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Court : Central Administrative Tribunal CAT Delhi

Decided On : Sep-23-2005

Reported in : (2006)(91)SLJ238CAT

Judge : M a V.K., S Raju

Appellant : Pushpender and ors.

Respondent : Union of India (Uoi) and ors.

Judgement :

1. As the facts are interwoven with identical question of law, for the sake of brevity and to avoid multiplicity, these O.As. are being disposed of by this common order.

2. At the outset, after allowing all the M.As. for impleadment of parties likely to be affected by the outcome of the case and on their statement to forego their right to file reply, they have been accorded an opportunity to address us orally on facts and law.

3. A common challenge has been made in these O.As. to the validity of Ministry of Finance, Department of Revenue, Income Tax Officer Group 'B' Recruitment (Amendment) Rules, 2005 notified on 24.3.2005 deemed to have taken effect from 21.12.2004 on the ground of having caused prejudice and vested right of consideration for promotion of Inspectors to the posts of Income Tax Officers (ITO) without qualifying the departmental test has been denied.

4. In O.A.-811/2005 applicant who was appointed as an Inspector on 27.12.1994 has become eligible for consideration under the recruitment rules notified on 21.12.2004. No DPC was held despite availability of large number of vacancies.

5. In O.A.-1150/2005, applicant No. 1 is a promotee Income Tax Inspector so is applicant No. 2. It is not disputed that they have not passed the departmental examination meant for promotion as ITO.6. In O.A.-1039/2005 there are three applicants. Applicant No. 2 is a direct recruit Income Tax Inspector and has not qualified the departmental examination as applicant No, 3, but applicant No. 1 is a promotee Inspector. All of them have not passed the departmental examination.

7. In O.A.-1309/2005 applicant is a promotee Inspector who has not qualified departmental examination.

8. In O.A.-1627/2005 applicant No. 1 is a promotee Income Tax Inspector and applicant No. 2 is a direct recruit. Both of them have not qualified the departmental examination.

9. In O.A.-1150/2005 applicants No. 1 and 2 belong to reserved category. Background Facts 10. Applicants in all these O.As. are either directly recruited Income Tax Inspectors or promotee Inspectors of Income Tax. Two applicants in O.A.-l 150/2005 belong to reserved category. Central Board of Excise and Customs in its digest requires Recruitment Rules for Group-B post to be reviewed once in 5 years with a view to effect necessary changes inclusive of addition and reduction in strength of lower and higher level posts. Earlier Recruitment Rules promulgated in 1994 provided promotion of Income Tax Inspectors in the scale of Rs. 5500-9000 with three years regular service in the grade to the eligible for consideration for promotion as Income Tax Officer on qualifying departmental examination for Income Tax Officers.

11. As per Rules for Departmental Examination for Income Tax Inspectors, 2001, the eligibility was for directly recruited Inspectors as well as to the feeder categories in Ministerial Staff. 10 chances and examination with a syllabus covering Income Tax Law, book keeping procedure and test of Hindi have been prescribed with 45% of the marks as qualification. However, in the year 2004, the

Departmental Examination Rules in Clause-4 provided as an amendment no restriction to the number of chances to appear in the examination but those who have crossed the age of 57 years are not eligible to compete.

12. In the year 1999, as per CBEG decision Income Tax Officer Group-B Recruitment Rules, 1999 had been reviewed but the provision of qualifying the departmental examination of Income Tax Inspector remained intact though the rules were cleared by DoP and T, Administrative Ministry and UPSC but for want of publication could not come into effect.

13. On further review in 2004 vide Notification dated 21.12.2004 Income Tax Officers, Group-B Posts Recruitment Rules, 2004 came into effect wherein Clause-12, the essential requirement of qualifying the departmental test by Inspector has been done away with. These Rules were published on 13.1.2005 and in pursuance thereof financial upgradation under ACP Scheme under the Rules had been accorded to few of the Inspectors who were stagnating.

14. Another set of Rules was published on 24.3.2005 i.e. Income Tax Officer, Group-13 Posts. Recruitment (Amendment) Rules, 2005 where on an explanatory Memorandum in Column-12 of the Rules promulgated on 21.12.2004 by an inadvertent mistake the eligibility of qualifying the departmental examination had been left was inserted by way of an amendment.

15. A DPC thereafter on the Rules had met on 30.3.2005 and promotion order had been issued on 31.3.2005. By an interim order dated 16.5.2005, Tribunal has directed not to give effect to the recommendations of the DPC till further orders.

16. Being aggrieved with a vested right for consideration for promotion under the Recruitment Rules of 21.12.2004 without passing the departmental examination and on the ground that conditions of service had been altered to the detriment without prior opportunity, the present O.As. have been filed.

17. Mr. Shyam Babu, learned Counsel of the applicants contends that in the wake of recommendation of Vth CPC though the earlier Rules of 1994 ibid prescribed a pre-qualification of departmental examination in order to be considered for

promotion as Income Tax Officer due to stagnation, it has been decided to do away with this requirement and accordingly by Notification of Rules ibidon 21.12.2004, qualifying examination was not a pre-condition for consideration of Income Tax Inspector to the post of Income Tax Officer. Learned Counsel further states that as the Rules had come into being, there has been an alteration of conditions of service. No subsequent amendment which though being preceded by a reasonable opportunity cannot be resorted to in the wake of decision of Apex Court in Grid Corporation of Orissa v.Rsananda Das 18. Mr. Shyam Babu, learned Counsel also contends that though mere chances of promotion is not a vested right but right for consideration for promotion is a fundamental right which had been denied to the applicants as till the Rules of 21.12.2004 were in vogue, applicants have to be considered without insisting upon eligibility of qualifying the departmental test. The amendment carried out on 24.3.2005 extending the application retrospectively is not legality tenable. It is further stated that juniors who had qualified the test are promoted and made senior to the applicants and therefore invoked the principle of promissory estoppel and doctrine of legitimate expectation to buttress his plea. Learned Counsel also contended that though a conscious decision of UPSC to delete the requirement of qualifying test was approved not only by DoP and T but by the Administrative Ministry yet the explanatory memorandum/amendment carried out is without approval of the DoP and T and not assented to by Member (P).

19. It is stated that once the Rules were published on 13.1.2005 to be effective from 21.12.2004, the amended rules which were made effective from 24.3.2005 holding the DPC on 30.3.2005 and orders of promotion issued on 31.3.2005 show undue haste of the respondents which is based on ulterior motive of favouring those who had qualified the test and this action is discriminatory.

20. It is stated that power to make Rules enshrined under Article 309 of the Constitution of India is subject to reasonable restriction of Articles 14 and 16 of the Constitution of India and as a right of consideration of the applicants has been violated, amended Rule is unconstitutional.

21. Lastly, it is stated that the object sought to be achieved by a conscious decision of the department to promulgate Recruitment Rules on 21.12.2004 same qualifying departmental examination as is amply established, as there was no departmental examination since 2003 till date.

22. Mr. K.C. Mittal, learned Senior Counsel of the applicant contended that whatever has been done by the respondents is not a mistake as correction of mistake cannot be through a long drawn process.

23. Mr. Mittal, learned Senior Counsel further stated that under Rules of 1999, 3260 vacancies had been notified whereas in the Rules of 2004 the number of vacancies had been raised to 4204 as no examination has been held from 2003 to 2005. A legal presumption can be drawn that the Rules promulgated on 21.12.2004 is a conscious decision of doing away with the qualifying examination.

24. As regards explanatory Memorandum issued on 24.3.2005, it is stated that in case it was a mistake, onus is on the department to show that Rules of 21.12.2004 are a bona fide mistake and for want of any record to establish, an adverse inference has to be drawn. It is also contended that if a simple mistake is to be rectified, some explanation is shown through a corrigendum but where the mistake is a devise based on ulterior motive to take away the vested right to favour a class of persons i.e. Income Tax Officer who had passed the examination when the criteria is selection and seniority has a role to play speaks, volumes about the mala fides of the respondents. While referring to M.A.-1538/2005 filed by the respondents, it is stated that the Secretary UPSC has been addressed a letter by the Ministry of Finance regarding discussion of the Rules to be brought in 2004 and there is no reference of this mistake. Accordingly, it is stated that letter dated 31.1.2005 where a mi stake has been noticed in Column-2 of the Rules has been written after publication of the Rules and despite an opportunity when UPSC has sought clarification in any manner to any changes in qualification etc., vide their letter dated 28.7.2004, the respondents are estopped from taking a plea of mistake. As reasons are not assigned, this deletion is a conscious decision of the respondents to which retrospectivity of amendment of the Rules through explanatory memorandum is unwarranted and misconceived.

25. Learned Counsel would contend that once by a letter dated 3.3.2005 written by the UPSC, the earlier Recruitment Rules have been finalized by the UPSC, the subsequent mistake cannot be assumed.

26. It is stated that no enquiry has been made into this mistake and assuming mistake is corrected it would take away the vested right of the applicants without putting them to notice.

27. Mrs. Nidhi Bisaria, learned Counsel of the applicants stated that once the Recruitment Rules of 21.12.2004 have been acted upon by preparing eligibility list for accord of ACP and where the same Recruitment Rules are to be followed, right to consideration to the applicants who belonged to reserved category had been denied. It is stated that the amendment to do away with the departmental test was as an underlying object of keeping at par Income Tax Officers with other departments.

28. Mr. Bisaria, learned Counsel of the applicants contended that Rules of 21.12.2004 had been notified through letter dated 13.1.2005 after a conscious decision in consultation with UPSC, DoP and T, Ministry of Law and vetting by Member(P). As no clerical mistake has accrued, mistake in policy cannot be rectified retrospectively. It is stated that while the Rules have been given effect to as ACP cannot be accorded without following the Recruitment Rules as there cannot be any set of Recruitment Rules for grant of ACP and if the Scheme of ACP applies for grant of upgradation, the Rules in vogue and test examination etc., to be qualified for eligibility. A discrimination cannot be made for grant of promotion on regular basis adopting a different criteria. It is stated that the Notification issued on 24.3.2005 is not approved by Member (P).

29. Following case laws have been referred to contend that a vested right cannot be taken away without following due process of law:Chairman, Railway Board and Ors. v. C.R. Rangadhamaiah .Ex. Capt. K.C. Arora and Anr. v. State of Haryana and Ors.

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30. Mr. V.P. Uppal, learned Counsel of official respondents vehemently opposed the contentions. It is stated that the 1994 Rules had provision of examination, which is an accepted position. The proposal of review of the Rules was approved by DoP and T but on receipt of the Rules from UPSC, the explanation to Clause-12 when missing, on detection of mistake after publication the same has been rectified through explanatory memorandum. As far as vested right is concerned, there is no effect to an unqualified person, under the Rules, but has affected those who had passed the examination. Both these Rules had made no difference. It is also stated that mere chances of promotion as there is hardly three months gap between promulgation of the Rules and Amended Rules, the Chief Commissionerate is a full organization where ACRs are collected but no promotions are made. A mere hope to get benefit cannot be a vested right.

31. Mr. M.L. Ohril, learned Counsel for the impleaded parties stated that who had earlier passed departmental examination and are considered in the DPC, qualification of departmental examination has an object sought to be achieved by those Inspectors who have to act as a quasi-judicial authority on becoming Income Tax Officers, have the knowledge of Income Tax Law and various other decision. As such in the past the Rules prescribed essential qualification of passing departmental examination.

32. It is stated that on an inadvertent mistake, disagreement by UPSC was found to be bona fide and on consultation they agreed to amend and on completion of formalities the explanatory memorandum by way of amendment has been carried out.

33. As regards not holding of examination, it is stated that due to change in Income Tax Laws and with a view to facilitate incorporation of changed syllabus, the examination was not held.Zile Singh v.State of Haryana and Ors. 2004(8) SCC 1, has been relied upon to contend whether the amendment is carried out to explain the former statute when the provisions already exist in the old rules, left inadvertently, an explanatory memorandum or a clarificatory amendment is permissible and would be effective retrospectively.

35. Mr. Baljit Singh, another Counsel of the impleaded respondents stated that the 2004 Rules for examination are an indication that requirement of qualifying examination has not been done away with. It is stated that these Rules are not challenged by the applicants. It is stated that the vested right has accrued to the private respondents who after qualifying examination have a right for consideration for promotion.

36. In the rejoinder, it is stated by the learned Counsel that if a mistake is discussed, it ceases to be a mistake. If the departmental examinations are to be held every year then why examinations are not held in 2003-2004. It is also contended that a vested right accrues even if Rules are not acted upon. A correction would always be prospective in nature.

37. It is contended that once UPSC has not approved the Rules and the draft is approved by the Ministry of Finance after 28.7.2004 what is not there is the draft approved in notification, the same would not be a mistake and this can be ascertained by the nothings on the file.

38. One of the contentions put forth is that the amended Rules are neither clarificatory nor explanatory as to what mistake has to be rectified and in what manner the same has taken place and by whom. For want of particulars a vague assertion would not take place of proof. It is stated that if the senior most who had not qualified examination once decided to be accorded the benefit of ACP the same would hold good for promotion as well. A decision of the Calcutta High Court in Lalin Kumar Mahato v. State of West Bengal and Ors. 1991 (1) SLR 452, has been relied upon to contend that once the interview has been held and certain qualifications are pre-requisite as per the old rules, the amended Rules would not apply prospectively which would take away existing rights.

39. Respondents' for our perusal have produced the concerned files relating to promulgation of Rules.

40. It is an accepted position that in the Rules for Income Tax Officer Group-B Recruitment Rules, 1994, a provision existed for eligibility of qualification of departmental examination. The Rules for departmental examination promulgated

in 2001 were amended in 2004 also. However, in the year 1999 when as per CBEC Policy decision due to reducing and enhancing strength of Income Tax Officers, the Rules are to be reviewed every 5 years had the review under-taken in 1999 could not be materialized despite approval by the concerned for want of publication.

As such, Rules of 1994 hold the field when CBDT on receipt of the report of Committee on revision of Recruitment Rules and Departmental Examination Rules of Income Tax Department and in the wake of cadre restructuring of various posts in Income Tax Department with a view to increase the strength of the cadre of Income Tax Officer. The proposed amendments in Rule-3 of Column-12 of the Rules was to clarify and define reason for the purposes of seniority. There was no proposal as such mooted by the Ministry for deleting the provision for holding the departmental examination. A draft notification sent clearly retained the provisions in Clause-12 of the Recruitment Rules for holding examination. When restructuring had taken place in the department in 2000, Rules of 1999 which had not come into being for want of publication necessitated revision. DoP and T agreed with the draft and UPSC while approving has deleted the conditions to qualifying the Income Tax Officer Departmental Examination in Column-12. The aforesaid proposal was vetted by the Legislation Department and had resulted in promulgation of the Rules on 21.12.2004 which had been published on 13.1.2005 and given effect to in the matter of accord of ACP to the Income Tax Officers. However, when it was detected that there had been a mistake though there is no proposal of the Ministry to delete the qualifying departmental examination, a proposal has been sent to the UPSC with regard to such an amendment and thereafter with an explanatory memorandum amendment has been carried out which had not only been approved by the DoP and T but also was notified on 24.3.2005.

41. With the above backdrop, the following issues are framed to adjudicate the controversy involved in these cases: (i) Is promulgation of Recruitment Rules for Income Tax Officers on 21.12.2004 without requirement of departmental examination a conscious decision? (ii) Whether rectification by insertion of qualifying examination is correction of an inadvertent mistake? (iii) Whether

through a Explanatory Memorandum by way of amendment vested rights of applicants could have been affected without following due process of law? (iv) Is right to consideration of promotion against the unamended Rules a right or mere hope or expectation? 42. It is not disputed that the Recruitment Rules for the post of Income Tax Officer promulgated in 1994 contained the provisions of qualification of departmental examination as an eligibility. Rules, which were revised in 1999 and could not be published, also retained the aforesaid provision. In the wake of restructuring and on the recommendations of the Committee on the revision of the Recruitment Rules and Departmental Examination Rules, the Draft Rules containing the provision of qualification of departmental examination were sent to the UPSC. On perusal of the departmental records, the only clarification sought was to the definition 'Region' under the provision of Rule 2(3) and as regards composition of DPC. Provision in Column 12 provides consideration of seniors in case their juniors were considered for promotion. One of the considerations of consultation with UPSC was also incorporated. At one point of time, it was an intention of respondents to promulgate ITO Group-B Recruitment Rules, 1999, which were though approved by DoP and T and Ministry of Law but could not be notified. It was decided not to supersede the earlier Rules of 1994.

Accordingly, a draft notification sent contained the provision of qualification of departmental examination for the purpose of promotion as ITO. After the Rules have been sent to the UPSC and on receipt of their letter ibid whereby whatever objections were to be taken, the matter had culminated into finalization of the Rules sane departmental examination figuring in Column 12 for the post of ITO. There is no whisper is the rules or the proposal sent there- of as to do away with the qualification of departmental examination. When the Rules were notified, the respondents immediately wrote to the UPSC as to the finalization of the Rules of 2004 for the post of ITO without a departmental examination and this has been accepted by the UPSC as an inadvertent error, which led to promulgation of the Rules with Explanatory Memorandum in 2005. From the above, it is clear that once the Rules for departmental examination have been framed and revised from time to time which facilitates an Income Tax Inspector to be well acquainted and equipped with the procedure laws, which are to be used in day to day working on the promoted post of ITO and as Recruitment Rules earlier to 2004 contained a

provision for eligibility as a condition precedent on passing a departmental examination, no object is sought to be achieved by deletion of such a provision. We do not find any reasonable nexus or intelligible differentia in it. If it is so, Departmental Examination Rules, 2004 would not have been promulgated.

This clearly shows that a conscious decision was taken by the respondents even on consideration in the wake of restructuring on the report of the Committee, which had not suggested deletion of departmental examination, to retain the aforesaid provision. A conscious decision was taken to preclude such a provision with an object not to effect any change in the earlier Rules of 1994. As such, what has been omitted is an inadvertent mistake on the part of the UPSC. Though the draft notification had contained under Rule 12 a provision for qualifying departmental examination yet deletion of it was neither based on any recommendation of the department nor any conscious decision of the UPSC as no reasons have come forth. Rather UPSC's stand in accepting the omission is a clear indication to the effect that though the department had retained the qualifying examination, inadvertently, this omission by the UPSC resulted in such a confusion.

43. We accordingly hold that Recruitment Rules promulgated on 21.12.2004 where qualifying departmental examination has been omitted is not a conscious decision of the respondents. It cannot be imputed on them.

44. As regards 'mistake' or an 'omission', as per Oxford English Dictionary Revised I0th Edition, 'error' has been defined as a mistake or state of being wrong in conduct or judgment. 'Omission' is defined as 'to leave out' or 'to flout' or 'failed to do so'. In the context of review, the Apex Court in Smt. Meera Bhanja v. Smt. Nirmala Kumari Choudhury AIR 1995 SC 455, defines an 'error' with the following observation: 8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to be scope and ambit of Order 47, Rule 1, C.P.C. In connection with the limitation of the powers of the Court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Ariban Tuleshwar Sharma v. Aribam Pishak Sharma AIR 1979 SC 1047, speaking through Chinnappa Reddy, J., had made the following

pertinent observations: It is ture there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.

Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137, wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record: An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ.

45. If one has regard to the above, an error is one which does not require any reasoning or long drawn process to be detected. It has to be self-established. An act by a person which is to be done in a manner suggested by the Rules and Law if not done and some important ingredients or relevant factors have been left to be considered or not incorporated unintentionally without iota of conscious decision to omit it with deliberation, rectifying this unintentional omission by way of correction cannot be treated as to fill up the lacuna or altering it in such a manner to effect the vested right of a person. To ascertain the real intent, whether there cropped an omission, which has to be set right or a conscious decision is over turned to favour a class, background would be of great assistance. In Income Tax Department, the established practice and the policy formulated clearly suggests that till the 1999 Rules for promotion to the post of ITO contained a provision as a pre-qualification as eligibility to pass a departmental examination. Accordingly, Departmental Examination Rules were promulgated and followed in the revised form from time to time and are still in vogue. Every post in an establishment carries discharge of duties and shouldering responsibilities by an incumbent. The work assigned to an incumbent on this promoted post in to from part of duties, which are to be carried out by ITO. Accordingly, the departmental examination which is being conducted to acquire eligibility to an ITI to be considered for the post of ITO includes as such of the examination the precis writing, drafting, knowledge of computer, office procedure, department of tax and also knowledge of Income Tax Laws. There is an object sought to be achieved to consider those from the feeder category officers who have requisite knowledge of the post of Income Tax Officer. If an ITI without qualifying the examination is considered for promotion and he is permitted to work on the promoted post without knowledge of the requisite procedure etc., the same would neither be in the interest of administrative exigency nor in public interest, which is paramount to effectively and smoothly run the administration.

46. With the underline object, earlier Rules promulgated for the post of ITO did contain a provision for qualifying departmental examination.

Framing of Rules and laying down qualifications and eligibility criteria is the prerogative of the Government, It is for the best of administration that these examinations are prescribed. Equal opportunities are accorded to all to compete

and qualify the examination and those who qualify are considered eligible for further consideration for promotion to the post of ITO. Equal opportunities extended to the similarly circumstanced is in consonance with the principles of equality enshrined under Article 14 of the Constitution of India. Even on the revision of the Recruitment Rules for the post of ITO, the Committee report does not whisper about any recommendation to do away with the qualifying examination. A proposal sent to the UPSC as a draft Recruitment Rules did contain the eligibility criteria of qualifying examination. UPSC without any background, recommendations from the department without any reasoning to the effect that despite 2004 Rules contained such provision sent an approval with regard to 1999 Rules that too without qualifying examination, which culminated into promulgation of Rules by publication. However, being pointed out this unintentional and inadvertent omission accepted by the UPSC, the same was later on corrected.

47. A mistake, which is established to be an inadvertent, can be rectified by the Government and on this mistake no vested right can be accrued. A right to be considered for promotion is well recognized by our law but the mere hope or expectation is not. It is established that the department at no point off time took a conscious decision to delete qualifying examination from the Recruitment Rules. Whatever has been done at the behest of UPSC once accepted to be an inadvertent omission, leaves this omission a mere mistake without any intent. As such, the rectification of such omission is permissible in law.

48. It is trite law that a vested right of a Government servant cannot be affected without affording an opportunity and by virtue of a retrospective amendment the Rules under Article 309 of the Constitution of India which is not permissible. Yet the following case law would clear the concept. Vested right of promotion as claimed by the applicants is only a right to be considered in accordance with Rules.

Any existing right cannot be whittled down by framing of Rules under Article 309 of the Constitution of India as held by the Apex Court in R.S. Ajara and Ors. v. State of Gujarat and Ors. .

However, the Apex Court in A.B. Krishna and Ors. v. State of Karnataka and Ors.

Article 309 of the Constitution has offended to the Statutory Act i.e.

Fire Force Act 1964 in Karnataka and clearly laid down the preposition that once a legislation intervenes to an Act relating to the conditions of service, the power of execution to display it would offend to doctrine of occupied field. A Rule made by the executive under Article 309 of the Constitution of India cannot be by any stretch alter the Statutory Legislation. In B.S.E. Brokers' Forum, Bombay and Ors. v.Securities and Exchange Board of India and Ors. , the following observations have been made: It is, no doubt, true that a perusal of Forms 'A' and 'D' shows that these forms are issued pursuant to the requirements of Regulations 3 and 6 and Section 12(2) of the Act which, however, does not by itself determine the nature of the fee in question. It is a well-established principle in law that so long as the impugned power is traceable to the statute concerned, mere omission or error in reciting the correct provision of law does not denude the power of the authority from taking statutory action so long as its action is legitimately traceable to a statutory power governing such action.

In such cases, this Court will always rely upon Section 114 III. (e) of the Evidence Act to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the Courts will uphold such State action. See Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India and Union of India v. Tulsirain Patel. Applying the said principles to the facts of this case, we notice that the Board has the necessary competence to collect the fees for the purpose of carrying out the mandates under Section 11 (2)(k) of the Act and also the power to collect the registration under Section 12(2) of the Act. Therefore, in our opinion, the Board has the necessary authority to collect a cumulative fee both for the purpose of regulating the activities contemplated under Section 11 of the Act as also for the purpose of registration under Section 12(2) of the Act, and the fee levied is both regulatory and registration fee leviable under Sections 11(2)(k) and 12(2) of the Act.In Zile Singh v. State of Haryana and Ors. (supra) where disqualification corrected under Section 13(A) of the Haryana Municipal Amended Act, 1994, an

Explanatory Memorandum issued had come under scrutiny. The following observations have been made: 13. In reply to the above contentions in the petition, first respondent Board has filed its objections denying that there was lack of legislative competence to levy registration fee as contended in the petition. It is also denied that the levy, in fact, is a tax in the guise of a fee. On the contrary, it is asserted that the said levy is a fee towards the service rendered by it to the petitioners and others involved in the business of stocks and shares and in furtherance of the object enumerated in Section 11 of the Act. It also denied that the levy would amount to an unreasonable restriction on trade/business so as to attract Article 19(1)(g) of the Constitution. It denied that any unreasonable hardship would be caused to the brokers by virtue of the levy being linked with the annual turnover of theirs and their classification vis-a-vis other intermediaries is an unreasonable classification. It contends that it is a reasonable classification taking into account the object of the Act, They, further, contended that when earlier a proposal was made to levy a flat fee the broker opposed the same strongly, hence, the said decision to levy flat fee had to be withdrawn. They denied that Regulation 10 of Schedule III to the Regulations is either ultra vires the Act or unconstitutional. Justifying the fee levied by them the Board contended that it had to render multifaceted and multitude of services contemplated under Section 11(2) of the Act which included the following mandatory duties under the Act: 11(2): (a) regulating the business in stock exchanges and any other securities markets; (b) registering and regulating the working of stockbrokers, sub-brokers, share-transfer agents, banks to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner; (c) registering and regulating the working of collective investment schemes, including mutual funds; (e) prohibiting fraudulent and unfair trade practices relating to securities markets; (f) promoting investors education and training of intermediaries of securities markets; (h) regulating substantial acquisition of shares and takeover of companies; (i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges and intermediaries and self-regulatory organizations in the securities market; (j) performing such functions and exercising such powers under the provisions of the Capital Issues (Control) Act, 1947 (29 of

1947) and the Securities Contracts (Regulation) Act, 1956 (42 of 1956), as may be delegated to it by the Central Government; (k) levying fees or other charges for carrying out the purpose of this section; 14. Taking into consideration to above multifarious duties, it contended that it required the finances for fulfilling the following statutory obligations. These are: (a) Establishment of a computer network, i.e., to create environment and facilities to enable dealers in securities to monitor trade at various places with interlink ages through telecommunication and other facilities for online transmission of information.

(b) Developing self-regulatory organization, i.e., to encourage formation and recognition of associations to be formed by respective intermediaries with the objectives of evolving a code of self-regulation on matters concerned with trade practices, code of business ethics, prevention of unhealthy and unfair competition among the members with powers to discipline the erring members.

(d) Undertaking studies and preparing reports relating to, inter alia, the functioning of the stockbrokers with a view to finding out ways and means of strengthening the basis of their operations.

(e) Organizing investor's education programmes including bringing out publications, books, magazines etc., including newspaper advertisements, relating to the capital market.

(f) To improve the procedure and practice for transaction on stock exchanges for the benefit of the brokers and investors, for settlement of disputes between the investors and brokers as well as brokers inter se.

(g) To inspect the records of the brokers and stock exchanges from time to time to prevent malpractices.

15. It is also contended that from the facilities that will be provided by the Board, the brokers would stand to benefit a great deal and that the Board intends to provide improved system of trading which would fetch larger income to the brokers by regulating the system the Board contends that the inflow of foreign investment into the country also would increase substantially. According to the Board, the

money that will be received by the levy would be reasonably sufficient to meet its expenses arising out of its statutory obligations. It specifically denied that the levy is a registration fee simpliciter but the same includes a fee required for establishing the necessary infrastructure for fulfilling and maintaining the objectives of the Act. It also disputed the figures relied upon by the petitioners to controvert the argument that the collection from the levy far exceeded the requirement of funds by the Board. It also denied that imposition of fee on the basis of turnover was either vague, unreasonable, arbitrary or discriminatory. It contends that a levy of .01% of the annual turnover when compared to the brokerage fee charged by a broker was hardly unreasonable. It further contended that on the representations made by the petitioners it had appointed an Expert Committee and this Committee after hearing various members of the Bombay Stock Exchange by its report dated 18.12.1992 in effect approved the levy. On the above basis, the Board prayed for the dismissal of the writ petition. The Union of India has adopted the said objections of the Board.

16. We have heard Mr. P. Chidambaram, Mr. Ashok H. Desai, Mr. S.K. Dholakia, Mr. Mahendra Anand, and Mr. Shanti Bhushan, Senior Advocates and Mr. Navroj Seervai and Mr. P.L. Narayanan, Advocates for the petitioners and interveners and Shri Kirti N. Raval, ASG for respondent 1.

17. From the arguments addressed before us, we will have to first consider the question whether the respondents have the necessary statutory authority for levying a fee of the nature which is impugned in this petition. If so ,whether this fee is, as a matter of fact, a tax in the guise of fee and is so excessive as to lose the character of a fee as contended by the petitioners. The Act in question is an Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto. The Board is established under Section 3 of the Act, Section 11 of the Act defines the powers and functions of the Board which mandates that it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market by such measures as it thinks fit. Sub-section (2) of the said section enumerates the various areas in which the Board is

mandated to take measures to fulfill the objects of the Act. They include such measures as (i) regulating the business in stock exchanges and any other securities markets; (ii) registering and regulating the working of stockbrokers and other intermediaries; (iii) registering and regulating the working of the depositories etc., (iv) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds; (v) promoting and regulating self-regulatory organizations; (vi) prohibiting fraudulent and unfair trade practices relating to securities markets; (vii) promoting investors' education and training of intermediaries; (viii) prohibiting insider trading in securities; (ix) regulating substantial acquisition of shares and takeover of companies; (x) collection of information, inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market and other intermediaries and self-regulatory organizations in the securities market; (xi) performing such other functions as are delegated to it by the Central Government; (xii) conducting research for the above purposes; (xiii) providing necessary information for the efficient discharge of the functions of the organizations with securities markets etc. The said Board is also vested with certain powers of the Civil Courts under the Code of Civil Procedure, 1908 in regard to discovery, production, summoning and enforcing the attendance of persons and inspection of books, registers etc. Section 11 (2)(k) of the Act empowers the Board to levy fees or other charges for carrying out the purposes enumerated in Section 11 of the Act.

Section 12 requires the stockbrokers, sub-brokers, share-transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolios managers, investment advisors and such other intermediaries who may be associated with the securities market to get themselves registered and obtain a certificate of registration from the Board in accordance with the Regulations made under this Act. Section 12(2) empowers the Board to collect such fees as may be determined by the Regulations from the applicants who seek registration.

18. Section 29 of the Act empowers the Central Government to make, by notification, rules for carrying out the purposes of the Act. It is an undisputed fact

that such Rules have been notified. Pursuant to the power vested in the Board under Section 30 of the Act, the Board has framed the Securities and Exchange Board of India (Stockbrokers and Sub-brokers) Regulations, 1992 ("the Regulations") with previous approval of the Central Government which came into force w.e.f. 23.10.1992. Regulation 10 of the said Regulations provides for payment of fees as specified in Schedule III of the said Regulations. Schedule III of the said Regulations provides that every stockbroker will have to pay a registration fee, where his annual turnover does not exceed Rs. 1 crore, a sum of Rs. 5000 for each financial year. In case of stockbrokers whose annual turnover exceeds Rs. 1 crore during any financial year, the fee payable is a sum of Rs. 5000 plus 100th of 1 per cent of the turnover in excess of Rs. 1 crore for each financial year. It also provides that after the expiry of 5 financial years from the date of initial registration as a stockbroker, he will have to pay a sum of Rs. 5000 for a block of 5 financial years commencing from the 6th financial year after the date of grant of initial registration to keep his registration in force. It also provides for instalments for payment of the said fee from the stockbrokers. In regard to sub-brokers and other intermediaries, the Schedule provides for a flat rate of fee.

19. From the enumeration of the above provisions of the Act, Rules and Regulations, it is clear that the Board is empowered to collect two types of fees, namely, the fee under Section 11(2)(k) for carrying out the purposes of Section 11 and a fee for the purpose of registering the applicants under Section 12(2) of the Act. The quantum of fee to be paid is fixed under Schedule III of the Regulations as provided under that Act. Therefore, there is no room to attack the levy on the ground that the same is not authorized by law.

20. The petitioners contend that it is clear from the demand that what is demanded by the Board from them is a fee under Section 12(2) of the Act which is a registration fee simpliciter. They support this contention by pointing out that the application for registration has to be made in Form 'A' and the registration certificate is issued in Form 'D', which are statutory forms and which shows that these forms are issued under Regulations 3 and 6 which are referable only to Section 12 of the Act. Therefore, they contend that the Board cannot now contend that the impugned fee is collected for any purpose other than for registration.

21. In reply, on behalf of the Board, it is contended that though the demand is termed as registration fees, as a matter of fact, the fee that is collected is a combination of a regulatory fee as well as registration fee as contemplated under Sections 11(2)(k)and 12 of the Act respectively. They also point out that, as a matter of fact, the collection from this levy is credited to a fund created under Section 14 of the Act and the amount from the said fund is utilised only towards the expenses incurred by the Board in performing its duties mandated under the Act. It is further contended that the mere fact that Forms 'A' and 'D' are referable to Section 12(2) only, ipso facto does not make the demand a registration fee simpliciter.

50. If one has regard to the above, it is a cardinal principle of construction that whenever rule is framed it has to be operated prospectively. But a declaratory statute would be an exception as well as a clarificatory amendment. The Apex Court in Sham Sunder's case (supra) makes such a rule, which explains and declares an omission, with a view to declare what was the earlier matter and such declaration relates back to and would be retrospective in nature. Applying the aforesaid to the present case as the Rules promulgated in 2004 after consultation with the UPSC omitting the qualifying departmental examination, which is stated to be an inadvertent mistake, the same has been brought out by a Explanatory Memorandum which provides a proposal to amend Column 12 to insert qualifying examination as a pre-requisite and its Class-4 provides its retrospectivity and no adverse affect on the officers as a similar provision existed in the earlier Rules. The aforesaid Explanatory Memorandum to bring about the omission and to rectify it is within the permissible mode of construction and is valid and permissible in law.

51. What has been brought through Explanatory Memorandum while amending Column 12 of the Rules vide Notification dated 24.3.2005 is a correction of the omission and rectification of an inadvertent error.

As in the past, the Recruitment Rules were consistently incorporated the qualifying departmental examination, through this Explanatory Memorandum the same has been brought in No vested right of the parties has been affected as in pursuance to the earlier Notification published in 2004, where a provision for departmental

examination was not incorporated, the applicants who formed a class could not qualify departmental examination. The Recruitment Rules earlier promulgated which by omission left this eligibility criteria not being a conscious decision of the department and also not being a pre-conceived definite decision to do away with the departmental examination, applicants cannot be treated as a class for dispensation of requirement as other ITOs who have qualified the examination would be discriminated and this is not in consonance with Articles 14 and 16 of the Constitution of India. By addition of correction of omission and/or rectification of error, the requirement remained the same and to insert eligibility criteria once established to be a prerogative of the Government, no indefeasible right was created in favour of the applicants. They are still to be considered for promotion as per the eligibility criteria.

The interregnum period from December 2004 to March 2005 had not vested them a right to be considered as no process had been initiated and such a right is mere a hope or expectation.

52. A Division Bench of the Tribunal at Lucknow in T.A.-11/1994 (Ashutosh Prasad v. U.O.I. and Ors.) decided on 30.10.1996 in a similar case of retrospective amendment of the Recruitment Rules observed as under: 15. The above cited rulings make amply clear that rules made under proviso to Article 309 of the Constitution are legislative in character and therefore, can be given effect retrospectively. It is also clear that retrospective amendment to rules cannot take away vested rights. At the same time the Apex Court has also held in the judgment of M. Loganathan (a three Judges Bench judgment) that a mere hope or expectation to get the benefit of provision is not a right accrued which could be saved under the unamended regulations....

16. In the above background, let us consider the case of the applicant. It is a fact that the applicant was considered for promotion even when the unamended rules were in force. However, as the persons belonging to 1972 batch and having been promoted as Deputy Commissioner in 1982, and also having been given non-functional selection grade since October, 1987, there is no doubt that he continues to be eligible for promotion. Still further, there is nothing on record to show that the

respondents are trying to push him out of reckoning i.e. out of the zone of consideration after retrospective amendment of the rules. It is also obvious that no vested right has accrued to the applicant as yet as he has not been selected and the matter is still in the realm of a mere hope or expectation In any case, it is clear from the facts that there is no threat extended to any expectation of the applicant by amended rules much less to any vested right of his. In the circumstances, we find no merit in the prayer of the applicant for quashing of I.R.S. Amendment Rules, 1995, notified on 14.6.1995.

53. In the above view of the matter, we are of the considered view that the amendment carried out through an Explanatory Memorandum is permissible under law and rights of the applicants are not affected.

54. It is trite law that the only right available to a Government servant is a right of promotion but chances of promotion cannot be claimed as a right as held by the Apex Court in Dwarka Prasad and Ors.

v. U.O.I. and Ors. 2004(1) ATJ SC 591 : 2004(1) SLJ 376 (SC). The following observations have been made: Articles 14 and 16 of the Constitution of India cannot be pressed into service to describe the fixation of lower quota for Pos as discriminatory. It is well established in law that the right to be considered for promotion on fair and equal basis without discrimination may be claimed as a legal and a fundamental right under Articles 14 and 16 of the Constitution but chances of promotion as such cannot be claimed as of right (see Ramchandra Shankar Deodhar v. State of Maharashtra decision relied on behalf of the appellants in the case of All India Federation of Central Excise v. UOI is of little assistance to the appellant's case. In that case, this Court has considered the proposals made by the department for re-fixation of quota to redress the grievance of the petitions to some extent. In the other case between the same parties in All India Federation of Central Excise v. UOI , the Court could not be persuaded to issue any direction for alteration of the quota fixed.

None of the two decisions is therefore is helpful in supporting the contention advanced on behalf of the appellants.High Court of Gujarat and Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors.

The legitimate expectation of a member to be promoted to the post of the Chairman as has been submitted by Mr. V. Venkataramani will, thus, have no relevance as nobody has a vested right to be promoted.

56. The Apex Court in M. Loganathan and Ors. v. T.N. Electricity Board and Ors. 1995 SCC (L and S) 1281, held as follows: 6. In our opinion, there is no real foundation for such an argument in the present case. The appellants on passing the test had merely a hope or expectation to be considered for promotion earlier than their seniors who had not passed that test if and when the selections were held for promotion to the post of Accountant during the continuance of the unamended regulation. However, that stage of consideration for selection never reached, irrespective of the fact whether there were vacancies available in the cadre of Accountants to be filled or not. The appellants do not belong to the category who had already been selected for promotion under the unamended regulation; and were merely awaiting the orders for promotion on the basis of the selection already made. That stage not having reached in the present case, the appellants had, at best, a mere hope or expectation of getting the benefit of the unamended regulation which hope was belied as a result of the amendment of the regulation priorto the stage when the appellants could be considered for promotion as Accountants during the period of application of the unamended regulation. It is well settled that a mere hope or expectation to get the benefit of a provision is not a right accrued which could be saved under the unamended regulation so as to ensure to the benefit of the appellants even after its amendment in the above manner (See Director of Public Works v. Ho Po Sang.) These appeals must, therefore, fail.

57. If one has regard to the above, applying the aforesaid ratio in the present case what has been acquired by the applicants on deletion of qualifying examination in the Recruitment Rules of 2004 and till it is amended by an Explanatory Memorandum in March 2005 a mere hope or expectation of getting the benefit of consideration for promotion without qualifying the departmental examination. Pursuant to the Recruitment Rules of 2004 neither any selection process was initiated nor any steps had been taken by the respondents to convene the DPC.Accordingly, the consideration remained on a mere hope or expectation to

get the benefit of consideration of promotion sane departmental examination is not a right accrued to the applicants.

58. It is settled law by the Apex Court in Shankarsan Dash v. U.O.I., that even after selection of a person and on being successful in the panel, one has no right of appointment despite vacancies existed. The aforesaid ratio was reiterated by the Apex Court in Bihar State Electricity Board v. Suresh Prasad 2004(3) ATJ SC 205.

In this view of the matter, once it is established that after promulgation of Rules 2004, no process of promotion was initiated and the Government has a right on justifiable grounds to keep the vacancies unfilled and also on the fact that immediately on notification, the corrective action had been initiated to insert the qualifying examination. The earlier Rules, which remained in vogue for three months, can best be a hope or expectation devolved in the applicants but the same had not culminated into right of consideration for promotion.

59. Accordingly, we have no hesitation to hold that the right as deposed by the applicants is merely a hope or an expectation to be considered against the unamended Rules without insisting on fulfilling the requirement of qualifying the departmental examination.

60. Classification, which is permissible under Article 14 of the Constitution of India, the Apex Court in K. Thimmappa and Ors. v.Chairman, Central Board of Directors, State Bank of India and Anr. 2001 (2) SCC 259 : 2001 (2) SLJ 318 (SC), held as follows: What Article 14 prohibits is class legislation and not reasonable classification for the purpose of legislation. If the rule-making authority takes care to reasonably classify persons for a particular purpose and if it deals equally with all persons belonging to a well-defined class then it would not be open to the charge of discrimination. But to pass the test of permissible classification two conditions must be fulfilled: (a) that the classification must be founded on an intelligible differentia which distinguishes persons or things which are grouped together from others left out of the group; and (b) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different basis and what is necessary is that there must be a nexus between the basis of classification and the object under consideration. Article 14 of the Constitution does not insist that the classification should be scientifically perfect and a Court would not interfere unless the alleged classification results in apparent inequality. When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis, having regard to the object which the legislature has in view. If a law deals with members of a well-defined class then it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. It is for the rule-making authority to determine what categories of persons would embrace within the scope of the rule and merely because some categories which would stand on the same footing as (b) Classification/Under classification/ Discrimination those which are covered by the rule are left out, would not render the rule or the law enacted in any manner discriminatory and violative of Article 14. It is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases. It depends on the object of the legislation, and what it really seeks to achieve.

61. In the Department Income Tax Inspectors, as a feeder category, are to be treated equally. There cannot be two different criteria to consider them for promotion. If as per Recruitment Rules without qualifying examination is a consideration for a few it is who, despite opportunity, could not qualify the examination, application of those Rules to them for consideration would treat them as a separate class which is not permissible as equal have to be treated equally and vice versa. Having two standards for two different categories, one those who qualified the examination and the other who has not, is not intelligible differentia and the object of keeping up for consideration those Income Tax Inspectors who have qualified the examination and are apt for being entrusted with the higher

responsibility of the post of ITO would not have reasonable nexus with the object sought to be achieved.

62. One of the grounds raised is headship caused to the applicants as during the interregnum period of three months, their right are affected and had they been considered, they would have, without insisting of qualifying departmental examination, been considered and promoted and, therefore, this amendment, which has caused undue hardship, cannot be countenanced. An action of the Government, which is in consonance with the Rules, would not be thrown aside as it causes hardship to some. If the action does not discriminate the scope of judicial review, is impermissible. The Apex Court in Prafulla Kumar Das v. State of Orissa , held as follows: The petitioners herein seek benefit to which they are not otherwise entitled. The legislature, has the requisite jurisdiction to pass an appropriate legislation which would do justice to its employees.

Even otherwise a presumption to that effect has to be drawn. If a balance is sought to be struck by reason of the impugned legislation, it would not be permissible for the Supreme Court to declare it ultra vires only because it may cause some hardship to the petitioners. A mere hardship cannot be a ground for striking down a valid legislation unless it is held to be suffering from the vice of discrimination or unreasonableness. Article 14 is not attracted in the present case.

63. As regards another contention raised on equality along law and right accrued on the amended Rules of 2004, it is trite law that the wrong order cannot be used to claim equality and Article 14 of the Constitution of India cannot be resorted to. The aforesaid dicta has been laid down by the Apex Court in Registrar, High Court of Gujarat and Anr. v. C.G. Sharma 2005(2) SLJ SC 104. The negative equality has no application under Article 14 of the Constitution of India. As we have held that the amendment carried out in 2004 without departmental examination is an omission, as a result of which any right accrued would not be enforceable though an omission or an inadvertence of the Government and would not give rise to a right. The decision of the Apex Court in U.O.I. v. International Trading Co. , is Two wrongs do not make a right. A party cannot claim that since something wrong has been done in another case; direction should be given for doing another wrong. It

would not be setting a wrong right, but would be perpetuating another wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the respondents cannot strengthen their case. They have to establish strength of their case on some other basis and not by claiming negative equality.

64. Another ground raised is that the respondents have taken undue haste after promulgation of the amended Rules in March, 2003 to hold the DPC and promote the incumbents, which act of the respondents shows a favoritism to a class depriving the vested rights of the applicants.

Undue haste is not by itself illegal unless shown to be mala fide.

After promulgation of the amended Rules in 2005, the promotions are being withheld and qualified persons are available in the administrative exigency. As the eligible persons have a right of consideration for promotion, the action taken by the respondents cannot be found fault with: Applicants who have not qualified the requisite examination, being eligibility, cannot question the action of the respondents being irrational or illegal. The Apex Court in Chairman and M.D. B.P.L. Ltd. v. S.P. Gururaja Undue haste in taking decision not by itself a ground unless held to be mala -fide --Manner in which decision taken should be seen--No interference if there had been fair play in action--So a decision promptly taken after due deliberation and upon due application of mind under single-window system, held, could not be assailed.

Undue haste also is a matter which by itself would not have been a ground for exercise of the power of judicial review unless it is held to be mala fide. What is necessary in such matters is not the time taken for allotment but the manner in which the action had been taken. In the absence of any finding that any legal malice was committed, the impugned allotment of land could not have been interfered with. What was necessary to be seen was to whether there had been fir

play in action.

Malice in common law or acceptance means ill will against a person, but in the legal sense it means a wrongful act done intentionally without just cause or excuse.

The question as to whether any undue haste has been shown in taking an administrative decision is essentially a question of fact. The State had developed a policy of single-window system with a view to get ride of red tapism generally prevailing in the bureaucracy. A decision which has been taken after due deliberations and upon due application of mind cannot be held to be suffering from malice in law on the ground that there had been undue haste on the part of the State and the Board.

65. In so far as the ground of promissory estoppel is concerned, it is trite law that an estoppel cannot be claimed against a statutory rule.

If the rule is explained and the provision of departmental examination is inserted which has been omitted, from retrospective date and the fact that it existed earlier in the Recruitment Rules, the applicants' expectation is not legitimate. They were aware that they had to qualify the departmental examination to become eligible for consideration for promotion and, therefore, an inadvertent mistake would not give rise to the legitimate expectation. Though the doctrine of legitimate expectation cannot be claimed as a right but if the action of the respondents suffers from arbitrariness only then Article 14 would be attracted. Once we have held that whatever has been done by the respondents is permissible in law and permitted by the Constitution as well, no legitimate expectation can be raised.

66. We fortify our above conclusion on a decision of the Apex Court in State of W.B., and Ors. v. Niranjan Singha 2001 (2) SCC 326, wherein the following observations have been made: We may notice that the distinction sought to be made by the High Court that this is not a case involving grant of a fresh agency but extension of the existing one does not make much sense. An extension of an agreement or renewal is granted on the expiry of the period of the existing agreement. Either the extension or the renewal of the existing agreement may be

on the same terms or on different terms.

If it is a case of extension of the existing agreement on the terms and conditions and such consideration gives rise to a question of legitimate expectation being a part of the agreement concerned, economic consideration of getting higher bid for the same period would be a relevant consideration. If the Governmental authorities had found that it would be feasible to have the agency, as in the present case, on fresh terms by enhancing the amount payable to the Government, it would be a relevant factor and in such a case it cannot be said that the legitimate expectation of the respondent had been affected because the public interest would outweigh the extension of the period of the agreement. The doctrine of "legitimate expectation" is only an aspect of Article 14 of the Constitution in dealing with the citizens in a non-arbitrary or otherwise it would be relevant. The decision in Food Corporation of India v. Kamdhenu Cattle Feed Industries does not lay down any principle which detracts from what we have stated now. In a case where the agency is granted for collection of toll or taxes, as in the present case, it can be easily discerned that the claim of the respondent for extension of the period of the agency would not come in the way of the Government if it is economically more beneficial to have a fresh agreement by enhancing the consideration payable to the Government. In such an event, it cannot be said that the action of the Government inviting fresh bids is arbitrary. Moreover, the respondent can also participate in the tender process and get his bid considered. Hence, we do not think that the view taken by the High Court can be justified.

67. Lastly, it is contended that once the benefit of Assured Career Progression Scheme has been accorded to some of the ITIs upgrading their scale to that of ITOs and the fact that under the ACP Scheme all the criteria and norms which are followed in normal promotion are consideration for grant of ACP under the Recruitment Rules of 2004 despite promulgation of the amended Rules of 24.3.2005. The accord of ACP to some employees by an order dated 24.3.2005 clearly establishes that the Rules promulgated on 21.12.2004 have been given effect to which also shows the conscious decision of the respondents. This cannot be countenanced. Merely because upgradation given would not amount to promotion or a consideration as per the Rules. On grant of financial upgradation

law shall take its own course. However, the aforesaid grant will not ipso facto be an indication for enforceability of the Recruitment Rules of 2004 and its constitutionality in the wake of Explanatory Memorandum notified on 24.3.2005.

68. Before parting with, we are constrained to take cognizance of the fact that the episode of promulgation of Rules in 2004 and 2005 as well as the fact that the department had not held qualifying departmental examination either in 2003 and 2004 and by virtue of Clause-4 of the Rules of Departmental Examination on 1st of April of the year ITIs who have crossed 57 years are precluded from availing a chance to appear in the examination. This action of the respondents needs to be re-examined as the applicants as well as others who for want of holding the departmental examination for these years, without any fault, attributable to them when there is no restriction on number of chances to be availed of in the departmental examination, have been deprived of an opportunity to appear in the examination and resultantly lost their right of consideration for promotion to the post of ITO. The respondents are well advised and we expect that this issue would be reconsidered to explore the possibility of according an opportunity to the applicants to appear in examination. Those who during this interregnum had crossed over 57 years of age, this consideration would have to abide by the respondents being a model employer and also that in a welfare State, the rights of Government servant in all fairness are to be safeguarded.

69. In the result, for the forgoing reasons, we do not find any infirmity in the action of the respondents. O.As. are found bereft of merit and are accordingly dismissed by without any order as to costs.

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