribunal or the Court, as the case may be, ought to step in and direct the respondents to convene DPC for the vacancy year and consider the petitioner if otherwise eligible and falling in the zone of consideration for promotion against the vacancies arise in the vacancy year. Any other view would negate the policy of the Government to prepare the Select List well in advance demoralize the employees and also result in the vacancies remaining unfilled without any reasonable excuse." (emphasis supplied)

21. Learned counsel for the Petitioner has also placed reliance on the decision of the Supreme Court in the case of **Nirmal Chandra Bhattacharjee** (*supra*), in support of her contention that once the petitioner was found eligible for being considered for promotion as an Architect against the vacancies available in 2003, the said consideration had to be done only in accordance with the then prevailing 1989 Rules. She submits that the Supreme Court has in para 5 of the aforesaid decision, categorically held that a change in service rules cannot be made to the prejudice of an employee who was in service prior to the said change, and he cannot be

made to suffer on account of the intervening events. It may, therefore, be appropriate to refer to para 5 of the aforesaid decision, which reads as under:-

"5. One of the principles of service is that any rule does not work to prejudice of an employee who was in service prior to that date. Admittedly the vacancies against which appellants were promoted had occurred prior to restructuring of these posts. It is further not disputed that various other posts to which class 'IV' employees could be promoted were filled prior to August 1, 1983. The selection process in respect of Ticket Collectors had also started prior to August 1, 1983. If the department would have proceeded with the selection well within time and would have completed it before August 1, 1983 then the appellants would have become Ticket Collectors without any difficulty. The mistake or delay on the part of the department, therefore, should not be permitted to recoil on the appellants. Paragraph '31' of the restructuring order itself provides that vacancies in various grades of posts covered in different categories existing on July 31, 1983 would be filled in accordance with the procedure which was in vogue before August 1, 1983."

22. As noted above the sole contention of the respondents in the present case is that there was no duty cast on it to hold DPCs for promotion of Assistant Architect to Architect in April, 2003 and the decision in ***Y.V.Rangaiah*** (*supra*) was not applicable to the instant case, for which reliance has been placed on the decision of the Supreme Court in ***Deepak Agarwal*** (*supra*), paras 21 and 22 whereof read as under:-

"21. We are of the considered opinion that the judgment in Y.V. Rangaiah case[(1983) 3 SCC 284] 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 amended Rules would be governed by the old Rules and not the amended Rules. In the present case, there is no statutory duty cast upon the respondents to either prepare a yearwise panel of the eligible candidates or of 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 as to how many posts are to be filled under Rule 7 cannot be equated with not issuing promotion orders to the 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 Dhavan that the vacancies, which had arisen before 17-5-1999 had to be filled under the unamended Rules."

22. 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 (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 cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment."

23. Learned counsel for the respondent has also placed reliance on the decision of this Court in ***Ashok Kumar & Anr. V. Union of India*** [W.P.(C) 8137/2015], wherein this Court had rejected the claim for seniority made by similarly placed persons, who had been appointed as Assistant Architect in the same department in the year 1996-97 and were promoted as Architects only in the year 2005 after being granted relaxation under the 2004 Rules. It may be appropriate to refer to paras 11, 23 and 24 of the said decision, which read as under: -

"11. Before the 2004 Rules were notified, the Directorate General of Works, Central Public Works Department vide letter dated 03rd March, 2003 had informed the UPSC that the revision of the recruitment rules was under process and was likely to take considerable time. The UPSC was requested to decide the mode of recruitment for filling up eight posts in the grade of Architects for the years 2002-2003 and 2003-2004 from the Assistant Architects quota, with one time relaxation pending the revision of recruitment rules. As noticed above, O.M. dated 25th May, 1998 had directed that pending revision of the recruitment rules with reference to pay scale as approved by the Government existing rules for lower pay scale shall not be operated."

*23. It is noticeable that the private respondents, i.e. erstwhile Deputy Architects with whom the present petitioners have the seniority dispute, were directly recruited and appointed to the post of Deputy Architects between the period 10.08.1994 and 28.02.1997. They had become eligible for consideration for promotion to the posts of Architects under the 1989 Rules after four years of regular service in the grade. In other words, they were eligible for consideration for promotion as Architects between the period 1998-2001. **The petitioners herein, appointed in 1996-1997, would have completed eight years of service under the 1989 Rules only in the year 2004-2005. They would have completed six years of service in 2002-2003, which is again after the private respondents no. 5 to 8 had already become eligible for promotion as Architects between the period 1998-2001.***

24. This is a case in which rules were relaxed to give benefit to the petitioners and other Assistant Architects. They have enjoyed the benefits of relaxation. Their claim for seniority against Deputy Architects, who were eligible both under the 1989 Rules and the 2004 Rules, and were senior, should be rejected.” (emphasis supplied)

24. Learned counsel for the respondents has also relied on the decision of this Court in **Pradeep Kumar** (*supra*) to contend that this Court having categorically held that the right of an employee to be considered for promotion accrues only on the date of consideration of eligible candidates by the department and that no right accrues to the candidates merely upon occurrence of vacancies, the present petition is liable to be outrightly rejected. Our attention has been drawn to para 28 thereof, which reads as under:-

“28. In view of the foregoing, it is clear that law in this regard is no longer res integra. The general rule is that vacancies occurring should be filled up as per the prevalent recruitment rules. The same is subject to two exceptions, i.e. when the rules are under consideration for amendment or revision and the authority has taken a conscious decision to defer further promotions until the changes are carried out or that the proposed new rules are to be made applicable retrospectively. Further, the decision to defer promotions should not be actuated by mala fides and must be based on proper reasons. Such a reason may be gathered from the background and circumstances in which the decision was taken. The right of an employee to be considered for promotion accrues only on the date of consideration of eligible candidates by the department and not before or if the rules provide for a particular time-frame in which the selection process is to be concluded. No right accrues to the candidates upon the occurrence of vacancies.”

25. Thus what emerges from the decisions relied upon by the learned counsels for the parties is that an eligible candidate does not have a right to insist that the vacancies must be filled as soon as they arise, but once there is

a prescribed time frame laid down for completing the selection process and filling of vacancies, the said timeline has to be followed unless it is a case where pending amendment of Recruitment Rules, a conscious decision is taken by the department not to fill the vacancies, as per the then existing Rules.

26. We find that there is no denial to the fact that the DOP&T's OM's are fully applicable to the respondent no.2/CPWD and, therefore, in view of the specific time frame prescribed in the DOP&T's OM dated 11.03.2011, we have no hesitation in holding that in the present case there was a duty cast upon the respondents to take steps to fill the available vacancies of Architect as on 01.04.2003. We find that the Supreme Court has, from time to time, emphasized on the requirement to hold DPCs in a timely-manner especially in cases, where there is a prescribed time schedule. We, therefore, see absolutely no reason as to why the time schedule as prescribed in the OM dated 11.03.2011 was not followed by the respondents. The respondents have neither contended, nor produced any material to show that any conscious decision was ever taken not to fill the vacancies of Architect as available in April, 2003 and, thus, in our considered view, the petitioner was entitled to be considered for promotion in April, 2003 itself, which consideration was denied to the petitioner without any justification. Once we conclude that the petitioner was entitled to be considered for promotion in April, 2003 itself, the necessary corollary thereof would be that the said consideration had to be done as per the rules applicable as on that date. Reliance in this regard may be placed on para 5 the decision of the Supreme Court in *Nirmal Chandra* (*supra*), where the Court held that change in

service rules cannot be made to the prejudice of an employee who was in service prior to the said change, and he cannot be made to suffer on account of the intervening events.

27. In the light of our aforesaid conclusion that the petitioner was entitled to be considered for promotion to the post of Architect in the year 2003 itself, and that too on basis of the 1989 Rules, we find no merit in the submissions of the learned counsel for the respondents that the petitioner having accepted the promotion granted to him in 2005, and that too only upon grant of relaxation of the requirements of 2004 Rules, he cannot subsequently claim promotion from 2003. On the other hand, we find merit in the contention of learned counsel for the petitioner that, even though the petitioner was duly fulfilling the eligibility criteria for promotion as per 1989 Rules in 2003 itself-when vacancies of Architect in his quota were available, his case was wrongly clubbed with the cases of some other Assistant Architects in the year 2005, who were not fulfilling the eligibility criteria even as per the 1989 Rules, when the new Rules of 2004 were notified. It is, thus, apparent that the petitioner-who was eligible for being promoted as an Architect in accordance with 1989 Rules, was denied the said promotion in 2003 despite availability of four vacancies of Architect as on 01.04.2003. Reliance placed on *Ashok Kumar* (*supra*) is misplaced. The said decision is clearly distinguishable on facts. We have consciously highlights the differential facts of that case. The Assistant Architects in that case had not completed the eligibility service till 2004-2005, however, in the present case the petitioner had become eligible to be considered for promotion as an

Architect on 08.03.2003 i.e. well beyond the amendment of the Recruitment Rules on 24.02.2004.

28. The learned counsel for the petitioner has also contended that even the revision of the original seniority list issued in 2008, by a subsequent OM dated 22.03.2011 was illegal, as it was based on DOP&T's OM dated 03.03.2008, which has been held to be '*non est*' by the decision of the Hon'ble Supreme Court in the case of **N.R. Parmar** (*supra*). In view of our conclusion that the petitioner was entitled to be considered for promotion in April, 2003, the petitioner's placement in the seniority list of 2008 based on grant of promotion to him in 2005 would itself be erroneous and the aforesaid issue raised by the learned counsel for the petitioner is no longer relevant.

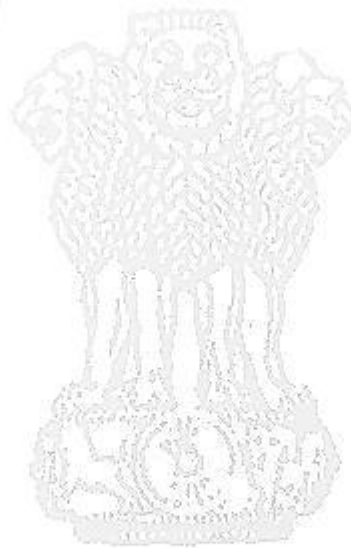
29. For all the aforesaid reasons, the present writ petition is allowed and the impugned order is set aside. However, instead of directing the promotion of the petitioner to the post of Architect w.e.f. 01.04.2003, we deem it appropriate to direct the respondents to reconsider the petitioner for promotion as an Architect against the vacancy as existing on 01.04.2003 in accordance with the Central Architects Service Group 'A' Rules, 1989. The said exercise be carried out within 12 weeks from today. In case, the petitioner is found 'fit' for promotion, his seniority shall be filed accordingly in the grade of "Architect" within six weeks thereafter. However, he would not be entitled to claim any arrears of monetary benefit-actual or notional on the basis of re-fixation of his seniority, if any.

30. The writ petition alongwith pending applications is disposed of in the above terms.

(REKHA PALLI)
JUDGE

(VIPIN SANGHI)
JUDGE

MAY 15, 2018
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