
(2012) 02 DEL CK 0180
In the Delhi High Court
Case No : Writ Petition (C) 5549 of 2007

Dr. Sahadeva Singh

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Administrative Service (Appointment by Promotion) Regulations, 1955 — Regulation 3, 5, 5(1)

Citation : (2012) 02 DEL CK 0180

Hon'ble Judges : V.K. Jain, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Suhail Dut, with Mr. Azhar Alam, for the Appellant; H.K. Gangwani, for the Respondent

Final Decision : Allowed

Judgement

V.K. Jain, J.—This writ petition is directed against the order dated 17.01.2007 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the Tribunal"), whereby Original Application No. 2125/2005, filed by the petitioner, was dismissed. The facts relevant for this petition can be summarized as follows:-

The petitioner before this Court was promoted as Assistant Commissioner (Crops) w.e.f. 29.06.1999. The next higher post, to which the petitioner could be considered for promotion, was of Deputy Commissioner (Crops). The Recruitment Rules for the post of Deputy Commissioner (Crops) provided that an Assistant Commissioner (Crops) with five years regular service in the grade and possessing Degree in Agriculture and Postgraduate Degree in Agriculture with specialization in Agronomy/Plant Breeding and Genetics from a recognized university or equivalent, could be promoted to the grade of Deputy Commissioner (Crops). Two posts of Deputy Commissioner (Crops) fell vacant in the year 2004, one on 15.05.2004 and the other on 04.04.2004. As per instructions, issued by DoP&T, the first day of the year in which the vacancy arose was to be taken as the date

for determining the eligibility of the officers working in the feeder cadre. The petitioner, therefore, was not eligible for being considered for promotion against the aforesaid two posts prior to 28.06.2004. Since no other person working in the feeder cadre was eligible to be considered for promotion in the year 2004, the vacancies which arose in that year were carried forward to the year 2005. The petitioner became eligible for being considered for promotion to the post of Deputy Commissioner (Crops) in the vacancy year 2005, relevant date for reckoning eligibility being 01.01.2005, and he having completed 5 years service in the grade of Assistant Commissioner on 28.06.2004. OA No. 2125/2005 was filed by the petitioner seeking promotion w.e.f. 28.06.2004. No Departmental Promotion Committee (DPC) was held in the year 2005. The DPC was held in the year 2006 during the pendency of OA and the petitioner was promoted as Deputy Commissioner (Crops) w.e.f. 04.10.2006. In view of the promotion of the petitioner w.e.f. 04.10.2006, the Tribunal dismissed the said OA and his prayer for promotion w.e.f. 26.06.2004 was declined on the ground that though an employee has a right to be considered for promotion, he has no right to demand the promotion.

2. It is an admitted position that two vacancies in the cadre of Deputy Commissioner (Crops) arose in the year 2004, one on 15.05.2004 and the other on 04.04.2004. It is also not in dispute that since the Recruitment Rules for the post of Deputy Commissioner (Crops) did not prescribe the day, crucial for determining the eligibility for promotion, OM No. 22011/9/98-Estt. (D) dated 08.09.1998 read with OM of even number dated 13.10.1998 became applicable, which prescribed the 1st January of the year in which the vacancies arose as the relevant date for determining seniority for the Recruitment Year 2005. It is also an admitted fact that no person working in the feeder cadre was eligible for promotion to the post of Deputy Commissioner in the year 2004 as the petitioner did not have the prescribed service, whereas the only other Assistant Commissioner did not have the prescribed educational qualification. It is also an admitted position that the Recruitment Rules do not prescribe any date for the meeting of the Departmental Promotion Committee to make recommendations for promotion to the aforesaid posts.

3. The aforesaid OM dated 08.09.1998 read with the OM dated 13.10.1998 suggested a Model Calendar for holding DPCs. The Model Calendar, to the extent it is relevant for our purpose, reads as under:

SUGGESTED MODEL CALENDAR FOR DPCs

Events (1)

Calendar Year-based (3)

(i) Vacancy year

(ii) Crucial date for determining eligibility

ACC cases [Cases where ACC approval is required (including SAG/HAG grades/

posts)]

(A) Completion of ACRs/Integrity Certificates/Vigilance Clearance/Seniority List/Panelty and Vacancy Position, etc. and forwarding DPC proposal to the UPSC.

(B) Last date for sending complete proposal along with relevant Recruitment/Service Rules to the UPSC (Effort should be made to send the proposal to the UPSC as soon as possible without waiting for the last date)

(C) DPC to be held.

(D) On receipt of DPC minutes from the UPSC, post-DPC follow-up action by the Administrative Ministry/Department

(E) Approval of the ACC including communication of its approval to the Administrative Ministry/Department.

(F) Last date for getting ready the approved select panel by the Administrative Ministry/Department.

2000

January 1, 2000

April 15, 1999

April 15?August, 1999

September, 1999

October? December, 1999

December 31, 1999

Note: Dates/period suggested in the Model Calendar for DPC put no bar on earlier completion of various pre-post-DPC related actions.

Early effort may, as such, be made for taking speedy action in the matter without waiting for the last date or completion of the period as suggested by the Model Calendar for DPCs.

Non-ACC Cases [Other grades/posts (with/without association of the UPSC)]

(A) Completion of ACRs/Integrity Certificates/Vigilance Clearance/Seniority List/Panelty and Vacancy Position, etc., and forwarding DPC proposal to the UPSC.

(B) Last date for sending complete proposal along with relevant Recruitment/Service Rules to the UPSC. (Effort should be made to send the proposal to the UPSC as soon as possible without waiting for the last date)

(C) DPC to be held

(D) On receipt of DCP minutes from the UPSC, post-DPC follow-up action (including approval of the Competent Authority) by the Administrative Ministry/

Department

(E) Last date for getting ready the approved select panel by the Administrative Ministry/Department

Note: Dates/periods suggested in the Model Calendar for DPC put no bar on earlier completion of various pre-post DPC related actions.

Early effort may, as such, be made for taking speedy action in the matter without waiting for the last date or completion of the period as suggested by the Model Calendar for DPC

January? April, 1999

April 30, 1999

May? October, 1999

November December, 1999

December 31, 1999

12. All Ministries/Departments are requested to take note of the above clarifications/modifications of the existing instructions for wide circulation on priority basis and strict compliance so that the desired objectives of convening of DPC meetings/preparation of the approved select panels as per the aforesaid prescribed time-frame may be achieved.

4. Vide DoPT OM No. 22011/9/98-Estt.(D) dated 14.12.2000, Department of Personnel and Training emphasized that the time-frame stipulated in the Model Calendar needs to be strictly adhered to and in case of the prescribed time-frame not being maintained, steps should be taken to fix responsibility for the lapse. The aforesaid OM reads as under:-

G.I., Dept. of Per. & Trg., OM No. 22011/9/98-Estt.(D),
dated the 14th December, 2000

Non-adherence to prescribed time-frame is a serious concern and responsibility for the lapse to be fixed

The undersigned is directed to invite reference to the Department of Personnel and Training OM of even number, dated September 8, 1998 prescribing a Model Calendar for DPCs in order to ensure that DPCs are convened in advance and approved select panels are prepared well before commencement of the relevant vacancy years. All Ministries/Departments were also requested vide D.O. letter of even number, dated March, 29, 2000 of Secretary (Personnel) for strict compliance of the instructions so as to achieve the desired objectives of timely convening of DPCs/preparation of approved select panels within the prescribed time-frame. Despite repeated communications to this effect, some of the Ministries/Departments are yet to implement these instructions. Non-adherence

to the prescribed time-frame is resulting in continued delay in convening DPCs. The UPSC has, on several occasions in the past, brought this note so satisfactory position to the notice of the Department of Personnel and Training. This is indeed a matter of serious concern for the Government. Hence, all concerned authorities are once again counseled to ensure adherence to the Model Calendar which has been devised as a system-improvement measure. In case of non-adherence to the prescribed time-frame, steps should be taken to fix responsibility for the lapse in this regard.

2. Ministries/Departments are requested to give wide circulation to these instructions to ensure strict adherence to the time-schedule prescribed as per the Model Calendar for DPCs.

(Emphasis supplied)

5. It would thus be seen that in terms of the Model Calendar, issued by the Department of Personnel and Training, since the vacancies in the cadre of Deputy Commissioner (Crops) which arose in the year 2004 were carried forward to the year 2005, the DPC should have been held between May to October, 2004, follow up action on receipt of DPC Minutes was to be taken by November-December, 2004 and 31.12.2004 was the last date for approving the select panel. Had the respondents maintained the time schedule prescribed in the Model Calendar, the petitioner would have been considered for promotion to the post of Deputy Commissioner (Crops) by October, 2004 and had he been found suitable for promotion, order of his promotion would have been issued by 31.12.2004.

6. The case of the petitioner before us is that since the Recruitment Rules did not stipulate any particular date for holding DPC for promotion to the post of Deputy Commissioner (Crops), it was mandatory for the respondent to follow the time table prescribed in the Model Calendar, issued by DoP&T and he could not have been deprived of his legitimate right for being considered to the promotion of the aforesaid post merely on the account of delay on the part of the respondents in convening the DPC. The learned counsel for the respondent, however, contended that since no officer working in the feeder cadre was eligible for promotion in the year 2004, they took a decision to amend the recruitment regulations, particularly because they did not want to supersede the officer senior to the petitioner and had they convened the DPC in terms of the Model Calendar, the inevitable consequence would have been the non-promotion of the officer who was senior to the petitioner in the feeder cadre. It was also contended by the learned counsel for the respondent that since the Model Calendar does not have statutory force, the petitioner has no right to seek promotion or even consideration of promotion in terms of the time frame, specified in the calendar.

7. It has been contended by the learned Counsel for the petitioner that since the law requires the vacancies existing on the date of amendment of the Rules have to be filled up in accordance with Rules as they stood prior to amendment and not in accordance with the amended Rules, the respondents had no justification

to withhold convening of DPC on the ground that they were contemplating the amendment of the Rules. In support of his contention the learned Counsel for the petitioner has relied upon the decisions of Supreme Court in *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, , which was referred in *State of Rajasthan Vs. R. Dayal and Others*, .

8. In *Y.V. Rangaiah (supra)*, there was delay in preparation of the panel for promotion. The Rules applicable in that case (*Andhra Pradesh Registration and Subordinate Service Rules*) provided that list of approved candidates for promotion would be prepared in the month of September every year and the instructions issued by the Government emphasized that prompt preparation of panel was essential for increasing administrative efficiency and also for filling up vacancies without delay. The panel of approved candidates for promotion was required to be prepared as on 01.09.1976 however, preparation of panel was delayed and it was drawn up only in the year 1977 and by that time the Rules had been amended, as a result of which the promotional chances of the respondents were adversely effected and they were superseded by their juniors in the panel prepared in accordance with the amended Rules. The Tribunal having ruled in favour of the respondents, the matter was taken by the State to Supreme Court and it was contended that the list prepared in May, 1977, in terms of the amended Rules, was correct particularly because the validity of the amendment had not been challenged by the respondents. Rejecting the contention, Supreme Court *inter alia* held as under:

x x x 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-Register Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondents Nos. 3 to 15 would not have been deprived of their 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.

In *R. Dayal (supra)*, Supreme Court referring to its decision in *Rangaiah (supra)* held that as a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules, were required to be filled in accordance with the laws existing on the date when the vacancies arose.

In *P. Ganeshwar Rao and Others Vs. State of Andhra Pradesh and Others*, , the Rules before they were amended prescribed that 37 1/2 % of the total number of vacancies (both substantive as well as temporary) to be filled by direct

recruitment. The amended Rules provided that only the substantive vacancies, to the said extent, shall be filled in by direct recruitment. Rejecting the contention that only the substantive vacancies in the above-referred ratio were to be filled by direct recruitment, Supreme Court inter alia held as under:

It is clear from the Special Rules as they were in force prior to the amendment on 28.4.1980 that it was open to the State Government to fill 37-1/2 per cent of the vacancies (both substantive and temporary) in the cadre of Assistant Engineers by direct recruitment. It is also not in dispute that during the years 1978 and 1979 the position of the vacancies was such that it was permissible for the State Government to appoint 51 Assistant Engineers by direct recruitment. The only question which has now to be considered is whether the amendment made on 28.4.1980 to the Special Rules applied only to the vacancies that arose after the date on which the amendment came into force or whether it applied to the vacancies which had arisen before the said date also. The crucial words in the Explanation which was introduced by way of amendment in the Special Rules on 28.4.1980 were "37-1/2 per cent of the substantive vacancies arising in the category of Assistant Engineers shall be filled by the direct recruitment". If the above clause had read "37-1/2 per cent of the substantive vacancies in the category of Assistant Engineers shall be filled by the direct recruitment" perhaps there would not have been much room for discussion. The said clause then would have applied even to the vacancies which had arisen prior to the date of the amendment but which had not been filled up before that date. We feel that there is much force in the submission made on behalf of the appellants and the State Government that the introduction of the word "arising" in the above clause made it applicable only to those vacancies which came into existence subsequent to the date of amendment.

In *N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others*, , a notification dated 23.5.1975 was published inviting applications for recruitment to 50 posts of Tehsildars. The notification also gave details of the posts that had been reserved for various categories. The Rules which were prevailing at that time were to apply to the appointments. A select list was thereafter prepared making reservation in terms of the instructions contained in Government Order dated 6.9.1969. The State Government refused to approve the list on the ground that reservation should have been made in accordance with the directions and procedure contained in a subsequent order dated 9.7.1975. The Government directed preparation of a fresh list of successful candidates by making reservations in terms of the subsequent order issued by it on 9.7.1975. The select list was revised accordingly. Since the names of the appellants did not figure in the revised list they challenged the validity of the Government order as well as the revised list. The petitions, filed by them were, however, dismissed by Division Bench of High Court. Accepting the contention of the appellants, Supreme Court inter alia held as under:

x x x Where advertisement is issued inviting applications for direct recruitment to

a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing Rules or Government Orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing Rules and Government Orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selections in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. x x x if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders which were in force on the date of advertisement.

In *B.L. Gupta and Another Vs. M.C.D.*, , the main contention before Supreme Court was whether the vacancies, which had arisen prior to amendment of the Rules, could only be filled as per the Rules as they stood prior to amendment. Dealing with the contention, Supreme Court inter alia held as under:

When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr. Mehta to a decision of this Court in the case of *N.T. Devin Katti v. Karnataka Public Service Commission*. In that case after referring to the earlier decisions in the cases of *Y.V. Rangaiah v. J. Sreenivasa Rao*, *P. Ganeshwar Rao v. State of A.P.* and *A.A. Calton v. Director of Education*, it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules. Though the High Court has referred to these judgments, but for the reasons which are not easily decipherable its applicability was only restricted to 79 and not 171 vacancies, which admittedly existed. This being the correct legal position, the High Court ought to have directed the respondent to declare the results for 171 posts of Assistant Accountants and not 79 which it had done.

9. We are conscious of the view which has been taken by Supreme Court in some other cases including *Rajasthan Public Service Commission Vs. Chanan Ram and Another*, and a recent decision in *Deepak Agarwal and Another Vs. State of Uttar Pradesh and Others*, . In *Rajasthan Public Service Commission (supra)*, an advertisement was issued for appointment to 23 posts of Assistant Director (Junior); the last date of submission of applications was 31.12.1993. But on 28.12.1993, the State Government asked the Rajasthan Public Service

Commission, which was to undertake the recruitment process, not to proceed with the recruitment because the relevant Recruitment Rules were being amended. On 19.4.1995, the Rajasthan Government issued a notification amending the relevant Rules. As a result of the amendment, the erstwhile post of Assistant Director (Senior) ceased to exist and in its place, came the post of Assistant Director simplicitor. The said post after the amendment had to be filled in by 100% promotion. The posts of Assistant Director (Junior) were replaced by the newly created post of Marketing Officers, which were to be filled up 50% by promotion and 50% by direct recruitment. A fresh advertisement was thereafter issued by the Commission for recruitment of eligible candidates to fill up 26 posts in the newly created cadre of Marketing Officers. A Writ Petition was filed in the High Court contending therein that the petitioner was entitled to be considered in the light of the first advertisement, qua vacancies, which already existed at that time and the amended Rules could not be pressed in service for filling up those earlier vacancies. The learned Single Judge decided against the petitioner, but, the Division Bench took a contrary view and held that the existing vacancies were to be filled up as per the Rules which existed at the time when those vacancies had occurred. Allowing the appeal filed by the Commission, Supreme court inter alia observed that the old vacancies which were to be filled pursuant to old Recruitments Rules, no longer existed after the amendment and therefore there would be no occasion to fill up those vacancies by applying the earlier Rules despite the fact that the existing vacancies were carried forward and merged with further vacancies in the newly created posts of Marketing Officers. The respondent before the Supreme Court relied upon the decision in Rangaiah (supra) in support of his contention that the old vacancies were to be filled in terms of the Rules which existed at the time the vacancies had occurred. Rejecting the contention, Supreme Court inter alia held as under:

x x x The said decision obviously cannot apply on the facts of the present case for two reasons. Firstly, this is not a case of promotion but direct recruitment to the advertised posts and secondly the scheme of the A.P. Rules considered by the Court in that case cast a statutory duty and obligation on the part of the appointing authority to prepare panels of eligible candidates year wise in connection with the vacancies then existing and if they had failed in that statutory duty and obligation they could legitimately be called upon to carry out that obligation and while doing so for preparing the panels for the earlier years the relevant rules then existing had to be kept in view. But even apart from these two distinguishing features one additional salient aspect of the matter is that these panels were to be prepared for filling up vacancies by promotion to the posts of Sub-Registrars Grade II. The said posts continued to exist in the cadre and the only question was how the vacancies in the said existing posts had to be filled in by promotion by preparing panels for the relevant years. As we have seen earlier in the present case the old posts of Assistant Directors (Junior) had ceased to exist. Therefore, there remained no occasion for proceeding with recruitment to such non-existing posts pursuant to the earlier stale and

infructuous advertisement of 05.11.1993

The Court also distinguished its decision in *B.L.Gupta (supra)* noting that in that case the post in question was a promotional post, which had not ceased to exist in the hierarchy of service echelon. The Court was of the view that its earlier decision in *Jai Singh Dalal and Others Vs. State of Haryana and Another, ,* where the Court had held that when the special process of recruitment had not been finalized and culminated into select list the candidates did not have any right to appointment, would squarely apply. In taking this view Supreme Court also relied upon its earlier decisions in *State of M.P. and Others Vs. Raghuveer Singh Yadav and Others, and J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., .*

In *Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, ,* Government of Andhra Pradesh decided in the year 1988 to amend the Animal Husbandry Service Special Rules, 1977 and also took a conscious decision not to fill up any vacancy till the amendment. The Rules of 1977 were repealed by Andhra Pradesh Animal Husbandry Service Rules, 1996. The Government had not prepared any panel for promotion to the post of Assistant Director for the year 1995-96 in accordance with the 1977 Rules. The Administrative Tribunal, on the application of the respondent before the Supreme Court, directed the Government to prepare and operate such a panel. The Rules of 1977 provided for preparation of a list of approved candidates during the month of September every year, on the basis of estimated vacancies. The panel was valid till the end of succeeding year or till the preparation of a new panel, whichever be earlier. It was not necessary to prepare the panel if the vacancies were not available for a particular period or if the Appointing Authority did not consider it necessary. Relying upon its earlier decisions in *State of Bihar and others Vs. Md. Kalimuddin and others, and Union of India and others Vs. K.V. Vijesh, ,* Supreme Court held that for the reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on relevant date. Dealing with *Rangaiah case (supra)* Supreme Court noted that in that case the Government had merely amended the Rules and applied the amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force whereas in the case before it the Government had taken a conscious decision not to make any appointment till the amendment of the Rules. In *Deepak Agarwal (supra)* the appellants therein challenged the notification whereby they had been rendered ineligible to the promotion of Deputy Excise Commissioner as well as the subsequent notification whereby the private respondents were promoted as Deputy Commissioners. Relying upon *Rangaiah case (supra)*, *P.Ganeshwar Rao (supra)* and *R.Dayal (supra)* they contended that the vacancies which stood prior to the issue of notification are to be filled under the Rules as they existed prior to amendment made on 17.5.1999. The justification given for the amendment in the case was that the Government had taken a conscious decision to exclude the Technical Officers and Statistical Officers from the feeder cadre 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 them for loss of promotion, the pay-scales of these two posts were upgraded to the level of Deputy Excise Commissioner. Relying upon its earlier decisions particularly in K.Ramulu (supra) and Rajasthan State Public Service Commission (supra) as also its earlier decision in Jai Singh Dalal (supra), Supreme Court rejected the contention of the appellants.

10. In Ashok Johri And Another v. NDMC And Others LPA No. 739/2003 decided on 1.3.2005, a learned Single Judge of this Court passed an order directing NDMC to fill up existing vacancies of Executive Engineer (Civil) in accordance with old Rules in force as the new Rules had not come into force. It was noticed that NDMC had not taken any conscious policy decision to follow the proposed amendment when it passed a resolution deciding to fill up the existing vacancies and NDMC was not the final authority to amend the Rules, which required approval of Central Government. Relying upon Rangaiah (supra) and P. Mahendran and others Vs. State of Karnataka and others, and after taking into consideration the decisions of Supreme Court in Ramulu (supra) as also the decision of Supreme Court in Vimal Kumari Vs. The State of Haryana and Others, , it was held by a Division Bench of this Court that the vacancies, which had arisen prior to the coming into force of the new Rules, were to be filled up under the old Rules whereas the vacancies that had occurred thereafter were to be filled up under the new Rules.

11. The propositions of law which emerge from a combined perusal of the above-referred decisions can be summarized as under:-

(a) The general rule is that the vacancies which exist on the date of amendment of rules have to be filled up in accordance with the rules, as they stood prior to amendment, provided the amendment is not retrospective. If the amendment made in the rules is retrospective, even the vacancies which exist on the date of amendment are also required to be filled up as per amended rules;

(b) The Competent Authority may take a decision to amend the rules and fill up all the vacancies in accordance with the amended rules. If such a decision is taken by the Competent Authority, that would justify the delay in making the promotion, against the existing vacancies. In such a case, all the vacancies, including the vacancies which existed on the date of amendment of the rules can be filled up as per the amended rules;

(c) The decision to amend the rules needs to be taken by the authority which is competent to amend the rules and if such a decision is taken by some authority other than the authority competent to amend the rules and the rules are later amended, the vacancies which existed on the date of amendment of the rules have to be filled up in accordance with the rules as they stood prior to amendment.

12. In the case before this Court, there has been no amendment of the rules.

Therefore, the question which arises for our consideration is as to whether any decision was taken by the rule making authority to amend the rules and whether a decision was taken by the Competent Authority to fill up the existing vacancies, in accordance with the proposed amended rules. If such a decision is shown to have been taken by the authority competent to amend the rules, there would be justification for not filling up the existing vacancies and in that case, it may be immaterial if the amendment ultimately does not materialize. The justification given by the respondent for not making appointment for the vacancy year, 2005 is primarily set out in para 5 and 21-22 of the counter-affidavit, which read as under:-

That two posts of Deputy Commissioner (Crops) fell vacant w.e.f. 15.02.2004 & 04.04.2004. As per DOP&T instructions, the date for determining eligibility of officers for promotion is to be taken as the first day of the crucial year of vacancy i.e. 01.01.2004 (ANNEXURE R-III). The applicant had not completed 5 years regular service as on 01.01.2004 and hence, he was not eligible for promotion against the aforesaid posts during 2004. Separately, the proposal for revision of the existing Recruitment Rules for the post was under process wherein different agencies were involved. Under the existing RRs Educational Qualification prescribed for Direct Recruits for the post of Deputy Commissioner (Crops) was applicable in promotion also. The senior most AC (Crop) in the feeder grade was not possessing the EQ though he had completed the requisite length of service. Thus, he was not eligible. In the proposed revised RRs, the condition of EQ was not being provided for promote. Hence, DPC proposal against the aforesaid 2 posts remained suspended during 2005. However, since the proposed revision of Recruitment Rules is taking time, the vacancies of 2004 have been carried forward to the Recruitment year 2005 and a proposal of holding the DPC on the basis of existing Recruitment Rules is being sent to UPSC. Meanwhile, the applicant has been given ad-hoc promotion to the grade of Deputy Commissioner (Crops). He will be given regular promotion after DPC is held.

That the contents of para under reply are wrong and denied. It is submitted here that the applicant had not completed 5 years regular service as on 01.01.2004. The applicant was not eligible for promotion against the aforesaid posts during 2004. Separately, the proposal for revision of the existing Recruitment Rules for the post was under consideration wherein different agencies were involved and EQ prescribed for Direct Recruits was not proposed to be made applicable to promote. Therefore, it was considered appropriate to send the proposal on revision of Recruitment Rules.

13. Thus, this is not the case of the respondents that a decision was taken by the authority competent to amend the rules, to amend the rules. In fact, the counter-affidavit does not even disclose as to who was the authority competent to amend the rules. This is also not the case of the respondents in the counter-affidavit that the Competent Authority had taken a conscious decision to fill up the vacancies, which existed at the time of taking such a decision, in accordance with

the proposed amended rules. The respondents do not even say in the counter-affidavit that any decision had been taken to fill up the existing vacancies in accordance with the proposed amended rules. The only averment in this regard is that a proposal was mooted for revision of the existing rules and that proposal remained under consideration. As per the proposal, the condition of Educational Qualification which had been prescribed for Direct Recruits was not to be prescribed for promotees. The proposal to amend the rules cannot be treated at par with a firm decision by the authority competent to amend the rules, to carry out amendment of the rules and a decision by the Competent Authority to fill up the existing vacancies in accordance with the proposed amended rules. If no decision was taken by the rule making authority to amend the rules and no decision was taken by the Competent Authority to fill up the existing vacancies in accordance with the proposed amended rules, there would be no justification for not convening the DPCs to make recommendations for making promotions to the vacancies in terms of the Model Calendar, issued by DOP&T vide its OMs dated 08.09.1998 and 13.10.1998. Merely a proposal by someone to amend the rules, without any decision by the Competent Authority in this regard did not justify postponing the promotion in terms of the Model Calendar issued by DOP&T.

14. Now, we come to the contention of the respondents that the Model Calendar, issued by DOP&T did not have statutory force and, therefore, their failure to convene DPC for the vacancy year 2005 does not give any right to the petitioner to seek promotion effective from a date prior to 04.10.2006, when he was actually promoted. The learned counsel for the petitioner, in support of his contention that the requirement to convene DPC and prepare a Select List in terms of the OMs dated 08.09.1998 and 13.10.1998, is mandatory has relied upon *Union of India and others Vs. N.R. Banerjee and others*, , *P.N. Premachandran Vs. The State of Kerala and Others*, , *Vinod Kumar Sangal v. Union of India (UOI) and Ors.*, (1995) 4 SCC 246 , *Union of India (UOI) and Others Vs. Vipinchandra Hiralal Shah*, and the decision of this Court in *Union of India (UOI) v. Central Administrative Tribunal*, CW 7073/2001, decided on 25.09.2002.

In *Vipinchandra Hiralal Shah* (supra), the Court was dealing with a case of promotion in terms of the Indian Administrative Service (Recruitment) Rules, 1954, which provided for appointment to the service by promotion from amongst the substantive members of a State Civil Service. The promotions were governed by The Indian Administrative Service (Appointment by Promotion) Regulations, 1955. Regulation 3 provided for constitution of a committee to make the selection. Regulation 5(1) provided that the Committee shall ordinarily meet at intervals not exceeding one year and prepare a list of such members of the State Civil Service as were held by them to be suitable for promotion to the Service. When the Selection Committee met in December 1986/January 1987, the vacancies for the years 1982 to 1986 were clubbed for the main purpose of making selections under Regulation 5. This was challenged by the respondent before the Supreme Court on the ground that the Committee was required to

meet every year to prepare a Select List for the vacancies of each year. The Tribunal directed the appellants to prepare Select List from year to year, from 1980 to 1986 and thereafter on the basis of vacancies from year to year without clubbing the vacancies in any particular year and as a part of the exercise to consider the case of the respondent for promotion and also to appoint him in case his name was to figure in the Select List and there was a vacancy with all consequential benefits. The decision of the Tribunal was challenged before the Supreme Court. Relying upon its earlier decision in *Union of India (UOI) Vs. Mohan Lal Capoor and Others*, and *Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others*, , Supreme Court held that in view of the provisions contained in Regulation 5, unless there was a good reason for not doing so, the Selection Committee was required to meet every year for the purpose of making the selection from amongst the State Civil Service officers who fulfilled the conditions regarding the eligibility on the first day of the January of the year in which the Committee met. It was held that failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the Select List for that year and if for any reason the Committee is not able to meet during a particular year, the Committee when it meets next, should, while making the selection, prepare a separate list for each year, keeping in view the number of vacancies in that year after considering the State Civil Service officers who were eligible and who fell within the zone of consideration for selection in that year. The Court specifically held that since the Committee did not meet during the years 1980 to 1985 and when it met in December 1986/January 1987, a consolidated Select List was prepared for the vacancies of the years 1980 to 1986, there was thus a failure to comply with the mandatory requirement of Regulation 5 of the Regulations.

(Emphasis supplied)

The Court, however, did not disturb the appointments of other State Civil Service officers made on the basis of the Select List of December 1986/January 1987 and directed that the vacancy against the respondent will have to be adjusted against the subsequent vacancies falling within the promotion quota.

In *N.R. Banerjee (supra)*, certain vacancies were likely to arise in the Financial Year 1994-95. A proposal for filling up the ensuing vacancies in Ordnance Factory Board was sent to the Ministry on 22.12.1993. The ACRs of the eligible candidates were approved on 16.08.1994 and the DPC was held on 15.03.1995 to fill up the four vacancies which were likely to arise in the year 1994-95. The Tribunal, however, directed the Government to ignore the ACRs for the year 1994. It also directed the DPC to be constituted as on 01.04.1994. This was challenged by the Government before the Supreme Court and it was contended that crucial date for DPC should be April or May, 1995, because the DPC will have to consider the ACRs for the year, 1994. Rejecting the contention, the Supreme Court, inter alia, held as under:

Though, *prima facie*, we are impressed with the arguments of Shri Altaf Ahmed, on deeper probe and on going through the procedure laid by the Ministry of Personnel and Training, we find no force in the contention. Preparation of the action plan for consideration by the D.P.C. of the respective claims of the officers within the Zone and thereafter for setting in motion the preparation of panel on year wise basis is elaborately mentioned. In case of their failure to do so, what further procedure is required to be followed is also indicated in the rules. It thereby manifests the intention of the rule-maker that the appellant-Government should estimate the anticipated vacancies, regular vacancies and also vacancies arising thereafter due to various contingencies and it should also get the A.C.Rs. prepared and approved. It is also made clear that the D.P.C. should sit on regular basis to consider the cases of the eligible candidates within the zone of consideration. The object is clear that the Government should keep the panel ready in advance so that the vacancies arising soon thereafter may be filled up from amongst the approved candidates whose names appear in the panel.

D.P.Cs. 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 May 13, 1995, it postulates that very often action for holding D.P.C. 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 D.P.C. 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 D.P.C. 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 confirmations during the year in question. It would, thus, be seen that D.P.Cs. 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 D.P.Cs. 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.

It is true that filling up of the posts are for clear or anticipated vacancies arising in the year. It is settled law that mere inclusion of one's name in the list does not confer any right in him/her to appointment. It is not incumbent that all posts may be filled up. But the authority must act reasonably, fairly and in public interest and omission thereof should not be arbitrary.

The preparation and finalisation of the yearly panel, unless duly certified by the appointing authority that no vacancy would arise or no suitable candidate was available, is a mandatory requirement. If the annual panel could not be prepared for any justifiable reason, year wise panel of all the eligible candidates within the

zone of consideration for filling up the vacancies each year should be prepared and appointment made in accordance therewith.

In P.N. Premachandran (supra), there was an administrative delay in convening the DPC. The Government, therefore, made temporary promotions of departmental candidates, pending convening of the DPC. The DPC was later convened on 05.07.1984 and the promotions made from 1964 to 1980 were regularized w.e.f. 1994. This was challenged by the appellant before the Supreme Court in a writ petition before Kerala High Court. The writ petition was dismissed. Dismissing the appeal filed by the writ petitioner, the Supreme Court, inter alia, observed as under:-

It is not in dispute that the posts were to be filled up by promotion. We fail to understand how the appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private respondents herein. It is not disputed that in view, of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their, part. It is also not disputed, that in ordinary course they were entitled to be promoted to the post of Assistant Director's, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect.

In Central Administrative Tribunal (supra), respondents 2 and 3, who were working as SSO Grade became eligible for promotion as Principal Scientific Officer, in the year 1990. Since no DPC was held to consider them for promotion, they filed an OA wherein the Tribunal directed the respondents in the OA (the appellants before Supreme Court) to consider the case of the applicants for promotion expeditiously in accordance with the rules. The DPC was held pursuant to the interim order passed by the Tribunal and respondent No. 4 alongwith another person was appointed as PSO against the vacancy that has arisen in the year 1998. The Tribunal vide subsequent order dated 06.06.1995 directed the respondent in the OA to consider the case of the applicants for promotion strictly in accordance with the extent rules/instructions on the subject in terms of its earlier order dated 24.04.1991. A DPC was subsequently held and respondents 2 and 3 were provisionally appointed as PSOs vide order dated 19.8.1996. The OA was later dismissed on 22.02.2000. A seniority list was circulated assigning the seniority of respondents 2 and 3 from 1996. They, however, wanted seniority from the year 1990, for which year they were empanelled, on the ground that they were not responsible for the delay in holding of DPC and further delay in implementation of the decision of the DPC. Another OA was filed by them which

was allowed observing that DPC was required to be held every year and if delay was caused in holding DPC, not because of the applicants or any other justifiable reason like the stay order of a Court, etc., the respondents 2 and 3 could not be made to suffer. In taking this view, the Tribunal relied upon the decision of the Supreme Court in N.R. Banerjee(supra). Rejecting the writ petition, the Court, inter alia, held as under:-

When the department fails in its duty to hold assessment board which are to meet every year, it cannot take advantage of its own wrong. Respondents No. 2 and 3, in instant case became eligible for promotion to the next higher post of director after rendering ten years as PSO although they became eligible as PSO in 1990 and although as per the Government's own directive assessment board should have met that very year, the DPC was held in 1996. If 1996 is granted as the year of seniority, respondents No. 2 and 3 are bound to suffer. On the other hand, had they been granted promotion in 1990 they would have become eligible. It is this hardship which is taken care of by the Supreme Court in N.R. Banerjee's case (supra) while holding that in such cases the order of eligibility should be treated as seniority.

The Court, however, protected the seniority of respondent No. 4 who was senior to respondents 2 and 3 and had been further promoted as director, whereas respondents 2 and 3 were still PSOs.

In Vinod Kumar Sangal (supra), no DPC meeting took place from 1979 to 1984. The appellant before this Court, in support of his contention that DPC was required to meet every year, placed reliance on the OM dated 24.12.1980, issued by the Government of India, Ministry of Home Affairs (Department of Personnel and Administrative Reforms), which provided for meeting of DPC at regular interval for preparation of Select List unless the Appointing Authority certified that there were no vacancy to be filled during the year. It further provided that if the DPC, for reasons beyond control, could not be held in any year, even though vacancies arose during that year, the first meeting held thereafter should determine the actual number of vacancies that arise in each of the previous years and the actual number of regular vacancies proposed to be filled in the current year separately and prepare a Selection List for each of the years starting with the earliest year onwards. It further stipulated that DPC should 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. The explanation given by the respondents for not holding DPC was the reorganization of the department which was under process during that period. Supreme Court was of the view that in view of the said OM, the DPC was required to make separate selections for the vacancies for the years 1980, 1982 and 1983. Noticing that DPC had bunched together all the vacancies for the years 1979 to 1985 which had resulted in enlargement of the field of choice for the purpose of selection. Supreme Court found the grievance of the appellant to be justified because had separate selection been made for the vacancies which

occurred in the years 1980, 1982 and 1983, the field of choice would have been much more restricted and the appellant would have had better chances of being selected. The Supreme Court, therefore, directed to convene a DPC, for considering the appellants for selection against the vacancies which had occurred in the years 1980, 1982 and 1983, as per OM dated 24.12.1980. It was further held that in case the appellant was selected for such promotion against any of these vacancies, he would be regularly promoted with all consequential benefits with effect from the date when six persons were selected by the DPC in the year 1985 were promoted.

In *S.K. Murti v. Union of India & Ors.* WP (C) 14263/2004 decided by a Division Bench of this Court on 5.10.2010, the Office Memorandum applicable to the case provided in-situ promotion under Flexible Complementing Scheme to be effected each year. The circular mandated that the assessment should be made well in advance keeping in view the crucial dates being 1st January and 1st July with effect from which the Flexible Complementing Scheme in-situ promotions had to be effected. The Office Memorandum also stipulated that no promotion should be granted with retrospective effect. However, the Assessment Boards had to be constituted well in advance keeping the crucial dates of 1st January and 1st July of each year to effect promotions. It was held by this Court that the benefit of in-situ promotion was required to be granted to the petitioner w.e.f. 1.1.1999 when he became entitled for it instead of 19.9.2000, the date on which such promotion was granted to him by the respondents. A SLP being SLP (Civil) CC 6864/2011 filed by the respondents before this Court, was dismissed by the Supreme Court vide its order dated 2.5.2011. Dismissing the SLP, Supreme Court inter alia held as under:

The respondent who was working as Scientist Grade-D in the Botanical Survey of India became eligible for promotion under FCS with effect from 1.1.1999. However, on account of delayed convening of the Departmental Review Committee/Selection Committee, his promotion was delayed and by an order dated 20.10.2000, he was promoted with effect from 19.9.2000.

x x x

It is not in dispute that vacancies existed when the Departmental Review Committee considered the case of the respondent and other similarly situated persons for promotion. It is also not in dispute that in terms of paragraph 51.25 of the V Pay Commission Recommendations, the Departmental Review Committee/Assessment Board was required to meet every six months i.e. in January and July and the promotions were to be made effective from the date of eligibility. Therefore, it is not possible to find any flaw in the direction given by the High Court.

15. 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 OM's 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 OM's is to ensure that the work of the Government does not suffer due to the posts remaining vacant, without any reasonable justification.

16. This is not the case of the respondents that OM's dated 08.09.1998 and 13.10.1998, issued by Government of India are not binding on them. The OM's, 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 OM's 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.

17. We are unable to accept the contention that failure of the respondents to adhere to the Model Calendar suggested in the OM's 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.

18. In the case before us, admittedly, there were two vacancies in the cadre of Deputy Commissioner (Crops) as on 01.01.2005. No decision was taken by the rule making authority to amend the Recruitment Rules for the post of Deputy Commissioner (Crops). No decision was taken by the appointing authority, to withhold promotions against the vacant post of Deputy Commissioner (Crops) till there was amendment to the Recruitment Rules. The impression we gather from the counter-affidavit of the respondents is that though a proposal was mooted by someone in the Department, to amend the Recruitment Rules, it was not approved by the Competent Authority. Hence, in terms of the time schedule laid down in OMs, the DPC, to make recommendations in respect of the vacancy year, 2005, ought to have met by October, 2004 and the promotion ought to have been finalized by 31.12.2004. Had the respondents adhered to the time schedule laid down in the Model Calendar, the petitioner would have been considered for promotion, for the vacancy year, 2005 sometime in the year 2004 and since he has been found fit for promotion, had the DPC been held in the year 2004, he would have been granted promotion w.e.f. 01.01.2005 which was the crucial date to determine the eligibility for the vacancy year 2005.

19. The case before this Court does not involve any dispute with respect to seniority in the cadre of Deputy Commissioner (Crops). No one has been either promoted or directly appointed as Deputy Commissioner (Crops) between 1.1.2005, when the petitioner became eligible to be considered for promotion, and 26.6.2006, when he was actually promoted. Thus, promotion of the petitioner w.e.f. 1.1.2005 will not adversely affect any other person nor will it disturb the existing seniority. Had someone been appointed or promoted as Deputy Commissioner (Crops) between 1.1.2005 and 26.6.2006, we might have been inclined to protect his seniority, but, that is not the position in this case.

We, therefore, see no good reason for not giving benefit of promotion to the petitioner w.e.f. 1.1.12005.

Conclusion

For the reasons stated hereinabove, the writ petition is allowed by directing the respondents to treat the petitioner promoted as Deputy Commissioner (Crops) w.e.f. 01.01.2005, against one of the two vacancies which had arise in the year 2004 and which were carried forward to the vacancy year 2005.

In the facts and circumstances of the case, there shall be no order as to costs.