In the High Court of Punjab and Haryana at Chandigarh

C.W.P. No. 19218 of 2015
Reserved on: 23.02.2017
Date of Decision: March 1st , 2017

Avtar Singh Kalra and others

... Petitioners

Versus

High Court of Punjab and Haryana at Chandigarh and another

... Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. Rajiv Atma Ram, Sr. Advocate with
Mr. Abhishek Arora, Advocate,
for the petitioners.

Mr. Gurminder Singh, Sr. Advocate with
Mr. Gaurav Chopra, Advocate,
for respondent No.1.

Mr. Puneet Bali, Sr. Advocate with
Ms. Monika Thakur, Advocate,
for respondent No.3.

P.B. Bajanthri, J.

1. In the instant writ petition, the petitioners have assailed the order dated 22.07.2014 passed by the first respondent (Annexure P/4) by which respondent no.3 is promoted to the post of Superintendent Grade-II and further prayed for consideration of the petitioners' claim to the post of Superintendent Grade-II w.e.f. the date third respondent was promoted with all consequential reliefs such as seniority, further promotion along with interest at the rate of 18% per annum.

2. All the petitioners are working as Senior Assistants in the

High Court of Punjab and Haryana at Chandigarh (hereinafter referred to as “High Court”).

3. The third respondent initially appointed as a Driver on 18.03.1991 in the High Court. He was attached with the then Hon'ble Mr. Justice N.K. Kapoor, Hon'ble Mr. Justice G.S. Singhvi and thereafter in the year 2005, his services were attached with the then Hon'ble Chief Justice. The then Hon'ble Chief Justice while invoking Rule 38 of High Court Establishment (Appointment and Conditions of Service) Rules, 1973 (hereinafter referred to as “Rules 1973”), appointed the third respondent to the post of Assistant in the High Court while relaxing rule 16(i) of Rules 1973 and re-designated as an Assistant Protocol Officer attached to the Chief Justice's office on 20.12.2010 (Annexure P/3), which is in pursuant to the decision dated 09.12.2010 of the Protocol Committee. Subsequently, the post of Assistant was equated to that of Senior Assistant. Thus, the third respondent has entered into the cadre of Senior Assistant.

4. Respondent no.1 notified the seniority list of Senior Assistants as on 21.07.2014 in which petitioners' name are at Sr. Nos. 11, 14, 26, 30, 36, 45, 54, 58, 66, 69, 75, 109, 114, 125, 132, 147, 155 and 157 respectively, whereas the third respondent's name is reflected at Sr. No. 172.

5. The then Hon'ble Chief Justice promoted the third respondent as a Superintendent Grade-II with immediate effect by relaxing all the rules to the post of Superintendent Grade-II and was re-designated as Protocol Officer to the Hon'ble Chief Justice. Consequently, a formal order was passed while ordering so it was ordered that third respondent would be

adjusted against the post reserved vide order dated 30.05.2014 for Smt. Sunayana Jain, Senior Assistant, who is facing disciplinary proceedings by de-reserving the above said post for the time being. Thereafter, 1st respondent passed a formal office order dated 22.07.2014 in promoting the third respondent to the post of Superintendent Grade-II in the pay band of Rs.10300-34800/- plus Rs.4800/- grade pay from officiating Senior Assistant to officiating Superintendent Grade-II against a vacant post and re-designated as Protocol Officer to Hon'ble the Chief Justice (Annexure P/4).

6. The petitioners' counsel submitted that under Right to Information Act, the petitioners have obtained proceedings like Annexures P/4 and P/5 relates to the various proceedings of third respondent's promotion as well as rejection of representation by three Joint Registrars dated 08.08.2014 seeking certain service benefits on par with one Sh. Sham Lal Sharma, Joint Registrar. Learned counsel for the petitioners further submitted that promotion of the third respondent to the post of Superintendent Grade-II is contrary to rules of recruitment governing the post. In this regard, he has pointed out that there is violation of rule 12 of Rules 1973 which relates to the post of Superintendent Grade-II, contending that Superintendent Grade-II shall be filled by promotion on the basis of seniority-cum-merit from out of the Senior Assistants having experience of minimum period of three years and there is also violation of Rule 30 of Rules 1973 relates to seniority. It was further submitted that as per the seniority list of Senior Assistants, third respondent is at Sr. No. 172, whereas all the petitioners are seniors to the third respondent.

Therefore, there is clear violation of Rule 12 read with Rule 30 of Rules 1973. Learned counsel for the petitioners further submitted that Rule 38 of Rules 1973 has been invoked by the then Hon'ble Chief Justice on count that there is undue hardship in a case and rest of the mandate under Rule 38 is not at all attracted to the third respondent's case for the reasons that if any provision of Rules 1973 would be hurdled for an employee, in such event, the Hon'ble Chief Justice can invoke Rule 38 after due consideration of hardship i.e. undue hardship due to particular provision or any provision of Rules, 1973. Even just and equitable manner concept has not been taken into consideration. It was further submitted that while taking decision to promote the third respondent on out of turn basis while relaxing all the rules, the Hon'ble Chief Justice has not taken note of Articles 14 and 16 of the Constitution since the post of Superintendent Grade-II is a public post. Any public post in the High Court is to be filled up only after due adhered to Articles 14 and 16 of Constitution read with Rules 1973 issued under Articles 229(1) and 231 of the Constitution herein.

7. Further it was contended that Rule 20 of the Punjab Services (General and Common Condition of Service) Rules 1994 (hereinafter referred to as the "Rules 1994") relates to over riding effect, which reads as under:-

> "***Over riding effect*** *– The provisions of these rules shall have effect notwithstanding anything to the contrary contained in any rules for the time being in force for regulating the recruitment and conditions of service for appointment to public service and posts in connection with the affairs of the State."*

Rule 19 of Rules 1994 provides for power to relax any of the provisions of the rule to any class or category of persons. Rule 20 read with rule 19 of Rules 1994 over rides Rule 38 of Rules 1973, therefore, invoking Rule 38 for promotion of the third respondent by the then Hon'ble Chief Justice is contrary to Rules 1994. It was further contended that at the time of considering the third respondent's promotion to the post of Superintendent Grade-II, the petitioners' names have not been considered even though admittedly, they are seniors to the third respondent and the third respondent has not questioned the ranking assigned to him in the seniority list of Senior Assistants cadre unless and until third respondent is placed over and above 1st petitioner in the seniority list of Senior Assistants. The third respondent's name could not have been considered for promotion to the post of Superintendent Grade-II overlooking the claims of the petitioners who are much seniors, since method of recruitment to the post of Superintendent Grade-II is seniority-cum-merit.

8. For the purpose of invoking Rule 38 of Rules 1973 by the Hon'ble Chief Justice to get certain benefits on par with one Sh. Sham Lal Sharma, Joint Registrar, who was earlier designated as Principal Secretary (Judicial)-cum-Registrar who was stated to be junior to Sh. Ram Kumar, Joint Registrar submitted representation for extending certain service benefits which have been extended to Sh. Sham Lal Sharma on out of turn basis while invoking Rule 38 by the then Hon'ble Chief Justice, therefore, Sh. Ram Kumar also requested for extending similar benefits granted to Sh. Sham Lal Sharma, who is junior. While considering the grievance of Sh. Ram Kumar, the Hon'ble Acting Chief Justice passed the following

order:-

"I regret my inability to grant the request contained in the representation by three Joint Registrars dated 08.08.2014 for their appointment/promotion to the post of Registrar on the same terms as that of Notification dated 23.07.2014 issued for Shri Sham Lal Sharma, Joint Registrar, who was earlier designated as Principal Secretary (Judicial)-cum-Registrar, although Shri Sham Lal Sharma was junior to them.

2. Shri Sham Lal Sharma was appointed pursuant to an administrative order dated 17.07.2014 made by the then learned Chief Justice. The order recorded that Shri Sham Lal Sharma had been working with the learned Chief Justice as the Principal Secretary (Judicial)-cum-Joint Registrar; that he was diligent, earnest, proficient, industrious, dedicated and efficient in discharge of his duties and that the assistance rendered by him in conducting the court proceedings always remained par excellence. The order further stated that his duties are arduous in nature and that he continued to work till late evening much beyond the court hours every day. In view thereof, the then learned Chief Justice in exercise of his powers under Article 229 of the Constitution of India upgraded the post of Principal Secretary (Judicial)-cum-Joint Registrar as the Principal Secretary (Judicial)-cum-Registrar and promoted him to the upgraded post with immediate effect by relaxing the rule as a measure personal to him till he retires on attaining the age of superannuation on 31.05.2015. The post is to revert to its original rank and status w.e.f. 01.06.2015. Lastly, the order states that he would be entitled to the emoluments and other perks as admissible to the post of Registrar.

3. Shri Sham Lal Sharma has been working with me for almost three and a half months. I find the quality of his work to be exactly as described by the learned Chief Justice. The

quality of his work is very good. His ability and willingness to work hard are obvious.

4. The representation states that in 2011, when the selection process was underway to fill up the two posts of Joint Registrars from amongst the Special Secretaries / Deputy Registrars, a post of Joint Registrar was specifically created w.e.f. 03.01.2011 which was filled up by giving out of turn promotion to Shri Sham Lal Sharma who was at the relevant time officiating as a Special Secretary and he was not even within the zone of consideration.

A representation in respect of this appointment was also made which was considered by a Committee. The Committee chaired by Mr. Justice A.K. Goel expressed the view that the relaxation in this selection process to exclude from consideration eligible candidates may affect their right and that all the eligible candidates in the zone of consideration should be considered for the post. However, in view of the observations made in the order of promotion, the Committee opined that the promotion given may not be disturbed but may be treated as adhoc subject to all eligible candidates being considered for the newly created post or for other available vacancy and that the matter be finalized in the light of recommendations of the Selection Committee.

5. The grievance of the representation made to me is that the selection process for the post of Registrar had been set in motion. The post was to be filled up from amongst the Joint Registrars belonging to the establishment of this Court. The interviews were fixed for 23.07.2014. Once again a post was specifically created / upgraded to Registrar for Shri Sham Lal Sharma, although he was neither in the zone of consideration nor called for the ongoing interviews and he has been appointed / promoted to the post of Registrar out of turn.

6. The Joint Registrars who have made the representation

stated t hat they have equally unblemished service records and they have been denied equal treatment. The three Joint Registrars stated that had a proper selection procedure been adopted and had they been given an equal opportunity, they may have been selected. I do not for a moment suggest that they are wrong. I do not wish to speculate on this issue as I have not had the benefit of observing the work of the three Joint Registrars. Their main grievance is that they did not have the benefit of working with the Chief Justice. They stated that if they had this opportunity they would have been willing to work as hard as Mr. Sham Lal Sharma did and would have been able to demonstrate to the Chief Justice that they were as hard working and efficient as him. Due to this lack of opportunity, enormous injustice has been caused to them.

7. I personally believe that an employee ought not to be given preferential treatment merely because he or she is attached to the Chief Justice / Acting Chief Justice. This would be unfair to other employees for they would be denied the opportunity of even being considered for the benefit.

8. Shri Sham Lal Sharma, however, has been conferred the benefit, in exercise of the powers under Article 229 of the Constitution of India by the then learned Chief Justice. The Chief Justice undoubtedly has the power to do so. It would not be appropriate for me to upset or even question this decision. The Chief Justice would obviously have considered the comparative merits of the employees concerned before conferring the benefits upon Shri Sham Lal Sharma.

9. I have been requested to confer the same benefit upon the existing Joint Registrars on the basis of their Annual Confidential Reports. Conferring ad hoc benefits upon any particular employee or employees including the three Joint Registrars would have enormous adverse consequences in the administration of this Court.

> *10. I have been informed that there are certain other out of turn appointments as well and that other employees have also been conferred benefits out of turn. Assuming that this is true it enhances my reluctance to confer out of turn benefits upon the three Joint Registrars even assuming that they are equally, if not more, entitled to the benefits conferred upon Shri Sham Lal Sharma. I am not inclined to grant ad hoc benefits to the employees selectively. If I grant this benefit to the three Joint Registrars, several other employees of this Court in different cadres would insist upon the same benefit in view their having been overlooked or in view of the persons junior to them having been conferred benefits of promotion out of turn and / or any other benefits on an ad hoc basis.*
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> *11. I reiterate that I do not for a moment suggest that the three Joint Registrars were not entitled to be considered when Shri Sham Lal Sharma was conferred the benefit or that their performances in any manner in inferior to that of Shri Sham Lal Sharma. I am not inclined to grant the request on principle for such a decision would be arbitrary and the same would have enormous adverse consequences upon the administration of this Court.*
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> *12. I must, therefore, unfortunately decline the request contained in the representation."*

Thus, the Hon'ble Acting Chief Justice expressed that employee ought not to be given preferential treatment merely because he or she is attached to the Chief Justice/Acting Chief Justice. Such granting of undue benefit would be unfair to other employees as they would be denied opportunity of even being considered for the benefit. The decision taken in the Ram Kumar's case is evident that while giving preferential treatment to an employee invoking Rule 38 if it is affected similarly situated persons, in

that event it is not fair and such decision would be arbitrary.

9. Learned counsel further submitted that even though Rule 38 of Rules 1973 provides for relaxing certain rules of Rules 1973 at the same time there should be compliance of Articles 14 and 16 of the Constitution which has not been taken note of while promoting the third respondent. Therefore, for the purpose of promotion of the third respondent to Superintendent Grade-II, his performance while discharging duties attached to the Hon'ble Chief Justice and their appreciation are not relevant since the method of recruitment to the post of Superintendent Grade-II is only by seniority-cum-merit. Respondent no.3 is at Sr. No. 172 and the fact that promotion to Superintendent Grade-II has been given upto Sr. No. 9 in the seniority list of Senior Assistants and the 1st petitioner is at Sr. No. 11 and rest of the petitioners are much over and above respondent no.3. Thus, order of promotion dated 22.07.2014 (Annexure P/4) is liable to be set aside and the petitioners' name be considered for the purpose of promotion to the posts of Superintendent Grade-II in accordance with rules governing the post. The petitioners' counsel in support of the petitioners' grievance cited the following decisions:-

1) Satinder Singh Bajwa vs. Registrar High Court of Punjab and Haryana, CWP No. 7418 of 1993, wherein this Court has held as under:-

"Before parting with the case, we consider it necessary to observe that practice of grant of pre-mature / advance increments does not have any sanction of law. From the record, it transpires that the incumbents of the office of the Chief Justice have granted increments to a large number of employees on the eve of their retirement. This practice cannot

be commended particularly when it is being followed by the holder of the highest judicial post in the State. In the bygones days of kings and princes charity used to be distributed when the king used to demit the office but in the present day system, people expect highest degree of restraint from those who hold judicial offices. The urge to distribute benefits on the eve of retirement has to be curbed by those who adorn the highest judicial offices. Even the grant of advance increment or additional increment with the avowed object of compensating the employee is not warranted. The only proper course open to compensate the employee for the loss, he may be put to in the discharge of his duties, is to make payment of specified allowances to him during the period he holds that post. We hope that in future the practice of giving advance increments or premature increments will not be followed."

2) Renu and others vs. District & Sessions Judge, Tis Hazari and another, reported in **JT 2014(3) SC(1)**, the Supreme Court in para nos. 24, 27, 29, 31 and 35(ii) held as under:-

"*24. In this case, this Court spelt out the powers of the Chief Justice of the High Court in the matters of appointment of staff of the High Court, but this Court did not lay down in any way that the Chief Justice can exercise such powers in contravention of the provisions of Articles 14 and 16 of the Constitution while making appointments in the establishment of this High Court.*

27. To say that the Chief Justice can appoint a person without following the procedure provided under Articles 14 and 16 would lead to an indefinite conclusion that the Chief Justice can dismiss him also without holding any inquiry or following the principles of natural justice/Rules etc., for as per Section 16 of General Clauses Act, 1897 power to appoint includes power to remove/suspend/dismiss. (Vide: Pradyat

Kumar Bose v. The Hon'ble Chief Justice of Calcutta High Court, 1956 SC 285; and Chief Justice of Andhra Pradesh & Anr. v. L.V.A. Dikshitulu & Ors., AIR 1979 SC 193). But as no employee can be removed without following the procedure prescribed by law or in violation of the terms of his appointment, such a course would not be available to the Chief Justice. Therefore, the natural corollary of this is that the Chief Justice cannot make any appointment in contravention of the Statutory Rules, which have to be in consonance with the scheme of our Constitution.

29. Thus, in view of the above, the law can be summarised to the effect that the powers under Article 229(2) of the Constitution cannot be exercised by the Chief Justice in an unfettered and arbitrary manner. Appointments should be made giving adherence to the provisions of Articles 14 and 16 of the Constitution and/or such Rules as made by the legislature.

31. In a democratic set up like ours, which is governed by rule of law, the supremacy of law is to be acknowledged and absence of arbitrariness has been consistently described as essence of rule of law. Thus, the powers have to be canalised and not unbridled so as to breach the basic structure of the Constitution. Equality of opportunity in matters of employment being the constitutional mandate has always been observed. The unquestionable authority is always subject to the authority of the Constitution. The higher the dignitary, the more objectivity is expected to be observed. We do not say that powers should be curtailed. What we want to say is that the power can be exercised only to the width of the constitutional and legal limits. The date of retirement of every employee is well known in advance and therefore, the number of vacancies likely to occur in near future in a particular cadre is always known to the employer. Therefore, the

exercise to fill up the vacancies at the earliest must start in advance to ensure that the selected person may join immediately after availability of the post, and hence, there may be no occasion to appoint any person on ad-hoc basis for the reason that the problem of inducting the daily labourers who are ensured of a regular appointment subsequently has to be avoided and a fair procedure must be adopted giving equal opportunity to everyone.

35. In view of the above, the appeal stands disposed of with the following directions:

i) xxxx xxxx xxx

ii) To fill up any vacancy for any post either in the High Court or in courts subordinate to the High Court, in strict compliance of the statutory rules so made. In case any appointment is made in contravention of the statutory rules, the appointment would be void ab-initio irrespective of any class of the post or the person occupying it.

iii) to (v) xxxx xxxx xxxx"

3) H.C. Puttaswamy & Ors. vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore & Ors., *reported in* **AIR 1991 S.C., 295**, the Supreme Court has held as under:-

"*But the Chief Justice or any other Administrative Judge is not an absolute ruler. Now he is a free wheeler. He must operate in the clean world of law, not in the neighbourhood of sordid atmosphere. He has a duty to ensure that in carrying out the administrative functions, he is actuated by same principles and values as those of the Court he is serving. He cannot depart from and indeed must remain committed to the constitutional ethos and traditions of his calling. We need hardly say that those who are expected to oversee the conduct of others, must necessarily maintain a higher stands of ethical and intellectual rectitude. The public expenses do not seem to*

be less exacting."

The above rulings are relating to how the Chief Justice has to exercise the power of appointment of the staff of the High Court. In the case of Renu's case (supra), it was pointed out that the Hon'ble Chief Justice of the High Court for the purpose of appointment of staff, Articles 14 and 16 of the Constitution is to be taken note of. In other words, Chief Justice cannot make any appointment in contravention of statutory rules and it has to be in consonance with the scheme of Constitution.

10. Per contra, learned counsel for the first respondent – High Court submitted that Protocol Committee of the High Court took a decision that the third respondent who is working as a Driver has been assisting the Protocol Branch of the Court. He is a Graduate. He has been discharging both the duties diligently and efficiently. Therefore, a proposal has been made to give him suitable designation / post the Protocol Branch. The then Hon'ble Chief Justice approved the recommendation of the Protocol Committee and appointed the third respondent as an Assistant directly in the High Court by relaxing Rule 16(i) of the Establishment Rules and designated as Assistant Protocol Officer attached to the Hon'ble Chief Justice's office when respondent no.3 was working as Driver and attached to the then Hon'ble Chief Justice. It was further submitted that appointment of the third respondent to the post of Assistant is un-challenged. Thus, the third respondent entered the cadre of Assistant on 20.12.2010. Consequent upon Assistant post was re-designated / upgraded to the Senior Assistant post and third respondent entered in the cadre of Senior Assistant. The then Hon'ble Chief Justice *suo moto* took a decision

to promote the third respondent to the post of Superintendent Grade-II to be adjusted against the post of reserved vide order dated 30.05.2014 for Smt. Sunayana Jain, Senior Assistant, who is facing disciplinary proceedings by de-reserving the above said post for the time being and made a note that his Lordship has gone through past records of the third respondent and approved it that he has all capabilities to handle any situation etc. Extract of note dated 20.07.2014 reads as under:-

> *"Shri Rajbir, Protocol Officer attached with me for the last 14 months is a very hard worker and is dedicated towards his work. I have gone through his past service records and he proved it that he has all capabilities to handle any situation. He has abilities to motivate others and to play the important role in team work. Not only the Judges of this Court but also the Hon'ble Judges of Supreme Court and other High Courts are also satisfied with his work and they always praising about his work. Therefore, keeping in view his work dedication, excellent team coordination and also meritorious service records I hereby promoted Shri Rajbir as Superintendent Grade-II with immediate effect by relaxing all rules and be designated as Protocol Officer to Hon'ble the Chief Justice."*

Perusal of the note of the Hon'ble Chief Justice, it is evident that the due application of mind and there is subjective satisfaction and necessary ingredients stated in Rule 38 has been complied while ordering promotion to the third respondent. Therefore, there is no infirmity. It was further submitted that petitioners have not urged any *mala fide*, therefore, there is no stuff in the present petition. It was also submitted that during the pendency of this petition, petitioners no. 1 to 10 were promoted to the

posts of Superintendent Grade-II during the intervening period of 2015-16.

11. Learned counsel for the first respondent vehemently contended that the Hon'ble Chief Justice of the Court has ample power under Article 229 of the Constitution for framing rules in relation to conditions and service of the High Court's staff. In other words, Rules 1973 are framed under Article 229 read with Article 231, therefore, petitioners' contention that the Hon'ble Chief Justice has violated Rules 19 and 20 of the Rules 1994 is incorrect for the reasons that Rules 1994 are issued under Article 309 of the Constitution, whereas Rules 1973 are issued under Article 229 of the Constitution, therefore, there is no application of Rules 1994 in the present case. Thus, order of promotion of the third respondent is within the ambit of Article 229 read with Rule 38 of the Rules 1973. Learned counsel for the first respondent cited the following decisions:-

> **1) Satya Vir Singh vs. Punjab and Haryana High Court**, reported in **2012 (1) RSJ 141**, wherein this Court in para no. 19 held as under:-
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> *"19. This Rule, when read, gives the power to the Chief Justice to do complete justice befitting to the office held by him. His power to do justice has been given precedence over the shackles and restrictions as imposed by these Rules. As per this rule, the satisfaction is his while dealing with the case of an individual that the operation of any Rule causes undue hardship. Once such satisfaction is reached, the Rule envisages that the Chief Justice may by order dispense with or relax the requirements of that Rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner. It*

further qualifies that the case be not dealt with in a manner less favourable to the officer or official concerned than in accordance with the Rules. This Rule thus, is required to be invoked and exercised by the Chief Justice for the benefit of an officer or official where in his opinion and satisfaction, any Rule has put an officer or official in a disadvantageous position by its operation and to deal with the case in a just and equitable manner, he may by order dispense with or relax the requirement of that Rule. Keeping in view the high office of the Chief Justice, this exceptional power has been conferred on him so that no officer or official by virtue of operation of any Rule is put in an disadvantageous position causing undue hardship and justice can be done to the employee where the Chief Justice is so satisfied. Present is a case where such hardship has, as a matter of fact, been caused due to no fault of the petitioner where the power under Rule 38 deserves to be invoked which has not been considered by the Committee."

2) R.K. Sharma vs. High Court of Punjab and Haryana, reported in ***2000(30 RSJ 168,*** wherein this Court in para no. 5 held as under:-

5. After hearing the learned counsel for the parties, we find no merit in this writ petition. No doubt under the rules, educational qualification for promotion to the post of Assistant Registrar has been prescribed as Graduation, but under those very Rules i.e. Rule 38 (supra), power has been vested in the Chief Justice of this Court that if he is satisfied that operation of any rule causes undue hardship in any particular case, he may, by order, dispense with or relax the requirement of that rule for dealing with the case in just and equitable manner. This power vests in the appointing authority, which is a high dignitary, and the rule itself contains self-imposed restriction on the power of the Chief

Justice that before relaxing any rule he is to be satisfied that operation of any rule causes undue hardship in a particular case and to do justice to the individual the case is to be dealt with in just and equitable manner. There is no fetter on the power of the Chief Justice in exercising the power of relaxation even in the presence of an eligible person, further, there is no fetter that the power cannot be exercised again and again. It will depend on the circumstances of each case and each case has to be dealt with on its merits as to whether a particular individual requires the relaxation of service rule, which causes undue hardship to that individual. For example, there may be a person, who is lacking the educational qualification and is senior-most having put in very long service with excellent record. Simply because the person is not graduate his further chance of rising in the service career will be blocked, inasmuch as the rigour of the rule of educational qualification would certainly cause undue hardship to that individual and the rigour of the rule may be relaxed. Learned counsel for the petitioner had cited ***Dr. Ami Lal Bhat v. State of Rajasthan, 1997(3) SCT 595,*** *judgment of the Apex Court, to contend that in presence of the eligible candidates, no relaxation should be given to the unqualified candidates. That case was a case of direct requirement, in which quite a few candidates were over-aged. By a general relaxation given to all such candidates, they were made eligible for appointments. Taking into consideration the power of relaxation, the Apex Court observed that the power of wholesale relaxation was not envisaged by the Rules, which could be exercised in a given case only to mitigate the hardship to an individual. Since there was wholesale relaxation, which was not to mitigate the hardship to any individual, the Apex Court had struck down the relaxation. The case in hand is totally different. It may be observed here*

that there is no specific challenge to the actual relaxation given by the Chief Justice to the private respondents."

3) Renu and others vs. District and Sessions Judge, Tis Hazari Courts, Delhi and another, reported in ***(2014) 14 Supreme Court Cases 50,*** wherein the Supreme Court in para no. 22 held as under:-

"*22. As a safeguard, the Constitution has also recognized that in the internal administration of the High Court, no other power, except the Chief Justice should have domain. In order to enable a judicial intervention, it would require only a very strong and convincing argument to show that this power has been abused. If an authority has exercised his discretion in good faith and not in violation of any law, such exercise of discretion should not be interfered with by the courts merely on the ground that it could have been exercised differently or even that the courts would have exercised if differently had the matter been brought before it in the first instance or in that perspective."*

Having regard to Article 229, Rule 38 of Rules 1973 read with above cited rulings, the petitioners have not made out a case, therefore, instant petition is liable to be dismissed.

12. Learned counsel for the third respondent submitted that it is prerogative of the Chief Justice to extend service benefits to class of employees. In the present case, the Hon'ble Chief Justice has exercised power under rule 38 of Rules 1973 while relaxing all rules under Rules 1973 and promoted the third respondent and further after due consideration of the third respondent's past records like Annual Confidential Reports for 10 years which are A+Outstanding and the fact that the third respondent as an Assistant Protocol Officer served the Hon'ble Judges of this Court,

Hon'ble Judges of the Supreme Court and other High Courts for their satisfaction and his work has been praised by each of the Judge. That apart having meritorious service record throughout his service has been taken note of by the then Hon'ble Chief Justice and after personal satisfaction with his merit and after subjective satisfaction, he has been promoted. The then Hon'ble Chief Justice exercising power under Rule 38 is widest power and it is within the rule 38 of Rules 1973. The petitioners' merit cannot be comparable with the third respondent. Therefore the petitioners' right to promotion is not at all affected in any manner. Learned counsel for the third respondent cited the following decisions:

> **1) M. Gurumoorthy vs. Accountant General, Assam and Nagaland and others,** reported in **(1971) 2 Supreme Court Cases 137,** wherein the Supreme Court in para no. 11, held as under:-
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> *"11. The unequivocal purpose and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of appointments of officers and servants of a High Court it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the Article. This was essentially to secure and maintain the independence of the High Courts. The anxiety of the constitution makers to achieve that object is fully shown by putting the administrative expenses of a High Court including all salaries, allowances and pension payable to or in respect of officers and servants of the court at the same level as the salaries and allowances of the judges of the High Court nor can the amount of any expenditure so charged be varied even by the legislature. Clause (1) read with clause (2) of Article 229 confers exclusive power not only in the matter of*

> *appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court by Rules on the Chief Justice of the Court. This is subject to any legislation by the State legislature but only in respect of conditions of service. In the matter of appointments even the legislature cannot abridge or modify the powers conferred on the Chief Justice under clause (1). The approval of the Governor, as noticed in the matter of Rules, is confined only to such rules as relate to salaries, allowances, leave or pension. All other rules in respect of conditions of service do not require his approval. Even under the Government of India Act the power to make rules relating to the conditions of service of the staff of the High Court vested in the Chief Justice of the Court under Section 242 (4) read with Section 241 of the Government of India Act, 1935. By way of contrast reference may be made to Article 148 relating to the-Comptroller and Auditor General of India. Clause (5) provides :*
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> > *"Subject to the provisions of this Constitution and of any law made by Parliament the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor General."*

The aforesaid decision cited in support of the contention of learned counsel for the petitioners that Rules 1994 are applicable to the present case. In view of the decision above Rules, 1994 are not applicable to the present case.

2. High Court of Judicature for Rajasthan vs. Ramesh Chand Paliwal and another, reported in (**1998) 3 Supreme**

Court Cases 72, wherein in para no. 24 and 28 the Supreme Court held as under:-

"24. The power of appoint an officer or servant of the High Court also includes the power to dismiss as was held in Pradyat Kumar Bose vs. Hon'ble Chief Justice of Calcutta High Court. AIR 1956 SC 285 = 1955 (2) SCR 1331. It was also held in that case that it was not necessary for the Chief Justice to consult the State Public Service Commission before dismissing the Registrar of the original side of the High Court. In M. Gurumoorthy vs. Accountant General, Assam and Nagaland & Ors., AIR 1971 SC 1850 = 1971 Supp SCR 420, it was held that in the matter of appointment of the High Court officers and servants, the Chief Justice is the supreme authority and there can be no interference by the executive except to the limited extent indicated in Article 229. If, however, the matter relates to pay fixation, it has to have the approval of the Governor of the State. (See: State of Assam vs. Bhubhan Chandra Datta & Anr. AIR 1975 SC 889, (1975) 4 SCC 1 = 1975 (3) SCR 854).

28. Apart from the fact that the impugned directions to the Registrar are contrary to Article 229, they also have the effect of negativing the impact of the Rajasthan High Court (Conditions of Service of Staff) Rules, 1953 made by the Chief Justice in exercise of power conferred by Article 229. Rule 2 specifies the strength of staff. It provides that the staff shall consist of the posts specified in the second column of Schedule I attached to the rules. It also provide that the Chief Justice may, from time to time, leave unfilled or hold in abeyance any vacant post. The rules also provide that the Chief Justice may increase or reduce the strength of staff. Method of recruitment has been specified in Rule 2A as under:-

"2A. Method of recruitment:- (1) Recruitment to a post or category of posts specified in the second column of Schedule I shall be made by one or more of the following methods, namely, -

(a) by direct recruitment, or

(b) by promotion of a person already employed in the High Court, or

(c) by transfer from subordinate courts or offices of the State Government.

Provided that the Chief Justice or subject to any general or special order of the Chief Justice, the Registrar may order transfer of any member of the ministerial or class IV staff serving on the establishment of the High Court to any Court subordinate to the High Court and vise versa on such terms and conditions as may be deemed proper.

(2) The Chief justice may, from time to time, by general or special order:-

(a) specify the method by which recruitment to a post or category of posts shall be made,

(b) determine the proportion of vacancies to be filled by each method of in case of recruitment by more than one method, and

(c) specify the manner in which such recruitment shall be made in the case of direct recruitment.

(3) Recruitment to the post of Court Officer shall be made & (by selection from the staff or) by direct recruitment in accordance with such method as may be prescribed by the Chief Justice."

3. Renu and others vs. District and Sessions Judge, Tis Hazari Courts, Delhi and another, reported in ***(2014) 14***

Supreme Court Cases 50, wherein the Supreme Court in para no. 1 held as under:-

"1. The matter initially related to the appointment of Class IV employees in the courts subordinate to Delhi High Court as the dispute arose about the continuity of the employees appointed on ad-hoc basis for 89 days which stood extended for the same period after same interval from time to time. The matter reached the Delhi High Court and ultimately before this Court. This court vide order dated 10.5.2012 took up the matter in a larger perspective taking cognizance of perpetual complaints regarding irregularities and illegalities in the recruitments of staff in the subordinate courts throughout the country and in order to ensure the feasibility of centralising these recruitments and to make them transparent and transferable. This Court suo motu issued notice to Registrar Generals of all the High Courts and to the States for filing their response mainly on two points viz. (i) why the recruitment be not centralized; and (ii) why the relevant rules dealing with service conditions of the entire staff be not amended to make them as transferable posts. All the States and High Courts have submitted their response and all of them are duly represented in the court."

In view of Rule 38 of Rules 1973 and the fact that the then Hon'ble Chief Justice is satisfied with the performance of the third respondent read with the aforesaid cited decisions, the petitioners have not made out a case so as to interfere with the third respondent's promotion, therefore, the instant writ petition is liable to be dismissed.

13. Heard the parties and gone through record.

14. Core issue in the present case is whether Articles 14 and 16 of the Constitution are complied or not before ordering promotion of respondent no.3 to the post of Superintendent Grade-II. Further is there any violation of Rules 12, 30 and 38 of Rules 1973. Admittedly, the post of Superintendent Grade-II in the High Court is a public post and it is to be filled with reference to seniority-cum-merit principle i.e. from feeder cadre viz. Senior Assitant. Therefore, Articles 14 and 16 are to be complied.

Equality

Supreme Court in ***Secretary, State of Karnataka and others vs. Umadevi and others,*** reported in ***(2006) 4 SCC 1,*** in paragraph nos. 2, 4, 6, 11, 13, 38, 40, 41 and 43 held as under:-

> ***"2.*** *Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals. Thus, any public employment has to be in terms of the constitutional scheme.*
>
> ***4.*** *But, sometimes this process is not adhered to and the constitutional scheme of public employment is bypassed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or*

otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over. It is time, that the courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very constitutional scheme of public employment. It has to be emphasised that this is not the role envisaged for the High Courts in the scheme of things

and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

6. *The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (see Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of*

those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognised that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

11. *In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and the Public Service Commissions for the States. Article 320 deals with the functions of the Public Service Commissions and mandates consultation with the*

Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognised by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the Scheduled Castes and Scheduled Tribes for employment. The States have made Acts, rules or regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, rules and regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

13. *What is sought to be pitted against this approach, is the so-called equity arising out of giving of temporary employment or engagement on daily wages and the continuance of such persons in the engaged work for a certain length of time. Such considerations can have only a limited role to play, when every qualified citizen has a right to apply for appointment, the adoption of the concept of rule of law and the scheme of the Constitution for appointment to posts. It cannot also be forgotten that it is not the role of the courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the Constitution. The approving of such acts also results in depriving many of their opportunity to compete for public employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions. In this context,*

we have also to bear in mind the exposition of law by a Constitution Bench in State of Punjab v. Jagdip Singh and others, (1964) (4) SCR 964). It was held therein:

> *"In our opinion where a government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give he will not in law be deemed to have been validly appointed to the post or given the particular status."*

38. *In Union Public Service Commission v. Girish Jayanti Lal Vaghela and others [2006(2) SCALE 115] this Court answered the question, who was a government servant and stated:*

> *"12. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words 'employment' or 'appointment' cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation, etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational*

criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution (see B.S. Minhas v. Indian Statistical Institute and others, AIR 1984 SC 363)."

40. *At this stage, it is relevant to notice two aspects. In Kesavananda Bharati v. State of Kerala (1973) Supp. SCR 1) this Court held that Article 14, and Article 16, which was described as a facet of Article 14, is part of the basic structure of the Constitution. The position emerging from Kesavananda Bharati (supra) was summed up by Jagannadha Rao, J. speaking for a Bench of three Judges in Indra Sawhney v. Union of India (1999 Suppl. (5) S.C.R. 229). That decision also reiterated how neither Parliament nor the legislature could transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. This Court stated:*

"64. The preamble to the Constitution of India emphasises the principle of equality as basic to our Constitution. In Kesavananda Bharati v. State of Kerala it was ruled that even constitutional

amendments which offended the basic structure of the Constitution would be ultra vires the basic structure. Sikri, C.J. laid stress on the basic features enumerated in the preamble to the Constitution and said that there were other basic features too which could be gathered from the constitutional scheme (para 506-A of SCC). Equality was one of the basic features referred to in the preamble to our Constitution. Shelat and Grover, JJ. also referred to the basic rights referred to in the preamble. They specifically referred to equality (paras 520 and 535-A of SCC). Hegde & Shelat, JJ. also referred to the preamble (paras 648, 652). Ray, J. (as he then was) also did so (para 886). Jaganmohan Reddy, J. too referred to the preamble and the equality doctrine (para 1159). Khanna, J. accepted this position (para 1471). Mathew, J. referred to equality as a basic feature (para 1621). Dwivedi, J. (paras 1882, 1883) and Chandrachud, J. (as he then was) (see para 2086) accepted this position.

65. What we mean to say is that Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet."

41. *In the earlier decision in Indra Sawhney v. Union of India (1992 Supp. (2) S.C.R. 454) B.P. Jeevan Reddy, J. speaking for the majority, while acknowledging that equality and equal opportunity is a basic feature of our Constitution, has explained the exultant (sic exalted) position of Articles 14 and 16 of the Constitution in the scheme of things. His Lordship stated:*

"644[6]. The significance attached by the

> *Founding Fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18. …*
>
> *645[7]. Inasmuch as public employment always gave a certain status and power—it has always been the repository of State power—besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1) expressly declares that in the matter of public employment or appointment to any office under the State, citizens of this country shall have equal opportunity while clause (2) declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same time, care was taken to declare in clause (4) that nothing in the said article shall prevent the State from making any provision for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State." (See paras 6 and 7 in SCR pp. 544 and 545.)*

These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment.

43. *Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our*

Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we

have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

Supreme Court in **Renu and others vs. District & Sessions Judge, Tis Hazari Courts, Delhi and another** reported in **(2014) 14 SCC 50,** in paragraph Nos. 6 to 16, 19, 21, 27, 29, 30, 31 and 35.2(ii), held as under:-

"6. *Article 14 of the Constitution provides for equality of opportunity. It forms the cornerstone of our Constitution.*

7. *In I.R. Coelho v. State of T.N.(2007) 2 SCC 1, the doctrine of basic features has been explained by this Court as under: (SCC p. 108, para 141)*

"141. The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Articles 14 and 19 which constitute the core values which if allowed to be abrogated would

change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III."

8. *As Article 14 is an integral part of our system, each and every State action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained in view of the judgments rendered by this Court in Delhi Development Horticulture Employees' Union v. Delhi Admn.(1992) 4 SCC 99, State of Haryana v. Piara Singh (1992) 4 SCC 118, Prabhat Kumar Sharma v. State of U.P.(1996) 10 SCC 62, J.A.S. Inter College v. State of U.P. (1996) 10 SCC 71, M.P. Housing Board v. Manoj Shrivastava (2006) 2 SCC 702, M.P. State Agro Industries Development Corpn. Ltd. v. S.C. Pandey (2006) 2 SCC 716 and State of M.P. v. Sandhya Tomar (2013) 11 SCC 357.*

9. *In Excise Supt. v. K.B.N. Visweshwara Rao (1996) 6 SCC 216, a larger Bench of this Court reconsidered its earlier judgment in Union of India v. N. Hargopal (1987) 3 SCC 308, wherein it had been held that insistence on recruitment through employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution. However, due to the possibility of non-sponsoring of names by the employment exchange, this Court held that any appointment even on temporary or ad hoc basis without inviting application is in violation of the said provisions of the Constitution and even if the names of candidates are requisitioned from employment exchange, in addition thereto, it is mandatory on the part*

of the employer to invite applications from all eligible candidates from open market as merely calling the names from the employment exchange does not meet the requirement of the said articles of the Constitution. The Court further observed: (K.B.N. Visweshwara Rao case), SCC p. 218 para 6)

> *"6. … In addition, the appropriate department … should call for the names by publication in the newspapers having wider circulation and also display on their office notice … and employment news bulletins; and then consider the cases of all candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."*
>
> *(emphasis supplied)*

(See also Arun Tewari v. Zila Mansavi Shikshak Sangh (1998) 2 SCC 332 and Kishore K. Pati v. District Inspector of Schools, Midnapore (2000) 9 SCC 405).

10. *In Suresh Kumar v. State of Haryana (2003) 10 SCC 276 this Court upheld the judgment of the Punjab and Haryana High Court wherein 1600 appointments made in the Police Department without advertisement stood quashed though the Punjab Police Rules, 1934 did not provide for such a course. The High Court reached the conclusion that process of selection stood vitiated because there was no advertisement and due publicity for inviting applications from the eligible candidates at large.*

11. *In UPSC v. Girish Jayanti Lal Vaghela (2006) 2 SCC 482 this Court held: (SCC p. 490, para 12)*

> *"12. … The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications*

from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made … Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

(emphasis supplied)

12. *The principles to be adopted in the matter of public appointments have been formulated by this Court in M.P. State Coop. Bank Ltd. v. Nanuram Yadav (2007) 8 SCC 264 as under: (SCC pp. 274-75, para 24)*

"(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.

(2) Regularisation cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(4) Those who come by back door should go through that door.

(5) No regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention of the statutory rules.

(6) The court should not exercise its jurisdiction on misplaced sympathy.

(7) If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

13. *A similar view has been reiterated by the Constitution Bench of this Court in State of Karnataka v. Umadevi (3) (2006) 4 SCC 1, observing that any appointment made in violation of the statutory rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. "Adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment." The Court further rejected the prayer that ad hoc appointees working for long be considered for regularisation as such a course only encourages the State to flout its own rules and would confer undue benefits on some at the cost of many waiting to compete.*

14. *In State of Orissa v. Mamata Mohanty (2011) 3 SCC*

436 this Court dealt with the constitutional principle of providing equality of opportunity to all which mandatorily requires that vacancy must be notified in advance meaning thereby that information of the recruitment must be disseminated in a reasonable manner in public domain ensuring maximum participation of all eligible candidates, thereby the right of equal opportunity is effectuated. The Court held as under: (SCC p. 452, para 36)

> *"36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."*

15. *Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his*

title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. (Vide University of Mysore v. C.D. Govinda Rao AIR 1965 SC 491, Kumar Padma Prasad v. Union of India (1992) 2 SCC 428, B.R. Kapur v. State of T.N.(2001) 7 SCC 231, Mor Modern Coop. Transport Society Ltd. v. State of Haryana (2002) 6 SCC 269, Arun Singh v. State of Bihar (2006) 9 SCC 375, Hari Bansh Lal v. Sahodar Prasad Mahto (2010) 9 SCC 655 and Central Electricity Supply Utility of Odisha v. Dhobei Sahoo (2014) 1 SCC 161.)

16. *Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly*

provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others.

19. *In Som Raj v. State of Haryana (1990) 2 SCC 653 this Court held as under: (SCC pp. 658-59, para 6)*

> *"6. … The absence of arbitrary power is the first postulate of rule of law upon which our whole constitutional edifice is based. In a system governed by rule of law, discretion when conferred upon an executive authority must be confined within clearly defined limits. The Rules provide the guidance for exercise of the discretion in making appointment from out of selection lists which was prepared on the basis of the performance and position obtained at the selection. The appointing authority is to make appointment in the order of gradation, subject to any other relevant rules like, rotation or reservation, if any, or any other valid and binding rules or instructions having force of law. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of rule of law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority."*

21. Even under the Constitution, the power of appointment granted to the Chief Justice under Article 229(1) is subject to Article 16(1), which guarantees

equality of opportunity for all citizens in matters relating to employment. "Opportunity" as used in this article means chance of employment and what it guaranteed is that this opportunity of employment would be equally available to all.

27. To say that the Chief Justice can appoint a person without following the procedure provided under Articles 14 and 16 would lead to an indefinite conclusion that the Chief Justice can dismiss him also without holding any inquiry or following the principles of natural justice/Rules, etc. for as per Section 16 of the General Clauses Act, 1897, power to appoint includes power to remove/suspend/dismiss. (Vide Pradyat Kumar Bose v. High Court of Calcutta AIR 1956 SC 285 and Chief Justice of A.P. v. L.V.A. Dixitulu (1979) 2 SCC 34.) But as no employee can be removed without following the procedure prescribed by law or in violation of the terms of his appointment, such a course would not be available to the Chief Justice. Therefore, the natural corollary of this is that the Chief Justice cannot make any appointment in contravention of the statutory rules, which have to be in consonance with the scheme of our Constitution.

29. Thus, in view of the above, the law can be summarised to the effect that the powers under Article 229(2) of the Constitution cannot be exercised by the Chief Justice in an unfettered and arbitrary manner. Appointments should be made giving adherence to the provisions of Articles 14 and 16 of the Constitution and/or such rules as made by the legislature.

30. *In today's system, daily labourers and casual labourers have been conveniently introduced which are followed by attempts to regularise them at a subsequent*

stage. Therefore, most of the times the issue raised is about the procedure adopted for making appointments indicating an improper exercise of discretion even when the rules specify a particular mode to be adopted. There can be no doubt that the employment whether of Class IV, Class III, Class II or any other class in the High Court or courts subordinate to it falls within the definition of "public employment". Such an employment, therefore, has to be made under rules and under orders of the competent authority.

31. *In a democratic set-up like ours, which is governed by rule of law, the supremacy of law is to be acknowledged and absence of arbitrariness has been consistently described as essence of rule of law. Thus, the powers have to be canalised and not unbridled so as to breach the basic structure of the Constitution. Equality of opportunity in matters of employment being the constitutional mandate has always been observed. The unquestionable authority is always subject to the authority of the Constitution. The higher the dignitary, the more objectivity is expected to be observed. We do not say that powers should be curtailed. What we want to say is that the power can be exercised only to the width of the constitutional and legal limits. The date of retirement of every employee is well known in advance and therefore, the number of vacancies likely to occur in near future in a particular cadre is always known to the employer. Therefore, the exercise to fill up the vacancies at the earliest must start in advance to ensure that the selected person may join immediately after availability of the post, and hence, there may be no occasion to appoint any person on ad hoc basis for the reason that the problem of inducting the daily labourers who are ensured of a regular*

appointment subsequently has to be avoided and a fair procedure must be adopted giving equal opportunity to everyone.

35.2. *(ii) To fill up any vacancy for any post either in the High Court or in courts subordinate to the High Court, in strict compliance with the statutory rules so made. In case any appointment is made in contravention of the statutory rules, the appointment would be void ab initio irrespective of any class of the post or the person occupying it."*

Supreme Court in **State of Punjab and another vs. Brijeshwar Singh Chahal and another**, reported in **(2016) 6 SCC 1**, in paragraph nos. 10, 20 to 23, 39, 41.1 to 41.5 has held as under:-

"10. *We are not sure whether a similar study has been conducted qua the State of Punjab, but given the fact that the number of Law Officers appointed by that State is also fairly large, we will not be surprised if any such study would lead to similar or even more startling results. The upshot of the above discussion is that for a fair and objective system of appointment, there ought to be a fair and realistic assessment of the requirement, for otherwise the appointments may be made not because they are required but because they come handy for political aggrandisement, appeasement or personal benevolence of those in power towards those appointed. The dangers of such an uncanalised and unregulated system of appointment, it is evident, are multi-dimensional resulting in erosion of the rule of law, public faith in the fairness of the system and injury to public interest and administration of justice. It is high time to call a halt to this process lest even the right thinking become cynical about our capacity to correct what needs to be corrected.*

20. *In S.G. Jaisinghani v. Union of India, AIR 1967 SC*

1427, this Court held that absence of arbitrary power is the first essential of "Rule of Law" upon which rests our constitutional system. This Court ruled that in a system governed by rule of law, any discretion conferred upon the executive authorities must be confined within clearly defined limits. This Court quoted with approval, the following observations of Douglas, J. in United States v. Wunderlich 1951 SCC Online US SC 93: 96 L Ed 113: 342 US 98 (1951): (S.G. Jaisinghani case AIR 1967 SC 1427, AIR p. 1434, para 14)

> *"9. Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler…. Where discretion is absolute, man has always suffered." (Wunderlich case 1951 SCC Online US SC 93: 96 L Ed 113: 342 US 98 (1951), SCC OnLine US SC para 9)*

21. *A similar sentiment was expressed by this Court in E.P. Royappa v. State of T.N. (1974) 4 SCC 3 wherein this Court declared that Article 14 is the genus while Article 16 is a specie and the basic principle which informs both these Articles is equality and inhibition against discrimination. Equality, declared this Court, was antithetic to arbitrariness. The Court described equality and arbitrariness as sworn enemies, one belonging to the rule of law in a republic and the other to the whims and caprice of an absolute monarch. Resultantly if an act is found to be arbitrary, it is implicit that it is unequal both according to political logic and constitutional law, hence violative of Article 14 and if it affects any matter of public employment it is also violative of Article 16. This Court reiterated that Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and inequality of treatment.*

22. *Then came the decision of this Court in Maneka Gandhi v. Union of India (1978) 1 SCC 248, wherein this Court held that the principle of reasonableness both legally and philosophically is an essential element of equality and that non-arbitrariness pervades Article 14 with brooding omnipresence. This implies that wherever there is arbitrariness in State action, whether it be legislative or executive, Article 14 would spring into action and strike the same down. This Court held that the concept of reasonableness and non-arbitrariness pervades the constitutional scheme and is a golden thread which runs through the entire Constitution.*

23. *In Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489, this Court relying upon the pronouncements of E.P. Royappa v. State of T.N., (1974) 4 SCC 3 and Maneka Gandhi v. Union of India, (1978) 1 SCC 248 once again declared that State action must not be guided by extraneous or irrelevant considerations because that would be denial of equality. This Court recognised that principles of reasonableness and rationality are legally as well as philosophically essential elements of equality and non-arbitrariness as projected by Article 14, whether it be authority of law or exercise of executive power without the making of a law. This Court held that State cannot act arbitrarily in the matter of entering into relationships be it contractual or otherwise with a third party and its action must conform to some standard or norm, which is in itself rational and non-discriminatory.*

39. *The development of law in this country has taken strides when it comes to interpreting Articles 14 and 16 and their sweep. Recognition of power exercisable by the functionaries of the State as a trust which will stand*

discharged only if the power is exercised in public interest is an important milestone just as recognition of the Court's power of judicial review to be wide enough to strike at and annul any State action that is arbitrary, unguided, whimsical, unfair or discriminatory. Seen as important dimensions of the Rule of Law by which we swear, the law as it stands today has banished from our system unguided and uncanalised or arbitrary discretion even in matters that were till recently considered to be within the legitimate sphere of a public functionary as a repository of executive power. Those exercising power for public good are now accountable for their action, which must survive scrutiny or be annulled on the first principle that the exercise was not for public good in that the same was either mala fide, unfair, unreasonable or discriminatory. Extension of the principle even to contractual matters or matters like engagement of Law Officers is symbolic of the lowering of the threshold of tolerance for what is unfair, unreasonable or arbitrary. The expanding horizons of the jurisprudence on the subject both in terms of interpretation of Article 14 of the Constitution as also the Court's willingness to entertain pleas for judicial review is a heartening development on the judicial landscape that will disentitle exercise of power by those vested with it as also empower those affected by such power to have it reversed if such reversal is otherwise merited.

41. *To sum up, the following propositions are legally unexceptionable:*

41.1. *The Government and so also all public bodies are trustees of the power vested in them.*

41.2. *Discharge of the trust reposed in them in the best possible manner is their primary duty.*

> ***41.3.*** *The power to engage, employ or recruit servants, agents, advisors and representatives must like any other power be exercised in a fair, reasonable, non-discriminatory and objective manner.*
>
> ***41.4.*** *The duty to act in a fair, reasonable, non-discriminatory and objective manner is a facet of the Rule of Law in a constitutional democracy like ours.*
>
> ***41.5.*** *An action that is arbitrary has no place in a polity governed by Rule of Law apart from being offensive to the equality clause guaranteed by Article 14 of the Constitution of India*."

Supreme Court in the case of **State of Jammu and Kashmir and others vs. District Bar Association, Bandipora**, reported in **AIR 2017 S.C. 11**, in paragraph nos. 12 to 14 has held as under:-

> *"12. The decision in* ***Renu v. District and Sessions Judge, Tis Hazari Courts, Delhi*** *MANU/SC/0096/2014: (2014) 14 scc 50 dealt with appointments which were shown to be illegal and the outcome of arbitrariness. It was in that backdrop that the following observations came to be made :*
>
> > *"2. This Court had appointed Shri P.S. Narasimha, learned Senior Counsel as amicus curiae to assist the Court. The matter was heard on 28-1-2014 and deliberations took place at length wherein all the learned counsel appearing for the States as well as for the High Courts suggested that the matter should be dealt with in a larger perspective i.e. also for appointments of employees in the High Court and courts subordinate to the High Court which must include Class IV posts also. A large number of instances have been pointed out*

on the basis of the information received under the Right to Information Act, 2005 of cases not only of irregularity but of favouritism also in making such appointments. It has been suggested by the learned counsel appearing in the matter that this Court has a duty not only to check illegality, irregularity, corruption, nepotism and favouritism in judicial institutions, but also to provide guidelines to prevent the menace of back-door entries of employees who subsequently are ordered to be regularised.

27. To say that the Chief Justice can appoint a person without following the procedure provided under Articles 14 and 16 would lead to an indefinite conclusion that the Chief Justice can dismiss him also without holding any inquiry or following the principles of natural justice/Rules, etc. for as per Section 16 of the General Clauses Act, 1897, power to appoint includes power to remove/suspend/dismiss. (Vide Pradyat Kumar Bose v. High Court of Calcutta [AIR 1956 SC 285] and Chief Justice of A.P. v. L.V.A. Dixitulu [(1979) 2 SCC 34 : 1979 SCC (L&S) 99].) But as no employee can be removed without following the procedure prescribed by law or in violation of the terms of his appointment, such a course would not be available to the Chief Justice. Therefore, the natural corollary of this is that the Chief Justice cannot make any appointment in contravention of the statutory rules, which have to be in consonance with the scheme of our Constitution.

This Court considered the modalities adopted by the High Courts across the country in making recruitments and

issued directions to ensure that appointments made by judicial institutions are in accordance the principle of equality of opportunity enshrined in Articles 14 and 16 of the Constitution. Emphasizing the principle of transparency in public appointment, this Court observed that :

> *"Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others.*
>
> *Thus, the aforesaid decisions are an authority on prescribing the limitations while making appointment against public posts in terms of Articles 14 and 16 of the Constitution. What has been deprecated by this Court time and again is "back-door appointments or appointments dehors the rules".*

The power that is vested in the Chief Justice of the High Court under Article 229(1) is, the Court held, subject to Article 16:

> *"the law can be summarised to the effect that the powers under Article 229(2) of the Constitution cannot be exercised by the Chief Justice in an unfettered and arbitrary manner. Appointments should be made giving adherence to the provisions of Articles 14 and 16 of the Constitution and/or such rules as made by the legislature".*

13. Four fundamental principles emerge from the decision of this Court in ***Renu****. The first principle is that Article 235 enables the High Court to exercise complete administrative control over the district judiciary which extends to all functionaries attached to those courts, including ministerial staff and employees on the establishment. The purpose of superintendence would be frustrated if the administrative control of the High Court is not to be exercised over the administrative and ministerial staff. However, the Chief Justice of the High Court as a constitutional functionary is subject to the mandate of Articles 14 and 16. No appointment can be made in contravention of statutory rules. Moreover, the rules themselves must be consistent with constitutional principles.*

The second principle is that employment in the High Courts or in the courts subordinate to them constitutes public employment. All recruitment in matters of public employment must be made in accordance with prevailing rules and orders:

> *"30. In today's system, daily labourers and casual labourers have been conveniently introduced which are followed by attempts to regularise them at a subsequent stage. Therefore, most of the times the issue raised is about the procedure adopted for making appointments*

> *indicating an improper exercise of discretion even when the rules specify a particular mode to be adopted. There can be no doubt that the employment whether of Class IV, Class III, Class II or any other class in the High Court or courts subordinate to it falls within the definition of "public employment". Such an employment, therefore, has to be made under rules and under orders of the competent authority."*

Thirdly, the date on which the vacancies are likely to occur are foreseeable with a reasonable amount of clarity and precision. An exercise to fill up vacancies must be undertaken in advance so as to ensure that there is no occasion to appoint persons on an ad hoc basis:

> *"31. In a democratic set-up like ours, which is governed by rule of law, the supremacy of law is to be acknowledged and absence of arbitrariness has been consistently described as essence of rule of law. Thus, the powers have to be canalised and not unbridled so as to breach the basic structure of the Constitution. Equality of opportunity in matters of employment being the constitutional mandate has always been observed. The unquestionable authority is always subject to the authority of the Constitution. The higher the dignitary, the more objectivity is expected to be observed. We do not say that powers should be curtailed. What we want to say is that the power can be exercised only to the width of the constitutional and legal limits. The date of retirement of every employee is well known in advance and therefore, the number of vacancies likely to occur in near future in a particular cadre is always known to the employer. Therefore, the*

> *exercise to fill up the vacancies at the earliest must start in advance to ensure that the selected person may join immediately after availability of the post, and hence, there may be no occasion to appoint any person on ad hoc basis for the reason that the problem of inducting the daily labourers who are ensured of a regular appointment subsequently has to be avoided and a fair procedure must be adopted giving equal opportunity to everyone."*

The information before the Supreme Court indicated that several High Courts have adopted a pattern of centralized recruitment so as to ensure transparency and objectivity in the appointment of ministerial staff both on the establishment of the High Court and in the district courts.

Fourthly, while the High Court is an autonomous constitutional authority whose status cannot be undermined, it is equally necessary for it to strictly comply with the rules framed in making recruitments :

> *"We would like to make it clear that the High Court is a constitutional and an autonomous authority subordinate to none. Therefore, nobody can undermine the constitutional authority of the High Court, and therefore the purpose to hear this case is only to advise the High Court that if its rules are not in consonance with the philosophy of our Constitution then the same may be modified and no appointment in contravention thereof should be made. It is necessary that there is strict compliance with appropriate rules and the employer is bound to adhere to the norms of Articles 14 and 16 of the Constitution before making any recruitment."*

The following directions have been issued in ***Renu*** *for observance by all the High Courts :*

"35.1. (i) All the High Courts are requested to re-examine the statutory rules dealing with the appointment of staff in the High Court as well as in the subordinate courts and in case any of the rules is not in conformity and consonance with the provisions of Articles 14 and 16 of the Constitution, the same may be modified.

35.2. (ii) To fill up any vacancy for any post either in the High Court or in courts subordinate to the High Court, in strict compliance with the statutory rules so made. In case any appointment is made in contravention of the statutory rules, the appointment would be void ab initio irrespective of any class of the post or the person occupying it*.*

35.3. (iii) The post shall be filled up by issuing the advertisement in at least two newspapers and one of which must be in vernacular language having wide circulation in the respective State. In addition thereto, the names may be requisitioned from the local employment exchange and the vacancies may be advertised by other modes also e.g. Employment News, etc. Any vacancy filled up without advertising as prescribed hereinabove, shall be void ab initio and would remain unenforceable and unexecutable except such appointments which are permissible to be filled up without advertisement e.g. appointment on compassionate grounds as per the rules applicable. Before any appointment is made, the eligibility as well as suitability of all the candidates should be screened/tested while adhering to the reservation policy adopted by the State, etc. if any.

35.4. (iv) Each High Court may examine and decide within six months from today as to whether it is

> *desirable to have centralised selection of candidates for the courts subordinate to the respective High Court and if it finds it desirable, may formulate the rules to carry out that purpose either for the State or on zonal or divisional basis.*
>
> *35.5. (v) The High Court concerned or the subordinate court as the case may be, shall undertake the exercise of recruitment on a regular basis at least once a year for existing vacancies or vacancies that are likely to occur within the said period, so that the vacancies are filled up timely, and thereby avoiding any inconvenience or shortage of staff as it will also control the menace of ad hocism."*
>
> *14. The judgment in Renu underlines the importance of the High Court complying with statutory rules in matters of recruitment. The judgment also emphasises the need to abide by the principles of equality and equal opportunity in Articles 14 and 16."*

Arbitrariness

Supreme Court in **U.V. Mahadkar vs. Subhash Anand Chavan and others**, reported in (2016) 1 SCC 536 in paragraph no. 8 held as under:-

> ***"8.*** *At the very outset, we are of the view that in the matter of selection and promotion to the higher post, if a Committee of Experts is constituted then normally, the Court should not interfere in such decision unless mala fides are attributed or allegations of arbitrariness are proved."*

15. The judicial review of administrative actions will be based on the grounds of (i) Illegality, (ii) Irrationality (iii) Procedural impropriety, having chances of further addition according to the need of hour. Illegality

covers the main substantive areas of ultra vires.

Illegality

The decision maker is expected to act for a purpose and for that end he must apply correct tests, must taking into account relevant factors, and disregard irrelevant factors. The Supreme Court in the case of **Centre for PIL vs. Union of India** (2011) 4 SCC 1 made it clear that it is not looking into the decision but the decision making process. The Court said that the government "is not accountable to the Courts for the choice made but the Government is accountable to the Courts in respect of lawfulness / legality of its decision when impugned under the judicial review jurisdiction."

Irrationality

The decision of an administrative authority is also bad where it is so perverse that no reasonable decision maker could have made such a decision. Judicial review on this ground veers around the exercise of discretion by a deciding authority, it is comparatively softer than illegality. Irrationality may arise when the decision maker has not applied his mind and acted mechanically by giving too much credence to the views of subordinates or authority himself. Generally speaking, an authority entrusted with a discretion must not, by adopting a rule or policy, disable itself from exercising its discretion in individual cases. There is no objection in its formulating a rule or policy. But the rule it frames or the policy it adopts must not be based on consideration extraneous to those contemplated or envisaged by enabling Act. It must not pre-determine the issue, as by resolving to refuse all applications or all applications of a

certain class or all applications except those of a certain class. In the case of **Ram Manohar Lohia vs. State of Bihar**, AIR 1966 SC 740, Supreme Court held that the decision of an administrative authority based on irrelevant consideration also renders the act or action bad. An administrative action based on mala fide is also subject to judicial review. De Smith explained the situation of dishonest and malicious action, thus:

> *"In relation to the exercise of statutory power it may be said to comprise dishonesty (fraud) or malice. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. A power is exercise fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred."*

To sum up "irrationality" as a mode of judicial review of administrative action covers cases of the exercise of a discretionary power, where the power is exercised for an irrelevant consideration or for an improper purpose or on dictate of a superior or in mala fide.

Procedural Impropriety

Procedural impropriety involves a failure on the part of the decision maker to comply the rules of natural justice, where appropriate, to act fairly, and to observe procedural norms established by the statute. It produces a refinement of the principle of *audi alteram partem.* It can be put in two folds: 1) Breach of principles of natural justice and, 2) not affording a fair and reasonable opportunity to meet the case. One of the important facets of judicial review of administrative actions is that discretionary actions are inherently arbitrary and arbitrariness is the

abnegation of equality clause. Arbitrariness and discrimination are but different forms of irrationality. In the case of **E.P. Royappa vs. State of Tamil Nadu** (1974) 4 SCC 3, it was observed as follows:-

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belong to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Whereas an act is arbitrary, it is implicit in it, that it is unequal both according to political, logic and constitutional law and is therefore violative of Article 14."*

In Associated Provincial Picture Houses Ltd. Wednesbury Corporation Lord Green explained the test with reference to wednesbury principle of reasonableness and violation of rule of natural justice as under:-

> *"A person interested with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often he said, to be acting `unreasonably'. Similarly, he may be something so absurd that no sensible person could ever dream that is lay within the powers of the authority."*

<u>Legitimate Expectation</u>

In the case of **Navjyati Cooperative Group Housing Society vs. Union of India** reported in (1992) 4 SCC 477, the Supreme Court has held that the doctrine of "legitimate expectation, it was pointed out that it imposes in essence a duty on public authority to act fairly; and within the conspectus of fair dealing in case of legitimate expectation, the reasonable opportunities to make representation by the parties likely to be affected by any change of consistent past policy come in. Natural justice i.e. reasoned decision is also appreciated by courts and they have been insisted upon giving reasons for decisions affecting the rights and liabilities of citizens. Supreme Court in the case of **S.N. Mukherjee vs. Union of India**, reported in (1990) 4 SCC 594 held that it is mandatory as it reduces chances of arbitrariness on part of authority because the reasons recorded by him are subject to judicial review.

16. Articles 14 and 16 of the Constitution relates to equality of opportunity in matters of public employment. Supreme Court in the case of **Union of India vs. S.C. Bagari** (1999) 3 SCC 709, it was observed that Article 16 does not bar reasonable classification of employees. **Equality of opportunity in employment or promotion means equality within a class Articles 14 and 16 are not violated if differential treatment is accorded in pay, perks and other privileges to different classes**. Two pay scales in the same posts based on experience and length of service are valid under Articles 14 and 16. **It was laid down by the Supreme Court that the basic principle Articles 14 and 16 is the same i.e. equality and prohibition against discrimination. Employment under Article 16(1) includes promotion**. Equality of opportunity is denied if direct

recruitment to service is made without advertising the posts. **As regards the equality of opportunity in matters of promotion, it is laid down that if all the posts are filled by promotion, there is no need to advertise.** However, if some posts are to be filled by promotion and some by direct recruitment, advertising the posts is necessary. The Supreme Court laid down that within the same cadre, educational qualification may be laid down for the purpose of promotion. **Fixation of seniority in services was also brought under the rule of equality of opportunity in public employment with certain exceptions under Article 336 and under clauses (1) and (2) of Article 16.**

Discretionary Power

Supreme Court in **U.P. State Road Transport Corporation and another vs. Mohd. Ismail and others** reported in (1991) 3 S.C.C., 239, in para no. 15 held as under:-

> ***"15.*** *These are, in our opinion, extreme contentions which are not sustainable under law. There are two aspects to be borne in mind in exercising the discretion. Firstly, there are constraints within which the Corporation has to exercise its discretion. The Corporation is a public utility organisation where mediating motion is efficiency and effectiveness of public service. Efficiency and effectiveness of public service are the basic concepts which cannot be sacrificed in public administration by any statutory corporation. The Corporation has to render this public service within the resource use and allocation. It is within these constraints the Corporation has to exercise its discretion and perform its task. The second aspect*

relates to the manner in which statutory discretion is to be exercised. The discretion allowed by the statute to the holder of an office, as Lord Halsbury observed in Susannah Sharp v. Wakefield, 1891 AC 173, 179: 64 LT 180 is intended to be exercised "according to the rules of reason and justice, not according to private opinion; … according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself". Every discretion conferred by statute on a holder of public office must be exercised in furtherance of accomplishment of purpose of the power. The purpose of discretionary decision making under Regulation 17(3) was intended to rehabilitate the disabled drivers to the extent possible and within the abovesaid constraints. The Corporation therefore, cannot act mechanically. The discretion should not be exercised according to whim, caprice or ritual. The discretion should be exercised reasonably and rationally. It should be exercised faithfully and impartially. There should be proper value judgment with fairness and equity. Those drivers would have served the Corporation till their superannuation but for their unfortunate medical unfitness to carry on the driver's job. Therefore, it would not be improper if the discretion is exercised with greater concern for and sympathetic outlook to the disabled drivers subject of course to the paramount consideration of good and efficient administration. These are some of the relevant factors to be borne in mind in exercising the discretion vested in the Corporation under Regulation 17(3)."

Supreme Court in the case of **Union of India vs. Kuldeep**

Singh, reported in (2004) 2 SCC 590 in Para nos. 20, 21 and 24 held as under:-

> ***"20.*** *When anything is left to any person, judge or Magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law. (See Tomlin's Law Dictionary.) In its ordinary meaning, the word "discretion" signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law. (See Tomlin's Law Dictionary.)*
>
> ***21.*** *Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice,*

> *not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (per Lord Halsbury, L.C., in Sharp v. Wakefield 1891 AC 173 : (1886-90) All ER Rep 651 (HL). (Also see S.G. Jaisinghani v. Union of India AIR 1967 SC 1427).*
>
> ***24.*** *Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (per Willes, J. in Lee v. Bude and Torrington Junction Rly. Co. (1871) LR 6 CP 576 : 24 LT 827 and in Morgan v. Morgan (1869) LR 1 P&M 644).*"

Supreme Court in the case of **Automotive Tyre Manufacturers Association vs. Designated Authority and others**, reported in (2011) 2 SCC 258, in para nos. 77 to 80 held as under:

> ***"77.*** *It is trite that rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. In A.K. Kraipak v. Union of India, (1969) 2 SCC 262, it was observed that the aim*

of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice.

78. *In Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405, upon consideration of several cases, Krishna Iyer, J. in his inimitable style observed thus: (SCC p. 434, para 48)*

> *"48. Once we understand the soul of the rule as fair play in action—and it is so—we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation; nothing more—but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Textbook excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation."*

79. *In Swadeshi Cotton Mills v. Union of India (1981) 1*

SCC 664, R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to several decisions, His Lordship observed thus: (SCC p. 666)

> *"Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) audi alteram partem, and (ii) nemo judex in re sua. The audi alteram partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain.* ***This rule cannot be sacrificed at the altar of administrative convenience or celerity****. The general principle—as distinguished from an absolute rule of uniform application—seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing,*

shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

(emphasis supplied by us)

80. *It is thus, well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a straitjacket nor is it a general rule of universal application."*

Supreme Court in the case of **State of West Bengal and**

others vs. Debasish Mukherjeet and others, reported in (2011) 14 SCC 187, in para no. 35 has held as under:-

> ***"35.*** *We may next consider the correctness of the finding of the Division Bench that the order dated 13-2-2003 of the Chief Justice is not justiciable and the State Government cannot challenge it in a court of law. At the outset, we may note that in a democracy, governed by the rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do whatever it pleases. Where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action. Even prerogative power is subject to judicial review, but to a very limited extent. The extent, depth and intensity of judicial review may depend upon the subject-matter of judicial review (vide observation of the Constitution Bench in B.P. Singhal v. Union of India (2010) 6 SCC 331).*"

Supreme Court in **Centre for Public Interest Litigation vs. Union of India and others** reported in (2016) 6 SCC 408 in para no.26 held as under:-

> ***"26.*** *It cannot be doubted that the primary and central purpose of judicial review of the administrative action is to promote good administration. It is to ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent, and unbiased fashion, keeping in forefront the public interest. To ensure that the aforesaid dominant objectives are achieved, this Court has added new dimension to the contours of judicial review and it has undergone tremendous change in recent years. The scope of judicial review has expanded radically and it now*

extends well beyond the sphere of statutory powers to include diverse forms of "public" power in response to the changing architecture of the Government (See: Administrative Law : Text and Materials (4th Edn., Oxford University Press, New York, 2011) by Beatson, Matthews and Elliott.). Thus, not only has judicial review grown wider in scope; its intensity has also increased. Notwithstanding the same,

> *"it is, however, central to received perceptions of judicial review that courts may not interfere with exercise of discretion merely because they disagree with the decision or action in question; instead, courts intervene only if some specific fault can be established—for example, if the decision reached was procedurally unfair ibid".*

Supreme Court in the case of **Satish Kumar vs. Karan Singh and others**, reported in (2016) 4 SCC 352 , in para no.10 held as under:-

> ***"10.*** *Exercise of discretionary power under Section 20 of the Specific Relief Act for granting a decree, this Court in Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son, 1987 Supp SCC 340: AIR 1987 SC 2328 observed: (SCC p. 345, para 14)*
>
> > *"14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the*

> *plaintiff. The High Court has failed to consider the motive with which Varghese instituted the suit. It was instituted because Kuruvila could not get the estate and Mathew was not prepared to part with it. The sheet anchor of the suit filed by Varghese is the agreement for sale, Ext. A-1. Since Chettiar had waived his rights thereunder, Varghese as an assignee could not get a better right to enforce that agreement. He is, therefore, not entitled to a decree for specific performance.*"

Supreme Court in the case of **State of U.P. and others vs. Renusagar Power Co. and others,** reported in **(1988) 4 SCC 59,** held as under:-

> "86. ..... The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated."

Supreme Court in **U.V. Mahadkar vs. Subhash Anand Chavan and others**, reported in (2016) 1 SCC, 536 , in para no 16 held as under:-

> ***"16.*** *Reference may also be made to a decision of this Court in K. Samantaray v. National Insurance Co. Ltd (2004) 9 SCC 286, observed as under: (SCC pp. 289-90, para 7)*

> *"7. The principles of seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid on seniority, though it is not the determinative factor, while in the latter, merit is the determinative factor. In State of Mysore v. Syed Mahmood AIR 1968 SC 1113 it was observed that in the background of Rule 4(3)(b) of the Mysore State Civil Services (General Recruitment) Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit; that the rule required promotion to be made by selection on the basis of 'seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion'. It was pointed out that where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. But these are not the only modes for deciding whether promotion is to be granted or not.*"

17. The petitioners argument is that promotion of respondent no.3 is in violation of Rules 12 and 30 of Rules 1973 since a method of recruitment to the post of Superintendent Grade-II is seniority-cum-merit. Petitioners are much seniors to respondent no.3 in the seniority list of Senior Assistants. Further contention is under rule 38 of Rules 1973. Only under circumstances where undue hardship arises in a case in such circumstances, rule 38 is required to be invoked. No undue hardship is

caused to the third respondent so as to invoke rule 38 and there is violation of Articles 14 and 16 in promoting the third respondent. Invoking rule 38 of Rules 1973 to promote respondent no.3 is in violation of rule 20 of Rules 1994. Further rule 19 provides for relaxation of any provision only to a class of persons and not to an individual. The third respondent has not questioned the validity of his ranking below the petitioners as long as petitioners are seniors to the third respondent. Promotion of the third respondent is contrary to Rules 12 and 30 of Rules 1973 and it is illegal and arbitrary. The petitioners have relied on the administrative decision of the present Chief Justice in the case of Ram Kumar, Joint Registrar, who had sought for benefit on par with his superior Sham Lal Sharma wherein detailed order has been passed while rejecting the claim of Ram Kumar, stating that grant of benefit to Ram Kumar and others would be arbitrary.

18. The petitioners in support of the petition cited decision of **Satinder Singh Bajwa (supra)**. The Court has held that undue benefit should not be given to the employees on the eve of Chief Justice's retirement. In the case of **Renu (supra)**, powers of Chief Justice of the High Court in extending service benefit to its employees should be in consonance with the constitutional provision like Articles 14 and 16 of the Constitution. In the case of **H.C. Puttaswamy (supra)**, Court has held that Chief Justice cannot depart from constitutional ethos and traditions of his calling. Since the then Hon'ble Chief Justice invoked Rule 38 of Rules 1973 the contention of the petitioners would be appreciable to the extent of violation of ingredients of above rule and violation of Articles 14 and 16 of Constitution.

19. Learned counsel for respondents no.1 and 3 contended that under Rule 38 of Rules 1973, Chief Justice has ample power, therefore, rightly the then Hon'ble Chief Justice has invoked rule 38 while examining the third respondent's past record after due appreciation of his work and ability by the Supreme Court Judges, Judges of this Court and Judges of other High Courts. Therefore, after due satisfaction in the matter, all rules have been relaxed insofar as granting promotion to the third respondent. In other words, all the ingredients under Rule 38 has been complied.

20. It was further submitted that contention of the petitioners that there is violation of rule 20 read with rule 19 of Rules 1994 in granting promotion to the third respondent, is not tenable for the reasons that Rules 1994 were issued under Article 309, whereas rule 38 of Rules 1973 were issued under Article 229(1) read with Article 231 of the Constitution. In support of the power of the Chief Justice, both the counsels relied on decisions of **Satya Vir Singh, R.K. Sharma, Renu and High Court of Judicature for Rajasthan vs. Ramesh Chand Paliwal and another (supra)**. Insofar as violation of Rules 1994 is concerned, third respondent relied upon in **M. Gurumoorthy's case (supra)** where the Supreme Court has held that in the matter of service conditions in the High Court even the Legislative action abridge or modify the powers conferred under clause (1) of Article 229 of the Constitution. It was further contended that **Renu's case (supra)** is not at all applicable in the present case as it relates to service condition of the Subordinate staff Courts.

21. The following rules of Rules 1973 which are at the heart of controversy in the present case reads as under:-

"*12. Superintendent Grade-II –* *The appointment to the post of Superintendent Grade-II shall be made by promotion on the basis of seniority-cum-merit from out of the Senior Assistants having experience of a minimum period of three years.*

Provided that 10% (ten per cent) posts in the cadre of Superintendent Grade-II shall be filled by direct recruitment from amongst the candidates possessing a certificate of passing State Accounts Service Examination of Punjab or Haryana or who are qualified Chartered Accountant / Company Secretary / Cost and Works Accountant. Such candidates shall not be less than 35 years of age with two years relevant experience in a Government Department or an organization of repute."

*"**16. Senior Assistant***

The posts of Senior Assistants shall be filled in the following ratio:-

(1) 80% - By Promotion from amongst the Junior Assistants working on the establishment of this Court on the basis of seniority-cum-merit.

(2) 20% - By Direct Recruitment.

Qualifications/Experience for direct recruitment:-

(i) Age: *The candidate should not be less than 25 years or more than 35 years of age on the last date of submission of applications.*

Provided that there shall be no age limit for the employees working on the Establishment of the High Court."

*"**30. Seniority (i)** Seniority shall be determined separately for each category of posts in the Establishment.*

(ii) Upto the date of confirmation, seniority shall be determined by the length of continuous service in the particular category of posts.

(iii) Within the same category seniority shall be determined from the date of confirmation. In any particular category seniority, between the persons confirmed on the same date shall be determined on the basis of their seniority as unconfirmed hands in that category.

Provided that notwithstanding anything contained in these rules, the inter-se seniority of the existing members of the establishment in any particular category, as already settled by the Chief Justice or by any Judge or Judges prior to the coming into force of these rules shall not be disturbed because of anything contained in the rules;

(iv) In case of any dispute regarding seniority the same shall be decided by the Chief Justice or any Judge nominated by the Chief Justice for that purpose."

***"38. Power to relax rules in favour of individuals** – Where the Chief Justice is satisfied that the operation of any rule causes undue hardship in any particular case, he may by order dispense with or relax the requirements of that rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner provided that the case is not dealt with in a manner less favourable to the officer or official concerned than in accordance with the rules."*

22. Rule 38 of Rules 1973 play a heroic role in crisis between equity and legalism.

Perusal of the records, it is evident that while promoting the third respondent, the then Hon'ble Chief Justice has relaxed all the rules of Rules 1973. In other words, Rule 12 relates to method of recruitment to the post of Superintendent Grade-II. Even though the third respondent fulfills stipulated condition for the post of Superintendent Grade-II except

seniority. Seniority is a fundamental right held by the Supreme Court in the case of **Ajit Singh and others (II) vs. State of Punjab and others,** reported in (1999) 7 Supreme Court Cases, 209, para nos.22, 23 and 27 reads as under:-

> ***"****Articles 14 and 16 (1) : is right to be considered for promotion a fundamental right.*
>
> ***22.*** *Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".*
>
> *It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16 (1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.*

"Promotion" based on equal opportunity and "seniority" attached to such promotion are facets of fundamental right under Article 16(1).

23. *Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of "seniority-cum-suitability", the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the seniormost person at the basic level is to be considered first and then the others in the line of seniority.) That is how right to be considered for promotion and the "seniority" attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).*

> *Right to be considered for promotion is not a mere statutory right*
>
> ***27.*** *In our opinion, the above view expressed in Ashok Kumar Gupta (1997) 5 SCC 201: 1997 SCC (L&S) 1299 and followed in Jagdish Lal vs. State of Haryana (1997) 6 SCC 538 : 1997 SCC (L&S) 1550 and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta (1997) 5 SCC 201 right from 1950."*

Having regard to Rule 12 and the above decision, the petitioners do have right of preference over the third respondent as they are much seniors to the third respondent. Therefore, the then Chief Justice relaxing rule 12 in promoting respondent no.3 would be contrary to Articles 14 and 16 of the Constitution.

23. Under Rule 38 of Rules 1973, the Chief Justice can invoke after satisfaction of undue hardship and just and equitable manner. Insofar as third respondent is concerned, the principle of no undue hardship and also just and equitable manner is not at all attracted. Undue hardship would arise if a particular provision of law is coming in the way of extending service condition to an employee without affecting the third party's right

like the petitioners in the present case. Further, Supreme Court in the case of **Union of India and another vs. Narendra Singh**, reported in **(2008) 2 SCC 750**, held that normally there should not be any relaxation in recruitment rules unless the eligible and qualified candidates are not available; relaxation should not be exercised to perpetuate mistake. Further it was held that power of relaxation should be exercised to the extent as may be necessary to ensure satisfactory working or removing hardship in a **just and equitable manner** but the Government cannot consciously and deliberately deviate from the rules exercising the power of relaxation.

24. Supreme Court in the case of **Shri Amrit Singh and others vs. Union of India and others, (1980) 3 SCC 393** held that there must be undue hardship and, further relaxation must promote dealing with the case "in a just and equitable manner". These are perfectly sensible guidelines . What is more, there is implicit in the Rule, the compliance with natural justice so that nobody may be adversely affected even by administrative action without hearing.

25. Having regard to the above rulings of the Supreme Court while exercising relaxation provision to an employee, such action should in consonance with Articles 14 and 16 of the Constitution. Thus, the third party's right should not be affected, whereas in the present case, while promoting the third respondent, Rules 12 and 30 of Rules 1973 and Articles 14 and 16 of the Constitution are violated. Therefore, the third respondent's promotion is liable to be set aside.

26. The present Hon'ble Chief Justice had an occasion to consider extension of certain service benefits to Ram Kumar on par with Sham Lal

Sharma, who is stated to be junior to Ram Kumar. The Hon'ble Chief Justice was pleased to observe as under:-

> *"I have not had the benefit of observing the work of the three Joint Registrars. Their main grievance is that they did not have the benefit of working with the Chief Justice. They stated that if they had this opportunity they would have been willing to work as hard as Mr. Sham Lal Sharma did and would have been able to demonstrate to the Chief Justice that they were as hard working and efficient as him. Due to this lack of opportunity, enormous injustice has been caused to them." "I have been informed that there are certain other out of turn appointments as well and that other employees have also been conferred benefits out of turn. Assuming that this is true it enhances my reluctance to confer out of turn benefits upon the three Joint Registrars even assuming that they are equally, if not more, entitled to the benefits conferred upon Shri Sham Lal Sharma. I am not inclined to grant ad hoc benefits to the employees selectively. If I grant this benefit to the three Joint Registrars, several other employees of this Court in different cadres would insist upon the same benefit in view their having been overlooked or in view of the persons junior to them having been conferred benefits of promotion out of turn and / or any other benefits on an ad hoc basis". "I am not inclined to grant the request on principle for such a decision would be arbitrary and the same would have enormous adverse consequences upon the administration of this Court.*"

The above decision of the present Hon'ble Chief Justice is crystal clear that giving out of turn promotion would lead to arbitrariness

in the decision and the same would have enormous adverse consequences upon the administration of the Court. The said decision supports the petitioners' claim, therefore, the third respondent's out of turn promotion under Rule 38 would be highly arbitrary, illegal and violation of Articles 14 and 16 of the Constitution.

27. Supreme Court extensively considered the power of Chief Justice in the cited decisions on behalf of the petitioners as well as respondents no.1 and 3. Ultimately, even though relaxation provision of any rule vested with the Chief Justice would be exercised at the same time such relaxation of provision in an individual case or class of persons that should comply Articles 14 and 16 of the Constitution. In the present case, the post of Superintendent Grade-II is required to be filled up by seniority-cum-merit, therefore, the then Hon'ble Chief Justice while promoting the third respondent relaxing the seniority criteria is incorrect so also in not complying Articles 14 and 16 of the Constitution. Petitioners' contention insofar as violation of rule 20 of Rules 1994 in promoting the third respondent is concerned, is not tenable in view of decision of the Supreme Court rendered in **M. Gurumoorthy vs. Accountant-General, Assam and Nagaland and others,** reported in **(1971) 2 S.C.C., 137,** wherein it has been held that Legislature cannot abridge or modify the powers conferred under clause (1) of Article 229 of the Constitution. The decision of the deciding authority can be quashed if it has abused its jurisdiction. It can be said to have abused its jurisdiction when it exercises power for an improper purpose, or an extraneous considerations, or in bad faith, or leave out relevant consideration. In the present case, there is no consideration of

Articles 14 and 16 read with Rules 12 and 30 of Rules 1973, while promoting respondent no.3 to the post of Superintendent Grade-II on 22.07.2014.

28. To sum up the case, promoting the third respondent to the post of Superintendent Grade-II there is a clear violation of Articles 14 and 16 of the Constitution even though rule 38 of Rules 1973 provides for relaxation. Relaxation of Rules 1973 would be highly arbitrary, irrational and illegal to the 3rd respondent's case when the post of Superintendent Grade-II is required to be filled up by seniority-cum-merit , when the third respondent is much junior to the petitioners in the feeder cadre of Senior Assistants i.e. petitioners are at Sr. Nos. 11, 14, 26, 30, 36, 45, 54, 58, 66, 69, 75, 109, 114, 125, 132, 147, 155 and 157 respectively, whereas the third respondent's name is at Sr. No. 172. Since respondent no.3 do not fulfill the criteria of seniority as per Rule 12 read with Rule 30 of Rules 1973. Supreme Court in the case of ***State of Gujarat and others vs. Arvindkumar T. Tiwari and another,*** reported in ***(2012) 9 SCC 545*** held as under:-

> *"14. A person who does not possess the requisite qualification cannot even apply for recruitment for the reason that his appointment would be contrary to the statutory rules is, and would therefore, be void in law. Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegibility and not mere irregularity. Such a person cannot approach the court for any relief for the reason that he does not have a right which can be enforced through court. (See: Prit Singh v. S.K. Mangal &*

Ors., 1993(1) SCC (Supp.) 714; and Pramod Kumar v. U.P. Secondary Education Services Commission & Ors., AIR 2008 SC 1817)".

29. Considering the factual and legal aspects of the case, coupled with the reasons afore-mentioned, promotion order of the respondent no.3 dated 22.07.2014 (Annexure P/4) to the post of Superintendent Grade-II is set aside. Consequently, 1st respondent is directed to fill up the vacancy of Superintendent Grade-II in accordance with Rule 12 read with Rule 30 of Rules, 1973 and promote eligible petitioner to the post of Superintendent Grade-II from 22.07.2014 within a period of three months from today.

30. Writ petition stands allowed.

No order as to costs.

March 1st, 2017 **[P.B. Bajanthri]**
vkd **Judge**

Whether reasoned / speaking : Yes

Whether reportable : Yes