

Sunil Bhattacharya Vs. Union of India (Uoi) and anr.

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Court : Central Administrative Tribunal CAT Kolkata

Decided On : Mar-02-2000

Judge : D Dattatreya, S A B.P.

Appellant : Sunil Bhattacharya

Respondent : Union of India (Uoi) and anr.

Judgement :

1. The applicant in this case prays for a direction to the respondents that he is deemed to have been promoted from the Grade of Director (Geology) to the grade of Deputy Director General (Geology) with effect from 20.11.96 i.e. the date from when similar benefits were given to the selected officers under Annexure A/3. He also prayed that this retirement benefits has to be accordingly changed. The other reliefs claimed in this application are not of much importance.
2. The applicant was selected by the Union Public Service Commission and joined the Geological Survey of India as Assistant Geologist on 1.10.63. He was selected for the post of Geologist (Jr.) in 1964. In September, 1971 he was promoted to the grade of Geologist (Sr.). In August, 1985 he was promoted to the Grade of Director (Geology). The applicant was due to retire on 31.12.96. (From the records it is seen that this OA was filed on 30.12.96).
3. It is the case of the applicant that his next promotion is to the post of Deputy Director General (Geology) in the Geological Survey of India. The said post is a selection post and it has to be done according to the recruitment rules. As per the

recruitment rules for the said post it is 100% by promotion failing which by transfer on deputation. The persons who are eligible for promotion are Director (Geology) with 8 years of regular service in the said grade. Copy of the Recruitment Rules is at Annexure A/1. According to the applicant, there are 32 posts of Deputy Director General (Geology) on 23.8.85 and from 1.1.86 he was given the benefit of Selection Grade. The applicant's seniority position is 20 among the serving officers. On 23.8.93, the applicant became eligible for being considered for promotion as Deputy Director General (Geology) as he had completed 8 years of regular service as Director (Geology).

4. A copy of the seniority list is marked as Annexure A/2. It is also stated that from 1991-92 the departmental promotion committee meeting was not held. As per the OM No. 22011/3/91-Estt. (D) dated 13.5.91 it is obligatory on the part of the administration to hold Departmental Promotion Committee meeting every year for making promotions against the vacancies arising every year, thereby the delay in filling up of the vacant post does not cause any injustice to the employees. As per the OMs dated 11.4.89 and 25.1.90 of the Department of Personnel & Training (mentioned in page 6 para 4 (10)) posts which fall within the purview of the ACC no officer should be promoted to a higher post in his own line of promotion unless he would have a minimum service of 3 months before retirement. It is also stated that the delay should be avoided taking into consideration that superannuation likely to come in the meanwhile. In paragraph 4.11 the applicant has given the number of vacancies for the years 1991-92, 1992-93, 1993-94, 1994-95, 1995-96, and 1996-97, totalling 27 vacancies. He has also given the details as to who are going to retire and who are going to be promoted. It is the further stand of the applicant that he ought to have been promoted by 31.8.95 as per the vacancies and the Departmental Promotion Committee meeting ought to have been held and he ought to have been considered for the post of Deputy Director General (Geology) but such steps were not taken. There is inordinate delay in convening the DPC meeting and the further process for making the appointment. Hence the inordinate delay has resulted in his not being given appointment to the promotional post. It is stated that on 29.8.96, the DPC meeting was held and 22 officers were included in the panel for promotion including the applicant. The recommendations were sent to the ACC by the end of the August, 1996. It is stated that one of the 22

officers retired from service on attaining the age of superannuation. It is the contention of the applicant that the ACC has not taken any decision. It seems by the order dated 2.11.96 out of 22 officers in the panel, 19 officers were given promotion. (A copy of the said order is at Annexure. A/3). The applicant's name was not there. The applicant made representation dated 26.11.96 (Annexure A/4) and Anr. representation at Annexure A/5. The applicant was not informed of the reasons as to why his name could not find a place. He was informed that his representation was forwarded to the Secretary to the Government of India, Ministry of Mines, for informing the applicant the reasons for not promoting him (Annexure A/6). The applicant understands that he is having less than 3 months service before his retirement as on 2.11.96, and hence he was not given the benefit of promotion. He states that this is arbitrary, illegal, unfair and unjust violating Articles 14 and 16 of the Constitution of India. Hence this application praying for the above reliefs.

5. In the reply filed on behalf of the respondents almost all facts narrated by the applicant are admitted. The plea of the respondents is that the competent authority did not approve the list for promotion earlier and since the applicant was having less than 3 months service before his retirement on superannuation, his name was not included in the list published on 2.11.96.

6. The applicant filed rejoinder stating that the facts mentioned in the reply are untenable.

7. We have heard the learned Counsel for the applicant and the learned Counsel for the respondents. We have considered the various annexures filed.

8. The first contention raised on behalf of the applicant is that the applicant ought to have been considered for promotion in the year 1994-95 itself, if the DPC meeting was held during that period. The other contention raised is that even if the DPC meeting was not held in that year subsequently the DPC meeting was held in August, 1996 and considered the applicant along with other eligible officers. The applicant was found eligible by the DPC and his name was recommended for promotion. It is seen that the ACC has not moved immediately in the matter and the decision is taken much later and hence the applicant was denied promotion on

the ground that he is having only less than 3 month's service before his superannuation. For the delay the applicant is not responsible. Hence the applicant must be deemed to have been promoted and he is entitled to all the consequential benefits.

9. In support of the above contentions, the applicant has relied on the following judgments of the Supreme Court: 1. Nirmal Ch. Bhattacharjee and Ors. v. Union of India and Ors., 1991 Supp (2) SCC 363. Union of India v. Mohan Singh Rathore and Ors., (1996) 10 SCC 469= 1997(1) SLJ 231 (SC). Union of India v. B.S. Agarwal, JT 1997(8) SC 290=1998(3) SLJ 50 (SC).

10. The respondents contention is that as per the OM dated 11.4.89 and 25.1.90, of the Department of Personnel & Training, as the applicant was having less than 3 months time before his superannuation, the ACC has not approved his case for promotion. As regards the non-holding of DPC meetings earlier, the respondents have contended that there are some Court cases pending and hence DPC meetings could not be held. Therefore there is no violation of any rule or instructions.

11. We have considered the arguments in depth. Before we come to the conclusion with regard to the finding that are going to be given herein regarding the service jurisprudence and the points of law that have to govern the cases in the service jurisprudence, we are making this analysis regarding the responsibility to hold the DPC regularly.

12. A job in Government service is governed by the selection which is followed by appointment and then onwards the process of climbing the ladder for further promotions in the line starts. The above thing ends on retirement on attaining the age of superannuation. Therefore the birth of an employee starts from the date of joining in service and the life in the official career ends on the date of superannuation. In between there are chances to go up in the ladder by way of promotion.

But that will fluctuate. If some cancerous growth is led into the official life of the employee such as Departmental Enquiries, Court Cases, and if the official is

punished, his official life comes to an end. Sometimes the law laid down by the Courts may also come in the way of promotion of an individual. Further if the appointment/promotion is by way of selection, steps are to be taken by the concerned well in advance so that it should not deprive his legitimate consideration for promotion. For selection posts, the suitability, fitness, efficiency, calibre and performance of an employee would be considered for the next promotion by the respective department by holding DPC. For holding a DPC the anticipated vacancies will also be taken into account. The selections will be made from the persons who comes within the zone of consideration, who are eligible to be considered for further promotion and the dead wood would not be considered and they will be removed.

This will be based on the subjective assessment by the DPC which results in the employee getting promotion. That is how the next stage in the official life of an employee begins. Therefore it is the constitutional mandate that every employee if he comes within the zone of consideration for the next higher post, he should be exposed before the DPC and if found suitable by the DPC, he will get the promotion and if unsuitable, remains there, This is the vested right of an employee under Article 14 of the Constitution of India, which is further enlarged by Article 16, which are to be read in conjunction with Article 21, "Right to Life". The process is the Constitutional mandate and not the sweet will and pleasure of the departmental authorities.

The Constitution of India gives direction to the authorities to treat every employee equally for being considered for promotion. If the DPC meetings are held as per the rules, every employee who comes within the zone of consideration will have equal opportunity for promotion and appointment to the next higher post at the time when the employee is ripe for the same. But time in this connection is very essential. If the DPC is not held in time some employees who are in the evening of their official life will not get their promotional chances by efflux of time. If the DPC is convened after some time some more employees who could not come within the zone of consideration will now come within the zone of consideration and the opportunity of getting in the ladder of promotion would be less and therefore an employee may lose his opportunity of getting promotion. In the service

jurisprudence getting promotion is one of the "Life objects-Pride of an employee." The employee has every right to be considered for promotion as per rules.

If the action for convening the DPC meeting is not initiated at the appropriate time, the life span on promotional post is in jeopardy and that cannot be compensated by simply granting the monetary benefits.

Right to hold an office is the prime thing i.e. the status of the job one holds and the salary attached to that post is secondary.

13. For considering this right to hold the office, the related provisions in the Constitution of India are Articles 14, 16 and 21.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

A simple reading of the Article would go to show that the State shall not deny any person equality before law or equal protection of law.

Equality before law in the service jurisprudence is the right to be considered among the persons who are eligible for being considered for promotion is first aspect. The other connotation "equal protection" must be understood to mean that from out of persons who have to be considered the promotion on availability of a vacant post or of a post likely to be vacant in the near future by which time process of DPC will normally be completed and the fundamental right casts a duty on the State to give that protection for being considered by the DPC at the time when the employee is eligible for being considered for promotion. In other words Article 14 of the Constitution is the clog on the arbitrary acts of the executive to hold the DPC whether the authorities like, but it must be held well within time so that the equal protection for that post to be considered is maintained.

14. Article 16 : An analysis of the said Article would go to show that the State shall provide equal opportunity for all the citizens in public employment. It is stated at page 83 of the Shorter Constitution of India 12th Edition - by D.D. Basu on Clause 5 as follows: "The guarantee in Clause (1) is violated only when discrimination or preference is made between persons belonging to the same class or grade or in

the matter of promotion between employees recruited from the same source..." Therefore this goes to show that equal opportunity must be given in the matter of promotion to the employees recruited from the same source.

Further analysis of this would go to show that if at a particular point of time any employee is eligible to be considered for promotion, it should be done at the appropriate time and postponing the same by non-holding the DPC, other persons who are not eligible at the earlier point of time would become eligible to be considered by the DPC when it meets later at a point of time. This would deprive the chances of promotion for those who are eligible at the earlier point of time, and they have to compete with more persons among the eligible persons.

Further by postponing the DPC meeting, the promotional life span would be reduced to some employees among the same class of employees violating the Articles 14 & 16 of the Constitution of India. It is also seen that it was settled that the words employment or appointment are wide enough to include the matter of promotion including promotion to selection posts. It is also seen from the same commentary that Clause 4 (A) has been inserted by the 77th Amendment of the Constitution, in the year 1995.

"No persons shall be deprived of his life or personal liberty except according to procedure established by law." The word "life" has been explained at page 169 of Basu (supra) which reads as under:It would include all those aspects of life which got to make a man's life meaningful complete and worth When once an employee joins the service, the employee will have ambition to go up in the service career and when that employee attains that, it will be having "meaningful life". In other words, getting promotion to higher post is "worth living", and his non-promotion due to non-holding of the DPC at the appropriate time would lead to frustration and mental torture and psychological set back. If a person is eligible to be considered for promotion and he is not considered for such promotion at the appropriate time, that employee will loose interest in the service which may lead to ineffective service in the job. Here comes into picture the theory of unforeseen events. If an employee is not considered for promotion at the appropriate lime by non-holding of the DPC, where is the guarantee that the employee will be alive till

the next DPC meets to decide about that employee's suitability for promotion. Death is certain which may intervene at any point of time and the individual may not live to be considered in the next time. Therefore an employee should be considered at the appropriate time. If the employee dies without being considered for promotion, the status of that employee in the employment is lost for ever and the family of the employee leading a meaningful life, complete life (of employment), contemplated under Article 21 of the Constitution of India are lost. This point should be taken into account by the authorities and the State should take into consideration that when an employee is eligible for promotion and a vacancy is available or is likely to be available shortly that employee must be considered at the appropriate time and if adjudged as suitable for the post he should be given the promotion immediately, to live meaningful employed life. Therefore the State is bound to discharge its constitutional obligations in this manner. It is pertinent to point out here that the language used in Articles 14, 16 and 21 of the Constitution of India is "shall". The word shall indicate "the imperative duty" cast on the State. Non-performing of Duty cast under the Constitution is also violative of fundamental rights. An act need not be positive violation of fundamental rights and if the duty is not performed at the appropriate time as per constitutional mandate, it is also the glaring infraction of Fundamental Rights. .

16. An analysis of the Articles 14, 16 and 21 as above and also the preamble of the Constitution of India, clearly shows social justice is the main thrust which includes upliftment of employees, as well, which includes the consideration of an employee for promotion at the appropriate time. Therefore it is mandatory on the part of the authorities to discharge its duties at the appropriate time, unless the reasons are beyond their Control, because even one day's loss in the service career of an employee on promotion cannot be compensated at any time. As per the saying that "Justice delayed is Justice denied", "Promotion delayed is Promotion denied". In our view the State has to bear the responsibility for the loss of span of life in the promotion post and the State has to be accountable for the same i.e. not holding the CPC in time. State of Punjab and Anr.

v. J.L. Gupta and Ors., 1990 SCC (L&S) 437, that it should be the endeavour of the State that there should be no casual approach which would result in unnecessary litigation and waste of time. In the above case though the facts are different, the preposition laid down by the Supreme Court at page 439 is as follows: "The explanation that Boota Singh decision was not reported and it could not be brought to the notice of the Counsel and therefore, could not be cited before the High Court shows a total casual approach particularly when the State of Punjab itself was the appellant in the said case. Such casual approach results in unnecessary litigation and waste of time besides incurring of unnecessary expenses and waste of public money. We can only express a hope that in further litigants such as State Government would be more careful." Another parametre of this decision is the guidelines that there should not be any casual approach by the State. It equally applies with regard to consideration of an employee for promotion by convening a DPC well within time. Otherwise, the eligible employees will go to Courts questioning that they are affected in their promotional avenues on account of the casual approach of the authorities in not convening the DPC in time resulting in unnecessary litigation, waste of time and money.

18. Reference is also invited to the judgment of the Supreme Court in A.P. Agarwal v. Government of NCT of Delhi and Anr., 2000 SCC (L&S) 206=2000(2) SLJ 123 (SC), which would go to show that State should act within time. Though the above case deals with appointment of a Member to the Sales Tax Appellate Tribunal the preposition laid down by the Supreme Court is that when a duty is cast on the Government to fill up the vacancy as early as possible it should be done immediately. The relevant paragraphs in the above judgment reads as under : "In our opinion this is a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. Even if it is said that the instructions contained, in the office memorandum dated 14.5.87 are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also satisfy the mandatory requirement of the statute. It is not therefore open to the

Government to ignore the panel which was already approved and accepted by it and resort to fresh selection process without giving any proper reason for resorting to the same. It is not the case of the Government at any State that the appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the appellant and launching a fresh process of selection.

"It is well settled that every State action in order to survive must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution of India to the rule of law, the system which governs us (vide *Shri Lekha Vidyarthi v. State of U.P.*)" The above statement of the Apex Court would go to show that the conferment of power to convene necessary DPC meeting for consideration of an employee for promotion "is the duty" and it should be exercised in time so that an eligible employee who would be found suitable will get promotion in time. If the DPC is not convened in time it amounts to arbitrariness and this is not permissible under Article 14 of the Constitution of India. It is only for the purpose of coming to the conclusion that non-convening of a DPC meeting at the relevant point of time when an employee is to be considered is arbitrariness, the decision is relied. This Tribunal is of the opinion that the non-convening of the DPC in time would mean that the authorities have failed in discharging their duties and the non-convening of the DPC in time must be taken to mean as arbitrary action on the part of the concerned authorities.

19. The most relevant judgment to the facts of the case on hand is *Pradip Gogoi and Ors. v. State of Assam and Ors.*, 1999 SCC (L&S) 259.

In the above case an advertisement was made for certain vacancies in the year 1991. On 9.11.93 a select list was prepared and appointments were made and vacancies which existed thereafter could not be filled.

Hence the petitioners therein approached the Court and the Apex Court held as under: "It is settled law that even an eligible candidate has a fundamental right to lay his claim for consideration in his own right for recruitment to an office or post under the State under Article 16(1) of the Constitution....."

The dereliction of duty is seriously eroding the constitutional rights under Article 16(1) and is a source to circumvent the process of selection." According to the above judgment, in the service jurisprudence inaction on the part of the State is stated as dereliction of duty. Applying the said dictum of law if the Departmental Promotion Committee is not convened at the appropriate time, the right of a particular employee for being considered for promotion for that particular post is deprived. They may be selected subsequently. But this is not the law contemplated. This is the clear mandate enshrined in the Constitution of India under Article 16(1).

The March of legal system in India regarding "deficiency in service" is also to be mentioned here. Under the Consumer Protection Act, "deficiency in service", persons who purchases the goods has every right to claim the compensation from the manufacturers who was responsible for the deficiency. A doctor performing an operation without taking sufficient care and caution and without having expertise is liable for negligence and the affected party can claim compensation against that particular doctor. In other words it is "cause". It is settled law that state can be taken to task for the torturous act on its employees. Now the law has progressed so far that if the action of police is found to be illegal, the affected party had every right for the compensation not only from the State but also from the officer who has committed the wrong. These are the few illustrations which go to show that the authorities in the State should discharge their duties as per the Constitutional mandate.

Failure to do so will have to be construed as "deficiency in service" in addition to the infraction of constitutional rights.

Those officers will have to be held personally responsible for that (damage likely to cause) in addition to liability of the State for compensation. The authorities should perform their duties when it is contemplated to be done without postponing it. Therefore the non-convening of the DPC at the appropriate time unless there are reasons beyond their control would amount to negligence on the part of the authorities. There should be a "watch dog" in order to avoid all these complications. This is essential for not only protecting the interest of an employee

but it protects the constitutional obligations of the State also. The authorities should act in time and thereby unnecessary litigations be avoided.

One more facet of this aspect is, if a particular employee is promoted at the appropriate point of time, that employee can show the calibre, capacity and dedication to work in the next promoted post. If that opportunity is not given at appropriate time it is postponed to a future date on account of the non-convening of the DPC for promotion, that employee may loose interest in performing the duties of the present post, with vigour and interest. These are the imbedded aspects if an employee who is eligible for consideration for promotion to the next post, is not considered at the appropriate time by the concerned authorities. We consider the above fact as the guidelines in order to act as a mandatory duty for the concerned authorities to constitute DPC at the point of time when it is required to be constituted and lake a decision one way or the other even without one day's delay.

22. Now coming to the case in hand, the applicant's case as per his pleadings in the application is that he has to be considered for the post of Deputy Director General (Geology) during the years 1994-95. The DPC meeting is convened on 29.8.96, (these dates are material in this case). All the facts stated in the application are admitted by the respondents. The vacancy position has been stated by the applicant year-wise in para4 (11). In the reply in para 6, it is stated that the statements contained in para 4.2 to para 4.11 of the application are substantially correct. This would mean that the vacancy position is admitted by the respondents. According to the applicant he became eligible for consideration for promotion in August, 1993. The vacancy position up to August, 1993 according to the respondents is 7 and the applicant's seniority position is at Sl. No. 20. This is incorrect as seen from the statement made by the applicant. The assertion of the respondents in para 8 is that the procedure for holding the DPC is lengthy one. If that is so, the concerned authorities who are responsible for convening the DPC ought to have taken steps much before for convening the DPC and the DPC meeting ought to have been held in time and the applicant's suitability for promotion as DDG (G) ought to have been considered much earlier. The assertion made in the reply that there are Court cases regarding the convening of the DPC,

is unfounded from the records. Infact, there cannot be any stay for holding a DPC meeting since it will affect a number of persons. On a perusal of the file it is clear that the promotions that are to be made will be subject to the result of the cases. It means there is no prohibition for convening a DPC. Taking shelter under the words "Court cases are pending" is another lapse on the part of the concerned authorities. The very fact that no details are mentioned in the reply nor any stay has been granted by any Court, would go to show that the stand of the respondents is untenable and the reply is an evasive reply in order to get away from the constitutional obligations in discharging their duties. The assertion made in para 9 of the reply that the actual date of convening the DPC meeting is to be given by the Chairman of the DPC and the department has no role to pay is not sound. If the authority concerned is not convening the DPC at the appropriate time it failed in discharging its duties. The authority concerned for not convening the DPC will have to be taken to task for affecting the fundamental rights of a person who is eligible to be considered for promotion at the relevant point of time.

23. In para 14 of the reply, the stand of the department is that the DPC in its meeting held on 29.8.96 recommended the name of the applicant and also one Mr. Dayal for promotion to the post of DDG (G), from the year 1994-95. Though the recommendation date back to earlier years the irreparable loss regarding the status as Deputy Director General (Geology), is caused to both of them. Though they may get salaries fixed notionally, but that is not sufficient. Can they be called as DDG (G) with effect from 1994-95. No. In fact, great distress is caused to the applicant in view of the discussion made in the earlier paragraphs of this judgment.

24. The narration of facts continues. As per the reply, the recommendations of the DPC was Sent for the approval of the competent authority and the competent authority affixed the approval on 1.10.96.

Again dates are material. DPC recommendations were made on 29.8.96 and it was approved on 1.10.96. Admittedly the time gap of 32 days is lost.

In the service career a step in the higher post is something and the number of days lost in issuing the orders cannot be compensated. The mental agony caused to the sufferers during this time gap cannot be compensated.

25. The real position in this case is that the competent authority did not approve the proposal for promotion of the applicant to the post of Deputy Director General (Geology), as the applicant has less than 3 months service before his retirement from the date of issuance of the promotion order. This is as per the OM Nos. 27(4)/EO/89(ACC) dated 11.4.89 and OM No. 22011/11/89 (Estt-D) dated 25.1.90. The above OM reads as under: "Attention is invited to OM No. 27(4)-EO/89(ACC) dated 11.4.89, communicating the order of the Government to the effect that in respect of appointments which fall within the purview of the ACC no officer should be promoted to a higher post in his own line of promotion unless he would have a minimum service of 3 months before retirement. Where, however, a larger minimum service is already prescribed the same will apply. These instructions are hereby reiterated for compliance by all Ministries/Departments. In order that officers approaching superannuation are not denied the promotion due to them subject to this limitation on account of the delay in processing their cases for promotion, Ministries/Departments are requested to ensure that the meetings of DPC are held well in time and proposals for submission to the Establishment Officer of the Department of Personnel & Training well in advance before the date of occurrence of the vacancy." (Emphasis is supplied) These orders stipulate that a promotee should have at least 3 months service in the promoted cadre. The entire crux will lie here. The concerned department is well aware of the date of superannuation of the applicant. The department has not taken proper steps to see that the applicant should not be deprived of his promotion. They ought to have acted on a war footing basis to get the approval of the competent authority to approve the promotion of the applicant and others. If the department or the approving authority has not acted at the appropriate time they cannot be absolved of the constitutional responsibility. By not giving the promotion to the applicant in his own line at the appropriate time, the respondents have violated the Articles 14, 16 and 21 of the Constitution of India. This is a blatant illegality committed by the respondents.

26. The narration further goes. The applicant has already retired from service on attaining the age of superannuation on 31.12.96. Time and tide waits for no man. The time of retirement came in the applicant's case. He lost his status of being Deputy Director General (Geology).

The status of an officer is different from the pecuniary benefit of that office. In this case if the respondents have acted in 1994-95 itself, the injustice would not have been done to the applicant.

Justice delayed is justice denied. The corollary is promotion delayed is promotion denied.

Now the question is whether the authorities can prescribe the minimum period of 3 months service before retirement in respect of appointments which falls within the purview of ACC. This requires thorough investigation. Whether the 3 months' minimum period will make any difference in the discharging of the duties? In our view it is not. The stipulation of 3 months is a restriction not to give promotion to those who are having less than 3 months before retirement to the posts fall within the purview of ACC. The rule must be rational and scientific. Depriving promotion and status of a post at a time when an employee who has been found fit to hold the post, on the ground that the employee is not having 3 months service, is illegal, arbitrary, unjust and unfair. The respondents in their reply do not give any reasons for the fixation of minimum period of 3 months service (in order to effect the promotion), to come to the conclusion that it has any scientific and rational basis to impose this ground of restriction. We are of the view that review should be done with regard to the above OMs basing on scientific and cogent rational reasons to have that kind of the clog. The authorities also have to consider by taking the expert legal opinion whether this clause of limiting the service would not affect the principles enshrined in Articles 14, 16 and 21 of the Constitution.

Though we intend to strike down the said OMs dated 11.4.89 and 25.1.90, of the Department of Personnel & Training, we are of the view that the above OMs should not come in the way of the present applicant to get promotion to the post on the basis of the other reasons given above i.e. not constituting the DPC in time on account of the fault of the authorities themselves for which the applicant should not be denied the opportunity.

Now, what relief the applicant/would be entitled to. As stated in para 9 supra, the applicant relied on the following judgments in support of his relief: Nirmal Chandra Bhattacharjee and Ors. v. Union of India and Ors., (supra). Union of India v. B.S.

Agarwal.

In Nirmal Chandra Bhattacharjee's case, the applicants therein were denied the chances of becoming ticket collectors on account of administrative lapse. It was held at page 366 as follows: "The mistake or delay on the part of the department therefore should not be permitted to recoil on the appellants." Therefore the delay in convening the DPC at the appropriate time and approving the selection by the competent authority should not stand in the way of the applicant for getting promotion as Deputy Director General (Geology). In Union of India v. B.S. Agarwal and Anr.'s case, the Apex Court has held that the date of accrual of vacancy is more definite and certain. The Supreme Court has held as under: "It will only be proper if the concerned authorities remain alive to the urgency in taking proper action in making actual appointments so that such appointment is made at least within 3 months from the date of accrual of vacancy.

In the above cases, the minimum period of 2 years service before retirement as prescribed by the Railways to hold posts like General Manager or equivalent is considered by the Apex Court. Though the validity of the above rule has not been decided in the above case, the Supreme Court has held that the concerned authorities should remain alive in making appointments to such posts within 3 months from the date of accrual of the vacancy. Union of India v. Mohan Singh Rathore and Anr., (1996) 10 SCC 469. In the above case the question decided by the Apex Court is to what relief an individual is entitled to if an injustice is done to the individual and if he retires from service before the approval is given for promotion/appointment/selection. In the above case no deterioration certificate was not sent within time by the concerned Government and therefore the respondent therein lost the chances of appointment to IPS, though he was found suitable and approved by the UPSC for inclusion in the IPS cadre. In the above circumstances, direction was given to the authorities to include the name of the respondent in the appointment notification dated 4.10.98 as a select list candidate and thereby declared that the respondents therein would be entitled to all retiral benefits on that basis.

31. In view of the above legal position the applicant's name must be deemed to have been included in the panel approved for promotion to the post of Deputy Director General (Geology) and the applicant has to get all the benefits of that post with effect from 20.11.96.

32. In the result the OA is allowed and the following orders are passed : (i) It is declared that the applicant shall be deemed to have been promoted along with others as per the promotion letter at (Annexure A/3) dated 20.11.96 and his pay be fixed accordingly.

(ii) The applicant would be entitled for all retiral benefits on the basis of his fixation of pay.

Before parting with the case we would like to make some observations. There should be some rational in fixing the minimum period of service before retirement for the posts which fall within the purview of ACC. The concerned authorities must ensure that DPC proceedings and meetings take place before the date of actual accrual of vacancy and appointment process is completed in all the cases without any fail within 3 months from the date of actual accrual of vacancy and selected candidates get the benefit of promotion from the same date, if not earlier. As per the Supreme Court judgments cited supra the authorities concerned should be vigilant in filling up of the posts which comes within the purview of ACC and act expeditiously so that eligible persons can have the benefit of serving in the higher posts. The Secretary to the Department of Personnel & Training is requested to constitute a cell in each department to monitor such type of cases so that unnecessary litigation and waste of time can be avoided. If the authorities concerned has not acted in time, responsibility has to be fixed on such authorities, but the affected official gets the benefit from the date not later than 3 months of actual accrual of vacancy. The Registry is directed to send the copy of this order to the Hon'ble Secretary to the Department of Personnel & Training for information and action.