(2004) 01 GAU CK 0015

Gauhati High Court

Case No: Writ Appeal No''s. 29, 30, 31, 32 and 33 of 2003

Dr. M. Laitphlang and Others		APPELLANT
	Vs	
State of Meghalaya and Others		RESPONDENT

Date of Decision: Jan. 28, 2004

Acts Referred:

- Constitution of India, 1950 - Article 16, 226

Citation: (2004) 2 GLR 546 : (2004) 1 GLT 308

Hon'ble Judges: P.P. Naolekar, C.J; I.A. Ansari, J

Bench: Division Bench

Advocate: B.P. Kakaty, M.K. Mishra, B.W. Phira, R. Bezbaruah, G.K. Bhattacharyya, S. Chakraborty, B.C. Kalita and B. Choudhary, for the Appellant; N. Dutta, B. Bhuyan, S.P. Mahanta, A. Sarma, B. Dutta, A.C. Borbora, B. Gunadhar Singh, G.B Das, H. Roy and K. Goswami, for the Respondent

Judgement

P.P. Naolekar, C.J.

A batch of four writ petitions, namely, WP(C) No. 274(SH)/ 2001, WP(C) No. 275(SH)/2001, WP(C) No. 276(SH)/2001 and WP(C) No. 277(SH)/2001, involving similar questions of facts and law, were heard together by the learned Single Judge and decided by common judgment and order, dated 2.1.2003. Aggrieved by the directions contained therein, the private respondents in the said writ petitions have preferred the present five writ appeals, namely, Writ Appeal No. 29/2003, 30/2003, 31/2003, 32/2003 and 33/2003.

2. The facts, which are material for the purpose of disposal of the writ appeals, are not in controversy. What emerges as the admitted case of the parties may, in brief, be set out as follows :

(i) All the writ petitioners in these appeals are Post Graduates in different specialized fields of medical sciences. Following selection by the Meghalaya Public Service Commission, the writ petitioners joined, on different dates, the Meghalaya Health Service as specialists in the pay scale of Rs. 1000-55-330-EB-70-1750. The writ petitioners in WP(C) No. 274 (SH)/2001, WP(C) No. 276 (SH)/2001 and WP(C) No. 275 (SH)/ 2001 have joined the said service on 14.7.1981, 24.1.1980 and 28.9.1981 respectively and though the petitioner in WP(C) No. 277 (SH)/2001 had initially joined, on 5.2.1979, as Assistant Surgeon in the pay scale of Rs. 700-40-900-EB-40-1100-EB-45-1550 he too, upon selection, joined the said services, on 24.1.1980, as Medical Specialist in the scale of Rs. 1000-1750. All the private respondents in the writ petitions aforementioned are appellants herein except Meghalaya Health Service Association, which is an association of all the members of the Meghalaya Health Service (hereinafter shall be referred to as "the said Association"). All the private respondents except the said Association were appointed on various dates in Meghalaya Health Service in the pay scale of Rs. 700-40-900-EB-40-1100-EB-45-1550. At the time, when the parties aforementioned had joined the said service, there was no definite set of recruitment rules. It was only on 16.8.1982 that the Meghalaya Health Services Rules, 1982 (hereinafter shall be referred to as the "1982 Rules") came into force and the said service received definite recruitment rules which prescribed, inter alia, conditions of recruitment and conditions of service of the members of the said service. The 1982 Rules prescribed four grades for the members of the said service, these grades being Senior Grade, Grade-I, Grade-II and Grade-III and laid down different pay scales for each of the said four grades. Since, at the time when the 1982 Rules came into force, the writ petitioners were working in the pay scale of Rs. 1000-1750, they were placed in Grade-II inasmuch as the said scale of pay was prescribed pay scale for the members of the Grade-II. Similarly, the appellants herein except the said Association were placed in Grade-III inasmuch as their pay scale of Rs. 700-1550 was the pay scale prescribed for the members of the Grade-III under the 1982 Rules, According to Sub-rule (2) of Rule 6 of 1982 Rules, a minimum period of 3 years of continuous service in Grade-III was required for the purpose of promotion to Grade-II from Grade-III and, similarly, for the purpose of promotion from Grade-II to Grade-I also, the minimum prescribed period was a period of 3 years of continuous service in Grade-II. Ignoring, however, the fact that the writ petitioners had become eligible for promotion on completion of three years of continuous service in Grade-II, the Government chose not to promote any of them to Grade-I, whereas the members of the said service, who were in Grade-III, continued to receive, from time to time, promotion to Grade-II from Grade-III. As promotions were not accorded to the members of Grade-II, they made several representations to the authorities concerned, but these representations yielded no results.

(ii) With effect from 5th December, 1990, the Meghalaya Health Service Rules, 1990 (hereinafter shall be referred to as the "1990 Rules") came into force repealing the

1982 Rules. Under these Rules, the post in Grade-I, Grade-II and Grade-III have been divided into two streams, namely, General Duty Stream and Specialist Stream, members of both the streams being entitled for promotion to the posts under different Grades meant for the two separate streams. However, from the Grade-I, the next promotional post is designs ed as Senior Grade "The Senior Grade is a common Grade, which is meant for promotion of the members of Grade-I of both the streams, though an early selection to Grade-I for any of the members from any of the two streams would give him/her an edge over the seniormost member in Grade-II of the other stream. The early selection in the post of Grade-I would be one of the factors for consideration, while considering the cases of the officers for selection to Senior Grade. The gradation list for each of the two streams has accordingly been prepared separately. Rule 7 of the 1990 Rules has made provisions for direct recruitment at the level of Grade-III. Rule 9 of the 1990 Rules has laid down the minimum qualifying periods of service for members of each Grade. According to these Rules, for promotion to Grade-II from Grade-III, a member from General Duty Stream is required to put in minimum 9 years of continuous service in Grade-III, whereas the members of the Specialist Stream needs, for such promotion, 6 years if he holds Post Graduate Degree and 8 years if he holds Post Graduate Diploma. Similarly, for promotion to Grade-I from Grade-II, a member of the General Duty Stream is required to put in 18 years of continuous service in Grade-III and Grade-II taken, together of which a minimum period of 2 years ought to have been put in Grade-II and a member of the Specialist Stream becomes eligible for promotion to Grade-I on completion of a period of 15 years if he holds a Post Graduate Degree and 17 years if he holds Post Graduate Diploma in Grade-III and Grade-II taken together, a minimum period of 2 years of continuous service in Grade-II being the pre-requisite for such promotion to Grade-I for each of these two categories of members of the Specialist Stream.

(iii) Alleging apprehension that their seniority was likely to be adversely affected by introduction of the 1990 Rules, the members of the Specialist Stream filed Civil Rule No. 50(SH) of 1990, which was renumbered as Civil Rule No. 144 of 1991, but the same was disposed of by a Division Bench of this Court, vide order, dated 6.3.1991, directing the writ petitioners therein to make necessary representations to the Government and depending upon the outcome of the representations, which would be so made, the petitioners were left free to take such steps as they might be advised.

(iv) Even after coming into the force of the 1990 Rules, while the Government continued to promote the members of Grade-III to Grade-II and from Grade-II to Grade-I in respect of General Duty Stream, the vacancies arising in Grade-I in Specialist Stream were not filled up. Thus, under the 1990 Rules, promotion has not been accorded to Grade-I posts of the Specialist Stream, although vacancies have been available for filling up the posts in Grade-I from Specialist Stream and the writ petitioners became eligible for promotion to Grade-I on different dates in the year

1995-96, whereas the members of the General Duty Stream have been receiving promotions and even the appellants in the present writ appeals, being members of the General Duty Stream, received promotions on different dates commencing from 1992.

(v) Though eligible, the petitioners, having not been given promotion either under the 1982 Rules or the 1990 Rules, have approached the Court by filing the writ petitions, which have given rise to these appeals. The petitioners have alleged, in their writ petitions, complete denial of their promotion as discriminatory, mala fide and also, at the same time, challenging the validity and constitutionality of the 1990 Rules, the petitioners sought for necessary directions in the matter of their promotion. While the appellants-private respondents, except the said Association, were arrayed as parties, for, their interest were involved, the said Association was, on an application made by the said Association, allowed to participate in the said writ petitions as intervener.

(vi) The respondents, while contesting the writ petitions, denied that the rules, in question, were invalid and/or that there was any discrimination in granting promotions to the private respondents. The respondents alleged that there was inordinate delay and latches on the part of the writ petitioners in approaching the Court and since the private respondents-appellants (except the said Association) had already received promotions, their promotions and seniority should not be affected by giving reliefs to the writ petitioners, who approached the Court belatedly and without offering any convincing reason for such delay and that the delay, which has so crept in, and the latches on the part of the writ petitioners were sufficient to deny them grant of equitable reliefs under Article 226 of the Constitution.

(vii) The learned Single Judge has allowed the writ petitions. The learned Single Judge, vide the impugned judgment and order, observed and directed as follows :-

"(i) The State respondents/authority concerned are directed to afford promotion to these writ petitioners to Grade-I posts/equivalent w.e.f. the date and in the year 1992 on which the private respondents concerned particularly, the respondent Nos. 7 to 10 were given promotion from Grade-11 to Grade-I and to consider their cases for their promotion for the post of Senior Grade w.e.f. September 1996 and to restore their respective seniority position in the related grades, I make these observations and directions keeping in view of the vacancy position in Grade-I posts when the Rules of 1982 was in force and relying the relaxation clause under Rules of 1990 as highlighted above and long service of the writ petitioners in Grade-II too by issuing necessary order within a period of one month from the date of receipt of this order. However, it is made clear that the petitioners shall not be entitled to any back salary.

(ii) After giving such promotion to Grade-I these writ petitioners, their seniority position in the Grade-I post/equivalent shall be determined by the respondent

authorities in accordance with the related service rules.

(iii) At this stage, this Court is not going to interfere with the impugned promotion orders of the private respondents as it is not desirable to dislocate them though there are materials on record for interfering with these impugned orders issued by the State-respondents to and in favour of the private respondents.

(iv) There is no delay or laches on the part of the writ petitioners, but there is lapses, ignorance and failure of the State-respondent authorities in discharging their lawful duties conferred upon them by the law and the Rules,

(v) It is made clear that even if there is no vacant post/posts in Grade-I, the State-respondents are directed to create supernumerary post/posts for accommodating these writ petitioners to secure ends of justice and to avoid further litigations."

3. Feeling aggrieved by the observations and directions contained in the judgment and order of the learned Single Judge, the present set of Writ Appeals have been preferred by the private respondents and by the said Association.

4. We have perused the materials on record. We have heard Mr. B. P. Kataky, learned senior counsel appearing for the appellants in Writ Appeal Nos. 29, 30 and 31 of 2003, and Mr. G.K. Bhattacharyya, learned senior counsel appearing for the said Association in Writ Appeal No. 33/2003, Mr. N. Dutta, learned senior counsel, Mr. A.C. Borobora and Mr. S. P. Mahanta, learned counsel appearing for the writ petitioners-respondents in the present Writ Appeal Nos. 29, 30 and 31 of 2003 respectively. We have also heard Mr. H. Roy, learned counsel for the private-respondents in Writ Appeal Nos. 32 and 33 of 2003, and Mr. Anil Sarma, learned Addl. Advocate General, Meghalaya, assisted by Ms. B. Dutta, learned Government Advocate, Meghalaya, appearing in all the appeals on behalf of the State respondents.

5. Upon hearing the learned counsel for the parties and upon perusal of the materials on record including the impugned judgment and order, what attracts our attention, most prominently, is that the writ petitioners had challenged the legality, validity and constitutionality of the 1990 Rules in the writ petitions, but in the impugned judgment and order, there is absolutely no indication at all that this ground had been urged before the learned Single Judge. This prominent feature of the judgment brings us to the conclusion that though mentioned in the writ petitions, it was not, eventually, agitated before the learned Single Judge that the Rules, in question, were illegal, unconstitutional and/or invalid. This impression gains strength from the fact that the learned Single Judge has, ultimately, directed the State-respondents to relax, in terms of Rule 22 of the 1990 Rules, the minimum qualifying period of service in respect of the writ petitioners (i.e., the private-respondents in the present appeals) for according them promotion to Grade-I with effect from 1992, when the appellants-private respondents, in

question, were given promotion to Grade-I and to further consider the cases of the writ petitioners for their promotion to the posts of Senior Grade with effect from September 1996. These directions have obviously been given under the provisions of the 1990 Rules. The benefits, which are so granted to the writ petitioners, have been challenged by the present appellants, Hence, the writ petitioners, it is clear, have opted to utilize the beneficial provisions of Rule 22 of the 1990 Rules for their promotion and they could not have, therefore, at the same time, challenged the provisions of the said Rules as unconstitutional and invalid. Coupled with this, it is also imperative to note that though the writ petitioners claimed to the effect, inter alia, that they ought to have been given promotion on completion of regular service in Grade-II in accordance with the provisions of the 1982 Rules, no such relief has been granted by the learned Single Judge and against the omission to grant such reliefs, as had been sought for, the writ petitioners have not preferred any appeal. Viewed from this angle too, we are of the view that though mentioned about the invalidity, etc., of the 1990 Rules in the writ petitions, the same were abandoned at the time of hearing of the writ petitions in order to gain benefit of the provisions of relaxation contained in Rule 22 of the 1990 Rules. Thus, the question as to whether the Rules in themselves are discriminatory or not, unconstitutional or not and/or invalid or not, do not arise for consideration in the present appeals and have not been accordingly heard at the time of hearing of the present appeals.

6. Presenting the case on behalf of the appellants, Mr. B.P. Kataki has submitted that since the 1990 Rules still stand good, it is clear that the writ petitioners qualified for promotion on putting in 15 years of service in the relevant grades and they cannot be granted promotion with retrospective effect by taking resort to Rule 22, for, no case for such relaxation has been made out and that the minimum qualifying period of service prescribed under the 1990 Rules for promotion from Grade-II to Grade-I being conditions of recruitment, the same cannot be relaxed. This apart, contends Mr. Kataki, before according relaxation, the Governor is required to hear the parties, who are likely to be affected if such relaxation is granted, but this aspect of the matter, submits Mr. Kataki, has not been taken into account by the learned Single Judge, while issuing the impugned directions and, hence, the learned Single Judge could not have directed the Government to straightaway grant any such relaxation. Support for his submissions is sought to be derived by Mr. Kataki from the decisions of the Apex Court in Syed Khalid Rizvi v. Union of India, reported in 1993 Suppl. (3) SCC 575 Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, N.K. Durga Devi Vs. Commissioner of Commercial Taxes, Hyderabad and Others, Government of Orissa and Another Vs. Hanichal Roy and Another, and Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others,

7. It is also submitted by Mr. Kataki that the writ petitioners (private-respondents in the appeals) had approached the Court, admittedly, after a long lapse of time and for such belated approach to the Court of law, the writ petitioners could not offer any convincing reasons nor is there any plausible or convincing reason discernible

from the records. Mr. Kataki has also pointed out that under the 1990 Rules, the writ petitioners became eligible for promotion on different dates commencing from 1995, yet they approached the Court only in the year 2001, i.e., after six long years. Hence, according to Mr. Kataki, in the absence of any convincing explanation offered by the writ petitioners, the writ petitioners have forfeited their rights, if any, to claim promotion with effect from 1995-96. It is further submitted by Mr. Kataki, on behalf of the appellants aforementioned, that in the face of the stale claims of the writ petitioners, they were not entitled to any relief under the writ petitions and no relief may be granted to them as the same will unsettle the settled position of the appellants in their service. To support his submission, Mr. Kataky has placed reliance on G.C. Gupta and Others Vs. N.K. Pandey and Others, and B.S. Bajwa and Another Vs. State of Punjab and Others,

8. Pointing out to the fact that on coming into force of the 1990 Rules with effect from 5th December, 1990, the 1982 Rules already stood repealed and ceased to exist, Mr. Kataki has submitted that in view of the fact that the writ petitioners were, at one point of time, eligible for promotion on completion of three years of continuous service in Grade-II under the 1982 Rules is wholly immaterial inasmuch as no benefit can be claimed by, or granted to, the writ petitioners under the provisions of the 1982 Rules, which stand repealed. Reference, in this regard, is made by Mr. Kataki to Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others,

9. Mr. G.K. Bhattacharyya, learned counsel appearing on behalf of the appellant in Writ Appeal No. 33/2003, has substantially adopted the submissions made by Mr. Kataki. What Mr. Bhattacharyya has, however, additionally submitted is that the 1982 Rules had not been acted upon by the State-respondents as a matter of policy. Nothing could, however, be cited by Mr. Bhattacharyya to show that the Government took any conscious decision, as a matter of policy, not to act upon the 1982 Rules. Far from this, the admitted case of the parties is that even when the 1982 Rules remained in force, promotions were, indeed, granted, under 1982 Rules, to Grade-II from amongst the members of Grade-III, though no promotion was granted, under the 1982 Rules, to the members of Grade-I. Hence, we do not find any force in the submissions of Mr. Bhattacharyya that as a matter of policy, the Government had decided not to act upon the 1982 Rules and that the said Rules stood abandoned even before the 1982 Rules were formally repealed.

10. As far as Mr. A.C. Borbora, learned counsel appearing on behalf of the writ petitioner private-respondent in Writ Appeal No. 30/2003 is concerned, he has submitted to the effect that while the members of the General Duty Stream continued to receive promotions from Grade-III to Grade-II under 1982 Rules and, then, under 1990 Rules, from Grade-II to Grade-I and also from Grade-I to Senior Grade, the members of the Specialist Stream were not promoted even when they became eligible for consideration for such promotion under the 1990 Rules. For

such discriminatory treatment, contends Mr. Borbora, the Government has not been able to offer any explanation. Hence, in order to undo the injustice caused to the writ petitioners, as a whole, the learned Single Judge was, according to Mr. Borbora, justified in directing the State Government to grant relaxation in terms of Rule 22 in the manner as has been directed by the learned Single Judge. The directions so given, according to Mr. Borbora, are in conformity with the provisions of law and in consonance with the requirements of justice. Mr. Borbora has also pointed out that though the writ petitioners did not approach the Court promptly, they had kept making representations time and again to the Government requesting the Government to undo the hardship caused to them and to accord them promotion, but the same yielded no result. Because the writ petitioners kept approaching the State Government, for relief, their claim for relief made in the writ petitions cannot, submits Mr. Borbora, be treated as stale.

11. In support of his passionate plea for maintaining the impugned judgment and order, Mr. Borbora has placed reliance on Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, P. Mahendran and others Vs. State of Karnataka and others, D.S. Nakara and Others Vs. Union of India (UOI), and AIR 1988 1033 (SC)

12. Appearing on behalf of the private-respondents in the Writ Appeal No. 29/2003, Mr. N. Dutta has submitted that the writ petitioner/private-respondent in this appeal, initially, joined the service in Grade-III on 5.2.1979 and he was, then, recruited to Grade-II on 24.1.1980. Though this writ petitioner, points out Mr. Dutta, became eligible for promotion to Grade-I under the 1982 Rules as far back as in 1982, he was, for no justified reasons, not considered for promotion. When the 1990 Rules came into force, this writ petitioner had already put in, points out Mr. Dutta, 11 years of service and even after he stood qualified, in the year 1995, to be promoted to Grade-I, the writ petitioner''s case for promotion was for no reasons whatsoever, not considered by the official-respondents, though, admittedly, vacancies in Grade-I from Specialist Stream did exist to accommodate this writ petitioner in Grade-I. Had this writ petitioner been, then, granted his lawfully due promotion, he would have become, submits Mr. Dutta, eligible for consideration for promotion to Senior Grade in May 1998. It is, unfortunate, points out Mr. Dutta, that in his whole service career, this writ petitioner has not been accorded even one promotion and similar is the fate of the remaining writ petitioners, who, though more qualified than the appellants, have been unjustly denied their well-deserved promotion. In a situation, such as this, submits Mr. Dutta, when the stagnation in promotion has arisen not only because of the operation of law with the changes that took place in the 1982 Rules, but also in consequence of the conduct of the persons vested with the powers to operate the law, the stagnation in promotion needs to be removed by this Court. As the writ petitioners kept knocking at the doors of the State-respondents, their case, according to Mr. Dutta, cannot be treated to have suffered from latches.

13. In the facts and circumstances of the case, submits Mr. Dutta, the writ petitioners formed a group of persons, who needed to be dealt with a little differently and, if necessary, even recruitment rules need to be relaxed, as a special case, for the purpose of giving promotion to the writ petitioners. The language employed in Rule 22, according to Mr. Dutta, permits relaxation of even the conditions of recruitment and in such a situation, in the facts and circumstances of the case, the authorities concerned ought to have considered the case of the writ petitioners under Rule 22 and the learned Single Judge acted in conformity with law in giving substantially the reliefs, which the writ petitioners were entitled to receive. In support of his submission that even the conditions of recruitment may be relaxed, Mr. Dutta has referred to Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, J.C. Yadav and others Vs. State of Haryana and others, State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, Dr M.A. Haque and Others Vs. Union of India (UOI) and Others, Ashok Kumar Uppal and Others Vs. State of Jammu & Kashmir and Others, M. Venkateswarlu and Others Vs. Govt. of A.P. and Others, State of Maharashtra v. Jagannath Achyut Karandika, reported in 1989 (1) SCC 393 S. Ashok Kumar v. State of TN, reported in (1994) 2 SCC 631 Dr. Surinder Singh Jamwal and another Vs. State of Jammu and Kashmir and others, and Dr. Arundhati Ajit Pargaonkar v. State of Maharashtra, reported in (1994) 3 SCC 380 .
14. In the facts and circumstances of the present case, submits Mr. Dutta, even delay may not be allowed to stand by this Court in the way of giving necessary reliefs to the writ petitioners. Strength for this submission is sought to be derived by Mr. Dutta from Bakshish Singh v. Darshan Engg. Works, reported in AIR 1994 SC 259.

15. So far as Mr. H, Roy, learned counsel for the private-respondent in Writ Appeal Nos. 32 and 33 of 2003, is concerned, his submission is that the right to be considered for promotion is a fundamental right and since the writ petitioners have been denied this right, it is in the fitness of things to direct the Government to consider the case of the writ petitioners for relaxation in terms of Rule 22. Reference, in this regard, is made by Mr. Roy to Delhi Jal Board Vs. Mahinder Singh, Ajit Singh and Others Vs. The State of Punjab and Others, and Permanent S. Syiem v. David Hammer Marwein, reported in 2002 (I) GLT 251.

16. As far as Mr. S.P. Mahanta, learned counsel for the private respondents in writ appeal No. 31 of 2003, is concerned, he has broadly adopted the submissions already made on behalf of the writ petitioners (private-respondents in the present set of appeal) and has contended that the case of the writ petitioners deserve to be considered with all compassion and in view of the fact that they have suffered unjustly at the hands of the State-respondents, their cases deserve to be considered as a special set of cases for the purpose of giving them relief of relaxation for promotion and the learned Single Judge acted within the ambit of law in giving the reliefs, which the writ petitioners so deserved.

17. Mr. A.C. Sharma, learned Additional Advocate General appearing on behalf of the State respondents, has submitted that the State respondents have an open mind and would abide by whatever directions are issued by this Court in the facts and circumstances of the present case and the law relevant thereto,

18. Upon hearing the learned counsel for the parties and upon perusal of the materials on record, what becomes glaring to the eyes is that when the writ petitioners had, initially, joined the Meghalaya Health Service as specialists, there was no recruitment rules governing the conditions of their service and/or conditions of their recruitment. However, when the 1982 Rules came into force, the writ petitioners were placed in Grade-III as per the pay scale, which they were enjoying, and, similarly, the private respondents (i.e., appellants herein), except the said Association, were placed in Grade-II under the said Rules as per the pay scale, which these private respondents were enjoying at the time, when the said Rules came into force. Under the 1982 Rules, the writ petitioners, having already put in 3 years of continuous service in Grade-II, had become eligible for promotion to Grade-I as early as in the year 1981-82, but no such promotion was granted to them, though promotions under the same set of Rules were kept on being granted to the private-respondents concerned. Generally, a person has to be considered for promotion under the Rules, which were in force at the time, when he became eligible for such promotion unless the subsequently made Rules, by giving retrospective effect, take away the right of consideration for such promotion given to the person under the old Rules. In the case of Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, the Apex Court has observed as follows :

"15. It is, however, a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect. But the Rule is general is applicable where the object of the statute is to affect the vested rights or to impose new burden or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to effect existing rights, it is deemed to be prospective only. Provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."

19. Reference may also be made to the case of P. Mahendran and others Vs. State of Karnataka and others, wherein the Apex Court has observed as follows :

"It is well settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. If a Rule is expressed in language, which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in

matter of procedure. The amending rule of 1987 in the instant case does not contain any express provision giving the amendment retrospective effect not there is anything therein showing the necessary intendment for enforcing the Rule with retrospective effect. Since the amending Rule speaking the charge in the eligibility criteria for selection and appointment to the post of Motor Vehicles Inspectors was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending rules came into force. The amended rule could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment: moreover construction of amending rules should be made in a reasonable manner to avoid unnecessary hardship to those who have not control over the subject matter."

20. However, what is of immense importance to note is that against their non-consideration for promotion, though vacancies were available, the writ petitioners never approached any Court and in course of time, the 1990 Rules came into force. The 1990 Rules placed the writ petitioners in the Specialist Stream and the private-respondents concerned in the General Duty Stream, but the length of qualifying period of service for receiving promotion from Grade-II to Grade-I was increased to 15 years in the cases of the present writ petitioners, who were Post Graduates, whereas according to the earlier rules, i.e., 1982 Rules, they were already eligible for promotion on completion of 3 years of continuous service in Grade-II. Thus, when the 1990 Rules came into force, the writ petitioners became disentitled to promotion until they had put in requisite period of service for consideration for such promotion under the 1990 Rules. Apprehending that their seniority might be affected by introduction of the 1990 Rules, the writ petitioners had approached this Court. In Civil Rule No. 50(SH)/1990, a Division Bench of this Court, as indicated hereinabove, while disposing of the writ petition, gave the writ petitioners freedom to approach this Court, in future, after their seniority in the service was finalized, but the writ petitioners did not approach the Court again.

21. Even under the 1990 Rules, the writ petitioners had become eligible for promotion on different dates in the year 1995-96 and though they were denied promotion, yet, strangely enough, they still did not approach the Court. In the meanwhile, the private-respondents concerned received promotions from Grade-II to Grade-I and from Grade-I to Senior Grade as the members of General Duty Stream, but the writ petitioners, who fell under Specialist Stream and were more qualified persons, did not receive promotion, though vacancies were available for absorbing them on promotion. For not promoting them to Grade-I and, then, to Senior Grade, no explanation was offered on behalf of the State-respondents before the learned Single Judge nor has any explanation been offered, in this regard, by the learned Additional Advocate General appearing on behalf of the State-respondents before this Court at the time of hearing of the present appeals. This apart, no

explanation, in this regard, is discernible from the materials on record.

22. However, what is of utmost importance to note, if we may reiterate, is that even after the writ petitioners had become eligible for promotion under the 1990 Rules, they did not approach the Court until 2001.

23. The question, which, now, arises for consideration is as to whether in the facts and circumstances of the case, the writ petitioners are entitled to any relief and, if so, what reliefs should be granted to them ?

24. In view of the fact that the vacancies were, admittedly, availably, in the year 2001, for promotion of the writ petitioners from Grade-II to Grade-I under the Specialist Stream, there was no difficulty on the part of the Court to direct the State-respondents to consider the cases of the writ petitioners for giving them such promotion with effect from the date, when they approached the Court. The learned Single Judge has, however, directed the State-respondents to relax the provisions of the 1990 Rules and accord promotion to the writ petitioners with effect from the year 1992 to Grade-I and with effect from the year 1996 to Senior Grade. The question which, now, falls for determination is as to whether any such relaxation could have been directed by the learned Single Judge to be made in favour of the writ petitioners; if not, whether the State-respondents can be directed to consider the cases of the writ petitioners for promotion with effect from, at least, 1995-96, when they had, admittedly, become eligible for promotion under the 1990 Rules.

25. While considering the above aspects of the matter, it needs to be pointed out, at the very outset, that the concept of appointment, absorption and/or promotion in service in relaxation of relevant recruitment rules has undergone a prominent development. The present view is that there can be no relaxation of the basic and fundamental rules of recruitment. Moreover, strict conformity with the recruitment rules is insisted both for direct recruits as well as promotees. (Ref : Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, Thus, the service jurisprudence, now, clearly draws a distinction between the conditions of recruitment and conditions of service. In other words, in the realm of service jurisprudence, a distinction is, now, drawn between the conditions of recruitment and the conditions of service. While the conditions of service may be relaxed, conditions of recruitment cannot be so relaxed. In other words, the provisions for relaxation, in general, contained in recruitment rules cannot be resorted to for relaxing the conditions of recruitment, the only exception being, when the recruitment rules, in question, contain provisions for relaxation of the conditions of recruitments. The minimum period of qualifying service for promotion, which recruitment rules impose, is really a condition of recruitment and such a condition, not being a condition of service, cannot, generally, be relaxed unless the Rules in themselves provide for otherwise J.C. Yadav and others Vs. State of Haryana and others, A Division Bench of this Court have set the matter at rest in the case of Ananda Ram Borah v. State of Assam, reported in 2003 (2) GLT 78 by observing and

laying down as follows :

".... The question, which call for determination by this Court is, whether the power to relax the Rule would go to the extent of relaxing conditions of recruitment also or it can be only to the extent of relaxing the conditions of service ? Can a direct recruit for recruitment to the post of LDA avoid competitive examination ? Can the Government exercise power of relaxation of Rule of recruitment requiring a direct recruit to appear in the competitive examination and such relaxation of the recruitment Rules is permissible. In Keshab Chandra Joshi v. Union of India, reported in 1992 SCC 272 the Apex Court has emphasized the need of strict compliance of the recruitment Rules for both direct recruits and promotees. It is held that there cannot be any relaxation of the basic or fundamental Rules of recruitment. That was a case where the Rule permitting relaxation of conditions of service came for consideration and it was held by a three Judges Bench that the Rule did not permit relaxation of the recruitment Rules. In Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, the Apex Court observed. "The condition precedent, therefore, is that there should be an appointment to the service in accordance with Rules and by operation of the Rules, undue hardship has been caused...it is already held that the condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed." Thus, according to the Apex Court there is distinction between the conditions of recruitment and conditions of service. Appointment has to be made in accordance with the recruitment Rules and, thereafter, there may be a relaxation in the service condition. Similarly, in State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, it was held that though the power of relaxation stated in the Rule was in regard to "any of the provisions of the Rules," this did not permit relaxation of the Rule of direct recruitment without consulting the Commission and the entire ad-hoc service of a direct recruit could not be treated as regular service. In Dr M.A. Haque and Others Vs. Union of India (UOI) and Others, and in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., it has been emphatically laid down that the Rule relating to recruitment could not be relaxed. The judgment in the matter of Suraj Prakash Gupta (supra) has also reiterated the principle laid down by the Apex Court that there cannot be any relaxation of the conditions of recruitment. The conditions of recruitment and conditions of service are distinct. The Government has the power to relax conditions of service, whereas the conditions of recruitment cannot be relaxed even though the Rule intends to do so." (emphasis is supplied)

26. We express our complete agreement with the position of law laid down in Ananda Ram Borah (supra) subject to only one clarification that if the recruitment rules, in themselves, provide for relaxation of conditions of recruitment, the conditions of recruitment may be relaxed, provided that such relaxation does not make the conditions of recruitment nugatory and that interpretation of such provisions of relaxation contained in the recruitment rules must not be liberal, but

very strict.

27. In the case at hand, Rule 22 of the 1990 Rules, which the writ petitioners rely upon, read as follows :

"22. Power of the Governor to dispense with or relax any rule. - The Governor, if he is satisfied that the operation of any of the provisions of these rules causes undue hardship in any particular case or cases, or result in any particular post or posts being left unfilled for want to persons possessing the qualifications as specified under these rules, may dispense with or relax the requirement of any of these rules, to such extent and subject to such conditions as he may consider necessary, for dealing with the case in a just and equitable manner or for meeting the exigencies in public interest:

Provided that the case of any person shall not be dealt with in any manner less favourable to him than that provided under these rules."

28. What is, now, of prime consideration, if we may repeat, is that though under the 1982 Rules, as indicated hereinabove, the petitioners were already eligible for promotion from Grade II to Grade I, the fact remains that when the 1990 Rules came into force, the petitioners ceased to become eligible for promotion until the time they had put in requisite number of years of service in Grade III. The requisite periods for making them eligible for promotion have already been completed by the petitioners, on different dates, between the year 1995-96; hence, the power of relaxation contained in Rule 22 of the 1990 Rules cannot be resorted to and retrospectively applied, in order to relax the conditions of recruitment, namely, the minimum qualifying period of service, which the petitioners have already completed under the 1990 Rules before they approached the Court. In other words, when, upon having completed the requisite qualifying periods of service, the petitioners have already become eligible for promotion to Grade I, they cannot, now, so belatedly seek direction for relaxing the requisite period of qualifying service and thereby unsettle the settled position of inter se seniority between the parties.

29. In other words, though a careful reading of Rule 22 shows that the Governor does have the power to relax even the conditions of recruitment, yet in view of the fact that the petitioners have approached the Court belatedly and without offering any reasonable explanation for approaching the Court so belatedly and in view also of the fact that the petitioners have, in the meanwhile, already acquired the qualifying periods of service for being considered for promotion, the question of, now, taking resort to the power of relaxation contained in Rule 22, will really amount to applying the provisions of relaxation contained in Rule 22 retrospectively.

30. Thus, notwithstanding the fact that Rule 22 of the 1990 Rules makes provisions for relaxation of conditions of recruitment, if, in the circumstances of a particular case, satisfaction is reached by the Government of undue hardship caused to any employee or class of employees, the fact remains that at the time, when the power

is so exercised under Rule 22, the satisfaction has to be that of the Government and not that of the Court; no doubt, however, that the Court has jurisdiction to scrutinize the reasons for the Government reaching such satisfaction, but that does not authorize the Court to step into the shoes of the State and exercise the powers straightaway.

The learned Single Judge could not have, in the face of the facts of the present case, directed the Government to relax the rules, in question, and accord promotion to the writ petitioners with effect from 1992. Consequently, the further direction given by the learned Single Judge for promoting the petitioners to Senior Grade with effect from 1996 is also not sustainable. To this extent, therefore, the directions given by the learned Single Judge, in our firm view, cannot be maintained.

31. It is, no doubt, true that in B.S. Bajwa and Another Vs. State of Punjab and Others, which Mr. B.P. Kataki relies, the Apex Court has held, "It is well-settled that in service matters the question of seniority should not be reopened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

32. While considering the case of B. S. Bajwa (supra), what is essential to note is that in this case, the Apex Court dealt with the situation, wherein the relief, if granted to the petitioners, would have unsettled the settled position of seniority between the parties. In the present case, we are not inclined to unsettle the inter se seniority between the writ petitioners and the respondents, but without adversely affecting the inter se seniority between the parties, if any relief can be given to the writ petitioners, the same cannot, in the facts and circumstances of the present case, be denied.

33. What is, however, of paramount importance to note is that ordinarily, a panel shall be prepared every year by the authorities concerned for considering for promotion the persons eligible for promotion. Unless the authorities concerned clarify that no vacancies arose in a particular year or no suitable candidates was available and/or that the Government, for justified reasons, decided not to fill up the promotional posts, it would be mandatory to prepare and finalize the yearly panel for promotion and consider the cases of persons, who fall within the zone of consideration for promotion during the year concerned. In Union of India and others Vs. N.R. Banerjee and others, the Apex Court, while laying down the procedure to be followed for the purpose of preparation of panel of promotion, observed thus, "It may be indicated that regular meeting of DPC should be held every year for each category of posts so that approved select panel is available in advance for making promotions against vacancies arising every year" (emphasis is added). The system of considering promotion on the basis of accumulated vacancies has been deprecated by the Apex Court in several cases.

34. Ideally, therefore, when the petitioners had become eligible for promotion under the 1982 Rules, they ought to have been considered for promotion and such promotion could have been denied to them only if no vacancies existed for accommodating the petitioners on promotion and/or if a conscious decision was taken for justifiable reasons by the State-respondent not to fill up the promotional posts at all and/ or that the petitioners were found not fit for promotion. No such stand has been taken by the State-respondents in the present case. After coming into force of the new Rules, i.e., 1990 Rules, the petitioners, admittedly, became, as members of the Specialist Stream, eligible for promotion on different dates in the year 1995-96. When they had become so eligible, their cases for promotion ought to have been considered by the State-respondents, particularly, when they are allowing the members of the General Duty Stream to receive promotion. No plea has been taken by the State-respondents that for some justifiable reasons, the promotional posts falling in the Specialist Stream had been consciously decided by the State Government not to be filled up. This apart, it will be wholly unreasonable, in the absence of any cogent material on record, to even infer that while the services of the members of the General Duty Stream were essential for the Government, the services of the officers of the Specialist Stream were not required by the Government.

35. To be considered for promotion, when a person becomes so eligible, is his fundamental right and denial of such a right, if discriminatory, cannot be permitted by a Writ Court. In the case of Delhi Jal Board Vs. Mahinder Singh, the Apex Court held, "The right to be considered by DPC is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is within the zone of consideration". In the case at hand, the State-respondents have completely failed to show as to why promotion could not have been accorded to the writ petitioners, when the writ petitioner had become eligible for promotion in the year 1995-96.

36. When we have already ascertained that the writ petitioners had become eligible for promotion to Grade I in the year 1995-96, there were vacancies available to accommodate them on promotion, but they were illegally and unjustly denied the promotion, which was due to them, we have no escape from the conclusion that the writ petitioners deserve to be considered for promotion with effect from the dates, when they became eligible for promotion under the 1990 Rules. In the case at hand, it is really sad and unreasonable that the writ petitioners, though more qualified than the appellants, have not been accorded even one promotion in their whole service career covering more than two decades, which was not only contrary to the Rules of 1982, but is also against the mandate of the 1990 Rules. When the 1990 Rules give the right to be considered for promotion, non-consideration for such promotion, without any justified reasons, is really denial of the fundamental right of a Government employee of being considered for promotion, when he becomes eligible for such promotion and the vacancy to accommodate him exists.

37. Way back, in the case of AIR 1988 1033 (SC) the Apex Court has observed as follows:

"Reasonable promotional opportunities should be available in every wing of public service. That generates efficiency in service and fosters the appropriate attitude to grow for achieving excellence in service. In the absence of promotional prospects, the service is bound to degenerate and stagnation kills the desire to serve properly."

38. In the present set of appeals, if the technicality of law that on account of delay, the grievances of the petitioners should not be considered at all is allowed to prevail, it will degenerate the efficiency of the person belonging to the Specialist Stream under the Meghalaya Health Service. Such technicality can, therefore, not impose impediments on the powers of this Court to issue necessary directions.

39. Thus, while accepting the fact that the learned Single Judge erred in law in directing the State-respondents to relax the provisions of 1990 Rules for the purpose of promoting the writ petitioners to Grade I with effect from 1992, we are firmly of the view that the discrimination, which is writ large on the face of the record, cannot be allowed to be perpetuated against the petitioner and the ends of justice will be met if the discrimination is removed from, at least, the date, when they became eligible for promotion in the year 1995-96.

40. It is trite that promotion of a Government servant should be considered in accordance with the rules, which were in force on the date, when he had fallen within the zone of consideration for promotion. In the present case, since the writ petitioners had become eligible for promotion under the 1982 Rules and the vacancies were, admittedly, available, they ought to have been considered for promotion under the 1982 Rules itself. We might have tempted to give them the promotion, which was unjustly denied to them, but on account of the fact that the petitioners approached the Court belatedly, granting of such promotion would, now, unsettle the settled position with regard to inter se seniority between the parties. Hence, we consciously refrain from doing so; but there is no reason why the cases of the writ petitioners be not directed to be considered for promotion when, as per the 1990 Rules too, they fell within the zone of consideration for promotion in the year 1995-96. For coming to the conclusion so reached, we have carefully considered the authorities cited at the bar in support of the respective cases of the parties.

41. In the result and for the reasons discussed above, this appeal partly succeeds and we direct the State-respondents to consider the cases of the writ petitioners for promotion to Grade-I with effect from the dates, when they became eligible for promotion under the 1990 Rules, and to consider the writ petitioners for further promotion to Senior Grade with effect from the dates, when they became eligible for such promotion too. Taking into account, the time factor, which has been lost in consideration of the cases of the writ petitioners for promotion by the

State-respondents, we direct that the entire exercise, as indicated hereinabove, shall be commenced and completed within a period of four months from today.

42. With the above modifications in the impugned order, these writ appeals shall stand disposed of. No order as to costs.

43. Send back the records to the Shillong Bench within seven days.