

the criminal case. It may not be possible for this court to examine this aspect.

(12) Apart from the above, it is equally established proposition that parameters for holding an accused guilty in a criminal trial are different than the standard of proof in departmental proceedings. Thus under the given circumstances, a separate departmental proceedings and criminal trial cannot be said to be impermissible in law. In the present case, I find that the termination of the petitioner having already been ordered by completion of the departmental proceedings, lateron registration of criminal case and acquittal of the petitioner therein, cannot be pressed into service as a ground for nullifying the departmental proceedings.

(13) In view of the above, I find no force in this writ petition. The same is, accordingly, dismissed.

M. Jain

Before Permod Kohli, J.

SUBHASH CHAND HIRA & OTHERS,—Petitioners

versus

**PUNJAB AND HARYANA HIGH COURT,
CHANDIGARH,—Respondent**

CWP No. 9806 of 1994

20th April, 2011

Constitution of Inda, 1950 -Art. 309 - High Court Establishment (Appointment & Condition of Service) Rules, 1973 - Rl. 19 - Petitioners working as Restorers - Appointment as Clerk is by either direct recruitment (90 %) and promotion from amongst Supervisors/Restorers (10%) - Petitioners appeared for type test and were placed at Sr. nos 5 to 8 - Petitioners made representation to keep their names in the panel for promotion as and when a vacancy occurs - No such panel contemplated at that time - Rule 19 amended subsequently - Petitioners claimed promotion retrospectively when the vacancies for promotional quota became available - Held, mere qualification does not create a vested right in empanelled candidate

to occupy a vacancy in future - However, in present case, Establishment branch will work out the vacancies of Clerks from promotional quota available during the calendar year 1993 and vacancies were more than four, Petitioners on the basis of their merit will be considered for notional promotion.

Held, That under normal circumstances the petition should have been dismissed on the ground that a Constitution Bench in the case of BS Vadera & Anr. v/s UOI & Ors: 1969 SLR 6 has inter-alia, held that Rule framed under Article 309 could have retrospective effect only if the Rule so prescribes. The amendment in the Rules in the present case does not provide for retrospective operation. The judgment rendered in YV Rangaiah v/s J Sreenivasa Rao; 1983 (3) SCC 285 is a true reflection of law. The contentions of the Petitioners is liable to be rejected since the Amendment of Rule 19(4) was made when the process of selection/ appointment had already been completed and because the amendment introduced keeping the panel alive is not merely procedural but also affect the substantive right of the person. Mere qualification does create a vested right in the empanelled candidate to occupy a vacancy in the future unless the panel legally survives for the future. The contentions of the Petitioners are thus, rejected.

(Para 9)

Further Held, However, the reply of the Respondents indicates that vacancies were available from time to time. From the information made available under the RTI Act, if taken to be authentic, it appears that four more vacancies were available in the year 1993, though the date is not mentioned, it can be assumed that the all or some vacancies were available before 6.11.1993. In that eventuality, the Petitioners who were next in the select panel could be considered for appointment. Petition disposed off with the direction that the Establishment Section will work out the vacancies of Clerks from promotional quota available during the calendar year 1993 and vacancies were more than four, Petitioners on the basis of their merit will be considered for notional promotion. If Petitioners are found entitled to promotion, they will be deemed to be promoted with effect from the said date, though only notionally, without any monetary benefit. The salary etc. of such Petitioners shall be fixed by giving notional benefit of promotion etc.

(Para 12)

Sangita Dhanda, Advocate, *for the petitioners*

Sanjeev Sharma, Sr. Advocate with Rajdeep Singh Cheema,
Advocate for respondents

PERMOD KOHLI, J.

(1) The petitioners are employees of the High Court. At the time of filing of this petition, they were working as Restorers, however, during the pendency of this petition, they stand promoted as Clerks in the year 2008. At the time of filing of this petition, the prayer made by the petitioners was for their promotion, on the basis of passing of the type test on 6th November, 1993 against the vacancies that may be available thereafter. Since the petitioners were promoted during the pendency of this writ petition, an amended writ petition has been filed seeking a direction for their retrospective promotion to the post of Clerks having qualified the type test on 6th November, 1993. It may be useful to briefly notice the factual matrix leading to the filing of this petition.

(2) Petitioners no.1 to 3 are matriculates whereas petitioner no.4 is graduate. Next promotion from the post of Restorer is to the post of Clerk. Promotion/recruitment is governed by Rule 19 of the High Court Establishment (Appointment and Condition of Service) Rules 1973 (hereinafter referred to as the "1973 Rules"). For appointment of Clerks, two sources are prescribed- by direct recruitment 90% and promotion from amongst the Supervisors/Restorers 10%. The relevant extract of Rule 19 is reproduced here under:-

“19. Clerks- (1) Appointment to the post of Clerk shall be made either by direct recruitment or by promotion from the High Court Establishment in accordance with the provision laid down hereunder:-

(2) The direct recruitment to the posts of Clerks shall be regulated as under:-

XXX XXX XXX

(v) A select list of successful candidates in order of merit shall be prepared as a result of one competitive examination. The

appointment to the posts of Clerks shall be made as the vacancies arise from the list which shall remain in force for a period of two years from the date of examination and lapse thereafter.

XXX XXX XXX

- (4) 10% of the vacancies in the cadre of Clerks during Calendar year may be filled up by promotion from amongst the supervisors/Restorers working in this Court possessing the following qualifications/experience:-

- (i) Graduate of recognized University with two years service as Supervisor/Restorer on the establishment of this Court.

OR

- (ii) Matriculates of a recognized University/Board or its equivalent with five years service as Supervisor/Restorer on the establishment of this Court. Provided that the eligible Supervisors/Restorers shall have to qualify type-writing test in English at the speed of 30 words per minute before promotion as Clerk.

- (iii) Add Notification No.258 dt. 27.5.1992, Following Proviso may be added as third below existing Rule 19(4) (ii):-

“Provided further that no Supervisor or Restorer shall be considered to have qualified the test, if he commits more than 10% mistakes.”

(3) Under the promotional channel, there are two categories of eligible persons, Matriculate, Supervisor/Restorer with five years experience and Graduate Supervisor/Restorer with two years experience. For making promotions against the available vacancies under 10% quota, a type test was held on 6th November, 1993. Petitioners were amongst 15 persons who participated in the type test for promotion as Clerks. Out of 15 persons, 8 qualified, including the petitioners. Petitioners were from Sr.Nos.5 to 8 in the Panel of the qualified Supervisors/Restorers. Four out of the 8 qualified persons were promoted. It is admitted case of the parties that no

wait list or select panel was prepared for the left over qualified candidates. It is alleged that a number of ineligible persons were promoted, without passing the type test either by granting exemption or without holding the type test. The petitioners have given names of such persons in paragraphs 8 and 9 of the writ petition. Details of these averments are not relevant for the purpose of this writ petition. After the declaration of the result and finding their names next in the list of the qualified persons, petitioners made representation for keeping their names in the panel for consideration for promotion as and when any vacancy occurs. Copies of these representations dated 29.11.1993 and 23.12.1993 are placed on record as Annexures P-4 and P-5. At that time, the petitioners were considered for promotion under the existing Rule 19. There was no provision for preparing a panel for promotional channel whereas Rule 19(2) (v) provides for a panel/waiting list to remain in force for a period of two years from the date of examination. One of the grievances expressed by the petitioners in this petition is that Rule 19 as in force at the time they participated in the selection was discriminatory in nature. The fact remains that Rule 19 is not under challenge in the present petition. Rule 19, however, was amended by adding clarification in the form of a note vide clarification dated 13.11.1995. This amendment came to be gazetted on 1.1.1996 and after 3rd Proviso to Rule 19(4), following note was added:-

- “Note (i) A panel of eligible Supervisors/Restorers who qualify the type test shall be maintained for making appointments to the vacancies of their quota. The first panel shall be prepared after holding a type test on such date as may be deemed appropriate by the Hon’ble Chief Justice and thereafter regular type tests shall continue to be held in January and July in each year and the names of those qualifying the type tests shall continue to be added in the panel having due regard to their seniority. The panel so prepared shall never lapse and senior employee passing the type test at the subsequent stage would jump over his juniors who have passed the type test earlier but are awaiting their turn, for appointment.
- (ii) The eligibility of the candidate for taking the type test shall be determined as on 31st December and 30th June, respectively.”

Apart from above note, another Sub Rule (5) to Rule 19 was added which reads as under:-

“19(5)(i) All regular vacancies of Clerks shall be filled in from the two sources by rotation i.e. first two vacancies shall be filled in from source (I) i.e. appointment by way of direct recruitment and the next one vacancy from source (II) i.e. appointment by way of promotion, from amongst eligible Supervisors/Restorers from the High Court Establishment.

Provided that all vacancies of one source may be filled in from the other by making appointments on ad hoc basis till the appointments of candidates from the source to which the vacancies belong, subject to the conditions that the persons appointed on ad hoc basis will not be entitled to claim seniority on the basis of such appointment.

(ii) The seniority inter-se of the Clerks shall be determined by the order in which they are appointed on regular basis.

Sd/-OP Goel, Additional Registrar (Admn.)”

(4) In view of the above amendment, a panel of the qualified persons under promotional quota was allowed to remain in force without any limitation and even if a senior person qualifies the written test, later than the juniors in the panel who had qualified the type test earlier is entitled to claim seniority in the matter of appointment/promotion as Clerks. The amended Rule further provides for holding regular type test of eligible candidates. Eligibility to be determined on 31st December and 30th June of a Calendar year, respectively. Sub Rule (5) of Rule 19 as introduced by amendment also provides rotation of vacancies for direct recruits and promotees. Though power to fill up the available vacancies from other source was also introduced subject to restrictions contained therein. Rule 19 is said to have been amended later in the year 2008 and under the amended rule exemption from passing type test has been granted to Restorers/Supervisors.

(5) The petitioners are claiming their promotion retrospectively when the vacancies for promotional quota became available after their qualifying type test on 6.11.1993. This plea is based upon the following

grounds:- (i) that the amended Rule 19 notified on 1.1.1996 is applicable in case of the petitioners as well; and (ii) that there is discrimination as a number of restorers/supervisors have been promoted for the post either by exempting them from passing the type test or imposing a condition for passing such a test after their promotion. It is also alleged that in the year 1995, only 10 vacancies were circulated vide Circular dated 21.10.1995 whereas 19 successful candidates who qualified the type test were appointed from the same panel on ad hoc basis even against the quota meant for direct recruits; (iii) The petitioners have placed on record information received under the RTI Act after the enforcement of the RTI Act where under it is disclosed that when the type test was conducted on 6.11.1993, four vacancies were available from 10% promotees quota for which test was held. It is further disclosed that after the amendment of the Rules, these vacancies belonging to the promotional quota were available out of 18 total vacancies of Clerks.

(6) The High Court in its reply mentioned that as on 31.12.1992, four posts of Clerks from promotional quota were available to be filled up from amongst the Supervisors/Restorers. These four posts were notified vide order dated 13.8.1993 for which test was conducted on 6.11.1993. Only four candidates could qualify the test out of which four candidates were appointed. It is further stated that during the years 1993 and 1994 only two posts for promotional quota became available for which test was conducted on 29.4.1995. Six candidates qualified out of them two senior most officials were promoted on the basis of their seniority and no panel was prepared. As regards the amendment is concerned, it is stated that subsequent to the amendment on 13/15.11.1995, a test was held on 2.12.1995. 19 candidates qualified the test. For the first time, a panel of type test qualified candidates was prepared. However, after 29.1.1996, all the officials were promoted. Regarding the petitioners, it is stated that petitioner no.1 appeared in the type test held on 15.2.1997, but could not qualify the same. Respondents have seriously disputed the contention of the petitioners regarding retrospective applicability of the amended rule. It is further mentioned that petitioner no.1 had filed CWP No.8296 of 1995 challenging the promotion of petitioner no.3 and others on the same ground of qualifying the test on 6.11.1993 claiming that he was not required to pass the type test. However, the writ petition was dismissed by learned Single

Judge vide judgment dated 24.3.1998. It was held by the High Court that the list of eligible candidates lapsed every year and each set of promotions being a separate one, a candidate is required to clear the type test each time he sought promotion. LPA No.383 of 1998 preferred by the petitioner was also dismissed.

(7) I have heard learned counsel for the parties at length. Ms.Sangeeta Dhanda, learned counsel for the petitioners has argued that amended Rule 1995 whereby a note was added for keeping the panel of successful candidates alive without any period, has retrospective operation and thus, on amendment of the rule, the panel prepared on the basis of type test held on 6.11.1993 was to remain alive in respect of vacancies when became available after the holding of the test. To support the contention regarding the retrospective effect of the amended rule 1995, she has placed reliance upon the judgment here-in-after being referred. In Constitution Bench judgment titled as **B.S.Vadera and another versus Union of India and others (1)**, it has been held by Hon'ble Supreme Court that rule framed under Article 309 regulating recruitment and condition of service shall have effect both prospectively and retrospectively. The relevant observations are contained in paragraph 24 which are as under:-

“24. It is also significant to note that the proviso to Article 309 clearly lays down that “any Rules so made shall have effect, subject to the provisions of any such Act”. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning, unless hedged in, by any limitations. The rules, which have to be “subject to the provisions of the Constitution” shall have effect, “subject to the provisions of any such Act. That is, if the appropriate Legislature has passed an Act, under Art. 309, the rules, framed under the proviso, will have effect, subject to that Act, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules made by the President, or by such person as he may direct, are to have full effect, both prospectively and retrospectively....”

(1) 1969 SLR 6

(8) These observations do not support the contention of the petitioners. Hon'ble Supreme Court has only stated that rules framed under Article 309 can be both retrospective and prospective. Hon'ble Supreme Court is only referring to the power of the rule making authority i.e. of the President or the Governor under Article 309. However, the position of law is clarified by the Constitution Bench in the paragraph 25 wherein following observations have been made:-

“25. In the case before us, the Indian Railway Establishment Code has been issued, by the President, in the exercise of his powers, under the proviso to Art.

309. Under Rule 157, the President has directed the Railway Board, to make rules, or general application to non-gazetted railway servants under their control. The rules, which are embodied in the Schemes, framed by the Board under Annexures 4 and 7 are within the powers conferred under r.157; and in the absence of any Act, having been passed by the “appropriate” Legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated, retrospective also. Such indication, about retrospective effect, as has already been pointed out by us is clearly there, in the impugned provisions.”

(9) The Constitution Bench has clearly held that rule framed under Article 309 could have retrospective impact only if the rule so prescribes. In the present case, amendment contained in Rule 194) of the 1973 Rule does not provide for retrospective operation of the amended provision and in absence of any such intention or specific statement, in the rule it has to be construed as prospective in nature. This is perhaps the settled proposition of law. Petitioners have further relied upon **M/s Punjab Traders and others versus State of Punjab and others (2)** and **Revinder Singh and others versus State of Punjab and another (3)**, to contend that the amendment in the procedural law operates retrospectively. In case before the Hon'ble Supreme Court in M/s Punjab Traders (supra), the amendment was found only clarificatory whereas before Division Bench of this Court in Revinder Singh (supra), it was a case of anomaly in the rule which was

(2) AIR 1990 SC 2300

(3) 1992 (2) SLR 245

removed by amendment of the Rules. Under these circumstances, it was held that the amendment will have retrospective operation. It is also pertinent to note that in **Revinder Singh's case (supra)** the selection process was still on. In another case relied upon by the petitioners, **Jatinder Kumar versus State of Haryana and another (4)**, a Division Bench of this Court held that where a person is possessed of requisite qualification and by amendment of the rules, he is rendered ineligible, the amended rule will not apply. Hon'ble Division Bench relied upon a famous judgment of the Supreme Court in the case of **Y.V.Rangaiah versus J. Sreenivasa Rao (5)** and host of other judgments which is true reflection of law. The contention of the petitioners in this regard is liable to be rejected for two reasons. Firstly, the amendment of Rule 19 (4) was made when the process of selection/appointment had already been completed. Even if it is assumed for the sake of argument that the amendment can be construed to be retrospective, the same cannot be applied to a concluded selection to be re-opened. It would create an anomalous situation. The amendment could be applied retrospectively only if the process of selection was still on. Secondly, the amendment introduced keeping the panel alive is not merely a procedural but also affects the substantive right of the person. Under the unamended Rule, panel stands denuded, the day available vacancies are filled up and for any vacancy that may come available, thereafter all candidates who come within the zone of consideration also acquire the right of consideration unless the rule specifically keeps the panel alive. It is equally settled law that promotion for a government/public servant is not a vested or fundamental right. The only right of a government servant is to be considered for promotion in accordance with the prescribed procedure. It is different matter that even after qualifying, the petitioner could not be appointed allegedly for want of vacancy. But that does not by itself create vested right in the empanelled candidate to occupy vacancy in future unless the panel legally survives for future. The contention of the petitioners in this regard is thus rejected.

(10) Under normal circumstances, this petition should have been dismissed on the above ground alone. However, there is one relevant factor which has persuaded me to examine another aspect of the case.

(4) 1995 (1) RSJ 752

(5) 1983 (3) SCC 285

(11) From the reply filed by the High Court, it appears that four vacancies were available upto 31st December, 1992. These four vacancies were notified for selection/promotion by conducting type test on 6.11.1993. It has further been disclosed by the High Court in the reply that two more vacancies became available during the years 1993-94. The date when these vacancies became available is not disclosed. However, the petitioner has placed on record copy of information received by it under the RTI Act. The relevant information supplied under RTI Act is as under:-

“...It is hereby informed that in the year 1993 four vacancies of the quota of Restorer/Supervisor @ 10% were available for which the type test amongst the Restorers/Supervisors was held in the year 1994 two vacancies of the quota of Restorer/Supervisor @ 10% were available for which they type test amongst the Restorer/Supervisor was held. In the year 1993 no posts of Clerk was advertised. However, in the year 1994 some posts of Clerks were advertised and in response to this, 32 candidates were appointed as Clerk from the open market. In the year 1995 following vacancies for direct recruitment as well as quota posts of Restorer/Supervisor were available.

- (i) 4 Vacancies at the rate of 10% against 41 vacancies occurring in the cadre till 1.5.95 when the rule was amended.
- (ii) 6 vacancies at the rate of 1/3rd of 18 vacancies occurring 1.5.95

Direct posts of Clerk 1.5.95	Quota posts of Restorer/Supervisor	Against available posts.
37	4	41
12	6	18

(12) From the above information, it appears that in addition to four vacancies available upto 31st December, 1992, four vacancies were available in the year 1993 and two in the year 1994. Type test was conducted on 6.11.1993. If the information supplied under RTI Act is to be taken as authentic, then four more vacancies were available in the year 1993, though the date is not mentioned, but it can be safely presumed that all or some of the vacancies could be available before 6th November, 1993. In that

eventuality, the petitioners who were next in the select panel after four appointees could be considered for appointment against all or some vacancies on the basis of their qualifying the type test on 6.11.1993. This is the one circumstance which needs to be considered in favour of the petitioners. However, the reply filed on behalf of the High Court is little confusing wherein it is stated that two vacancies were available during the 1993-94 without disclosing the date. In the totality of the circumstances, this petition is disposed of with the following directions:-

Establishment Section of the High Court will work out the vacancies of Clerks from promotional quota available during calendar year 1993 and if vacancies were more than four as filled on the basis of type test held on 6.11.1993, the petitioners on the basis of their merit in the panel prepared pursuant to test held on 6.11.1993 be considered for notional promotion against such vacancies/vacancy in addition to four vacancies filled up by promotion from the panel. If the petitioner(s) is/are found entitled to promotion against any such available vacancy, he/they will be deemed to have been promoted with effect from the said date, though only notionally, without any monetary benefit. However, the salary etc. of such petitioners shall be fixed by giving them notional benefits of promotion etc. The entire exercise be completed within a period of two months from the date a certified copy of this order is received by the competent authority.

M. Jain

Before Nawab Singh, J.

SUKHWINDER KAUR,—*Petitioner*

versus

AMARJIT SINGH AND OTHERS,—*Respondents*

C.R. No. 2616 of 2011

12th January, 2012

Constitution of India - Art. 227 - Code of Civil Procedure, 1908 - O. 7 Rl. 11 - Indian Registration Act, 1908 - S. 17(1A) & 49 - Transfer of Property Act, 1882 - S. 53-A - Specific Relief Act, 1877