HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Case Number and Parties Name	**WP No.4792/2020** Shailesh Kumar Sonwane Vs. State of M.P. and others **W.P. No.4801/2020** Sarvesh Pachori vs. State of M.P. and others **W.P. No.4808/2020** Mithuan Prajapati vs. State of M.P. and others **W.P. No.6675/2020** Shiv Krishna Garg vs. High Court of M.P.
Date of Order	**09/09/2021**
Bench Constituted	**Division Bench:** **Justice Prakash Shrivastava** **Justice Vishal Dhagat**
Judgment delivered by	**Justice Prakash Shrivastava**
Whether approved for reporting	Yes
Name of counsels for parties	Shri Naman Nagrath, Sr. Advocate with Shri Vikram Singh and Satyendra Jain, Advocates for the petitioners. Shri Piyush Dharmadhikari, Shri B.N. Mishra, Shri Arpan J. Pawar and Shri Ashish Shroti, Advocates for the respondents.
Law laid down	**1. Purpose of wait list:–** A wait list is a list prepared in the selec-tion process by the competent

	authority of eligible and qualified candidates who in order of merit are placed below the last selected candidate. Such lists are prepared either under the Rules or even otherwise mainly to ensure that working in the set up does not suffer if selected candidates do not join for one or the other reason or the next selection or examination is not held soon. **2. Right of the wait list candidate:–** A candidate in the waiting list as per his position in the list has right to be considered for appointment if for any reason the post falls vacant during the validity period of the list. Such a right is not a vested right but it is only a right to be considered for appointment. The appointment authority can deny appointment by giving any justifiable reason. **3. When a select list candidate be denied appointment:**-The appointing authority must give a justifiable or non-arbitrary reason for not filling up the posts from the list of the selected candidates. It is not at the whims and fancies of the State to keep the advertised posts vacant when the select list is operative as the same would run counter to the mandate of Article 14 of the Constitution. Though the justification offered by the State is normally not questioned by the Court but the justification must be reasonable and not arbitrary or capricious. **4. Whether wait list candidate has any legitimate expecta-**

	tion:-The wait list candidate has legitimate expectation for being considered for appointment when the post in question falls vacant. The legitimate expectation of the select list candidate for consideration for appointment when the post in question falls vacant cannot be denied by the State Government by acting arbitrarily or without offering any justifiable reason. **5. If norms can be changed after the commencement of the selection process:**-Once the selection process commences on the basis of certain norms then those norms cannot be changed and the right accrued to a candidate by virtue of the original norms cannot be taken away. The principle that the Rules of game cannot be changed after the commencement of the game applies to the selection process also. **6. Applicability of Rules notified in 2019 to pending selection process**:-The modified Madhya Pradesh District Court Establishment (Recruitment and Conditions of Service) Rules, 2016 notified on 28.06.2019 has no retrospective applicability and Rule 17(3) of these modified Rules has no application to the selection process which commenced under the original Rules. **7. The effect of lapse of select list during the pendency of the writ petition:**–The principle of "*actus curiae neminem gravabit"* i.e. the act of the Court shall prejudice no one applies in such cases and if the

	writ petition is filed during the validity of the select list, the period during which the petition remained pending can be excluded for issuing appropriate direction on establishment of the right.
Significant paragraph numbers	8 to 34

O R D E R
09.09.2021

Per: Prakash Shrivastava, J.

This order will govern the disposal of WP No.4792/2020, W.P. No.4801/2020, W.P. No.4808/2020 and W.P. No.6675/2020 since it is jointly submitted by counsel for the parties that these writ petitions involve common issue in the identical fact situation.

2. For convenience the facts are noted from W.P. No.4792/2020. In the writ petition, the petitioner has prayed for a direction to the respondents to appoint the petitioner on the vacant post of Assistant Grade-III by giving effect to the waiting list and has further challenged the validity of Rule 17(3) of the Rules of 2019.

3. An advertisement dated 02.06.2017 was issued by the respondent No.3 for recruitment to the post of Assistant Grade-III. After the screening, District-wise select list (Annexure P/3) was declared and the waiting list (Annexure P/2) in respect of UR, OBC, SC and ST candidates was also published on 20.09.2018. As per the averment, in the petition, the name of the petitioners find place in the waiting list. Further case of the petitioners is that certain vacancies are still unfilled on account of non-joining of some of the selected candidates. As per the averment made in para 5.7 of W.P.No.4792/2020, the

respondents have cleared the waiting list by making some of the appointments and the petitioner's name has come up from Sr. No.42 to Sr. No.5 in the waiting list and 6 seats in the UR category are still lying vacant. Further case of the petitioner is that since the advertisement was published on 02.06.2017, the result of the examination was declared on 20.09.2018, therefore, validity of the select list will be 18 months in terms of the rules which were prevailing at the time of issuance of advertisement and conduct of examination and the same cannot be reduced to 12 months on the basis of new Rules which have subsequently come in force.

4. The stand of the respondent No.2 and 3 is that though in the Rules of 2016, the validity of the select list was 18 months from the date of declaration of final list but in terms of the subsequent Rules published in the year 2019, the validity period has been reduced to 12 months and justifiable reason exists for reducing the validity period and now the select list has lapsed as the validity period is over.

5. Shri Naman Nagrath, learned senior counsel has submitted that since the petitioners have been placed in the waiting list, therefore, they have a legitimate right of consideration for appointment on the posts which have fallen vacant due to non-joining, resignation, etc. of the selected candidates. In support of his submission, he has placed reliance upon the judgments of Supreme Court in the cases reported in ***(1997) 8 SCC 488 (Surinder Singh and others vs. State of Punjab and another), (1994) Supp. 2 SCC 591 (Gujarat State Dy. Executive Engineers' Association vs. State of Gujarat and others), (1999) SCC Online Rajasthan 241 (Ram Babu Koli Vs. Zila Parishad Sawai Madhopur), (1986) 3 SCC 273 (S.***

Govindaraju Vs. Karnataka SRTC and another) and ***(1995) Supp. 2 SCC 230 (R.S. Mittal Vs. Union of India)***.

He has further submitted that the State cannot act arbitrarily and if the posts are lying vacant, the appointment cannot be denied unless there is a valid justifiable reason. In support of his submission, he has placed reliance on the judgments of Supreme Court in the cases reported in ***(2019) 12 SCC 798 (Dinesh Kumar Kashyap and others vs. South East Central Railway and others), (2010) 7 SCC 678 (East Coast Railway and another Vs. Mahadev Appa Rao and others)*** and ***(2019) 11 SCC 771 (Gagandeep Singh Vs. State of Punjab and others)***.

His further argument is that Rules of Game cannot be changed after commencement of the game. He has submitted that the selection process was initiated under the Rules of 2016, therefore, the entire process is required to be completed under the said Rules and in the midway the Rules of 2019 cannot be applied. In support of his submission, he has placed reliance upon the judgments in the cases reported in ***(1983) 3 SCC 284 (Y.V. Rangaiah and others Vs. J. Sreenivasa Rao and others), (2003) 9 SCC 335/336 (State of Uttaranchal and others Vs. Sidharth Srivastava and others), (1994) 5 SCC 450 (Para 14 & 15) (Union of India and others Vs. Tushar Ranjan Mohanty and others)*** and ***(2010) 13 SCC 467 (State of Bihar and others Vs. Mithilesh Kumar)***. He has further submitted that the Rules of 2019 have not been made retrospective nor they can be inferred to be retrospective and in this regard he has referred to the Repeal and Savings clause of the Rules of 2019. In support of his submission, he has placed reliance upon the judgments in the cases reported in **(2016) 4 SCC 179 (Richa Mishra Vs.**

State of Chhattisgarh and others), ***(2009) 4 Guwahati Law Report 507 (Abdul Hai Ahmed and others Vs. State of Assam and others), (1990) 1 SCC 411 (P. Mahendran vs. State of Karnataka)*** and ***(1987) 3 SCC 516 (Commissioner of Income Tax, U.P. Vs. M/s Shah Sadiq and Sons)***. Arguing on the issue of challenge to the *vires* of the Rules of 2019, he has made limited submission that his grievance is only in respect of retrospective application of the Rules, therefore, he is not questioning the constitutional validity of the Rules.

Learned senior counsel for the petitioners has further placed reliance upon the judgment in the case reported in ***(2006) 2 MPLJ 312 (Kanchan Saxena Vs. State of M.P. and another)*** and has submitted that the right of the petitioners was crystallized on the date of filing of the petitions which were filed before expiry of 18 months. He has also placed reliance upon the judgment of Supreme Court in the case reported in ***(2013) SCC Online MP 6365 (Gopal Singh Gurjar Vs. State of M.P. and others)***.

6. Shri Ashish Shroti, learned counsel for the respondent High Court has placed reliance upon Rule 11 of the Rules of 2016 and has submitted that the requisition from District Establishment is made by 30th of September in each recruitment year for all the posts and has further referred to Rule 12(c) and submitted that examination is conducted between January to April every year and referring to Rule 2(r), he has submitted that "year of recruitment" means year commencing from 1st January to 31st December and in this background, he has submitted that an anomalous position was created as Rule 17(3) of the Rules of 2016 contained the provision about validity of the select list for 18 months whereas the recruitment was required to be made

every years, hence Rules of 2019 have been introduced and the validity period of select list has been reduced to one year. He has further submitted that there is no violation of fundamental right, therefore there is no question of challenging the *vires* of the Rules of 2019 and in this regard he has placed reliance upon the judgment in the case reported in ***(2009) 2 SCC 1 (Mahmad Husen Abdulrahim Kalota Shaikh Vs. Union of India and others)***. He has also submitted that the Rules of 2019 have not been applied retrospectively but these Rules have been applied from the date they have come in force. He has also submitted that by changing the duration of the validity of the select list, there is no change in the Rules of Game and in this regard he has further placed reliance upon the judgment in the case reported in ***(2020) 2 SCC 173 (Anupal Singh and others Vs. State of U.P.)***. Elaborating the meaning of the wait list, he has placed reliance upon the judgment in the matter of ***Gujarat State Dy. Executive Engineers' Association*** (supra). He has also submitted that there is no provision in the Rules of 2016 or 2019 to prepare any waiting list and even otherwise the wait list candidate has no right to be considered. In this regard, he has placed reliance upon the judgment of Supreme Court in the case of ***Anupal Singh and others*** (supra). Shri Shroti has also placed reliance upon the judgments in the cases reported in ***(2004) 2 SCC 681 (Bihar State Electricity Board Vs. Suresh Prasad and others), (2013) 12 SCC 243 (Raj Rishi Mehra and others Vs. State of Punjab and another)*** and ***(1997) 1 SCC 650 (Gajraj Singh and others Vs. State Transport Appellate Tribunal and others)***.

7. We have heard the learned counsel for the parties and perused the record.

8. Undisputedly, the advertisement for recruitment to the post of Assistant Grade-III and other posts was issued on 02.06.2017. The result of the said examination was declared on 20th September, 2018. While declaring the result alongwith the list of the selected candidates, a waiting list was also published. The name of these petitioners finds place in the waiting list. At the time of issuance of the advertisement and publication of the select list and waiting list, the Madhya Pradesh District Court Establishment (Recruitment and Conditions of Service) Rules, 2016 were in force. Sub-rule (3) of Rule 17 of the Rules of 2016 provides for the duration of validity of the list of successful candidates and reads as under:

> *"17(3) **Duration of validity of the final list of successful candidate**: The final list of the successful candidates in the examination in any recruitment year shall be valid upto 18 months from the date of declaration of the final list, but shall become invalid after declaring the results of next years examination."*

Subsequently same Rules were again published in official Gazette on 28.06.2019 with certain modifications. These Rules published on 28.06.2019 are referred to in this order as Rules of 2019. Sub-rule (3) of Rule 17 of the Rules of 2019 provides for validity period of the select list and reads under:

> ***"17(3) Validity period of the select list-** The select list of the successful candidates in the examination in any recruitment year shall be valid upto 12 months from the date of declaration of the select list."*

9. A bare perusal of the aforesaid Rules reveal that under the Rules of 2016, the validity period of the select list was 18 months whereas in the Rules of 2019, the validity period of the

select list has been reduced to 12 months from the date of declaration of the select list.

10. In the present case, the select list was declared on 20th of September, 2018, therefore, 12 months period was to be over on 20th September, 2019 and 18 months period was to be over on 20th March, 2020. The respondents in their reply have taken a stand that the Rules of 2019 will apply and therefore the validity period of the list expired on 20th September, 2019 and during the validity of the select list, the waiting list of UR category was cleared upto Sr. No.42 and after 20th September, 2019, the waiting list cannot be given effect to.

11. In the above factual background, the first issue is as to whether the petitioners who are wait list candidates have any legitimate right of consideration for appointment on the post falling vacant due to non-joining, resignation, etc. of the selected candidates ?

12. A candidate in the waiting list, as per his position in the list, has right to be considered for appointment if for any reason the post falls vacant during the validity period of the list. Such a right is not a vested right but it is only a right to be considered for appointment. The appointing authority can deny appointment for some justifiable reason to such a candidate. In the matter of ***Gujarat State Dy. Executive Engineers' Association***(supra), the Hon'ble Supreme Court has explained the meaning of waiting list by clarifying that a waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. Such lists are prepared either under the Rules or even otherwise mainly to ensure that

the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A wait list candidate has no vested right except the right to claim that he may be appointed if for any reason one or other selected candidates does not join. Supreme Court in the matter of ***Surinder Singh and others*** (Supra) has held that a waiting list cannot be used as a perennial source of recruitment for filling up the vacancy not advertised. The candidate in the waiting list has no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative.

13. In the matter of ***S. Gonvindaraju***(Supra), Supreme Court has held that once a candidate is selected and his name is included in the select list for appointment in accordance with the Regulation, he gets a right to be considered for appointment as and when the vacancy arises. In the matter of ***R.S. Mittal***(Supra), the Hon'ble Supreme Court has further clarified that although a person on the select panel has no vested right to be appointed to the post for which he has been selected, the appointing authority cannot ignore the select panel or on its whims decline to make the appointment. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him keeping in view his merit position then ordinarily there is no justification for ignoring him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel.

14. Thus, from the aforesaid pronouncements, it is clear that if name of a candidate is included in the select list, he has a right to be considered for appointment but the appointment can be

declined for justifiable reason. In the present case, the name of the petitioners were included in the waiting list, the respondents have offered appointment to the candidate upto Sr. No.42 in the waiting list of UR category. The posts are lying vacant against which remaining wait listed candidates can be considered for appointment.

15. In the above factual and legal backdrop, the next issue is as to whether the respondents are justified in denying appointment to the petitioners on the posts which are lying vacant ?

16. The law in this regard is settled that the State must give some justifiable and non-arbitrary reason for not filling up the posts. It is not at the whims and fancies of the State to keep the advertised post vacant when the select list is operative as the same would run counter to the mandate of Article 14 of the Constitution. Though the justification offered by the State is normally not questioned by the Court but the justification must be reasonable and not arbitrary or capricious.

17. The Supreme Court in the matter of ***Dinesh Kumar Kashyap***(Supra) in this regard has held that-

> *"6. Our country is governed by the rule of law. Arbitrariness is an anathema to the rule of law. When an employer invites applications for filling up a large number of posts, a large number of unemployed youth apply for the same. They spend time in filling the form and pay the application fees. Thereafter, they spend time to prepare for the examination. They spend time and money to travel to the place where written test is held. If they qualify the written test, they have to again travel to appear for the interview and medical examination, etc. Those who are successful and declared to be passed have a reasonable expectation that they will be appointed. No doubt, as pointed out above, this is not a vested right.*

> *However, the State must give some justifiable, non-arbitrary reason for not filling up the post. When the employer is the State it is bound to act according to Article 14 of the Constitution. It cannot without any rhyme or reason decide not to fill up the post. The Courts would normally not question the justification but the justification must be reasonable and should not be an arbitrary capricious or whimsical exercise of discretion vested in the State. It is in the light of these principles that we need to examine the contentions of SECR."*

In the matter of ***East Coast Railway and another***(Supra), the Hon'ble Supreme Court has held that though a candidate who has passed an examination or whose name appeared in the select list does not have any indefeasible right to be appointed yet appointment cannot be denied arbitrarily and the select list also cannot be cancelled without giving proper justification. While holding so, Hon'ble Supreme Court has placed reliance upon the Constitution Bench judgment of the Supreme Court in the matter ***Shankarsan Dash vs. Union of India*** reported in (1991) 3 SCC 47 wherein it is held that-

> *"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jatendra*

Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."

In the matter of ***Gagandeep Singh***(Supra), the Hon'ble Supreme Court has taken the view that though no candidate has vested right for appointment but at the same time appointing authority cannot frustrate intention behind and purpose of preparation of select list. Next available candidate in the select list has legitimate expectation for being considered for appointment when the post falls vacant.

18. Thus, it is clear that the legitimate expectation of the select list candidate for consideration for appointment when post in question falls vacant cannot be denied by the Government by acting arbitrarily or without offering any justifiable reason.

19. In the present case, only reason which has been offered by the State Government for denying appointment to the remaining wait list candidates is that the Rules of 2019 had come in force in the meanwhile; therefore, the validity of the select list was curtailed to 12 months from 18 months.

20. In view of the above position, the next issue which arises for consideration of this Court is whether the respondents could have changed the rules of the game after commencement of the process of selection and curtail the validity period of select list ?

21. Once the norms of selection are declared on the commencement of the selection process then those norms cannot be changed and the right accrued to a candidate by virtue of the original norms cannot be taken away. The Supreme Court in the matter of ***Y.V. Rangaiya and others***(Supra), in a case of promotion where the Rules were changed in the midway, has

taken the view that vacancies which occured prior to the amended Rules would be governed by the old Rules and not by the amended Rules. In the matter of ***Siddharth Shrivastava***(Supra), the Hon'ble Supreme Court has considered the scope of power to make laws under Article 309 with retrospective effect and has held that this power cannot be used to nullify a right vested in a person under a Statute or the Constitution. In the matter of ***Tushar Ranjan Mohanty and others***(Supra), in a case where norms for recruitment were changed during the pendency of the selection process has held that norms or Rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process unless specifically the same were given retrospective effect. After referring earlier judgments on the point, Hon'ble Supreme Court in the case of ***Tushar Ranjan Mohanty and others***(Supra) has held that-

> ***"****14. The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.*
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> *15. Respectfully following the law laid down by this Court in the judgments referred to and quoted above, we are of the view that the retrospective operation of the amended Rule 13 cannot be sustained. We are satisfied that the retrospective amendment of Rule 13 of the Rules takes away the vested rights of Mohanty and other general category candidates senior to Respondents 2 to 9. We, therefore, declare amended Rule 13 to the extent it has been made operative retrospectively to be unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution of India. We strike down the retrospective operation of the rule. In the view we have taken on the point it is not necessary to deal with the other contentions raised by Mohanty."*

22. Thus, from the aforesaid analysis, it is clear that once the process of selection had commenced on the basis of the norms prescribed under the Rules of 2016 then in normal circumstances the changed norms relating to curtailing the validity period of select list could not have been applied to the pending process.

23. This takes us to the next issue as to whether the Rules of 2019 can be applied to the pending selection process to curtail the validity period of the select list ?

24. To examine this issue, the Repeal and Savings Clause of the Rules of 2019 needs to be considered which reads as under:

> *"**37. Repeal and Savings**-*
> *All Rules, Orders, Instructions and Circulars corresponding to these Rules, in force immediately before the commencement of these Rules are hereby repealed in respect of matters covered by these Rules:*
> *Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules."*

The Rules of 2019 have not been made retrospective by any express provision. The stand of the respondents is that the Rules of 2019 have been applied from the date they have came in force and therefore in terms of Rule 17(3) of the Rules of 2019, the validity period of the list has been curtailed to 12 months. Hon'ble Supreme Court in the case of ***Richa Sharma***(Supra) has considered the issue if the Rules specified in the advertisement for recruitment process can be departed from and new Rules can have the retrospective effect. In that case, the recruitment had commenced under the Rules of 2000 and subsequently the Rules of 2005 were promulgated,

therefore, the Hon'ble Supreme Court after considering the similar proviso in the Repeal and Savings clause which exists in the present case has held that -

> ***18.*** *The High Court held that the first and second requisitions to commence recruitment process against the vacant seats to the post of DSP were made when the 2000 Rules were in force. Therefore, recruitment was rightly undertaken under the 2000 Rules. The admitted facts are that the process of selection started before the 2005 Rules were promulgated with the requisitions dated 27-9-2004 and 26-3-2005 sent by the State Government to CPSC. At that time, the 2000 Rules were in vogue. For this reason, even in the requisition it was mentioned that appointments are to be made under the 2000 Rules. Further, it is also an admitted fact that the vacancies in question which were to be filled were for the period prior to 2005. Such vacancies needed to be filled in as per those Rules i.e. the 2000 Rules. This is patent legal position which can be discerned from Y.V. Rangaiah v. J. Sreenivasa Rao [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] . As per the facts of that case a panel had to be prepared every year of list of approved candidates for making appointments to the grade of Sub-Registrar Grade II by transfer according to the old Rules. However, the panel was not prepared in the year 1976 and the petitioners were deprived of their right of being considered for promotion. In the meanwhile, new Rules came into force. In this factual background, it was held that the vacancies which occurred prior to the amended rules would be governed by the old Rules and not by the amended rules. The judgment in B.L. Gupta v. MCD [B.L. Gupta v. MCD, (1998) 9 SCC 223 : 1998 SCC (L&S) 532] also summarises the legal position in this behalf. The judgment in P. Ganeshwar Rao v. State of A.P. [P. Ganeshwar Rao v. State of A.P., 1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] is also to the same effect. Para 9 of the judgment laying down the aforesaid proposition of law, is reproduced below: (B.L. Gupta case [B.L. Gupta v. MCD, (1998) 9 SCC 223 : 1998 SCC (L&S) 532] , SCC p. 226)*
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> > *"9. 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 [K.C. Sharma v. DESU, 1997 SCC OnLine Del 128 : (1997) 66 DLT 39] 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 N.T. Devin Katti v. Karnataka Public Service Commission [N.T. Devin Katti v. Karnataka Public Service Commission, (1990) 3 SCC 157 : 1990 SCC (L&S) 446 : (1990) 14 ATC 688] . In that case after referring to the earlier decisions in Y.V. Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] , P. Ganeshwar Rao [P. Ganeshwar Rao v. State*

> *of A.P., 1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957] and A.A. Calton v. Director of Education [A.A. Calton v. Director of Education, (1983) 3 SCC 33 : 1983 SCC (L&S) 356] 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."*

> ***19.*** *No doubt, under certain exceptional circumstances, the Government can take a conscious decision not to fill the vacancies under the old Rules and, thus, there can be departure of the aforesaid general rule in exceptional cases. This legal precept was recognised in Rajasthan Public Service Commission v. Kaila Kumar Paliwal [Rajasthan Public Service Commission v. Kaila Kumar Paliwal, (2007) 10 SCC 260 : (2008) 1 SCC (L&S) 492] in the following words:*

> > *"30. There is no quarrel over the proposition of law that normal rule is that the vacancy prior to the new Rules would be governed by the old Rules and not by the new Rules. However, in the present case, we have already held that the Government has taken conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case."*

> *This position is reaffirmed in State of Punjab Vs. Arun Kumar Aggarwal, (2007)10 SCC 402.*

> ***20.*** *However, as far as the present case is concerned, the State sent the requisition specifically mentioning that the recruitment has to be under the 2000 Rules. This was so provided even in the advertisement. The appellant never challenged the advertisement and contended that after the promulgation of the 2005 Rules the recruitment should have been made under the 2005 Rules and not the 2000 Rules. Therefore, the appellant is even precluded from arguing that recruitment should have been made under the 2005 Rules.*

> ***21*** *Thus, we answer Question (a) by holding that recruitment was rightly made as per the 2000 Rules.*

The normal Rule is that the vacancies which arise prior to the amended Rules would be governed by the unamended Rules and in exceptional circumstances the Government can take a conscious decision not to fill the vacancies under the old Rules. In the present case, neither any exceptional circumstances are shown nor any conscious decision of the respondents based on such exceptional circumstances has been placed on record for

not filling the vacancies under the Rules of 2016. The Division Bench of the Gauhati High Court in the case of ***Abdul Hai Ahmed and others***(Supra) has considered some what similar position and has taken note of the similar though not identically worded the Repeal and Savings clause and provision of the Assam General Clauses Act (which is similar to M.P. General Clauses Act, 1957) about the effect of Repeal and has held that -

> ***"9.*** *As the Rules of 2003 referred to earlier or rules framed under article 309, which repealed the 1982 Rules, also made in exercise of article 309 the effect of such repeal is to be decided in accordance with the provisions of the Assam General Clauses Act, 1915. It can be seen that section 6 seeks to protect the legality of the orders and also the rights and privileges acquired during the subsistence of the repealed enactment. It also preserves the obligations or liabilities accrued during such subsistence. It also declared that any legal proceeding or remedy, etc., initiated during the subsistence of the repealed enactment would continue to be prosecuted as if the repeal never took place. The true import of the proviso to rule 32, in our opinion, is not to affect the operation of section 6 of the General Clauses Act, 1897 or section 6 of the Assam General Clauses Act, 1915, which is substantially similar to section 6 of the General Clauses Act, 1897. The effect of section 6 of the Assam General Clauses Act, in our view, is similar to the effect of section 6 of the General Clauses Act, 1897. No doubt, the Legislature while repealing any law and replacing it by a new law can stipulate such consequences as the Legislature deems fit shall follow such a repeal. If the Legislature is silent about the consequences of the repeal the provisions of the General Clauses Act, 1897 or the Assam Act, 1915 automatically apply by virtue of the declaration contained in section 6. If any provision is made by the repealing enactment declaring the consequences of the repeal the language of such a declaration should be examined in juxtaposition with the language of section 6 of the General Clauses Act, 1897, Assam Act, 1915. Unless the language of the repealing enactment is found to be plainly and expressly contrary to the scheme of section 6 of the General Clauses Act, 1915 this court is not to infer a departure from the principles enshrined under the General Clauses Act. Having regard to the language of the proviso of rule 3 we are not able to perceive any intention of the Legislature (in the present case the Governor acting under article 309) to depart from the scheme of section 6 of the General Clauses Act. In our view, the proviso is more akin to the provisions under section 24 of the General Clauses Act, 1897 or section 26 [26. Continuation of orders, etc., issued under enactments repealed and re-enacted. Where any enactment is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or bye-law, made or issued under the repealed enactment, shall so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed*

to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order, scheme, rule, form, bye-law made or issued under the provisions so re-enacted.] of the Assam General Clauses Act, 1915.

10. *In the matter of recruitment in public service, it is settled law of this Country that "Rules of the game cannot be changed in the midstream". K Manjusree v. State of Andhra Pradesh, (2008) 3 SCC 512]. This is a principle enunciated by the Supreme Court in the background of the requirements of articles 14 and 16 of the Constitution of India as permitting the change of the rules of recruitment midstream would enable the State to arbitrarily eliminate some of the candidates who were otherwise eligible to compete for the post for which the recruitment process is undertaken or alternatively arbitrarily enable the State to enable some of the candidates who were not otherwise eligible to compete in accordance with the law as ir existed on the date when the recruitment process was initiated. It is a principle which is consistent with the general scheme of the consequences of repeal of a law as envisaged under the provisions of the General Clauses Act discussed above. In our view in the realm of public law and more particularly in the context of employment under the State the above referred judgments only declare that notwithstanding the ability of the Legislature in general to alter the scheme of section 6 of the General Clauses Act such an ability in the context of recruitment in public employment is liable to be restricted in view of the demands of articles 14 and 16 of the Constitution of India. Therefore the submission of Mr. Sharma is set aside."*

25. Hon'ble Supreme Court in the matter of ***P. Mahendran***(Supra) in a case where the Rule relating to qualifications for appointment was amended during continuance of the process of selection and the process was subsequently completed under the old Rules, has held that the select list was not vitiated on account of the amendment of the Rules. Considering the issue of retrospectivity, it has been reiterated that every Statute or Statutory Rules is prospective unless it is expressly or by necessary implication made to have retrospective effect. Considering this issue, the Hon'ble Supreme Court has held that -

"5. It is well-settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to

> *be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure. The amending Rule of 1987 do not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary intendment for enforcing the Rule with retrospective effect. Since the amending Rule was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force. The amended Rule could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter."*

26. In the matter of ***M/s Shah Sadiq and Sons***(Supra) while considering the issue of vested and accrued right of set off under the Income Tax Act and Section 6 of the General Clauses Act, 1957, the Hon'ble Supreme Court has held that accrued and vested right acquired under a repealed Act which is neither expressly saved nor expressly or impliedly taken away by the repealing Act, would continue to be effective and enforceable.

27. Thus, we are of the opinion that the right which had accrued to the select list candidates on the basis of their placement in the select list/waiting list prepared under the Rules of 2016 cannot be taken away by subsequent notification of the Rules of 2019.

28. Counsel for the respondents has placed reliance upon the judgment of the Supreme Court in the matter of Mohd. Hussain wherein settled principles have been enumerated which are to be kept in view while examining the constitutional validity of the Repealing Act but in the present case, the petitioner has not

raised any argument about constitutional validity of the Rules of 2019 but has raised a limited issue in respect of applicability of Rules of 2019 in the pending select list, hence this judgment is of no help to the respondents. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the case of ***Anupal Singh and others***(Supra) but in that case there was a revised requisition notifying revised vacancies in different categories of a particular subordinate service, therefore, it was held valid since the same was only intended to rectify wrongful calculation of number of vacancies in different category and to comply with the requisite percentage of quota of reservation in different category as per 1994 Act, hence the said judgment stands on different footing. So far as the submission of counsel for the respondents that there is no provision for preparing the wait list is concerned, the same does not carry any weight as in the present case not only the wait list has been prepared but has also been acted upon by giving appointment upto Sr. No.42 in the UR category of wait list. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the matter of ***Bihar State Electricity Board***(Supra) wherein it is held that in the absence of any Statutory Rules to the contrary, the employer is not bound to offer the unfilled vacancies to the candidates next below the candidates selected for appointment but had not joined but the respondents cannot be extended any benefit on the basis of the said judgment, in view of the settled legal position that the respondents cannot act arbitrarily and deny appointment to a select list candidate without any justifiable reason. Even otherwise, in that case, no wait list was prepared; therefore, it was held that in the absence of the Statutory Rules to the contrary, the employer is not bound to prepare the wait list in addition to the panel of select list candidate, but, in the present

case, not only the wait list has been prepared but it has also been acted upon. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the case of ***Raj Rishi Mehra and others***(Supra), but, in that case, settled position has been reiterated that a wait list candidate is not entitled to appointment against unfilled post as of right. In that case, in the meanwhile, the State Government had already approved fresh recruitment and State Public Service Commission had issued fresh advertisement, therefore, it stands on different footing. Counsel for the respondents has also placed reliance upon the judgment of the Supreme Court in the matter of ***Gajraj Singh and others***(Supra), but in that case also, the Stage Permit was granted under the Repealed Act for a period which was to expire after the commencement of the new Act, therefore, while holding that grant of permit under the new Act is a mere privilege and not a vested and accrued right, the Hon'ble Supreme Court has held that the permit will lapse after the expiry of the period for which it was initially granted unless publication for renewal was pending under Section 58 of the Repealed Act as on the date of commencement of the new Act.

29. Hence, in view of the above analysis, it is clear that since the waiting list has been prepared by the respondents and the appointment upto Sr. No.42 in UR category in the wait list has been made, therefore, remaining candidates also have legitimate expectation and right for consideration of their names for appointment since posts have fallen vacant on account of non-joining or resignation, etc. of selected candidates during the validity of the select list. The respondents without any justifiable reason acting in arbitrary manner cannot deny consideration for such appointment.

30. In the present case, since the selection process had commenced and selection list was prepared under the Rules of 2016, therefore, in terms of Rule 17(3) of the Rules of 2016, the final list of successful candidates will be valid upto 18 months. By virtue of Rule 17(3) of the Rules of 2019 which came into force pending the selection process, the validity period of the select list prepared under the old Rules cannot be curtailed from 18 months to 12 months because it is the settled principle that the norms of process of selection cannot be changed by changing the rules of the game in the middle of the selection process. It is also worth noting that under the Rules of 2019 some of the eligibility conditions have been changed, therefore, the respondents cannot selectively apply Rule 17(3) of the Rules of 2019 relating to validity period of the select list ignoring that if the Rules of 2019 are applied in toto then vested right of other selected candidate will also be taken away due to change of the eligibility condition. Hence, the decision of the respondents to curtail the period of select list to 12 months cannot be sustained and is hereby set aside.

31. The next issue as to whether the petitioners can be granted any relief at this stage in view of the fact that subsequently 18 months period from the date of declaration of select list has already expired ?

32. The 18 months was to expire on 20th of March, 2020. It is worth noting that the present petition being W.P. No.4792/2020 was filed on 20th of February, 2020 when the select list was valid. In the case of ***Ram Babu Koli***(supra), the Hon'ble Supreme Court has considered the issue if any right survives if the list lapses during the pendency of the petition**.** In that case, the writ petition was filed on the date when merit list was

operative and the Hon'ble Supreme Court placing reliance upon the judgments in the matter of ***Surinder Singh and others***(Supra) and **1996(9) SCC 309** has held that the right was subsisting on the date of filing of the writ petition and accordingly allowed the writ petition.

33. In view of the above analysis and having regard to the basic principles of "*actus curiae neminem gravabit" i.e.* the act of the Court shall prejudice no one, the respondents are directed to exclude the period from the date of filing of the petition till the date of this judgment for calculating 18 months validity period of the select list.

34. Having regard to the aforesaid factual and legal position, we are of the opinion that the petitioners have right to be considered for appointment on the posts which are unfilled due to non-joining, resignation, etc. of the selected candidates. Hence, the present writ petition is **disposed of** by directing the respondents to consider the names of the petitioners and other wait list candidates as per their position in the waiting list in accordance with law before the list lapses.

(PRAKASH SHRIVASTAVA)
JUDGE

(VISHAL DHAGAT)
JUDGE

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