

DEEPAK AGARWAL & ANR.

v.

STATE OF UTTAR PRADESH & ORS.  
(Civil Appeal No. 6587 of 2003)

MARCH 31, 2011

[B. SUDERSHAN REDDY AND SURINDER SINGH  
NIJJAR, JJ.]

UTTAR PRADESH EXCISE GROUP 'A' SERVICE  
RULES, 1983:

*Rules 5(3)( as amended w.e.f.16.5.1999), 7 and 8 – Promotion to Deputy Excise Commissioner – Exclusion of Technical Officer and Statistical Officer from the feeder streams w.e.f. 16.5.1999 – Vacancies occurring prior to amendment filled after amendment according to substituted Rule 5(3) – Held: There is no statutory duty cast upon the State to complete the selection process within a prescribed period – Nor is there a mandate to fill up the posts within a particular time – The requirement of filling up of old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion which accrues on the date of consideration of the eligible candidates – In the instant case, consideration for promotion took place after the amendment came into operation – Therefore, it cannot be held that any accrued right of the two officers was taken away by the amendment – Moreover, a conscious decision was taken to abolish the feeder cadre consisting of Technical Officers and Statistical Officers for promotion to the post of Deputy Excise Commissioner – Service Law – Uttar Pradesh Government Criterion for Recruitment by Promotion Rules, 1994 – r.4.*

SERVICE LAW:

*Promotion – Need to open avenues for – Technical*

- A *Officers and Statistical Officers excluded from the feeder stream for promotion to Deputy Excise Commissioner in the State of U.P. – But posts upgraded – HELD: Mere upgradation may not be sufficient compensation for loss of opportunity of promotion – State Government advised to re-look at the promotion policy to provide some opportunity of further promotion to officers concerned – Uttar Pradesh Excise Group 'A' Service Rules, 1983.*

- C Appellant no. 1, who was appointed as a Technical Officer and appellant no. 2, who was appointed as Statistical Officer, filed a writ petition before the High Court seeking to quash the Notification dated 17.5.1999 whereby they had been rendered ineligible for promotion to the post of Deputy Excise Commissioner; as also the Notification dated 26.5.1999 promoting respondent nos. D 3 to 9 as Deputy Excise Commissioners. They further prayed for a direction to the respondent-authorities to consider and promote them as Deputy Excise Commissioners. The stand of the appellants was that the vacancies arising prior to 17.5.1999 ought to be filled up E in terms of the Uttar Pradesh Excise Group 'A' Service Rules, 1983, as they existed prior to the amendment dated 17.5.1999. The High Court dismissed the writ petition.

- F In the instant appeal it was contended for the appellants that by the Uttar Pradesh Excise Group 'A' Service (5th Amendment) Rules, 1999, the posts of Technical Officer and Statistical Officer, were excluded from the feeder streams to the post of Deputy Excise Commissioner, w.e.f. 17.5.1999, but as there were 10 G vacancies prior to 17.5.1999, those vacancies should have been filled as per the Rules existing at the time the vacancies occurred, and, therefore, the appellants were entitled to be considered for the said 10 vacancies under

Rule 5(2). The stand of the respondents, on the other hand, was that no selection before the amendment had taken place and that the amendment of the Rules was based on a conscious decision taken by the Government upon consideration of representations of both the sides. A

Dismissing the appeal, the Court B

HELD: 1.1. Service conditions of the appellants and the private respondents are governed by U.P. Excise Group 'A' Service Rules, 1983, framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. A perusal Rule 5(3) of the 1983 Rules and Rule 4 of the Uttar Pradesh Government Criterion for Recruitment by Promotion Rules, 1994 would indicate that the appellants would have been eligible for promotion on the basis of seniority, as determined under the Note to Rule 8. However, the said right for consideration to be promoted on the post of Deputy Excise Commissioner has been taken away by the Uttar Pradesh Excise Group 'A' Service (5th amendment) Rules, 1999 by substitution of sub-rule (3) whereunder only Assistant Excise Commissioners, who have completed two years service as such are made eligible for consideration for promotion as Deputy Excise Commissioner. [paras 15,16 and 18] [162-C-D; 164-D-E; 165-B-D] C D E F

1.2. Rule 7 of the 1985 Rules provides that the appointing authority shall determine the vacancies to be filled during the course of the year. There is no statutory duty cast upon the State to complete the selection process within a prescribed period. Nor is there a mandate to fill up the posts within a particular time. Rather the proviso to Rule 2 enables the State to leave a particular post unfilled. There is no statutory duty cast upon the respondents to either prepare a year-wise panel of the eligible candidates or the selected candidates for G H

- A promotion. Therefore, clearly there is no statutory duty which the State could be mandated to perform under the applicable rules. The requirement to identify the vacancies in a year or to take a decision how many posts are to be filled under Rule 7 cannot be equated with not issuing promotion orders to candidates duly selected for promotion. Therefore, it can not be said that the vacancies, which had arisen before 17-5-1999 had to be filled under the unamended rules. It can also not be said that the amendment has been given a retroactive operation as the vacancies which arose prior to the amendment are sought to be filled under the amended rules. [para 17, 21 and 26] [164-G-H; 165-A-B; 166-H; 167-A-C-E-H; 170-A-B]

- 1.3. 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 lays down any particular time frame, within which the selection process is to be completed. In the instant case, consideration for promotion took place after the amendment came into operation. Thus, it can not be accepted that any accrued or vested right of the appellants have been taken away by the amendment. [para 22] [167-F-H; 168-A-B]

- Rajasthan Public Service Commission Vs. Chanan Ram & Anr. 1998 (1) SCR 1099 = 1998 (4) SCC 202, Dr. K. Ramulu & Anr. Vs. Dr. S. Suryaprakash Rao & Ors 1997 (1)*

DEEPAK AGARWAL & ANR. v. STATE OF UTTAR 153  
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SCR 287 = 1997 (3) SCC 59, *Union of India vs. K.V.Vijeesh* 1992 (3) Suppl. SCR 816 = 1993 (2) Suppl. SCC 600; *Jai Singh Dalal vs. State of Haryana* 1992 (3) Suppl. SCR 816 = 1993 (2) Suppl. SCC 600; and *State of M.P. & Ors. Vs. Raghuveer Singh Yadav & Ors* 1994 (2) Suppl. SCR 459 = 1994 (6) SCC 151, *H.S. Grewal Vs. Union of India & Ors.* (1997) 11 SCC 758 - relied on. A B

*Y.V.Rangaiah & Ors. Vs. J.Sreenivasa Rao & Ors.* (1983) 3 SCC 284; *Food Corporation of India Vs. Parashotam Das Bansal* 2008 (2) SCR 412 = 2008 (5) SCC 100; *P. Ganeshwar Rao Vs. State of Andhra Pradesh*, 1988 Suppl. SCR 805 = 1988 Suppl. SCC 740; *N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors* 1990 ( 2 ) SCR 239 = 1990 ( 3 ) SCC 157, *A.A. Catton Vs. Director of Education*, (1983) 3 SCC 33, *State of Rajasthan Vs. R. Dayal* 1997 ( 2 ) SCR 108 = 1997 (10 ) SCC 419, and *B.L. Gupta Vs. M.C.D.* (1998) 9 SCC 223-held inapplicable. C D

1.4. The High Court has noticed that the post of Technical Officers and Statistical Officers have been deleted from the feeder cadre for promotion to the post of Deputy Excise Commissioner for valid reasons. The Government was of the opinion that the Technical Officers and Statistical Officers were not suitable to be promoted on the post of Deputy Excise Commissioner, which involved multifarious administrative responsibilities. The experience gained by the officials working on the post of Technical Officer and Statistical Officer was of no relevance for the duties to be performed on the post of Deputy Excise Commissioner. Consequently, a conscious decision was taken to abolish the feeder cadre consisting of Technical Officers and Statistical Officers for promotion to the post of Deputy Excise Commissioner. It cannot be said that the conscious decision so taken is not grounded on the relevant facts. A perusal of the counter affidavit filed by the respondent shows that the E F G H

- A recruitment of appellant No.1 has been made purely with the objective of looking after the technical work pertaining to pharmacies and industrial units. Therefore, the requisite qualification for the post is Degree in Chemical Engineering. Appellant No.2 has been recruited for
- B compilation, analysis and maintenance of statistical data of the Excise Department. The basic qualification for the post of Statistical Officer is Graduation in Statistics. It appears that the two categories of posts have been eliminated as the incumbents on the said posts do not
- C have any administrative experience. The decision was taken clearly in public interest. Since the decision has been taken after taking into consideration the view points of both the sides, it can not be said to be arbitrary or based on irrelevant considerations. [para 25-26] [169-A-H; 170-A-B]

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2. It may be that the removal of the two posts, namely, Technical Officer and Statistical Officer, from the feeder cadre would lead to some stagnation for the officers working on the said two posts. In fact, the
- E Government seems to recognize such a situation. It is perhaps for this reason that the posts have been upgraded to the post of Deputy Excise Commissioner. However, mere upgradation of the post may not be sufficient compensation for the officers working on the
- F two posts for loss of opportunity to be promoted on the post of Deputy Excise Commissioner. In such circumstances, the Government may be well advised to have a re-look at the promotion policy to provide some opportunity of further promotion to the officers working on these posts. [para 29] [172-H; 173-A-B]
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#### Case Law Reference:

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|------------------|---------------------------|
| (1983) 3 SCC 284 | held inapplicable para 2  |
| 2008 (2) SCR 412 | held inapplicable para 10 |

1988 Supl. SCR 805	held inapplicable para 10	A
1990 (2) SCR 239	held inapplicable para 10	
(1983) 3 SCC 33	held inapplicable para 10	
1997 (2) SCR 108	held inapplicable para 10	B
(1998) 9 SCC 223	held inapplicable para 10	
1997 (1) SCR 287	relied on para 11	
1998 (1) SCR 1099	relied on para 13	
1992 (3) Supl. SCR 816	relied on para 13	C
1994 (2) Supl. SCR 459	relied on para 13	
(1996) 3 SCC 139	relied on para 25	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6587 of 2003. D

From the Judgment & Order dated 16.4.2002 of the High Court of Judicature at Allahabad in C.M.W.P. No. 34533 of 1999. E

Dr. Rajesh Dhawan, P.S. Narasimha, Dinesh Dwivedi, Pankaj Bhatia, Vivek Chaudhary, Dr. Kailash Chand, Priyanka Singh, K. Parmeshwar, K.K. Mohan, Ravi Prakash Mehrotra, Mukesh Verma, Vibhu Tiwari, Abhishek K. Singh for the appearing parties. F

The Judgment of the Court was delivered by

**SURINDER SINGH NIJJAR, J. 1.** This appeal is directed against the judgment of the High Court of Judicature at Allahabad dated 16th April, 2002, dismissing the writ petition challenging the Notification dated 17th May, 1999, wherein the appellants had been rendered ineligible for promotion to the post of Deputy Excise Commissioner (DEC) and the Notification dated 26th May, 1999, promoting respondents No. G H

A 3 to 9 as Deputy Excise Commissioner, and further to consider and promote the appellants as Deputy Excise Commissioner, on the vacancies that arose before 17th May, 1999.

B 2. Old vacancies have to be filled under the old rules is the mantra, sought to be invoked by the appellants in support of their claim that the vacancies arising prior to 17th May, 1999, ought to be filled under the 1983 Rules as they existed prior to the amendment dated 17th May, 1999. The claim is based on the principle enunciated by this Court in *Y.V.Rangaiah & Ors. Vs. J.Sreenivasa Rao & Ors.*<sup>1</sup>.

C 3. The appellants were recruited through the Uttar Pradesh Public Service Commission on Class II posts in the Excise Department under the Excise Commissioner, Uttar Pradesh. Deepak Agarwal (hereinafter referred to as 'appellant No.1')  
D was appointed on the post of Technical Officer in the pay scale of Rs.2200–4000 by an order dated 13th August, 1991. Similarly, Jogendra Singh (hereinafter referred to as 'appellant No. 2') was directly recruited through the Uttar Pradesh Public Service Commission and appointed on the post of Statistical  
E Officer by Notification dated 8th January, 1992 in the pay scale of Rs.2200–4000. It is not disputed that both the appellants are confirmed in service. There is no adverse entry in their service record. The appellants are the only two officers recruited directly to Class II Excise Service. Otherwise, majority of the officers  
F have entered service as Inspectors in the Excise Department and subsequently promoted to higher posts.

4. The U.P. Excise Group 'A' Service Rules, 1983 govern the procedure for recruitment and conditions service of officers of Group 'A' of the Excise Department. Initially under Rule 5(2)  
G only Assistant Excise Commissioners and Technical Officers were eligible for promotion. Subsequently by amendment of the 1983 Rules on 22nd June, 1998, Statistical Officers were also made eligible for promotion to the post of Deputy Excise Commissioner.

H 1. (1983) 3 SCC 284.



5. It came to the knowledge of the appellants that U.P. Excise Officers Sangh, Allahabad had filed a representation before the State Government in the month of September, 1998 protesting against the inclusion of the Technical Officers and Statistical Officers in the feeder cadre for promotion to the post of Deputy Excise Commissioner. The appellants, therefore, also made representations before the Departmental Promotion Committee (DPC). In the year, 1997-98 and 1998-99, 12 vacancies arose for the post of Deputy Excise Commissioner. Out of these 12 vacancies, 10 vacancies had arisen prior to 17th May, 1999 and 2 vacancies had arisen on 30th June, 1999 due to the retirement of Deputy / Joint Excise Commissioner. It is the case of the appellants that they were entitled to be considered for the aforesaid 10 vacancies under Rule 5(2).

6. Inspite of the representation made by the appellants, the 1983 Rules were amended on 17th May, 1999. By the aforesaid amendment, the posts of Technical Officers and Statistical Officers have been excluded from the feeder cadre for promotion to the post of Deputy Excise Commissioner. This amendment came just two days before the DPC was scheduled to meet on 19th May, 1999. As a consequence of the amendment, the DPC did not consider the appellants for promotion. The justification given for the aforesaid amendment is that the State Government had taken a "conscious decision" to exclude the Technical Officers and Statistical Officers as they were not fit for the post of Deputy Excise Commissioner because of their peculiar qualifications, duties, responsibilities and work experience. However, to compensate for loss of promotion, the pay scale of these two posts has been upgraded to the level of Deputy Excise Commissioner.

7. Thereafter, the State Government issued a Notification dated 26th May, 1999 wherein the State Government granted promotion to the 10 persons (Respondent Nos. 3 to 9) to the posts of Deputy Excise Commissioner. Aggrieved by the same, the appellants filed a writ petition before the Allahabad High Court challenging the Notification dated 26th May, 1999. It was

A also prayed that they should be considered for the posts of Deputy Excise Commissioner and Notification dated 17th May, 1999 be quashed. The High Court vide its judgment dated 16th April, 2002 dismissed the petition. Hence the present appeal.

B 8. We have heard the exhaustive submissions made by the learned counsel for parties. Dr. Rajeev Dhawan, learned senior counsel, appearing for appellants, has highlighted the primary issues involved herein, which are as follows:

C Whether the State of Uttar Pradesh amendment of 17th May, 1999 in the Schedule is invalid because –

(a) it abolishes Technical Assistant Officers (TAO) and Statistical Officer (SO) as feeder streams to the post of Deputy Excise Commissioner.

D (b) denies TAO and SO the right to be considered for promotion.

(c) stagnates them by denying any promotional avenue and merely gives them a 'sop' of up-gradation with no avenue to promotion.

E (d) gives retroactive application to the amendment to exclude persons covered by the pre-amended rules of 1983.

#### **SUBMISSIONS ON FACTS –**

F 9. By the amendment, the avenue of promotion of the appellants has been totally blocked. The up-gradation of the pay scale is a mere sop. The decision to amend the rules on 19th May, 1999 came within one year of granting eligibility to the post of Statistical Officer on 22nd June, 1998. It was unreasonable for the State to do a total volte-face. Only reason for such a volte-face was the pressure from the Excise Commissioner to be favoured.

#### **SUBMISSIONS ON LAW –**

H 10. Right to be considered for promotion is a valuable right.

The Government is required to make necessary provision in the rules to remove stagnation on a particular post and by giving suitable promotion avenue to its employees. Learned counsel relied on a decision of this Court in the case of *Food Corporation of India Vs. Parashotam Das Bansa*<sup>2</sup> in support of the submissions that the Superior Courts have the jurisdiction to issue necessary direction to the Government. He submits, the issue herein, is squarely covered by the judgment of this Court in the case of *Y.V. Rangaiah* (supra). Therefore, the appellants were entitled to be considered for promotion against the ten vacancies that occurred prior to the amendment dated 17th May, 1999. Reliance is also placed on Rule 7 to show that the Government has to determine the number of vacancies to be filled during the course of the year. Learned counsel also relied on the decisions of this Court in the cases of *P. Ganeshwar Rao Vs. State of Andhra Pradesh*,<sup>3</sup> *N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors.*<sup>4</sup> *A.A. Catton Vs. Director of Education*,<sup>5</sup> *State of Rajasthan Vs. R. Dayal* and *B.L. Gupta Vs. M.C.D.*<sup>7</sup> to emphasis that the rule of prospectivity application requiring the pre-amendment vacancies to be considered under the unamended rule is firmly embedded in the law. He has, however, very fairly stated that although the normal rule of prospectivity will apply, a subsidiary rule has come into existence since 1997 that if the Government takes a conscious decision not to apply the rule to pre-amendment vacancies under the old rules, it has the power to do so.

11. On facts, he submits that there was no legally binding conscious decision taken in this case. The criteria laid down

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2. (2008) 5 SCC 100.

3. 1988 (Supp) SCC 740.

4. (1990) 3 SCC 157.

5. (1983) 3 SCC 33.

6. (1997) 10 SCC 419.

7. (1998) 9 SCC 223.

A in the case of *Dr. K. Ramulu & Anr. Vs. Dr. S. Suryaprakash Rao & Ors.*<sup>8</sup> has not been satisfied. He submits that the conscious decision has to satisfy the test of reasonableness and relevancy of criteria. In the present case, there is no evidence of a conscious decision being taken. The plea was not even raised in the High Court. It is raised in this Court based on the observations made by the High Court. Such a conscious decision must be based on existing facts and cannot be conjured up in the affidavit to oppose the writ petition. He further submits that under Note to Rule 8 the respondents are required to prepare combined eligibility list of the candidates in order of seniority determined by the dates of their substantive appointments. Furthermore, the promotions under Rule 5(2) are to be made on the basis of the criteria in "The Uttar Pradesh Servants Criterion for Recruitment by Promotion Rules, 1994."

D 12. Rule 4 of these Rules provides that the promotion shall be made on the basis of seniority subject to the rejection of the unfit. Under these Rules, Dr. Dhawan has submitted that the appellants were bound to be promoted being senior and having a good record of service. The attempt by the State without amendment in this rule to introduce comparative merit on irrelevant considerations to exclude the appellants from the feeder cadre was *ex facie* illegal and arbitrary.

F 13. On the other hand, Mr. P.S. Narasimha, learned senior counsel for the respondents submitted that:

- (i) The amendment in the rules is based on a conscious decision taken by the Government upon consideration of the representations of both the sides.
- G (ii) The ratio in *Rangaiah's case* (supra) will not be applicable in the facts of this case. No selection before the amendment had taken place in this case.
- (iii) The right of the candidate is to be considered under

the Rules in force on the date the consideration takes place. In support of his submission, he relied on the decisions of this Court in the cases of *Jai Singh Dalal & Ors. Vs. State of Haryana & Anr.*<sup>9</sup>, *Rajasthan Public Service Commission Vs. Chanan Ram & Anr.*<sup>10</sup>, *State of M.P. & Ors. Vs. Raghuveer Singh Yadav & Ors.*<sup>11</sup>, *H.S. Grewal Vs. Union of India & Ors.*<sup>12</sup> and *Dr. K. Ramulu & Anr. Vs. S.Suryaprakash Rao & Ors. (supra)*.

(iv) The Officers have only a right of consideration under the Rules in force.

(v) In this case, there is no acquired or vested right of the appellants which has been taken away. He relied on the decisions of this Court in the cases of *High Court of Delhi & Anr. Vs. A.K. Mahajan & Ors.*<sup>13</sup>, *New India Sugar Works Vs. State of U.P.*<sup>14</sup> and *Dr. K. Ramulu (Supra)*.

(vi) The issue herein is squarely covered by the judgment in *Dr. K. Ramulu's case (supra)*. The cases relied upon by the appellants have been explained in the case of *Rajasthan Public Service Commission (Supra)*.

(vii) The State is conscious of the loss of promotion avenue to the posts of Senior Technical Officer (STO) and Senior Statistical Officer (SSO). The Court can issue necessary directions to the State to remove any stagnation on the aforesaid two posts.

14. Mr. Dinesh Dwivedi, learned senior counsel for the State submits that the ratio in the case of *Y.V. Rangaiah (supra)* is not applicable in the facts of this case. There is no

9. 1993 (Supp) 2 SCC 600.

10. (1998) 4 SCC 202.

11. (1994) 6 SCC 151.

12. (1997) 11 SCC 758.

13. (2009) 12 SCC 62.

14. (1981) 2 SCC 293.

A requirement under Rule 7 of the applicable rules in this case to prepare a year wise panel of the selected candidates. Therefore, no acquired or vested right of the appellants has been taken away. Under Rule 7, the vacancies have only to be identified. The right accrues only at the time of consideration for promotions. Therefore, the amendment has not been given a retroactive effect. The matter is covered by the judgment in the case of *Dr. K. Ramulu* (supra) as a conscious decision has been taken by the State to exclude the two parts of STO and SSO from the feeder cadre for promotion as DEC.

C 15. We have considered the submissions made by the learned counsel for parties. Service conditions of the appellants and the respondents are governed by U.P. Excise Group 'A' Service Rules, 1983, framed in exercise of the powers conferred by the proviso of Article 309 of the Constitution of India. Therefore, it would be appropriate to notice the relevant provisions of the Rules at this juncture.

E Rule 2:- Status of the Service – The Uttar Pradesh Excise Group 'A' Service is a State service comprising Group 'A' posts.

Rule 3(g):- "Service" means the Uttar Pradesh Excise Group 'A' Service;

F (h); "Substantive appointment" means an appointment, not being an adhoc appointment on a post in the cadre of the service after selection in accordance with the rules and, if there are no rules, in accordance, with the procedure prescribed for the time being by executive instructions issued by the Government;

G (i) "Year of recruitment" means a period of twelve months commencing from the first day of July of a calendar year.

H Rule 4: Cadre of Service - (1) the strength of the service shall be such as may be determined by the Government from time to time.

(2) The strength of the service shall, until orders varying the same are passed under sub-rule (1), be as follows: A

.....			
Name of the post		Number of Posts	
.....			B
	Permanent	Temporary	
Joint Excise Commissioner	-	6	
Deputy Excise Commissioner	11	6	C
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Provided that –

[i] The appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to compensation; D

[ii] The Governor may create such additional permanent or temporary posts as he may consider proper. E

Rule 5(2): Recruitment to the post of Deputy Excise Commissioner shall be made by promotion from amongst substantively appointed Assistant Excise Commissioners and Technical Officers who have completed two years service as such, on their respective posts, on the first day of the year of recruitment. F

Rule 7: Determination of vacancies – The Appointing Authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies, if any, to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under Rule 6. G

Rule 8(3): The Appointing Authority shall prepare eligibility list of the candidates in accordance with the Uttar Pradesh H

A Promotion by Selection (on posts outside the purview of the Public Service Commission) Eligibility List Rules, 1986 and place it before the Selection Committee along with their character rolls and such other records pertaining to them as may be considered necessary.

B **NOTE:-** For the purpose of promotion to the post of Deputy Excise Commissioner, under Rule 5(2), a combined eligibility list shall be prepared by arranging the names of Assistant Excise Commissioners and Technical Officer in order of seniority as determined by the dates of their substantive appointment.

C 16. A perusal of the aforesaid rules would show that Rule 5, recruitment to the post of Joint Excise Commissioner shall be made by promotion from amongst substantively appointed Deputy Excise Commissioner. Under Rule 5(2), recruitment to the post of Deputy Excise Commissioner shall be made by promotion from amongst substantively appointed Assistant Excise Commissioners and Technical Officers, who have completed two years of service on their respective posts on the first day of the year of recruitment.

E 17. The short question that arises for consideration is as to whether the appellants were entitled to be considered for promotion on the post of Deputy Excise Commissioner under the 1983 Rules, on the vacancies, which occurred prior to the amendment in the 1983 Rules on 17th May, 1999. Under the unamended 1983 Rules, the petitioners would be eligible to be considered for promotion by virtue of Rule 5(2). By virtue of the Note to Rule 8, a combined eligibility list has to be prepared by arranging the names of Assistant Excise Commissioner and Technical Officers in order of seniority as determined by the date of their substantive appointment. The appellants were, therefore, clearly in the feeder cadre of the post for promotion to the post of Deputy Excise Commissioner. Rule 7 provides that the Appointing Authority shall determine the vacancies to be filled during the course of the year and the number of

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- A From the above, it is evident that under the existing sub-rule 3, substantively appointed Assistant Excise Commissioner, Technical Officers and Statistical Officers, who have completed two years of service as such on their respective posts were entitled to be considered for promotion on the post of Deputy
- B Excise Commissioner. By substitution of sub-rule 3, only Assistant Excise Commissioner, who have completed two years service as such are made eligible for consideration for promotion as Deputy Excise Commissioner. It is also a matter of record that 12 vacancies existed on the post of Deputy
- C Excise Commissioner for the year 1997-98 and 1998-99. Out of these 12 vacancies, 10 had arisen prior to 17th May, 1999 and two vacancies arose on 30th June, 1999. By virtue of the amendment in sub-rule 3 of Rule 5, the appellants have been deprived of the right to be considered for promotion on the post
- D of Deputy Excise Commissioner. Respondents have been promoted by the impugned order dated 26th May, 1999 under the amended Rules.

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

21. We are of the considered opinion that the judgment in *Y.V. Rangaiah's* case (supra) would not be applicable in the facts and circumstances of this case. The aforesaid judgment was rendered on the interpretation of Rule 4(a)(1)(i) of the
- G 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,
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only promotion orders were to be issued. However, no panel A  
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 B  
amendment. The vacancies which occurred prior to the  
amendment 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 year-wise  
panel of the eligible candidates or the selected candidates for C  
promotion. In fact, the proviso to Rule 2 enables the State to  
keep any post unfilled. Therefore, clearly there is no statutory  
duty which the State could be mandated to perform under the  
applicable rules. The requirement to identify the vacancies in  
a year or to take a decision how many posts are to be filled D  
under Rule 7 cannot be equated with not issuing promotion  
orders to candidates duly selected for promotion. In our opinion,  
the appellants had not acquired any right to be considered for  
promotion. Therefore, it is difficult to accept the submissions  
of Dr. Rajeev Dhawan that the vacancies, which had arisen E  
before 17th May, 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 F  
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 G  
promotion. The right to be considered for promotion accrues  
on the date of consideration of the eligible candidates. Unless,  
of course, the applicable rule, as in *Y.V. Rangaiah's* case  
(supra) lays down any particular time frame, within which the  
selection process is to be completed. In the present case, H

- A consideration for promotion took place after the amendment came into operation. Thus, it can not be accepted that any accrued or vested right of the appellants have been taken away by the amendment. The judgments cited by learned counsel for the appellants namely *B.L. Gupta Vs. MCD* (supra), *P. Ganeshwar Rao Vs. State of Andhra Pradesh* (supra) and *N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors* (supra) are reiterations of a principle laid down in *Y.V. Rangaiah's case* (supra).

23. All these judgments have been considered by this Court in the case of *Rajasthan Public Service Commission Vs. Chanan Ram & Anr.* (supra). In our opinion, the observations made by this Court in paragraphs 14 and 15 of the judgment are a complete answer to the submissions made by Dr. Rajiv Dhawan. 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.

24. In our opinion, the matter is squarely covered by the ratio of the judgment of this Court in the case of *Dr. K. Ramulu* (supra). 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's case* (supra) 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.

25. The High Court has noticed that the post of Technical Officers and statistical Officers have been deleted from the feeder cadre for promotion to the post of Deputy Excise Commissioner for valid reasons. The Government was of the opinion that the Technical Officers and Statistical Officers were not suitable to be promoted on the post of Deputy Excise Commissioner, which involved multifarious administrative responsibilities. The experience gained by the officials working on the post of Technical Officer and Statistical Officer was of no relevance for the duties to be performed on the post of Deputy Excise Commissioner. Consequently, a conscious decision was taken to abolish the feeder cadre consisting of Technical Officers and Statistical Officers for promotion to the post of Deputy Excise Commissioner. The Division Bench, therefore, correctly applied the ratio laid down in *Dr. K. Ramulu's case (supra)* wherein this Court reiterated the ratio in *Union of India Vs. K.V. Vijeesh*<sup>15</sup> that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies on the relevant date.

26. We are also unable to accept the submissions of Dr. Dhawan that the conscious decision taken herein is not grounded on the relevant facts. A perusal of the Counter Affidavit filed by the respondent herein shows that the recruitment of the appellant No.1 has been made purely with the objective of looking after the technical work pertaining to pharmacies and industrial units. Therefore, the requisite qualification for the post is Degree in Chemical Engineering. Appellant No.2 has been recruited for compilation, analysis and maintenance of statistical data of the Excise Department. The basic qualification for the post of Statistical Officer is Graduation in Statistics. It appears that the two categories of posts have been eliminated as the incumbents on the said posts do not have any administrative experience. The decision was taken clearly in public interest. Since the decision has been taken after taking into consideration the view points of both the sides, it can not be

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A said to be arbitrary or based on irrelevant considerations. We also do not find any merit in the submission of Dr. Dhawan that the amendment has been given a retroactive operation as the vacancies which arose prior to the amendment are sought to be filled under the amended rules.

B 27. This Court in the case of *Jai Singh Dalal Vs. State of Haryana* (supra) has held as under:

C "It is clear from the above pleadings that in 1990 the State Government resolved to resort to special recruitment to the Haryana Civil Service (Executive Branch) invoking the proviso to Rule 5 of the rules. Pursuant thereto, it issued the notifications dated December 20, 1990 and January 25, 1991. The names of the candidates were forwarded by the State Government to the HPSC for selection. The D HPSC commenced the selection process and interviewed certain candidates. In the meantime, on account of an undertaking given by the Advocate General to the High Court at the hearing of C.W.P. No. 1201 of 1991 and allied writ petitions, the State Government was required to E forward the names of the candidates belonging to two other departments of the State Government. Before it could do so, the new Government came into power and it reviewed the decision of the earlier Government and found the criteria evolved by the earlier Government F unacceptable and also noticed certain infirmities in the matter of forwarding the names of eligible candidates. It, therefore, resolved to rescind the earlier notifications of December 20, 1990 and January 25, 1991. It will thus be seen that at the time when the writ petition which has given rise to the present proceedings was filed, the State G Government had withdrawn the aforesaid two notifications by the notification dated December 30, 1991. The stage at which the last-mentioned notification came to be issued was the stage when the HPSC was still in the process of selecting candidates for appointment by special H

recruitment. During the pendency of the present proceedings the State Government finalised the criteria for special recruitment by the notification of March 9, 1992. Thus, the HPSC was still in the process of selecting candidates and had yet not completed and finalised the select list nor had it forwarded the same to the State Government for implementation. The candidates, therefore, did not have any right to appointment. There was, therefore, no question of the High Court granting a mandamus or any other writ of the type sought by the appellants. The law in this behalf appears to be well settled.”

28. Similarly, this view has been reiterated by this Court in the cases of *State of M.P. & Ors. Vs. Raghuveer Singh Yadav & Ors.* (supra), *H.S. Grewal Vs. Union of India & Ors.* (supra) and *Rajasthan Public Service Commission Vs. Chanan Ram & Anr.* (supra). This Court in *Rajasthan Public Service Commission's* case (supra) has held that it is the rules which are prevalent at the time when the consideration took place for promotion, which would be applicable. In Para 17, it has been held as follows:

“In the case of *State of M.P. v. Raghuveer Singh Yadav* a Bench of two learned Judges of this Court consisting of K. Ramaswamy and N. Venkatachala, JJ., had to consider the question whether the State could change a qualification for the recruitment during the process of recruitment which had not resulted into any final decision in favour of any candidate. In paragraph 5 of the Report in this connection it was observed that it is settled law that the State has got power to prescribe qualification for recruitment. In the case before the Court pursuant to the amended Rules, the Government had withdrawn the earlier notification and wanted to proceed with the recruitment afresh. It was held that this was not the case of any accrued right. The candidates who had appeared for the examination and

A passed the written examination had only legitimate expectation to be considered according to the rules then in vogue. The amended Rules had only prospective operation. The Government was entitled to conduct selection in accordance with the changed rules and make

B final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State was entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended

C Rules. In the case of *J&K Public Service Commission v. Dr Narinder Mohan*<sup>2</sup> another Division Bench of two learned Judges of this Court consisting of K. Ramaswamy and N.P. Singh, JJ. considered the question of interception of recruitment process earlier undertaken by the recruiting

D agency. In this connection it was observed that the process of selection against existing and anticipated vacancies does not create any right to be appointed to the post which can be enforced by a mandamus. It has to be recalled that in fairness learned Senior Counsel, Shri Ganpule for the respondent-writ petitioner, stated that it is not his case that

E the writ petitioner should be appointed to the advertised post. All that he claimed was his right to be considered for recruitment to the advertised post as per the earlier advertisement dated 5-11-1993 Annexure P-1 and nothing more. In our view, the aforesaid limited contention also, on

F the facts of the present case, cannot be of any assistance to the writ petitioner as the earlier selection process itself had become infructuous and otiose on the abolition of the advertised posts, as we have seen earlier. The second point, therefore, will have to be answered in the negative

G in favour of the appellants and against the respondent-writ petitioner."

29. It may be that the removal of the two posts from the feeder cadre would lead to some stagnation for the officers

H working on the two aforesaid posts. In fact, the Government



seems to recognize such a situation. It is perhaps for this reason A  
that the posts have been upgraded to the post of Deputy Excise  
Commissioner. However, mere upgradation of the post may not  
be sufficient compensation for the officers working on the two  
posts for loss of opportunity to be promoted on the post of  
Deputy Excise Commissioner. B

30. In such circumstances, the Government may be well  
advised to have a re-look at the promotion policy to provide  
some opportunity of further promotion to the officers working  
on these posts. C

31. With these observations, the impugned judgment is  
affirmed and the appeal is accordingly dismissed with no order  
as to costs.

R.P.

Appeal dismissed. D