

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8978 OF 2021

Vilas Shankarrao Deshpande } ..Petitioner

Versus

The Govt. of Maharashtra }
and Anr. } .. Respondents

Mr. Vaibhav A. Sugdare a/w Mr. Chandrakant T.
Chandratre, Advocate for the Petitioner.

Mr. A. I. Patel, Addl. GP a/w Mr. S. D. Rayrikar, AGP for the
Respondents-State.

**CORAM : DHIRAJ SINGH THAKUR AND
VALMIKI SA MENEZES, JJ.**

**RESERVED ON : 11th NOVEMBER, 2022.
PRONOUNCED ON : 02nd DECEMBER, 2022.**

ORDER

[PER DHIRAJ SINGH THAKUR, J.]

. The present petition under Article 226 of the
Constitution of India has been filed challenging the order
dated 07th January, 2020, passed by The Maharashtra
Administrative Tribunal, Mumbai Bench (for short

“MAT”). The Petitioner, had filed the Original Application before the Tribunal challenging the order dated 03rd August, 2016 passed by Respondent No. 1, whereby the prayer of the Petitioner to correct his date of birth entered in his service record as 15th December, 1963 to 25th January, 1966, was rejected.

2. Briefly stated the material facts are as under:

The Petitioner joined service as Police Constable on 16th December, 1991. The date of birth in his service record, based upon the date of birth particulars recorded in his Secondary School Certificate Examination held in March-1980 was recorded as 15th December, 1963.

On 27th January, 1999 i.e. within a period of eight years of joining his service, an application was filed by the Petitioner seeking correction of his date of birth. The basis for seeking such a correction was that the date of birth of the Petitioner's elder brother Ashok Shankarrao Deshpande as also the Petitioner was erroneously recorded as 15th December, 1963. It was alleged that the

Petitioner was three years younger to his brother Ashok Shankarrao Deshpande and, therefore, his date of birth ought to be corrected as 25th January, 1966 in place of 15th December, 1963.

This application was rejected by the Commissioner of Police (Respondent No. 2) vide his order dated 23rd December, 1999. It is stated that thereafter the Petitioner filed a representation cum appeal on 26th July, 2000, before Respondent No. 1, the Home Department of the Government of Maharashtra, which too came to be rejected on the ground that the request for change of particulars was being made beyond the period of five years from the date of joining of service and hence not maintainable as per rule 38 of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981, (for short “the MCS Rules, 1981”) as substituted by Notification dated 24th December, 2008.

3. Being aggrieved of the order of rejection, the Petitioner herein preferred the Original Application (O.A.)

before the MAT, in which it was contended that the rejection of the prayer of the Petitioner by the Home Department, based upon the amendment Notification dated 24th December, 2008 of the Rule 38 of the MCS Rules, 1981, was bad inasmuch as the said rule was prospective in nature, as had been held by a Single Bench of this Court in the case of *Ashok s/o Pralhad Meshram V/ s. Head Master, Zilla Parishad High School, 2014 (6) Mh.L.J 590*.

4. Since a reference has been made to the provisions of Rule 38(2)(f) of the MCS Rules, 1981, it is apposite to reproduce the same as it existed before and after its substitution by virtue of Notification dated 24th December, 2008.

Rule 38 of the MCS Rules, 1981 (before substitution)
read as under:

38. Procedure for writing the events and recording the date of birth in the service book:

- (1)
- (2) While recording the date of birth, the

following procedure should be followed:

(a) The date of birth should be verified with reference to documentary evidence and a certificate recorded to that effect stating the nature of the document relied on;

(b)

(c)

(d)

(e)

(f) When once an entry of age or date of birth has been made in a service book no alteration of the entry should after-wards be allowed, unless it is known that the entry was due to want of care on the part of some person other than the individual in question or is an obvious clerical error.

Instruction - (1) Normally, no application for alteration of the entry regarding date of birth as recorded in the service book or service roll of a Government servant should be entertained after a period of five years commencing from the date of his entry in Government service.

Rule 38 of the MCS Rules, 1981 (after substitution) read as under:

38. Procedure for writing the events and recording the date of birth in the service book:

(1)

(2) While recording the date of birth, the following procedure should be followed :-

- (a)
- (b)
- (c)
- (d)
- (e)

(f) When once an entry of age or date of birth has been made in a service book no alteration of the entry should afterwards be allowed, unless it is known that the entry was due to want of care on the part of some person other than the individual in question or is an obvious clerical error.

Instruction - (1) No application for alteration of the entry regarding date of birth as recorded in the service book or service roll of a Government servant, who has entered into the Government service on or after the 16th August 1981, shall be entertained after a period of five years commencing from the date of his entry in Government service.

(2)

(2-A) At the time of scrutiny of the application, it shall be ensured that -

(i) no advantage has been gained in school admission, entry into Government service by the said Government servant by representing a date of birth which is different than that which is later sought to be incorporated;

(ii) the date of birth so altered would not make him ineligible for admission in any school or University or for the Maharashtra Public Service Commission examination in which he had

appeared, or for entry into Government service on the date on which he entered in the Government service.

5. The effect of the substitution incorporated vide Notification dated 24th December, 2008 on the MCS Rules, 1981, as seen hereinabove is that after substitution, as per Instruction- (1) appended to Rule 38 of the MCS Rule, 1981, no application for alteration of the date of birth particulars could be entertained at all beyond a period of five years commencing from the date of entry into Government service of a Government servant. In addition to this, Instruction (2-A) was inserted, which impliedly prohibited a change in date of birth particulars, if there was an advantage obtained by such a Government servant while securing admission in a school or otherwise would confer an advantage to such a Government servant for securing such a Government service.

6. The MAT proceeded to hold, firstly, that the O.A. filed by the Petitioner was barred by limitation, having been filed beyond the period of one year from the date of accrual

of cause of action in terms of Section 21 of the Administrative Tribunals Act, 1985. It was held that the cause of action had accrued to the Petitioner on 23rd December, 1999, when the Commissioner of Police proceeded to reject the prayer of the Petitioner for change of the date of birth particulars in the service record and further that the rejection of the representation of the Petitioner by the Home Department, would not give a fresh cause of action to the said Petitioner before to bring his case within the period prescribed under Section 21 of the Administrative Tribunals Act, 1985.

Despite having held so the Tribunal proceeded to examine the right of the Petitioner to seek such a change in the date of birth in terms of Rule 38 (2)(f) and Instruction (2-A) of the MCS Rules, 1981, which has been reproduced in the preceding paragraphs. In regard to Rule 38 (2)(f) of the MCS Rules, 1981, it was held that since there was no clerical error on the part of the department when the entries were made on the basis of the SSC

Certificate of the Petitioner, which reflected his date of birth as 15th December, 1963, the Petitioner would not succeed under Rule 38 (2)(f) of the MCS Rules, 1981 to seek the correction of the service record.

Additionally it was held that no direction could be issued for correction of the service records, inasmuch as the Petitioner had secured the admission in the school based upon the date of birth 15th December, 1963, and in case the date of birth was actually 25th January, 1966, he would be ineligible to secure the admission in the school and which would be contrary to Rule 128 of the Bombay Primary Education Rules, 1949, (for short “the Rules of 1949”) which reads thus:

“128. Admission of pupils:- (1) No approved school shall admit-

(a) a child who has not completed the 5th year of age on the date of admission.”

7. Learned Counsel for the Petitioner questions the legality of the order passed by the Tribunal, primarily on

the ground that reliance placed upon Rule 38(2)(a) was misplaced as the said Instruction had been incorporated only in the year 2008 by virtue of the Notification dated 24th December, 2008, which was prospective, as had been held by a Single Bench of this Court in the case of *Ashok Pralhad Meshram V/s. Head Master, Zilla Parishad High School*. Additionally it was urged that the service records ought to be corrected, inasmuch as the dates of birth of the Petitioner as also his elder brother could not have been the same, which mistake ought to be corrected especially in the service records of the Petitioner.

8. The issue that falls for our consideration is whether the Petitioner has a right to seek a direction against the Respondents for correction of his date of birth in his service record from 15th December, 1963 to 25th January, 1966 in accordance with the applicable rules or not.

Admittedly the date of birth of the Petitioner was recorded as 15th December, 1963, based upon the

particulars furnished by him and recorded in the SSC Certificate.

9. Rule 38(2)(f) of the MCS Rules, 1981, thus create a right in favour of a Government servant to seek correction of the entry as regards the date of birth in the service records provided the entry made in such service record was due to 'want of care' on the part of some persons other than 'the individual in question' or was a result of 'an obvious clerical error'. While Instruction- (1) of Rule 38 of the MCS Rules, 1981 before its substitution in 2008 envisaged that 'normally, no application for alteration of the service book alteration of the entry regarding date of birth in the service book should be entertained after a period of five years', after amendment there was a clear prohibition envisaged in Instruction- (1) which prescribes that 'no application for alteration of the entry regarding date of birth in the service book of a Government servant, who has entered into the Government service on or after 16th August, 1981, shall be entertained after a period of five years commencing from the date of his entry in

Government service’.

Instruction (2-A) (i) further envisages that no advantage ought to have been gained in the school admission or for entry into Government service based upon the date of birth, which is different than the one, which is later sought to be incorporated and further as per Instruction – (2-A) (ii) that the date of birth if so altered, would not make him ineligible for admission in any school or university or for the Maharashtra Public Service Commission examination.

10. Since the Tribunal has proceeded to decide the O.A. based upon the provisions of Rule 38 (2)(f) and the Instructions and did not dismiss the O.A. primarily on the issue of limitation, we do not deem it absolutely necessary to decide whether the issue of limitation was rightly decided by the Tribunal or not being totally academic. The issue that arises for consideration is whether the Instructions appended to Rule 38 of the MCS Rules, 1981, substituted by virtue of Notification dated 24th December

2008 have any retroactive effect or not. First of all it needs to be understood as to what is the effect when a provision is substituted and whether upon substitution a provision should always be deemed to have retrospective or retroactive effect.

11. In *Government of India & ors vs. Indian Tobacco Association, (2005) 7 SCC 396*, the Apex court considered the meaning of the word 'substitute' and held as under:

"15. The word "substitute" ordinarily would mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, Fifth Edition, at page 1281, the word "substitute" has been defined to mean "To put in the place of another person or thing".or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing"; "to replace (an atom or group in a molecule) with (another atom or group)"; or "a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague".

12. In the aforementioned judgment, reliance was placed upon *Ramkanali Colliery of BCCL vs. Workmen by Secy., Rashtriya Colliery Mazdoor Sangh and another, (2001) 4 SCC 236* in which the Apex Court has held as under:

“8.....

 If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression substituted is used. Such deletion has the effect of the repeal of the existing provision and also provide for introduction of a new provision. In our view there is thus no real distinction between repeal and amendment or substitution in such cases. If that aspect is borne in mind, we have to apply the usual principles of finding out the rights of the parties flowing from an amendment of a provision. If there is a vested right and that right is to be taken away, necessarily the law will have to be retrospective in effect and if such a law retrospectively takes away such a right, it can no longer be contended that the right should be enforced

”

13. While dealing with the issue of substitution, repeal and amendment in *Bhagat Ram Sharma vs. Union of India & ors*, AIR 1988 SC 740, the apex Court held that it was a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. It was further held that such deletion had the effect of repeal of the existing provision and that there was no real distinction between 'repeal' and an 'amendment'. Reliance was placed on

Sutherland's Statutory Construction, 3rd Edn., Vol. 1 at p. 477, on the following statement of law:

"The distinction between repeal and amendment as these terms are used by the Courts, is arbitrary. Naturally the use of these terms by the Court is based largely on how the Legislatures have developed and applied these terms in labelling their enactments. When a section is being added to an Act or a provision added to a section, the Legislatures commonly entitle the Act as an amendment..... When a provision is withdrawn from a section, the Legislatures call the Act an amendment, particularly when a provision is added to replace the one withdrawn. However, when an entire Act or section is abrogated and no new section is added to replace it, Legislatures label the Act accomplishing this result a repeal. Thus as used by the Legislatures, amendment and repeal may differ in kind-addition as opposed to withdrawal or only in degree-abrogation of part of a section as opposed to abrogation of a whole section or Act; or more commonly, in both kind and degree-addition of a provision to a section to replace a provision being abrogated as opposed by abrogation of a whole section of an Act. This arbitrary distinction has been followed by the Courts, and they have developed separate rules of construction for each. However, they have recognised that frequently an Act purporting to be an amendment has the same qualitative effect as a repeal-the abrogation of an existing statutory provision-and have therefore applied the term 'implied repeal' and the rules of construction applicable to repeals to such amendments. Amendment is, in fact, a wider term and it includes abrogation or deletion of a provision in an existing statute. If the amendment of an existing law is small, the Act professes to amend; if it is extensive, it repeals a law and re-enacts it. An amendment of

substantive law is not retrospective unless expressly laid down or by necessary implication inferred.

14. It was thus held that amendment was a wider term and that if the amendment was small, the term 'amend' is used and if the same is extensive, the law is said to be repealed.

15. It was further held in the judgment supra that mere use of the word substitution would not make the amendment retrospective. It was held:

“19. For the sake of completeness, we wish to add that the mere use of the word 'substitution' does not imply that Regulation 8(3) must relate back to November 1, 1956, the appointed day.....”

16. In *Zile Singh vs. State of Haryana & ors, (2004) 8 SCC 1*, the Apex Court while dealing with the effect of substitution held as under:

“25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (See Principles of Statutory Interpretation, *ibid*, p.565). If any authority is needed in support of the proposition, it is to be found in *West U.P. Sugar Mills Assn. and Ors. Vs. State of U.P. (2002) 2 SCC 645*, *State of Rajasthan Vs. Mangilal Pindwal, (1996) 5 SCC 60*, *Koteswar Vittal Kamath Vs. K. Rangappa*

Baliga and Co., (1969) 1 SCC 255 and A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael & Ors., AIR 1963 SC 933. In West U.P. Sugar Mills Association and Ors.'s case (supra) a three-Judges Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centering around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal's case, this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case a three-Judge Bench of this Court emphasized the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps : first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

17. If an amendment by substitution is not retrospective by implication, then the issue arises whether it is to operate retrospectively or prospectively. Certain tests have been crystallized by the apex court in *Hitendra Vishnu Thakur & ors vs. State of Maharashtra & ors*, (1994) 4 SCC 602, which held:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary

intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

18. At this stage, it may also be apt to refer to Maxwell on the Interpretation of statutes, 12th Edition, wherein it is stated thus:

"Perhaps no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the

enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

19. In Zile Singh vs. State of Haryana, the apex court was considering a case where the Haryana Municipal (Amendment) Act, 1994 inserted section 13-A in the Principal Act prescribing the disqualification from being chosen as a member of the municipality if he had more than two children living. The proviso appended to the said section provided as under:

"Provided that a person having more than two children on or after the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified".

20. The amendment came into force on 5th of April, 1994. The amendment however proved to be defeating the purpose of the enactment inasmuch as while a person with more than two children as on 5th April, 1994 would stand disqualified upto a period of one year from the said date,

yet the disqualification would cease upon expiry of one year. With a view, thus, to take corrective action by virtue of an amendment Act, which came into effect from 4.10.1994 in the proviso, the word “after” was substituted with the word “upto”. In the meantime, Zile Singh had fathered his fifth child on 13.8.1995. Since he was holding the office as a member of the municipality, the issue regarding his incurring a disqualification arose and subsequently his disqualification was notified. On the issue as to whether the second amendment in October, 1995 was retrospective in operation, it was held that the same was declaratory in nature and intended to remove the absurdity and to bring it in conformity with what the legislature had really intended to provide.

It was held that while there was a presumption against retrospectivity, presumption against retrospective operation was not applicable to declaratory statutes. What was stated by the Apex court in Zile Singh's case (supra) in paragraph 14 is reproduced hereunder:

“14. The presumption against retrospective operation is not applicable to declaratory statute.....In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended..... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect.”

Reliance was also placed on the constitution bench judgment in *Shyam Sunder & Ors. Vs. Ram Kumar & Anr., (2001) 8 SCC 24*, wherein it was held, "Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or explain previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed invariably it has been held to be retrospective.

Mere absence of use of word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act but if the Court finds an Act as declaratory or explanatory it has to be construed as retrospective.”

21. A full bench judgment of this Court in *Badrinarayan Shankar Bhandari & ors vs. Omprakash Shankar Bhandari*, AIR 2014 Bombay 151, drew the distinction as follows:

38. (i) A prospective statute operates forwards from the date of its enactment conferring new rights on parties without reference to any anterior event, status or characteristic;

(ii) Retrospective statute, on the other hand, operates backwards, attaches new consequences, though for the future, but to an event that took place before the statute was enacted. It takes away vested rights. Substantive benefits which were already obtained by a party are sought to be taken away because of legislation being given effect to from a date prior to its enactment. The rules of interpretation of statute raise a presumption against such retrospective effect to a legislation. In other words, if the Legislature has not expressly or by necessary implication given effect to a statute from a date prior to its enactment, the Court will not allow retrospective effect being given to a legislation so as to take away the vested rights. Statutes enacted for regulating succession are ordinarily not applicable to successions which had

already opened, as otherwise the effect will be to divest the estate from persons in whom it had vested prior to coming into force of the new statutes.

(iii) There is the intermediate category called "Retroactive Statute" which does not operate backwards and does not take away vested rights. Though it operates forwards, it is brought into operation by a characteristic or status that arose before it was enacted. For example, a provision of an Act brought into force on 1 January 2014, the Act applies to a person who was employed on 1 January 2014 has two elements:

(a) that the person concerned took employment on 1 January 2014 - an event;

(b) that the person referred to was an employee on that day - a characteristic or status which he had acquired before 1 January 2014. Insofar as the Act applies to a person who took employment on 1 January 2014, the Act is prospective. Insofar as the Act applies to a person who had taken employment before 1 January 2014, the Act is retroactive.

22. With a view to test the principles of retroactivity, it may be necessary to refer to a few judgments on the point.

23. In *R v. Inhabitants of St. Mary, Whitechapel, 1848 (12) QB 120*, the court was considering Section 2 of the Poor Removal Act, 1846, which envisaged that "no woman residing in any parish with her husband at the time of his

death would be removed from such parish, for twelve calendar months next after his death, if she so long continues a widow". In the said case, the widow was sought to be removed within twelve months from the date of the death of her husband, who had died prior to the Act came into force. The eviction was sought to be justified on the ground that the act was prospective in nature as the death of the husband had occurred before the act was passed. The court in the said judgment held as under: ;

"It was said that the operation of the statute was confined to persons who had become widows after the Act was passed, and that the presumption against a retrospective statute being intended supported this construction: but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

24. In *Boucher Pierre Andre vs. Superintendent Central Jail Tihar, New Delhi & anr AIR 1975 SC 164* the issue that arose before the court was as to whether the benefit of set-off of a pre-conviction detention period against the term of imprisonment conferred by section 428 of the

CrPC 1974, where an accused person has on conviction been sentenced to imprisonment for a term was also available where the sentence was imposed before the commencement of the code to reduce the unserved portion of the sentence. It was held that the benefit of set-off was available inasmuch as in so construing the section, no retrospective effect would be given for it would not affect the sentence already undergone but would affect only that part of the sentence which remained to be served in future. It was held that words “**has been sentenced**” were neutral and could take in conviction prior to the coming into force of the code.

25. The Apex Court in *State of Maharashtra vs. Vishnu Ramchandra*, AIR 1961 SC 307 relied upon *Rex vs. Birthwhistle (1889) 58 LJ M.C 158*. The issue that fell for consideration before the court in that case was whether the Act i.e., Married Women (Maintenance in case of Desertion) Act, 1886, would cover even those desertions, which occurred prior to the promulgation of the Act. It was

held to be so applicable as it intended to curb an existing evil and afforded to the married woman a remedy for desertion, whether such desertion took place before the passing of the act or not.

26. In *Weldon vs. Winslow, 1884 Vol. 13 QBD page 784*, the statutory provision envisaged to the effect that “a married woman shall be capable of suing and being sued either in contract or otherwise as if she was a *feme sole* and her husband need not be joined with her as plaintiff or defendant.....” It was held that a married woman was competent to file an action in tort in her own name although the cause of action arose before the statutory provision came into operation.

27. On a reading of the aforementioned judgments, it thus becomes clear that with a view to apply the principle of retroactivity, a statute may not take away the vested rights may, in its direct operation, be prospective yet, cannot be called a retrospective statute because a part of the requisites for its action is drawn from time antecedent

to its passing as was held in *R vs. Inhabitants of St. Mary, Whitechapel*.

28. The connected question that arises for consideration is what is a vested right and whether the Instructions contained in Rule 38 of the MCS Rules of 1981, which according to the Petitioner, did not envisage a total prohibition on entertainment of the request for correction in the service record as regards an entry of date of birth could be said to be a vested right, which is said to have been taken away by virtue of the substitution of the Instruction pursuant to Notification dated 24th December, 2008, which specifically prohibits the entertainment of an application for alteration of a date of birth entry in the service book or service rule of the Government servant beyond a period of five years commencing from the date of his entry in the Government service.

29. Black Law"s Dictionary, Ninth Edition, defines 'vested' as under:

"Having become a completed, consummated

right for present or future enjoyment; not contingent; unconditional; absolute.....”

30. The Oxford dictionary defines ‘vested’ as:

“....secured or settled in the possession of or assigned to a person”

31. In ***J.S. Yadav vs. State of Uttar Pradesh & anr, (2011)***

6 SCC 570, the Apex Court while defining the word ‘vest’

and ‘vested rights’ has held as under:

21. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word "vest" has also acquired a meaning as "an absolute or indefeasible right". It had a "legitimate" or "settled expectation" to obtain right to enjoy the property, etc. Such "settled expectation" can be rendered impossible of fulfillment due to change in law by the Legislature. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the law. (Vide: Howrah Municipal Corpn. & Ors. v. Ganges Rope Co. Ltd. & Ors., (2004) 1 SCC 663).

22. Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provide for such a course.”

32. In ***P.D. Aggarwal & ors vs. State of U.P & ors, (1987)***

3 SCC 622, the Apex Court was dealing with the issue of retrospective amendments to rules, having the effect of taking away vested rights and held thus:

"18.....
.....
.....
the Government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."

33. In *Chairman Railway Board & ors vs. C.R. Rangadhamaiiah & ors*, **AIR 1997 SC 3828**, the Apex Court held that a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.

34. From the aforementioned, it thus becomes clear that any amendment, which has the effect of altering the rule retrospectively from an anterior date, which has the effect

of taking away the benefits from an employee, which were available under the said rule can successfully be challenged as being arbitrary and discriminatory and violative of Articles 14 and 16 of the Constitution on the principle that vested/accrued rights cannot be taken away retrospectively in an arbitrary manner.

35. Equally settled is the principle of law that where vested/accrued rights are sought to be taken away retrospectively from an anterior date, the law must provide for taking away such rights expressly or by necessary implication and unless and until the law specifically provides so, the same shall be deemed to be prospective. In *Sangam Spinners vs. Regional Provident Fund Commissioner I*, (2008) 1 SCC 391, the Apex Court held as under:

“It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question. In terms of Section 6(c)

of the General Clauses Act 1897 unless a different intention appears, the repeal shall not affect any right, privilege or liability acquired, accrued or incurred under the enactment repealed."

36. Considering the ratio of the judgments cited hereinabove, it cannot be said that any of the vested rights of the Petitioner have been taken away by virtue of the newly substituted Instructions in 2008, which fixed the period of limitation of five years from the date of entry into the Government service for seeking an alteration in the service records of the Petitioner. Moreover keeping in view the ratio of the judgment in *Hitendra Vishnu Thakur & Ors. V/s. State of Maharashtra & Ors. (1994) 4 SCC 602*, law relating to forum and limitation can only be said to be procedural in nature and does not affect the substantive rights and hence it would not be open to the Petitioner to claim in any manner that any of his vested rights were being taken away by virtue of the newly substituted provisions of Rule 38 of the MCS Rules, 1981.

37. A reading of Rule 38 (2-A), which was also incorporated by virtue of the Notification dated 24th

December, 2008, would show that the alteration in the service records would not be permitted, firstly, if an advantage had been gained by the Government servant in the school admission on the basis of the unaltered date of birth and additionally if the altered date of birth would make him ineligible for admission in any school or university or examinations conducted by the Maharashtra Public Service Commission. The aforementioned provisions of clause (2-A) of the Instructions would make it clear that it thus had the requisite element for its action, which can be said to be drawn from time antecedent to its passing.

Instruction (2-A) specifically envisages and provides a link with an event and time antecedent to the promulgation of the substituted provisions of Instruction (2-A) of Rule 38 of the MCS Rules, 1981 as it envisages rejection even when not so specifically provided, of an application for alteration of the date of birth if he was to be declared ineligible for admission in any school. In the present case, since one of the consideration prescribed for

grant of refusal of the prayer for amendment is to test whether the Petitioner would be ineligible for admission, based upon the altered date of birth, at the time when the admission was sought, makes the provision retroactive in its operation, when tested on the touch stone of the judgments mentioned hereinabove as also on the basis of the ratio in the case of *R V/s. Inhabitants of St. Mary, Whitechapel, 1848 (12) QB 120*, wherein by the time, the Poor Removal Act, 1846 came into operation, the lady had already become a widow. The event of becoming a widow had in fact preceded the passing of the Act and it was in those circumstances that the Court had related that event for purposes of extending the protection against an eviction in future.

Be that as it may, we have no hesitation in holding that the substituted provisions incorporated vide Notification dated 24th December, 2008, are in fact retroactive in operation.

38. Having said so, we are not for the time being holding

that the application of the Petitioner ought to have been rejected at the very outset as it was filed beyond a period of five years from the date of his entry into Government service, inasmuch as the Tribunal has proceeded to test the claim of the Petitioner on the strength of the provisions of Rule 38 (2)(f) of the MCS Rules, 1981, as also Instruction (2-A) appended to the said Rule. The Petitioner would succeed under Rule 38 (2)(f) of the MCS Rules, 1981, if he could satisfy that the entries made in the service book was on account of a clerical error or want of care on the part of some persons other than the individual in question.

39. Although learned Counsel for the Petitioner vehemently urged that the phrase due to '*want of care on the part of some persons other than the individual in question*', should relate to the time of his enrollment initially in the school, we respectfully disagree with that proposition as clause 38(2)(f) is quite clear that the error has to relate to the time, when the entry is incorporated in

the service book of the petitioner and not to an event earlier thereto. The entry was incorporated based upon the SCC Certificate of the Petitioner and was therefore correctly recorded as per records produced.

Equally so the Tribunal proceeded to hold that the age of the Petitioner would be less than five years, if it was accepted that his real date of birth was 25th January, 1966, which would make him ineligible to be enrolled as a student to school in terms of the specific prohibition contained under Rule 128 of the Bombay Primary Education Rules, 1949, which envisages that no approved school should admit a child, who has not completed the 5th years of age on the date of admission. The case of the Petitioner, therefore, is liable to be rejected even in terms of the Instruction (2-A) of the Rule 38 of the MCS Rules, 1981, as has been rightly held by the Tribunal.

40. The Petitioner cannot be permitted to run with the hare and hunt with the hounds. Be that as it may, we do

not find any merit in the present petition, which is,
accordingly, dismissed.

(VALMIKI SA MENEZES, J.)

(DHIRAJ SINGH THAKUR, J.)