**IN THE HIGH COURT OF MADHYA PRADESH**
**AT GWALIOR**

**BEFORE**

**HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA**

**ON THE 5th OF SEPTEMBER, 2022**

**WRIT PETITION (S) No.2343 of 2004**

**Between:-**

**RAVINDRA KUMAR VYAS S/O LATE SHRI HARI BALLABH VYAS RECENTLY RETIRED OFFICE ASSISTANT GRADE-2 B.R. AMBEDKAR POLYTECHNIC COLLEGE, GWALIOR, R/O DANAOLI, GWALIOR.**

**…......PETITIONER**

***(BY SHRI B.B. SHUKLA – ADVOCATE)***

**AND**

1. **STATE OF MADHYA PRADESH THROUGH – THE SECRETARY TECHNICAL EDUCATION & TRAINING DEPTT. BALLABH BHAWAN, BHOPAL.**

2. **DIRECTOR TECHNICAL EDUCATION 4TH FLOOR SATPUDA BHAWAN, BHOPAL.**

3. **PRINCIPAL, DR. B.R. POLY. TECH. COLLEGE, GWALIOR.**

**….....RESPONDENTS**

***(BY SHRI JITESH SHARMA – GOVERNMENT ADVOCATE)***

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*This petition coming on for hearing this day, the Court passed the following:*

**ORDER**

This petition under Article 226 of the Constitution of India has been filed seeking the following reliefs:-

> “(a) The respondents may kindly be commanded to fix seniority of the petitioner and further he may kindly be awarded benefits of higher pay scale like his other junior colleagues who were promoted earlear to the petitioner without considering the name of the petitioner, and arears of the difference of pay also and other allowances may also be commanded to pay.
>
> (b) That in the alternate the petitioner may be awarded the benefits of higher pay scale since 1999 in compliance of Time Bound Advancement Scheme framed by the State Govt. and arears of difference of pay may also be awarded by fixing salery and their after tension accordingly.
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> (c) Any other service benefits which may be awarded to the petitioner in the facts of circumstances of this case may also be awarded with costs.”

2. It is submitted by the counsel for the petitioner that he was appointed on the post of LDC on 1/5/1965. A list for promotion of LDC was issued on 29/5/1985 and since the name of the petitioner was not mentioned in the same, therefore, he made a representation and the respondents after realizing their mistake also granted promotion to the petitioner by order dated 5/2/1986 and accordingly, he was promoted to the post of UDC with consequential relief like seniority. Thereafter, by

order dated 3/8/1988 UDCs were promoted to the post of Accountant, but the petitioner was not promoted and accordingly, the petitioner submitted his representation and they did not correct their mistake and ultimately, the petitioner was promoted by order dated 26/11/1996, but the petitioner was not given seniority. The petitioner represented the non-grant of seniority and specifically clarified that unless and until his due seniority is given, he would not accept the promotion. Thereafter, on 31/3/2002 an adverse entry was made in his service book on the allegations that the petitioner is not keeping the files and records properly with ulterior motive and the said entry was made with an intention to deprive the petitioner of the benefit of seniority, promotion and time bound advancement scheme. The adverse entry was communicated, which was replied by the petitioner on 12/11/2002. The petitioner has retired w.e.f.31/5/2004 and on the same day the impugned order dated 31/5/2004 was issued and the benefit of Kramonnati was denied. It was the case of the petitioner that although the petitioner has retired, but the claims of the petitioner have not been decided till the date of filing of the petition. Thus, it is the case of the petitioner that the action of the respondents in not awarding seniority and promotion from the date of his junior is bad in law. The petitioner was also not awarded the benefit of time bound advancement scheme as per the circular issued by the Government in the year 1999. It is submitted that either the seniority of the petitioner on the post of UDC should have been fixed from 1996 or he should have been awarded the benefit of time bound advancement scheme.

3. The respondents have filed their return and submitted that the petitioner was appointed on the post of LDC and he submitted his

resignation from the said post on 2/1/1985 to take effect from 1/5/1985. His resignation was accepted by order dated 21/5/1985 and accordingly, the name of the petitioner was not sent for consideration of his promotion to the post of UDC in the departmental promotion committee, which was held on 2/5/1985. Therefore, the petitioner is incorrect in saying that the respondents had deliberately not considered the petitioner for promotion in the year 1985. Later on, at the request of the petitioner, he was taken back in service and, therefore, his name was sent and he was considered by the DPC, which was held on 28/12/1985 and on the basis of the recommendation, the petitioner alongwith other persons was promoted on the post of UDC vide order dated 5/2/1986 and accordingly, the petitioner joined as UDC on 1/5/1986. For promotion of the UDC to the post of Accountant, three years experience as UDC is required. The DPC was convened on 31/7/1988 and by that time the petitioner was not having three years' experience as UDC, therefore, neither his name was sent nor was considered by the DPC and the eligible employees were promoted on the post of Accountant. The petitioner submitted his representation which was rejected on the same ground by order dated 9/12/1988. Therefore, the contention of the petitioner that his juniors were promoted by superseding him is incorrect and not sustainable. After the petitioner became entitled for his promotion to the post of Accountant, his name was considered by the next DPC held in the year 1996 and on the recommendation, the petitioner was promoted to the post of Accountant by order dated 26/11/1996, but the petitioner refused to accept this promotion and did not join on the promoted post and submitted a representation on 5/10/1996 claiming that he should be

promoted to the post of Head Clerk which was forwarded by the Principal, Government Polytechnic, Gwalior vide letter dated 13/1/1997. The State Government has framed the time bound advancement scheme on 19/4/1999. Since the petitioner had not accepted his promotion order, therefore, he is not entitled for the benefit of the scheme.

4. The petitioner filed his rejoinder and claimed that the petitioner had applied for voluntary retirement, but the same was withdrawn after submitting an application. It is submitted that withdrawal was accepted by order dated 25/5/1985, whereas the list of promotion was issued on 29/5/1985 and, therefore, a false plea has been taken. It is submitted that so far as the stand taken by the respondents that the petitioner was not having the minimum experience of three years on the post of UDC is concerned, it was the mistake on the part of respondents because they failed to perform their duties in not allowing the petitioner to function as Accountant in due course as per the seniority and term. DPCs were held on 11/7/89, 28/1/1991 and 17/1/1994, but in those DPC the name of the petitioner was not considered, whereas he had already completed his three years in the year 1989.

5. The respondents filed their additional return and denied that no DPC was held on 11/7/1989, 28/1/1991 and 17/1/1994. It is claimed that the actual DPC was held on 15/6/1989 and 20/6/1989, but the name of the petitioner was not placed before the DPC because he was above 45 years of age and he was not a trained Accountant. Next DPC was held on 17/12/1990 and as per the revised rules in 5th Pay Commission, two posts of Accountant were created, i.e. one for trained Accountant and another for untrained Accountant, and the name of the petitioner for untrained

Accountant was also placed before the DPC, but the petitioner was at serial No.65, whereas only 13 posts were available for promotion and, therefore, the employees senior to the petitioner were promoted and the petitioner could not be promoted. Thereafter, the DPC was held on 12/10/1993 and the name of the petitioner was at serial No.66, while there was total 17 posts and, therefore, as per the recommendation of the DPC, the persons who were senior to the petitioner were promoted. Again in the year 1996 the DPC was held and the name of the petitioner was considered and recommended for promotion and accordingly, he was promoted on the post of Accountant vide letter dated 16/11/1996, but the petitioner did not accept this promotion and refused to join on the promoted post. Thus, it is the case of the respondents that the name of the petitioner was considered by the DPC on 17/12/1990, 12/10/1993 as well as in the DPC held in the year 1996, but looking to the limited number of seats, the petitioner could not be promoted in the year 1990 or 1993.

6. Considered the submissions made by the counsel for the parties.

7. It appears that the petitioner did not approach this Court with clean hand and he did not disclose in the writ petition that he had either resigned or had opted for voluntary retirement which was accepted by the respondents in the year 1985. From the letter dated 25/5/1985, it is clear that the petitioner had made an application for voluntary retirement on 2/1/1985. According to the respondents, the said request was to become effective w.e.f.1/5/1985, whereas the meeting of DPC was held on 2/5/1985, i.e. after the voluntary retirement had come into existence. Thereafter, it appears that the petitioner made a prayer for withdrawal of the order of acceptance of voluntary retirement and the respondents by

adopting a lenient view, withdrew the said order dated 21/2/1985 by passing an order dated 25/5/1985.

8. Be that as it may.

9. The crux of the matter is that the petitioner was given promotion to the post of Accountant, but the said order was not accepted by the petitioner and he did not join at the promoted post.

10. So far as the relief no.1 which has been sought by the petitioner for fixing the seniority of the petitioner as well as to award the benefits of higher pay scale which have been given to other junior colleagues is concerned, it is clear that the petitioner was granted promotion to the post of UDC on 5/2/1986, whereas the DPC for promotion of the UDCs to the post of Accountant was held on 31/7/1988. The undisputed fact is that the minimum requirement for promotion to the post of Accountant is three years experience as UDC. According to the respondents, the petitioner joined as UDC on 1/5/1986. Thus, it is clear that the petitioner was not having three years' experience on 31/7/1988, i.e. when the DPC was held, therefore, the name of the petitioner was rightly not considered by the said DPC.

11. It is the case of the respondents that in the subsequent two DPCs which were held on 17/2/1990 and 12/10/1993 the name of the petitioner was considered and he was placed at serial no.65 in the recommendation made by the DPC held on 17/2/1990 and at serial no.66 in the recommendation made by the DPC held on 12/10/1993. Since only 13 and 17 posts respectively were available for promotion, therefore, the petitioner could not be promoted. Later on, in a recommendation made by the DPC convened in the year 1996 the petitioner was promoted.

Thus, it is clear that there was no error on the part of respondents in not granting the promotion, as claimed by him. Since the juniors were not superseded, therefore, he is not entitled for promotion from the date on which his juniors were promoted and he is also not entitled for the arrears of any higher pay scale. Furthermore, the petitioner has not impleaded any of his juniors in the writ petition. It is the case of the petitioner that he was denied promotion in the year 1990 and 1993, but the present petition was filed on 22/9/2004, i.e. after 14 long years as well as after his retirement.

12. The Supreme Court in the case of **Ghulam Rasool Lone v. State of J&K** reported in **(2009) 15 SCC 321** has held as under:-

> **11.** There cannot be any doubt whatsoever that keeping in view the equal protection clause contained in Article 14 of the Constitution of India as also Article 16 thereof, all the employees should be treated equally. Equality clause, however, must be enforced in legality and not illegality.
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> **12.** There cannot furthermore be any doubt that Article 14 is a positive concept. The Constitution does not envisage enforcement of the equality clause where a person has got an undue benefit by reason of an illegal act. In *Panchi Devi* v. *State of Rajasthan* [(2009) 2 SCC 589 : (2009) 1 SCC (L&S) 408] this Court held: (SCC p. 591, para 9)
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> > "*9.* … Article 14 of the Constitution of India has a positive concept. Equality, it is trite, cannot be claimed in illegality. Even otherwise the writ petition as also the review petition have rightly not been entertained on the ground of delay and laches on the part of the appellant."
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> **13.** The Court in a given case may be inclined to pass similar order as has been done in the earlier case on the basis of equality or otherwise. The discretionary jurisdiction under Article 226 of the Constitution

may, however, be denied on the ground of delay and laches.

**14.** It is now well settled that who claims equity must enforce his claim within a reasonable time. For the said proposition, amongst others, we may notice a decision of a three-Judge Bench of this Court in *Govt. of W.B.* v. *Tarun K. Roy* [(2004) 1 SCC 347 : 2004 SCC (L&S) 225] , wherein it has been opined: (SCC pp. 359-60, para 34)

> "*34*. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in *Debdas Kumar* [*State of W.B.* v. *Debdas Kumar*, 1991 Supp (1) SCC 138 : 1991 SCC (L&S) 841 : (1991) 17 ATC 261] . *The plea of delay, which Mr Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents*. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law."
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> (emphasis supplied)

**15.** The question yet again came up for consideration before this Court in *NDMC* v. *Pan Singh* [(2007) 9 SCC 278 : (2007) 2 SCC (L&S) 398] wherein it has been observed: (SCC p. 283, para 16)

> "*16*. There is another aspect of the matter which cannot be lost sight of. The respondents herein filed a writ petition after 17 years. They did not agitate their grievances for a long time. They, as noticed herein, did not claim parity with the 17 workmen at the earliest possible opportunity. They did not implead themselves as parties even in the reference made by the State before the Industrial Tribunal. It is not their case that after 1982, those employees who were employed or who were recruited after the cut-off date have been granted the said scale of pay. *After such a long time, therefore, the writ petitions could not have been entertained even if they are similarly situated*. It is trite that the discretionary jurisdiction may not be exercised in favour of those who approach the court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction."(underlining [**Ed.**: Herein italicised.] is mine)

(See also *Virender Chaudhary* v. *Bharat Petroleum Corpn.* [(2009) 1 SCC 297] )

**16.** The said principle was reiterated in *S.S. Balu* v. *State of Kerala* [(2009) 2 SCC 479 : (2009) 1 SCC (L&S) 388] in the following terms: (SCC p. 485, para 17)

> "*17*. It is also well-settled principle of law that 'delay defeats equity'. The Government Order was issued on 15-1-2002. The appellants did not file any writ application questioning the legality and validity thereof. Only after the writ petitions filed by others were allowed and the State of Kerala preferred an appeal thereagainst, they impleaded themselves as party-respondents. It is now a trite law that where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the

fact that they are similarly situated to the other candidates who obtain the benefit of the judgment. It is, thus, not possible for us to issue any direction to the State of Kerala or the Commission to appoint the appellants at this stage."

**19.** It is beyond any cavil of doubt that the remedy under Article 226 of the Constitution of India is a discretionary one. For sufficient or cogent reasons a court may in a given case refuse to exercise its jurisdiction; delay and laches being one of them. While considering the question of delay and laches on the part of the petitioner, the court must also consider the effect thereof.

**22.** If at this late juncture the petitioner is directed to be promoted to the post of Sub-Inspector even above Abdul Rashid Rather, the seniority of those who had been promoted in the meantime or have been directly recruited would be affected. The State would also have to pay the back wages to him which would be a drainage of public funds. Whereas an employee cannot be denied his promotion in terms of the rules, the same cannot be granted out of the way as a result whereof the rights of third parties are affected. The aspect of public interest as also the general administration must, therefore, be kept in mind while granting equitable relief.

**23.** We understand that there would be a heart burning insofar as the petitioner is concerned, but then he is to thank himself therefor. If those five persons, who were seniors to Hamiddulah Dar filed writ petitions immediately, the High Court might have directed cancellation of his illegal promotion. This Court in *Maharaj Krishan Bhatt* [*Maharaj Krishan Bhatt* v. *State of J&K*, (2008) 9 SCC 24 : (2008) 2 SCC (L&S) 783] did not take into consideration all these aspects of the matter and the binding decision of a three-Judge Bench of this Court in *Govt. of W.B.* v. *Tarun K. Roy* [(2004) 1 SCC 347 :

> 2004 SCC (L&S) 225] . The Division Bench of the High Court, therefore, in our opinion was right in opining that it was not necessary for it to follow *Maharaj Krishan Bhatt* [*Maharaj Krishan Bhatt* v. *State of J&K*, (2008) 9 SCC 24 : (2008) 2 SCC (L&S) 783] .

The Supreme Court in the case of **P.S. Sadasivaswamy v. State of T.N.** reported in **(1975) 1 SCC 152** has held as under:-

> …..........Not only Respondent 2 but also Respondents 3 and 4 who were the appellant's juniors became Divisional Engineers in 1957, apparently on the ground that their merits deserved their promotion over the head of the appellant. He did not question it. Nor did he question the promotion of his juniors as Superintending Engineers over his head. He could have come to the Court on every one of these three occasions. A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters. The petitioner's petition should, therefore, have been dismissed in limine. Entertaining such petitions is a waste of time of the Court. It clogs the work of the Court and impedes the work of the Court in considering legitimate grievances as also its normal work. We

> consider that the High Court was right in dismissing the appellant's petition as well as the appeal.

The Supreme Court in the case of **Gian Singh Mann v. High Court of P&H** reported in **(1980) 4 SCC 266** has held as under:-

> **3.** In regard to the petitioner's claim for promotion to the Selection Grade post in the Punjab Civil Service (Judicial Branch) with effect from November 1, 1966, and to a post in the Punjab Superior Judicial Service with effect from May 1, 1967 on the basis that a post had been reserved in each of the services for a member of the scheduled castes, it seems to us that the claim is grossly belated. The writ petition was filed in this Court in 1978, about eleven years after the dates from which the promotions are claimed. There is no valid explanation for the delay. That the petitioner was making successive representations during this period can hardly justify our overlooking the inordinate delay. Relief must be refused on that ground. It is not necessary, in the circumstances, to consider the further submission of the respondents that the provision on which the petitioner relies as the basis of his claim is concerned with the appointment only of members of the scheduled castes to posts in the Punjab Superior Judicial Service and not to recruitment by promotion to that service.

The Supreme Court in the case of **Union of India v. S.S. Kothiyal** reported in **(1998) 8 SCC 682** has held as under:-

> **3.** In our opinion, the admitted facts of this case alone are sufficient to reverse the judgment of the learned Single Judge as well as that of the Division Bench of the High Court. According to the version of Respondent 1 himself, his

> representation against non-promotion as Deputy Commandant was rejected on 10-6-1971, the second such representation made on 19-8-1971 was rejected on 4-11-1974 and the third representation made on 12-4-1977 was rejected on 11-7-1977. It is obvious that on rejection of his representation in June 1971, there was no occasion for Respondent 1 to wait any longer to challenge his non-promotion and, therefore, the filing of the writ petition 8 years thereafter in December 1978, was highly belated and deserved to be rejected on the ground of laches alone in view of the settled principles relating to interference in service matters of this kind in exercise of the power of judicial review. The learned Single Judge as well as the Division Bench of the High Court completely overlooked this aspect. The fact that Respondent 1 waited for several years till he was actually promoted as Deputy Commandant in 1972 and even as Commandant in 1975 and more than three years elapsed even thereafter before he had filed the writ petition, is itself sufficient for the rejection of the writ petition.

The Supreme Court in the case of **Nadia Distt. Primary School Council v. Sristidhar Biswas** reported in **(2007) 12 SCC 779** has held as under:-

> **11.** In the present case, the panel was prepared in 1980 and the petitioners approached the court in 1989 after the decision [**Ed.**: After disposal of the contempt petition in *Dibakar Pal case* on 23-6-1999.] in *Dibakar Pal* [ C.O. No. 11154 (W) of 1989, decided on 13-3-1991] . Such persons should not be given any benefit by the court when they allowed more than nine years to elapse. Delay is very significant in matters of granting relief and courts cannot come to the rescue of the

> persons who are not vigilant of their rights. Therefore, the view taken by the High Court condoning the delay of nine years cannot be countenanced.

The Supreme Court in the case of **U.P. Jal Nigam v. Jaswant Singh** reported in **(2006) 11 SCC 464** has held as under:-

> **12.** The statement of law has also been summarised in *Halsbury's Laws of England*, para 911, p. 395 as follows:
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> "In determining whether there has been such delay as to amount to laches, the chief points to be considered are:
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> (*i*) acquiescence on the claimant's part; and
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> (*ii*) any change of position that has occurred on the defendant's part.
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> Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

The Supreme Court in the case of **Jagdish Lal v. State of Haryana** reported in **(1997) 6 SCC 538** has held as under:-

> **18.** That apart, as this Court has repeatedly held, the delay disentitles the party to the discretionary relief under Article 226 or Article 32 of the Constitution. It is not necessary to reiterate all the catena of precedents in this behalf. Suffice it to state that the appellants kept sleeping over their

rights for long and elected to wake up when they had the impetus from *Virpal Chauhan* [*Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] and *Ajit Singh* [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : JT (1996) 2 SC 727] ratios. But *Virpal Chauhan* [*Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] and *Sabharwal* [*R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] cases, kept at rest the promotion already made by that date, and declared them as valid; they were limited to the question of future promotions given by applying the rule of reservation to all the persons prior to the date of judgment in *Sabharwal case* [*R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] which required to be examined in the light of the law laid in *Sabharwal case* [*R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] . Thus earlier promotions cannot be reopened. Only those cases arising after that date would be examined in the light of the law laid down in *Sabharwal case* [*R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] and *Virpal Chauhan case* [*Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] and equally *Ajit Singh case* [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : JT (1996) 2 SC 727] . If the candidate has already been further promoted to the higher echelons of service, his seniority is not open to be reviewed. In *A.B.S. Karamchari Sangh case* [*Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India*, (1996) 6 SCC 65 : 1996

SCC (L&S) 1346] a Bench of two Judges to which two of us, K. Ramaswamy and G.B. Pattanaik, JJ. were members, had reiterated the above view and it was also held that all the prior promotions are not open to judicial review. In *Chander Pal* v. *State of Haryana* [(1997) 10 SCC 474] a Bench of two Judges consisting of S.C. Agrawal and G.T. Nanavati, JJ. considered the effect of *Virpal Chauhan* [*Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] , *Ajit Singh* [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : JT (1996) 2 SC 727] , *Sabharwal* [*R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] and *A.B.S. Karamchari Sangh* [*Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India*, (1996) 6 SCC 65 : 1996 SCC (L&S) 1346] *cases* and held that the seniority of those respondents who had already retired or had been promoted to higher posts could not be disturbed. The seniority of the petitioner therein and the respondents who were holding the post in the same level or in the same cadre would be adjusted keeping in view the ratio in *Virpal Chauhan* [*Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] *and Ajit Singh* [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239 : JT (1996) 2 SC 727] ; but promotion, if any, had been given to any of them during the pendency of this writ petition was directed not to be disturbed. Therein, the candidates appointed on the basis of economic backwardness, social status or occupation etc. were eligible for appointment against the post reserved for backward classes if their income did not exceed Rs 18,000 per annum and they were given accelerated promotions on the basis of

> reservation. In that backdrop, the above directions came to be issued. In fact, it did not touch upon Article 16(4) or 16(4-A). Therefore, desperate attempts of the appellants to redo the seniority had by them in various cadres/grades though in the same services according to the 1974 Rules or 1980 Rules, are not amenable to judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well.

The Supreme Court in the case of **State of Uttaranchal v. Shiv Charan Singh Bhandari** reported in **(2013) 12 SCC 179** has held as under:-

> **19.** From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time.
>
> **28.** Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the Tribunal and accepted by the High Court.

13. Furthermore, merely because a junior was promoted would not confer any right upon a senior for promotion on that ground only. First of all he is required to prove that he was eligible for promotion under the statutory rules.

14. In the present case, the undisputed fact is that because the petitioner had taken voluntary retirement and after he stood voluntary retired, DPC for promotion from the post of LDC to UDC took place. After the DPC was held, petitioner filed an application for withdrawal of his prayer for voluntary retirement. Although the prayer for voluntary retirement was already accepted by order dated 21/2/1985 and the same had become effective from 1/5/1985, but still the respondents by adopting a lenient view decided to recall the order dated 21/2/1985. Thereafter, the case of the petitioner was considered for promotion and ultimately, he was promoted and he joined at his promoted post of UDC on 1/5/1986, whereas the DPC for promotion from the post of UDC to Accountant was held on 31/7/1988 and as the petitioner was not having experience of three years of the post of UDC, therefore, he was rightly not considered. Under these circumstances, the first prayer for grant of promotion with consequential relief is hereby rejected.

15. It is next contended by the counsel for the petitioner that the petitioner was entitled for time bound advancement scheme. It is the case of the petitioner as well as the respondents that the petitioner was offered promotion, but he refused to accept the same.

16. The next question for consideration is "as to whether the petitioner is entitled for Kramonnati after having refused to accept the promotion or not?"

17. The Supreme Court in the case of **Union of India and others Vs. Manju Arora and another by judgment dated 3/1/2022 passed in Civil Appeal No.7027-7028/2009** has held as under:-

> 11. As can be seen, the benefit of the financial upgradation under the ACP Scheme shall be

available only if regular promotion during the prescribed intervals, 12 years and 24 years, could not be availed by an employee. While Condition no. 5.1 is clear to this effect, the Division Bench unnecessarily referred to condition No. 10 to hold in favor of employees who have refused promotion offered to them. The Court was of the opinion that the employees concerned are entitled to one financial upgradation, even if theyturn down the offer of promotion, as non-acceptance of such promotion would impact only their second upgradation. With such finding, the respondents were held entitled to the relief under the ACP Scheme, although it was a case of refusal of promotion offered to the employee.

12. The learned counsel for the appellant has taken us through the relevant conditions in the ACP Scheme notified on 9.8.1999 and more particularly clause 5.1 and Clause 10 thereof. She has also brought to the notice of the Court, the promotions offered to the employees and their refusal to accept the promotion for their own personal reasons, such as family needs or movement to another station etc.

13. Reading of the ACP Scheme shows that financial upgradation would accrue to an employee only if no regular promotions have been received by her/him at the prescribed intervals of 12 and 24 years respectively. In the entire service career, an employee is entitledto financial upgradation if the concerned employee had to suffer stagnation in the same post without benefit of any regular promotion and, as earlier stated, the O.M. dated 9.8.1999 was introduced as a “safety net” to deal with the problems of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues. But can the benefit of the Scheme be claimed by an employee when she, despite offer

of regular promotion, refuses to accept the same and chooses to remain in the existing grade of her own volition?

14. As can be seen from the records, Manju Arora and Suman Lata Bhatia were offered promotion to higher grade on multiple occasions, but they refused the same and chose to continue in the existing pay scale. The purport of the O.M. dated 9.8.1999 was subsequently clarified by the O.M. dated 18.7.2001 where it was specifically provided that an employee who had been offered regular vacancy based promotion before grant of ACP benefit and the regular promotion was refused, she/he become ineligible to the grant of the ACP benefits. Even without the clarificatory notification dated 18.7.2001, a plain reading of clause 5.1 of the O.M. dated 9.8.1999 makes it abundantly clear that an employee who has opted to remain in the existing grade, by refusing offer of promotion, forfeits the rights to ACP benefits and such employee, on account of refusal, can be considered for regular promotion only after necessary debarment period is over.

15. However, despite the clear wordings in condition 5.1, the purport of the OM dated 9.8.1999 was missed out in the impugned judgment and the learned Court unnecessarily adverted to the words in condition 10 of the O.M. to hold in favor of the employees who have refused promotion for their own personal reasons.

16. We are quite certain that if a regular promotion is offered but is refused by the employee before becoming entitled to a financial upgradation, she/he shall not be entitled to financial upgradation only because she has suffered stagnation. This is because, it is not a case of lack of promotional opportunities but an employee opting to forfeit offered promotion, for

her own personal reasons. However, this vital aspect was not appropriately appreciated by the High Court while granting relief to the employees.

17. It may also be observed that when an employee refuses the offered promotion, difficulties in manning the higher position might arise which give rise to administrative difficulties as the concerned employee very often refuse promotion in order to continue in his/her own place of posting.

18. This Court by **order dated 14/2/2020** passed in the case of **Smt. Premlata Raikwar Vs. State of M.P. and others** decided in **Writ Petition No.22795/2019** has held as under:-

8. The question is no more *res integra*. This Court in the case of **Vishnu Prasad Verma vs. Industrial Court of M.P. By order dated 31.1.2019 passed in W.P.No. 19767/2017** has held as under:

The judgments on which reliance has been placed by the counsel for the petitioner, are distinguishable for the simple reason that in those cases the benefit of Kramonnati was granted and thereafter at a later stage the concerning employee forwent their promotions. Here in the present case, the petitioner has forgone his promotion prior to passing of an order granting the benefit of Kramonnati w.e.f. back date. The petitioner while foregoing his promotion was well aware of the circular dated 23.9.2002.

The respondents have relied upon the circular dated 23.9.2002, in which it is clearly mentioned that in case if a person forgoes his promotion then he would not be entitled for Kramonnati. The circular dated 23-9-2002 is reproduced as under :

"मध्य प्रदेश शासन
सामान्य प्रशासन विभाग
मंत्रालय

क्रमांक एफ.1–1/1/वेआप्र/99

भोपाल, दिनांक 5 जुलाई, 2002

23 सितम्बर, 2002

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मंडल, म.प्र., ग्वालियर,
समस्त विभागाध्यक्ष,
समस्त संभागायुक्त,
समस्त कलेक्टर,
समस्त मुख्य कार्यपालन अधिकारी जिला पंचायत,
मध्यप्रदेश।

विषयः— शासकीय सेवकों के लिये क्रमोन्नति योजना।
संदर्भः— इस विभाग का ज्ञाप क्रमांक एफ 1—1/1/वे आप्र/99, दिनांक 31.03.2001 एवं दिनांक 9.4.2001.

संदर्भित ज्ञापन द्वारा ये निर्देश जारी किये गये थे कि "जिन पात्र कर्मचारियों ने उच्च पदों पर पदोन्नति लेने से या पदोन्नति पद पर जाने से इंकार किया है, वे कर्मचारी क्रमोन्नति योजना के पात्र नहीं होंगें। उन्हें उक्त योजना का लाभ प्राप्त नहीं होगा। "

2. शासन के ध्यान में यह बात आई है कि कुछ शासकीय सेवक क्रमोन्नति योजना के लाभ प्राप्त होने के बाद पदोन्नति छोड़ देते है, क्योंकि उन्हे उच्च वेतनमान का लाभ क्रमोन्नति योजना के अंतर्गत पूर्व से ही प्राप्त होता रहता है।

3. क्रमोन्नति योजना, पदोन्नति नहीं मिल पाने के कारण एक वैकल्पिक एवं तदर्थ व्यवस्था है जो शासकीय सेवक को लम्बी अवधि तक पदोन्नति नहीं मिल पाने के एवज में दी जाती है।

4. राज्य शासन द्वारा विचारोपरान्त यह निर्णय लिया गया है कि ऐसे शासकीय सेवक, जिन्हें क्रमोन्नति का लाभ दिया गया है, को जब उच्च पद पर पदोन्नत किया जाता जाता है और वह ऐसी पदोन्नति लेने से इंकार करता है तो उसे प्रदान किए गए क्रमोन्नति वेतनमान का लाभ भी समाप्त कर दिया जावे। साथ ही, पदोन्नति आदेश में भी इसका स्पष्ट उल्लेख किया जावे कि यदि शासकीय सेवक इस पदोन्नति का परित्याग करता है तो उसे पदोन्नति के एवज में, पूर्व में प्रदान किए गए क्रमोन्नति वेतनमान का लाभ भी समाप्त कर दिया जावेंगा।

5. यह आदेश वित्त विभाग के पृष्ठांकन क्रमांक 1031/1399/02/आर/चार, दिनांक 23.09.2002 द्वारा महालेखाकार, मध्यप्रदेश , ग्वालियर को पृष्ठांकित किया गया है।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,

हस्ता /—
(के.एल. दीक्षित)
अपर सचिव,
मध्यप्रदेश शासन,
सामान्य प्रशासन विभाग"

Stagnation is a situation in which something stays the same and does not grow and develop. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is an acceptable reason for pay differentiation, therefore, Krammonati is granted to an employee by way of stagnation allowance, as the employer is not able to provide promotional avenues to its employees. Thus, in order to avoid work frustration amongst the employees, stagnation allowance is given by awarding higher pay scale. Now the only question for consideration is that whether an employee can waive this right, by refusing promotion or not?

A person may refuse promotion for various reasons. A person may not be interested in taking additional responsibilities attached to the promoted post or he might be already getting higher pay scale or he may not be interested to go to the place of posting etc. In the present case, the petitioner was posted at Gwalior and by order dated 24-4-2003, he was promoted to the post of Daftari and was posted in Labour Court, Damoh. The petitioner by his letter dated 3-5-2003 had forgone his promotion on the ground that Damoh is situated at a distance of 500 Km.s and since, he would not get much financial benefit, therefore, the family of the petitioner would get disturbed. Thus, the petitioner had forgone his promotion, primarily because he was not interested to join at Damoh.

The Supreme Court in the case of **Kanchan Udyog Ltd. Vs. United Spirits Ltd.,** reported in **(2017) 8 SCC 237** has held as under :

"**22.** The learned Single Judge framed an issue also with regard to waiver, estoppel and acquiescence, then answered it in the negative in a singular line, without any discussion. Waiver and acquiescence may be express or implied. Much will again depend on the nature of the contract, and the facts of each case. Waiver

involves voluntary relinquishment of a known legal right, evincing awareness of the existence of the right and to waive the same. The principle is to be found in Section 63 of the Act. If a party entitled to a benefit under a contract, is denied the same, resulting in violation of a legal right, and does not protest, foregoing its legal right, and accepts compliance in another form and manner, issues will arise with regard to waiver or acquiescence by conduct. ........................

**23.** Waiver by conduct was considered in *P. Dasa Muni Reddy* v. *P. Appa Rao*, observing as follows: (SCC p. 729, para 13)

"*13*. Abandonment of right is much more than mere waiver, acquiescence or laches. … Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an

opportunity for choice between the relinquishment and an enforcement of the right in question."

**24.** Waiver could also be deduced from acquiescence, was considered in *Waman Shriniwas Kini* v. *Ratilal Bhagwandas & Co.* observing as follows: (AIR p. 694, para 13)

"*13.* … Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied."

The Supreme Court in the case of **All India Power Engineer Federation Vs. Sason Power Ltd.,** reported in **(2017) 1 SCC 487** has held as under :

**"19.** At this juncture, it is important to understand what exactly is meant by waiver. In *Jagad Bandhu Chatterjee* v. *Nilima Rani* this Court held: (SCC pp. 446-47, para 5)

"*5.* In India the general principle with regard to waiver of contractual obligation is to be found in Section 63 of the Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in *Waman Shriniwas Kini* v. *Ratilal Bhagwandas & Co.*, SCR p. 226 that: (AIR p. 694, para 13)

'*13.* … waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right.'

It is well known that in the law of pre-emption the general principle which can be said to have been uniformly adopted by the Indian courts is that acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of the forfeiture of such a right. So far as the law of pre-emption is concerned the principle of waiver is based mainly on Mohammedan Jurisprudence. The contention that the waiver of the appellant's right under Section 26-F of the Bengal Tenancy Act must be founded on contract or agreement cannot be acceded to and must be rejected."

**20.** In *P. Dasa Muni Reddy* v. *P. Appa Rao*, this Court held: (SCC p. 729, para 13)

"*13.* … Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of

waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent."

The Supreme Court in the case of **Sonel Clocks and Gifts Ltd. Vs. New India Assurance Co. Ltd.** reported in **(2018) 9 SCC 784** has held as under :

**"13.** It is a well established position that waiver is an intentional relinquishment of a right. It must involve conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. It is an agreement not to assert a right. To invoke the principle of waiver, the person who is said to have waived must be fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (See para 41 of *State of Punjab*.) There must be a specific plea of waiver, much less of abandonment of a right by the opposite party."

The Supreme Court in the case of **Babulal Badriprasad Varma Vs. Surat Municipal Corpn.** Reported in **(2008) 12 SCC 401** has held as under :

**"48.** Significantly, a similar conclusion was reached in *Krishna Bahadur* v. *Purna Theatre* though the principle was stated far more precisely, in the following terms: (SCC p. 233, paras 9-10)

"*9*. The principle of waiver although is akin to the principle of estoppel; the difference

> between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

*10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein*. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. *Statutory right, however, may also be waived by his conduct*."

(emphasis supplied)

(See also *Bank of India* v. *O.P. Swarnakar*.)

**49.** In *Ramdev Food Products (P) Ltd.* v. *Arvindbhai Rambhai Patel* this Court observed: (SCC pp. 761-62, paras 73-74)

> "*73*. The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellant Company, could he claim the said right indirectly? The answer to the said question must be rendered in the negative. It is well settled that what cannot be done directly cannot be done indirectly.
>
> *74*. The term 'waiver' has been described in the following words:

'1471. *Waiver.*—Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. … A person who is entitled to rely on a stipulation, existing for

his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. …

It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration."

Thus, it is clear that "Waiver" is the voluntary relinquishment or surrender of some known right or privilege.

If the facts and circumstances of the case are considered, then it is clear that the petitioner was aware of the fact that if forgoes his promotion, then he would not be entitled to claim Kramonnati, but still he decided to forgo his promotion. The judgments on which the reliance has been placed by the petitioner are distinguishable because in those cases the employees had forgone their promotion after grant of Kramonnati, and it was held that if the benefit of kramonnati is withdrawn, then it would result in reduction of pay, therefore, the principle of estoppel has no application in those case.

Thus, it is held that although the right of kramonnati had already accrued in favor of the petitioner on 7-4-2002, but before the same could be declared and could be granted, the petitioner was promoted, which was forgone by him for the simple

> reason, that he was not inclined to join at Damoh, which according to the petitioner was about 500 Kms. away from Gwalior. Thus, it can be said that the petitioner had "waived" his right of getting kramonnati, which had already accrued to him.
>
> Under the facts and circumstances of this case, this Court is of the considered opinion that the respondents did not commit any mistake by refusing to extend the benefit of Kramonnati to the petitioner, after his refusal to accept the promotion, for the simple reason because the Kramonnati is granted in order to encounter the situation of stagnation but where the employee is not the victim of stagnation and if he voluntarily and consciously decides not to take the promotion, then he cannot claim the benefit of Kramonnati.
>
> Accordingly, this petition fails and is hereby **dismissed**.
>
> 9. Thus it can be said that the petitioner had consciously waived his right of getting kramonnati by refusing to accept promotion.
>
> 10. Therefore, in the light of the judgment passed in the case of **Vishnu Prasad Verma (supra)**, it is held that since the petitioner was promoted to the post of Headmaster which was forgone by him, as a result of which it is held that the petitioner had waived his right to get the benefit of Kramonnati which became due to him subsequent to his promotion.

19. Since the petitioner was offered promotion which was not accepted by him, therefore, he cannot claim the benefit of time bound advancement scheme, because it is applicable to only those employees who were the victims of stagnation.

20. Accordingly, the petition fails and is hereby **dismissed.**

**(G.S. AHLUWALIA)**
**JUDGE**

**Arun***