

**Rajesh Henry. Vs. the State of Madhya Pradesh, and ors.**

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**Court :** Madhya Pradesh Jabalpur

**Decided On :** Jul-29-2010

**Judge :** Rajendra Menon, J.

**Acts :** M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 - Section 29(1)(iii) ;

**Appeal No. :** Writ Petition No : 328 of 2009(S).

**Appellant :** Rajesh Henry.

**Respondent :** The State of Madhya Pradesh, and ors.

**Advocate for Def. :** Shri Vivek Agrawal ; Shri Sanjay K. Agrawal, Adv.

**Advocate for Pet/Ap. :** Shri R.N. Singh, Adv.

**Judgement :**

1- Challenging the orders Annexure P/1 and P/2, by which promotion to the post of Assistant Commissioner Excise is granted to respondent No.3, superseding the petitioner and the order seeking suo motu review of a departmental proceeding closed against the petitioner, this writ petition has been filed.

2- Petitioner was initially appointed as a District Excise Officer on 1.9.1999. He claims to be a person belonging to the Scheduled Tribe community. In the year 2005, while petitioner was posted as District Excise Officer, Mandsaur a show-cause notice was issued to him on 5.11.2008, pointing out various irregularities in

the matter of recovery of revenue. Petitioner is alleged to have filed reply denying the allegations. However, a charge-sheet was issued to the petitioner on 3.3.2006, to which the petitioner submitted his reply and pointed out his defence. Being satisfied with the reply submitted by the petitioner, the disciplinary authority exonerated the petitioner of all the charges and passed an order Annexure P/4 on 11.4.2007, holding that the allegations levelled against the petitioner are not correct and, therefore, the proceedings be dropped. However, it was found that the predecessor of the petitioner one Shri Pratyush Kabra was responsible for certain irregularities and, therefore, vide order-dated 27.12.2007 Annexure P/3, punishment was imposed upon Shri Kabra. 3- It is the case of the petitioner that while the departmental proceedings were pending and just before he was exonerated of the charges on 11.4.2007, a DPC met on 7.4.2007 for considering the case of eligible persons for promotion on the post of Assistant Commissioner Excise. It is common ground that this DPC was infact a review DPC of an earlier DPC that was held for promotion to the said post. Be it as it may be, in the said review DPC due to pendency of the departmental proceedings sealed cover procedure was followed and the recommendations of the petitioner were kept in the sealed cover. However, inspite of the fact that petitioner was exonerated on 11.4.2007, the sealed cover was not opened in the case of the petitioner, instead by the impugned order-dated 18.4.2007 Annexure P/1, respondent No.3 who was junior to the petitioner was promoted as Assistant Commissioner Excise. It is the case of the petitioner that once he was exonerated on 11.4.2007 and on 18.4.2007 when respondent No.3 was promoted and when no proceedings were pending, on the said date the sealed cover should have been opened and promotion granted to the petitioner. Accordingly, on the aforesaid consideration, challenge is made to the order-dated 18.4.2007 Annexure P/1, granting promotion to respondent No.3. That apart, it is the case of the petitioner that when he represented against the supersession, when respondent No.3, who is junior to the petitioner as is evident from the Gradation List Annexure P/5, was promoted, petitioner submitted representation on 15.5.2007 vide Annexure P/6. The Secretary in the Commercial Tax Department made certain queries with regard to the departmental enquiry of the petitioner vide Annexure P/7, on 25.7.2007. Respondent No.2 Excise Commissioner furnished the information within two days vide Annexure P/8, on

27.7.2008, and it was pointed out that no departmental enquiry was pending and the petitioner has been exonerated. Thereafter, respondent No.1 again raised a query on 8.8.2007 and sought further details in the matter. These communications were followed by two more communications on 18.7.2007 and 5.10.2007 and finally all these were answered by respondent No.2 on 29.12.2007. Grievance of the petitioner is that even though with Annexure P/9 on 29.12.2007 it was already brought to the notice of the State Government that petitioner has been exonerated, but still when nothing was done petitioner filed a writ petition before the Indore Bench of this Court, being W.P.No.2745/2008(S), and this Court vide order-dated 13.5.2008 Annexure P/10 directed the respondents to consider the representation of the petitioner for grant of promotion. Petitioner vide Annexure P/11 dated 18.8.2008, brought to the notice of the respondents the entire facts so also the order passed in the writ petition Annexure P/10. It is the grievance of the petitioner that instead of promoting him and granting him the benefit, by the impugned order-dated 16.12.2008 Annexure P/12, State Government has decided to exercise the powers of suo motu revision conferred on it under section 29(1)(iii) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 [hereinafter referred to as 'Disciplinary Rules'] and by an order-dated 31.12.2008 ordered an enquiry under Rule 14, challenging this action, petitioner has filed this writ petition.

4- Shri R.N. Singh, learned Senior Advocate appearing for the petitioner, submitted that when the petitioner was exonerated on 11.4.2007 and when the promotion order was issued on 18.4.2007 vide Annexure P/1, then on the said date i.e.. 18.4.2007, when nothing was pending against the petitioner, the sealed cover should have been opened and the recommendations implemented so far as the petitioner is concerned. It is argued by him that when the promotion was affected on 18.4.2007, petitioner was entitled for the benefit of opening the sealed cover and implementing its decision, as on the said date no disciplinary proceedings were pending against the petitioner. It was further argued by the learned Senior Advocate that the powers of review under Rule 29(1)(iii) exercised by the State Government is unsustainable. Referring to sub-clause (iii) of Rule 29(1) and the law laid down by two Division Benches of this Court, in the cases of State of MP and others v. O.P. Gupta and another, 2001(2) MPLJ 690, and State of MP and others v. Brijesh Niboria, 2007(2) MPLJ 273, learned Senior Advocate

argued that the decision for review has to be taken by the State Government within six months and in this case as the decision to review is taken after a period of more than six months, the power exercised by the State Government is unsustainable. It was pointed out that the petitioner was exonerated on 11.4.2007 and the decision to review the said order was taken on 16.12.2008, which is beyond the period of six months from the date of exoneration and, therefore in the light of the law laid down by the Division Bench, in the cases of O.P. Gupta (supra) and Brajesh Niboria (supra), the entire action is unsustainable. 5- As an alternate submission, it was argued by Shri R.N. Singh, learned Senior Advocate, that even if for argument sake it is accepted that the State Government has power to condone the delay and exercise the powers of review beyond six months by virtue of the provisions of Rule 31 of the Disciplinary Rules, but as there is no reasonable and sufficient justification for the delay, it is argued by him that the power exercised is unsustainable. Learned Senior Advocate pointed out that petitioner was exonerated vide Annexure P/4 on 11.4.2007 and initially when the petitioner submitted a representation on 15.5.2007 vide Annexure P/6, queries were called vide Annexure P/7 on 25.7.2007 by the State Government. This was replied to vide Annexure P/8 on 27.7.2007 and, therefore, on 27.7.2007 the State Government knew that the petitioner is exonerated. In spite there no decision was taken within a reasonable time. Thereafter further communications took place and finally on 29.12.2007 vide Annexure P/9, all the details sought for by the State Government were furnished. From 29.12.2007 the State Government kept quiet for a further period upto 16.12.2008 i.e.. for about one year and the decision for review was taken only on 16.12.2008. The reason for sleeping over the matter atleast from 29.12.2007 upto 16.12.2008 is not reasonably explained and, therefore, the action of the State Government is unsustainable. 6- It was finally argued by Shri R.N. Singh, learned Senior Advocate that the provisions of Rule 31 will not apply to a proceeding for review under Rule 29, because Rule 29(1) starts with a non obstante clause i.e 'Notwithstanding anything contained in these rules'. Accordingly, he argues that the provisions of Rule 31 will have no application to a proceeding under section 29 in view of the fact that the non obstante clause gives over-riding effect to Rule 29 over Rule 31 and by virtue of the over-riding provision conferred on the Rule by the non obstante clause, the power under section 31

cannot be exercised. In support of this contention he invites my attention to a judgment of the Supreme Court in the case of Union of India and another v. G.M. Kokil and others, 1984 (Supp) SCC 106, to contend that the power to condone the delay in exercising the power of review is not available to the State Government. Accordingly, on these counts Shri R.N. Singh, learned Senior Advocate, seeks for interference and quashing of the entire action of the State Government.

7- Shri Vivek Agrawal, learned counsel for the State, and Shri Sanjay Agrawal, learned counsel for respondent No.3, rebutted the aforesaid contentions. Learned counsel for State argued that the non obstante clause of Rule 29 does not come in the way of the State Government in exercising powers of review by condoning the delay in view of Rule 31. It was argued by him that the State Government has given reasonable justification for the delay and keeping in view the serious allegations against the petitioner, it is submitted by him that the action is justified and no interference is called for. 8- Shri Sanjay K. Agrawal, learned counsel for respondent No.3, argued that the non obstante clause of Rule 29 cannot be read in isolation, it has to be read in furtherance to the entire legislative scheme of the Disciplinary Rules and by referring to the Principles of Statutory Interpretation for advancing the cause of justice and applying the principle of harmonious interpretation to reconcile the conflict, if any, between the two statutory provisions, Shri Sanjay Agrawal argued that it has to be held in this case that inspite of the non obstante clause in Rule 29, the power under section 31 can be exercised by the State Government in a given case and by applying the harmonious construction, the situation can be reconciled. Further he points out that a Bench of this Court, in the case of Ashok Jayant v. State of MP and others, 2003(2) MPLJ 146, has already laid down the principle that the provisions of Rule 31 is applicable while considering the question of review under Rule 29 of the Disciplinary Rules and, therefore, in the light of the aforesaid settled legal principle Shri Agrawal submits that the contentions advanced by Shri R.N. Singh, learned Senior Advocate, cannot be accepted.

9- I have heard learned counsel for the parties at length and perused the records.

10- Before advertizing to consider the rival contentions, it would be appropriate to take note of the statutory provisions involved in the matter i.e.. rule 29 and Rule 31 of the Disciplinary Rules. Rule 29, relevant for the present case, reads as under:

"29. (1) Notwithstanding any thing contained in these rules except Rule 11

(i) the Governor, or

(ii) the Head of a Department under the State Government, in the case of a Government

servant serving in a department of office (not being the secretariat), under the control of such Head of a Department; or

(iii) the appellate authority, within six months of date of the order proposed to be reviewed; or

(iv) any other authority specified in this behalf by the Governor by a general or special order, and within such time as may be prescribed in such general or special order;

may at any time, either on his or its own motion or otherwise call for the records of any inquiry and review any order made under these rules or under the rules repealed by Rule 34 from which an appeal is allowed, but from which no appeal has been preferred or from which no appeal is allowed, after consultation with the Commission where such consultation is necessary, and may

(a) confirm, modify or set aside the order; or

(b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or

(c) remit the case to the authority which made the order to or any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or

(d) pass such other orders as it may deem it: ."

Similarly, Rule 31 reads as under:

"31. Power to relax time-limit and to condone delay:- Save as otherwise expressly provided in these rules, the authority competent under these rules to make any order may, for good and sufficient reasons or if sufficient cause is shown, extend the time specified in these rules for anything required to be done under these rules or condone any delay."

11- The first question warranting consideration is as to whether the non obstante clause in Rule 29 over-rides the provisions of Rule 31 and makes it non-applicable in cases of review under Rule 29. Rule 29 begins with non obstante clause, which reads as under:

"Notwithstanding any thing contained in these rules except Rule 11 ."

12- It is a well settled principle of law that a non obstante clause is nothing but a legislative device employed to give over-riding effect to certain provisions, which may be contrary to certain other provisions that may be found either in the same enactment or any other enactment. The principle of law in this regard has been considered by the Supreme Court in the case of G.M. Kokil (supra) relied upon by Shri R.N. Singh, learned Senior Advocate. In the said case the question arose with regard to applicability of the Factories Act 1948 to certain employees working in the Indian Security Press, Nasik. Section 59 of the Factories Act alongwith the rules framed therein contemplates a provision for payment of extra wages for over time. However, the aforesaid benefit was only available to certain class of employees who fell in the category of workmen or workers as defined in the Factories Act. Certain Supervisors and Executive Staff, who did not fall in the category of workers and who were not entitled to the benefit of overtime under the Factories Act claimed overtime on the ground that by virtue of Section 70, of the Bombay Shops and Establishment Act, 1948 and the non obstante clause contained therein, the Factories Act would become applicable to them. It was the case of the claimants therein that Section 70 contains a clause in its second part, which provided that the provisions of the Factories Act shall not, notwithstanding anything contained in that Act, apply to all persons employed in or in connection with the factory. It was argued that by virtue of this non obstante clause in Section

70 of the Bombay Shops and Establishment Act, the Factories Act, which was not applicable to the claimants would become applicable. The matter was considered by the Supreme Court and it was held in the aforesaid case that the non obstante clause is a legislative device which is employed to give over-riding effect to certain provisions over some contrary provisions that may be found either in the same Act or in some other enactment. It was finally held that the non obstante clause in Section 70 of the Bombay Shops and Establishment Act would give over-riding effect and the provisions of the Factories Act would be applicable to the claimant. If the principle laid down by the Supreme Court in the case of G.M. Kokil (supra) is taken note of, it would be seen that by virtue of the non obstante clause contained in Rule 29(1) to the effect that 'Notwithstanding anything contained in these Rules except Rule 11'; it has to be held that except for the provisions of Rule 11, nothing contained in the Discipline Rules would apply in cases for review under Rule 29.

13- The aforesaid would be further clear and clarified if the principle laid down by the Supreme Court in the case of Iridium India Telecom Limited v. Motorola Inc, (2005) 2 SCC 145, are taken note of. In the aforesaid case the question was with regard to the provisions of the Bombay High Courts (Original Side) Rules 1959 and the effect of Order 8 Rule 1 CPC, as amended and the provisions of section 129 CPC. The power of the Bombay High Court to lay down its own rules and procedure for dealing with suits on the original side was protected by section 129 of the CPC. The question was as to whether this non obstante clause in section 129 CPC has over-riding effect over the provisions of Order 8 Rule 1 prescribing a time limit for filing of written statement introduced by the Amending Act to the CPC, in the year 2000. After taking note of the judgments rendered by the Supreme Court in the case of G.M. Kokil (supra) and various other cases, the principle is laid down by the Supreme Court, in paragraphs 34, 35 and 36 in the following manner:-

"34. After noticing the observations made in Aswini Kumar Ghosh, AIR 1952 SC 369, and Dominion of India v. Shrinbai A. Irani, AIR 1954 SC 596, this Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447, observed thus, in the context of construction of a non obstante clause:

'67. A clause beginning with the expression

"notwithstanding anything contained in the Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in *South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum* (1964) 4 SCR 280.

68. It is well settled that the expression 'notwithstanding' is in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. This will be clarified in the instant case by comparison of sub- section (1) of Section 15 with sub-section (1) of Section 15-A. We are therefore unable to accept, with respect, the view expressed by the Full Bench of the Bombay High Court as relied on by the learned Single Judge in the judgment under appeal."

35. Again in *Parayankandiyal Eravath Kanapraavan Kalliani Amma (Smt.) and Ors. v. K. Devi and Ors*, (1986) 4 SCC 447, this Court observed:

"77. Non obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision or Act mentioned in that clause. It is equivalent to saying that in spite of the provisions or Act mentioned in the non

obstante clause, the enactment following it will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment. [See: *Union of India v. G.M. Kokil*; *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* (supra); *R.S. Raghunath v. State of Karnataka*

(supra); G.P. Singh's Principles of Statutory Interpretation.]"

36. Reference was made to A.G. Varadarajulu and Anr. v. State of Tamil Nadu and Ors.,(1998) 4 SCC 231, at para 16. This judgment merely followed the observations made in Aswini Kumar (supra) and Madhav Rao Scindia v. Union of India, (1971) 1 SCC 85. There is no doubt that where the non obstante clause is widely worded, "a search has, therefore, to be made with a view to determining which provision answers the description and which does not". The historical development of the law suggests that the non obstante clause in Section 129 is intended to bypass the entire body of the Code so far as the rules made by the Chartered High Court for regulating the procedure on its Original Side are concerned.

(Emphasis supplied)

Thereafter, in paragraph 37, the principle of interpreting a statute and similar submissions as has been made by Shri Sanjay Agrawal in this case, with regard to harmonious construction is taken note of in paragraph 37 and the principle laid down in the case of G.M. Kokil (supra) and other cases approved and it has been held as under: "37. The observations of this Court in R.S. Raghunath, (1992) 1 SCC 335, in paragraphs 11 and 12 were pressed into service. These paragraphs merely reiterate and follow the observations made in Aswini Kumar Ghosh (supra), The Dominion of India (supra), Union of India v. G.M. Kokil (supra) as well as the observations made in Chandavarkar Sita Ratna Rao (supra). Finally, it is observed in Paragraph 12, in the words of Chinnapa Reddy, J:-

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear

different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit 12

into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

14- If the case in hand is examined in the light of the principles laid down by the Supreme Court, in the case of G.M. Kokil (supra) and the observations reproduced hereinabove and made in the case of Iridium India Telecom Ltd.(supra), there is no doubt that the non obstante clause in Rule 29(1) will have over-riding effect over the provisions of Rule 31 and except for in cases falling under Rule 11, nothing in the Rule 31 will apply to a proceeding under Rule 29. To that effect the legal principle is crystal clear and there remains no iota of doubt.

15- There is another aspect of the matter as canvassed by Shri R.N. Singh, learned Senior Advocate, which has to be taken note of. Two Division Benches of this Court, in the cases of O.P. Gupta (supra) and Brajesh Niboria (supra), have considered the provisions of Rule 29 and after taking note of various provisions, including a judgment in the case of State of MP v. Prahlad, 1988 (1) MPWN SN-113, and a Full Bench judgment of the Central Administrative Tribunal in the case of K.G. Mohanan v. General Manager, Telecommunication, Ernakulam and others, (1991) 15 ATC 920, it has been held that the powers of review conferred in Rule 29(1) can be exercised by the competent authority by taking a decision to review the action within six months. It is held that the decision to review should only be taken within six months and further proceedings for completing the exercise of review can continue after the period of six months. That being so, the principle that emerges from the law laid down by the Division Bench is to the effect that the entire exercise of review is not to be completed and a final order passed within a period of six months. What is required under law is that within a period of six months from the date of passing of the order proposed to be review, the competent authority exercising powers under Rule 29 has to take a decision for

reviewing the matter and thereafter the proceedings for review can continue till finalization. If the said principle is applied in the present case, it would be seen that the petitioner was exonerated on 11.4.2007 and the impugned action for review was taken on 29.12.2007 Annexure P/9 i.e beyond the period of six months as laid down by the Division Bench and, therefore, the action could be unsustainable.

16- While hearing the matter on 15.2.2010, this Court to consider this question had directed the State Government to file an affidavit and to indicate as to on which date the decision was taken to review and it is clear from the affidavit now filed that the decision was taken on 16.12.2008 vide Annexure P/2. That being so, the decision to review having been taken beyond six months the action is vitiated. 17- If the matter is taken note of in the light of alternate submissions also made by Shri R.N. Singh, learned Senior Advocate, I am of the considered view that the action of the State Government will have to be quashed. Even if it is assumed that the State Government has the power to proceed in the matter and exercise the powers of review conferred under Rule 29, by condoning the delay by applying the principles of Rule 31, then also Rule 31 contemplates that there should be 'good and sufficient' reason to show that the delay is liable to condoned and relaxed. In the present case, if the matter is examined in the light of this principle also, it would be seen that the order of exoneration was passed by the Disciplinary Authority on 11.4.2007 and after various communications made and explanation given on 29.12.2007 vide Annexure P/9, the entire position was explained by respondent No.2 to the State Government. The State Government from 29.12.2007 till passing of the impugned order on 16.12.2008 did not take any action. No plausible explanation or justification is given for the delay of about a year between 29.12.2007 to 16.12.2008. That being so, the delay in taking the action even beyond the period of six months is not properly and reasonably explained and there is no justification for this delay warranting its relaxation or condonation. On this count also, the action of the State Government is unsustainable.

18- Having so held and considered, at this point of time it would be appropriate to take note of the effect of the judgment rendered by Single Bench of this Court, in the case of Ashok Jayant (supra). It was argued by Shri Sanjay Agrawal, learned

counsel for respondent No.3, that the question of law raised in this writ petition stands concluded by the judgment rendered in the case of Ashok Jayant (supra) and, therefore, nothing further survives for adjudication. 19- If the case of Ashok Jayant (supra) is taken note of and the facts analysed, it would be seen that Shri Ashok Jayant was a member of the District Level Vigilance and Monitoring Committee. Respondent No.4 in the said case was holding the post of Assistant Teacher/Superintendent in Adim Jati Harijan Kalyan Vibhag. Respondent No.4 was granted compassionate appointment on the basis of circular of the State Government dated 24.7.1980, because he was held to be a victimized and harassed backward class employee. Subsequently, it was found that appointment to respondent No.4 was granted incorrectly. Therefore, a charge-sheet was issued to him and a departmental enquiry was conducted under the M.P. Civil Services (Classification, Control and Appeal) Rules 1966 and vide order-dated 6.5.1999 he was removed from service. He preferred an appeal and the Commissioner, Gwalior vide Annexure P/7 dated 30.12.1999 dismissed his appeal. The appeal was dismissed by the Commissioner on the ground that the State Government having already rejected his appeal on 6.5.1999, the Commissioner cannot entertain the appeal. Respondent No.4 challenged this action by filing an appeal under section 19 of the Administrative Tribunal's Act before MP State Administrative Tribunal in O.A.No.1750/2000 and simultaneously filed an application for review of the entire matter before the State Government within six months from the date of passing of the appellate order by the State Government on 12.11.1999 and by the Commissioner on 30.12.1999. This review application under Rule 29 of the Disciplinary Rules was allowed by the State Government and he was reinstated in service. Ashok Jayant filed a writ of quo warranto against respondent No.4 on the ground that he has no authority to hold office. It was while considering the case in this manner that this Court in paragraph 12 held that the power of review under Rule 29 read with Rule 31 has been exercised correctly by the State Government and Rule 31 empowers the appellate authority to review its earlier decision by relaxing the time limit. 20- Under such circumstances the question would be as to whether the findings recorded in paragraph 12 by a Bench of this Court, in the case of Ashok Jayant (supra) settles the principle correctly or the same warrants reconsideration or the matter can be decided again by this

Court.

21- This Court is of the considered view that the principle laid down in the case of Ashok Jayant (supra) has to be held per incuriam and based on the facts and circumstances of that case and does not effect the present case at all for the following reasons: (i) In the case of Ashok Jayant (supra), the question involved was not as to whether powers of suo motu revision can be exercised by the appellate authority beyond the period of six months. That was a case where the competent authority had dismissed the appeal on 12.11.1999 and 30.12.1999 and within a period of six months the aggrieved delinquent employee himself had sought for a review before the competent authority under Rule 29 and it was decided after a period of more than six months vide order-dated 4.9.2000. This was strictly in accordance to the principle laid down by a Division Bench of this Court in the case of O.P. Gupta (supra) and it was in that context that the power to relax under Rule 31 was held applicable. The question that is involved in this writ petition was not considered in the case of Ashok Jayant (supra).

(ii) That apart, after the judgment was rendered in the case of Ashok Jayant (supra), a Division Bench of this Court has clearly laid down the principle in the case of Brajesh Niboria (supra) and the earlier judgment of the Division Bench in the case of O.P. Gupta (supra) is also not referred to in the said case of Ashok Jayant (supra).

(iii) The third reason is that, the principles of law, if any, laid down in the case of Ashok Jayant (supra) is without considering the law laid down with regard to applicability of the principle governing the interpretation of a non obstante clause and the judgments of the Supreme Court in this regard referred to in this judgment.

(iv) In view of these circumstances, it has to be held that the observations made and the question as decided in case of Ashok Jayant (supra) has to be held to be per incuriam, based on the peculiar facts and circumstances of that case and will have no application as far as the present case is concerned. That being so, the contentions advanced by Shri Sanjay Agrawal and the State Government has to be rejected.

22- For the grounds and reasons as indicated hereinabove, this petition has to be allowed. Accordingly, respondents are directed to open the sealed cover of the petitioner and implement its decision and grant promotion to the petitioner to the post of Assistant Commissioner Excise, if he is found fit for promotion on the basis of the recommendations of the DPC. Even though petitioner has prayed for quashing the order of promotion Annexure P/1 dated 18.4.2007, granted to respondent No.3, this Court directs the respondents to consider the case of the petitioner and to grant him promotion retrospectively with effect from the date it was granted to respondent No.3. In case additional posts are available, in such eventuality the promotion granted to respondent No.3 need not be disturbed. However, on grant of promotion petitioner should be kept above respondent No.3 in the Cadre of Assistant Commissioner Excise and all benefits granted to him with effect from the said date. However, if this is not possible, State Government may either create a supernumerary post for adjustment of respondent No.3 and proceed without disturbing his promotion and ultimately if this is also not possible then the promotion of respondent No.3 be cancelled and in his place the promotion be granted to the petitioner.

23- As the initiation of departmental proceedings now by exercising power of review under Rule 29 is found to unsustainable, the order-dated 16.12.2008 Annexure P/2, for review/revision of the order of exoneration dated 11.4.2007 Annexure P/4, passed by the disciplinary authority is quashed and further the departmental enquiry initiated vide Annexure P/12 on 31.12.2008 is also quashed.

24- Petition stands allowed and stands disposed of.

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