

Before A.K. Sikri, CJ and Rakesh Kumar Jain, J.
SURINDER SINGH AND ANOTHER—Appellants
versus
STATE OF PUNJAB AND OTHERS—Respondents

LPA No. 1598 of 2010

February 2, 2013

A. Letters Patent, 1919 - Cl. X - Punjab Service of Engineers, Class-II (Irrigation Branch) Rules, 1941 (repealed by 2004 Rules) - Rl. 3, 4 and 5 - Old vacancy old Rule - Diploma holders seeking promotion to the post of Sub Divisional Officers/ Assistant Engineers - Now under 2004 Rules the diploma-holders are entitled to 25% out of 40% promotional quota - The criteria of outstanding merit is also done away with - Now the criteria applicable for promotion is seniority-cum-merit - Adjudication by the Supreme Court while dealing with a matter pertaining to the vacancies of 2000-2001 holding that vacancies are to be filled up as per 2004 Rules - They would also be applicable to vacancies prior thereto - Principle "old vacancy old Rule" is not a mantra which is of universal application - Government can take a decision for filling up vacancies in view of old rules as and when new rules are in contemplation and even on the basis of new draft rules.

Held, that no doubt, in question No. (2) which was framed by the Supreme Court and answered in Arun Kumar Aggarwal's case (supra) specifically mentions the vacancies arising during 2000-01 but the reason for stating so is that the Supreme Court dealt with the issue taking into consideration the facts of Civil Appeal No. 2336 of 1987 whereas two other Civil Appeals Nos. 2337 and 2338 of 2007 were also decided by the common judgment rendered by the Supreme Court. The parties in other appeals were those who were concerned with the vacancies prior to 2000 as well. It is pertinent to note that in para No. 22 of the judgment, the Supreme Court took note of Civil Writ Petition No. 11644 of 1999 filed by Satbir Singh (AMIE Holder) and which case pertains to the vacancies prior to 2001 as is clear from the order of the writ petition itself.

It is thus apparent that while deciding the issue the Supreme Court was not limiting to the vacancies of the year 2000-01 only but all the vacant posts. This further becomes apparent from the directions contained in the said judgment in para No. 38 which we have already reproduced above wherein direction to the State Government is "to fill up the vacant posts in accordance with 2004 Rules within a period of 3 months from today". This direction pertains to all the vacant posts and not only those posts which pertain to the year 2000-01.

In any case, we are of the opinion that the ratio of the judgment in Arun Kumar Aggarwal's case (supra) would cover the vacancies prior to 2000-01 as well. The Supreme Court has held that the Government had taken a conscious decision not to make any promotion and did not hold the DPC for all these years because of new Rules were on the anvil. Once that is the position qua 2000-01 vacancies, we fail to understand as to how it would not be applicable for the vacancies prior thereto. The principle of "old vacancy old Rule" has been revisited once again by the Supreme Court in the recent judgment in the case of Deepak Aggarwal and another Vs. State of Uttar Pradesh and others, (2011) 6 SCC 725, in a elaborate discourse on this proposition. The Court has clarified in no uncertain terms that principle "old vacancy old Rule" as enunciated in V.V. Rangaiah vs. J. Sreenivasa Rao, (1983) 3 SCC 284, is not a mantra which is of universal application and the Government can take a decision for filling up vacancies in view of old rules as and when new rules are in contemplation and even on the basis of new draft rules.

(Para 28 and 30)

B. Letters Patent Appeal, 1919 - Cl. X - Practice and Procedure - Statement made by parties that matter was covered by the judgment of the Supreme Court - Statement was not a concession on fact but on the legal issue about coverage of the matter by the judgment of the Supreme Court- If concession in law is wrongly given, it can always be withdrawn and it can always be shown that such concession was under misconception.

Held, that even if we presume that the statement was given it was not concession on fact but on the legal issue about coverage of the matter by the judgment of the Supreme Court. If concession in law is wrongly given, it can always be withdrawn and it can always be shown that such concession

was under misconception. Persuaded by this consideration, we undertook the exercise of hearing the parties at length so as to decide on merits as to whether the controversy raised in this petition is covered by the judgment of the Supreme Court.

(Para 7)

D.S.Patwalia, Advocate, for the appellants in LPA No. 1598 of 2010 and for respondents No. 4 and 5 in CWP No. 16606 of 2012 and for respondents No.3 and 4 In CWP No. 17666 of 2012.

Girish Agnihotri, Senior Advocate with Arvind Seth, Advocate, for the petitioners in CWP Nos. 16606 of 2012 and 17666 of 2012.

J.S.Puri, Addl. Advocate General, Punjab, for the respondent-State of Punjab.

A.K.SIKRI, CHIEF JUSTICE

(1) By this judgment, we propose to dispose of this appeal as well as connected two writ petitions as the common question of law and facts are involved therein. For brevity, the facts are taken from Letters Patent Appeal No. 1598 of 2010.

(2) The order of the learned Single Judge which is impugned by way of present intra court appeal is of one paragraph order whereby writ petition was disposed of in terms of the judgment of the Supreme Court in *State of Punjab and others versus Arun Kumar Aggarwal (1)*. The learned Single Judge has not discussed the nuances of the controversy involved in the writ petition and has also not given any reasons as to how the matter is covered by the judgment. It has happened because of the reason that counsel for all the parties had conceded that the matter is covered by the judgment of the Supreme Court in Arun Kumar Aggarwal's case (supra) which can be noticed from the impugned order. We thus reproduce that order hereunder:-

Present :

Vivek Sharma, Advocate, *for petitioners.*

Mr. Ram Lal Gupta, Addl. A.G. Punjab.

Girish Agnihotri, Sr. Advocate with Arvind Seth, Advocate.

Learned counsel for the parties are agreed that the issues raised in the present petition are squarely covered by a judgment of Hon'ble the Supreme Court in the case of *State of Punjab and others Vs. Arun Kumar Aggarwal and others* 2007(5) S.L.R. 237 wherein identical issue has been gone into by Hon'ble the Supreme Court.

Accordingly, this writ petition is disposed of in terms of the judgment in Arun Kumar Aggarwal's case (supra)

Dated: 10.10.2007

Sd/-Rajesh Bindal, Judge'.

(3) As per the judgment in Arun Kumar Aggarwal's case (supra), the appellants herein (petitioners in the writ petition) are not to be given any relief, inasmuch as certain percentage of the posts of Sub Divisional Officers/Assistant Engineers to which they are claiming their exclusive right to be considered being degree-holders, have to be filled up from the diploma holders as per the decision of Arun Kumar Aggarwal's case (supra). The appellants, however, contend that the matter is not covered by the aforesaid judgment of the Supreme Court which is distinguishable on facts. It is contended that if the merits of the case are to be gone into, the petitioners' claim was justified as Rules, which were applicable, do not permit any promotions from amongs the diploma holders.

(4) Before filing this appeal, the appellants had approached the learned Single Judge for recalling of the order dated 10.10.2007 stating that the order was not passed in presence of counsel for the parties on the statement made by them. However, that application was dismissed by the learned Single Judge on 04.02.2009 in the following manner:-

“The order review of which is sought by the applicant/petitioner was passed in presence of counsel for the petitioner where on the statement of the parties, the petition was disposed of being covered by the earlier judgment of Hon'ble the Supreme Court in *State of Punjab and others Vs. Arun Kumar Aggarwal and others* 2007(5) S.L.R. 237.

Now the plea is sought to be raised that on the date when the case was fixed, counsel for the petitioner was not present in the court and his presence has been wrongly marked. The same cannot be accepted

as there is presumption of truth in the order passed by the Court. There was no application filed for correction in the present case immediately after the receipt of copy of order dated 10.10.2007. The application was filed by the counsel on 12.11.2007 by only saying that he was not present in the Court.

No case is made out to review the order dated 10.10.2007.

Civil Misc. stands dismissed.

Dated : 04.02.2009 Sd/-Rajesh Bindal, Judge.”

(5) The appellants have challenged this order dated 04.02.2009 as well.

(6) We would like to remark at the out set that though the observations of the learned Single Judge while dismissing the review petition that there is a presumption of truth in the order passed by the Court and thus proceedings on the basis that statement was made by learned counsel for the parties that the matter is covered by the judgment of the Supreme Court in Arun Kumar Aggarwal's case (supra), may be correct. However, still we have heard learned counsel for the parties at length on the issues involved. The reason is simple. Even if we presume that the statement was given it was not concession on fact but on the legal issue about coverage of the matter by the judgment of the Supreme Court. If concession in law is wrongly given, it can always be withdrawn and it can always be shown that such concession was under misconception. Persuaded by this consideration, we undertook the exercise of hearing the parties at length so as to decide on merits as to whether the controversy raised in this petition is covered by the judgment of the Supreme Court.

(7) In order to appreciate the controversy, it would be necessary to go into the factual background and the earlier rounds of litigations on the same subject matter.

(8) Facts may first be noticed. The appellants are Junior Engineers in the Irrigation Branch of the Public Works Department in the respondent State of Punjab. Appellant Nos. 1 and 2 joined the service in December 1990 and April 1985 respectively. They are aspiring for promotion to the post of Sub Divisional Officer/Assistant Engineer. The services of the Junior Engineers working in the Overseers Engineering Service, Irrigation Branch

of the respondent State were to be governed by the service rules, namely, the Punjab Service of Engineers, Class-II (Irrigation Branch) Rules, 1941 (for brevity, 'the 1941 Rules')[P-1/A]. A brief survey of 1941 Rules would show that for promotion to the post of Sub Divisional Officer/Assistant Engineer, a degree or equivalent qualification is essential requirement and diploma holders are not eligible. Rule 3 of the 1941 Rules talks about the nationality and other qualifications of candidates. As per Clause (c) of Rule 3 no person could be appointed to service unless he possesses one of the University degrees or other qualifications prescribed in Appendix 'A' to the 1941 Rules. It may be observed here that Appendix 'A' to the Rules, to which reference has been made in Rule 3(c), lays down a degree in Engineering from certain Institutions/Universities as the prescribed qualification for appointment to Class-II Service. However, note appended to Rule 3 clarified that qualification laid down in Clause (c) may be waived in case of the members of the Overseer Engineering Service, Irrigation Branch, for promotion to Class II Service to be given under proviso to Rule 5. Rule 5 of the 1941 Rules deals with the appointment to service and states that the appointment to the service could be made from the classes mentioned in Rule 4. But no person could be appointed to the service unless he possesses the qualifications specified in Rule 3, which in turn refers to Appendix 'A' appended to the 1941 Rules. Rule 5 further specifies that no Temporary Engineer could be taken into service and no member of the Overseers Engineering Service or Draftsman Service could be promoted to the Service unless he is declared fit for service by the Commission on the report of the Chief Engineer. A further stipulation has been laid down that such person must be serving in the Department and must have held an appointment for not less than 2 years continuously before the date of entry into the service. He must not be less than 26 years or more than 50 years of age on the first day of June immediately preceding the date on which he was taken into the service. After promotion the members of Overseers Engineering Service or Draftsman Service are obliged to pass the Department's Professional and Revenue Examinations of the Irrigation Branch. However, proviso to Rule 5 clothed the Chief Engineers with the power of relaxation of the above rule with respect to possessing of qualifications specified in Rule 3 in order to grant promotion to a outstanding meritorious member of the Overseer Engineering Service of Irrigation Branch, Punjab, and Irrigation Branch (Provincial Draftsman and Tracers) Service.

(9) The appellants claimed that under the 1941 Rules though there were various modes provided for induction into Service but no separate quota was provided as to how the number of posts in the service would be apportioned amongst various eligible persons. On 20.8.1957, the Secretary to Government of Punjab, Public Works Department (Irrigation Branch) issued a letter to the effect that in view of a large number of temporary Engineers being in employment of the Irrigation Branch due to heavy expansion on account of Bhakra Nangal and other projects, the Government had decided that till further orders no officer should be appointed by direct recruitment to P.S.E. Class II and henceforth the same be filled up by promotion from amongst temporary Engineers and Sectional Officers and Head Draftsmen in the ratio of 75% : 25% respectively. Later on the above percentage was revised from time to time and ultimately on 23.4.1992 (P-2), the same has been fixed as under:-

“I: DIRECT RECRUITMENT;

Temporary Engineers 55%

II: BY PROMOTION;

(i) From Junior Engineers (Civil): 20%

(ii) From Junior Engineers (Mech): 5%

(iii) From Members of Drawing Section: 6%

(iv) From AMIE Qualified: 14%

Junior Engineer: 11%

Drawing Staff: 3%”

(10) It is evident that 55% quota has been earmarked for temporary Engineers by way of direct recruitment. Out of the remaining 45% by way of promotion, 25% has been prescribed for Junior Engineers Civil and Mechanic, 6% for the members of the Drawing Section and 14% for AMIE qualified persons. 14% quota of AMIE qualified persons has been further bifurcated into 11% for Junior Engineers and 3% for Drawing Staff. In this manner, the total quota for Junior Engineers by promotion comes out to be 36% and remaining 9% comes to the share of Draftsman. These

instructions apparently made non-graduate engineers eligible for promotion as Sub Divisional Officer/Assistant Engineer which is patently against Rule 3(i)(c) of 1941 Rules.

(11) It is clear from the above that vide administrative instructions dated 23.04.1992 quota was prescribed for diploma holders as well for promotion to the post of Assistant Engineer. This was challenged by some Junior Engineers working in the Punjab Irrigation Department, who were having qualification of AMIE and treated as Graduates in Engineering, contended that these administrative instructions were contrary to the statutory recruitment rules i.e. 1941 Rules and those administrative instructions could not supplant the provisions of Recruitment Rules. It was contended that under 1941 Rules, the promotion to the post of Assistant Engineer could be made from among those Junior Engineers only who were Graduates or equivalent like AMIE which was treated as equivalent to Graduates. Two writ petitions filed in this behalf were numbered as Civil Writ Petition Nos. 16691 of 1997 and 12725 of 1997. These writs were decided by a Division Bench of this Court on 07.01.1998 with leading case known as *Gurmej Singh and another Vs. State of Punjab and another*. The Division Bench quashed the orders dated 23.04.1992 as ultra-vires 1941 Rules holding that there could not be any quota provided for promotion to the non-degree holders who were ineligible for promotion under Rules and if the Government wanted to provide quota for them pre-requisite which was imperative was that the Rules should be amended providing making diploma holders also eligible for promotion. The operative portion of the said judgment reads as under:-

“No Rules have been amended to provide promotions to such persons. No Rules have been amended till date. Consequently, we are of the view that as per Class II Rules, only those person can be promoted who answer the qualifications mentioned in Rule 3(1)(c) of the Rules and appropriate quota can be provided by the State Government for only those different categories which are eligible for promotion. Depending upon various factors, it is up to the State Government to provide reasonable quota for different eligible categories. So far as the ineligible persons are concerned, their cases can only be considered if the rule regarding qualifications specified in Rule 3 is relaxed by the Government. On the recommendations of

the Chief Engineers regarding a particular Junior Engineer(s) of outstanding merit, consequently, the quota provided for Junior Engineer (Civil and Mechanical) in Annexure P-4 dated April 2, 1992, who do not answer the qualifications as provided under Rule 3 is liable to be quashed. We order accordingly. There is no bar to the Punjab Public Service Commission to recommend the names of those persons who are duly qualified for promotion to the grant of Assistant Engineer in P.E.S. Class-II. As and when any recommendation is made by the State Government of a particular Junior Engineer in whose case the rigor of Rule 3 (1)(c) is relaxed on the recommendation of the Chief Engineer that a particular Junior Engineer is of Outstanding Merit, the Public Service Commission may consider such a case. In a Misc. Application we had observed that any promotion that may be made during the pendency of the writ petition of an unqualified person would abide by final orders, if any such promotion has been made of any such Junior Engineer who is not qualified under Rule 3(1)(c) would stand quashed.”

(12) Special Leave Petition filed by the State of Punjab against that order was dismissed by the Supreme Court on 14.05.1999.

(13) According to the appellants who are Graduate or possess AMIE qualification, the necessary consequence of the aforesaid decision was that the posts which were wrongly earmarked for diploma holders were to be necessarily filled from amongst the degree holder Junior Engineers only. These degree holder Junior Engineers made various representations through their Association for implementing the aforesaid judgment of this Court. When the respondent-State failed to act, a Contempt Petition No. 612 of 1998 was also filed.

(14) It is pointed out by learned counsel for the appellants that though initially in the said contempt petition the official respondents took up the plea that the list of Junior Engineers was sent to the Field Officer calling for their record for considering their names for promotion in terms of the judgment of the Division Bench and vacancy position was also communicated vide letter dated 06.07.1999 by the Chief Engineer/Canals, Irrigation Department, to the Government stating that 105 vacancies were available, against which eligible persons would be considered, thereafter in

the written statement filed to the said contempt petition the official respondents turned turtle and took a diametrical opposite stand. It was stated by the respondent-Irrigation Department that due to the closure of Ranjit Singh Dam, SYL and other projects, a large number of staff had become surplus. The effect thereof was that out of 687 posts of Sub Divisional Officers at that time, 115 posts were occupied by the persons having AMIE qualification as against 96 posts (14%). Therefore, no promotion of the AMIE/B.E. qualified Junior Engineers/Drawing Staff could be made being in excess of their quota.

(15) After finding the aforesaid stand of the official respondents in reply to the contempt petition, the appellants herein along with respondents No. 4 to 23 herein (who are proforma respondents) filed Writ Petition seeking direction that AMIE/BE qualified Junior Engineers be promoted to the post of Assistant Engineer against 45% posts as per the provisions of 1941 Rules. It is in this petition that impugned orders are passed.

(16) At this stage it would also be necessary to trace the history of events leading to passing of the judgment in Arun Kumar Aggarwal's case (supra) by the Supreme Court. It will also be necessary to find out what this case decides.

(17) It so happened that 20 Junior Engineers Diploma holders (outstanding category) were given current duty charge as Sub Divisional Officer/Assistant Engineer under proviso to Rule 5 of the 1941 Rules, vide order dated 21.06.2001. Naturally they did not possess the required qualification of Graduation i.e. B.E. or its equivalent i.e. AMIE which is prescribed under Rule 3(i) (c) of 1941 Rules. However, current duty charge was given invoking the provisions of proviso to Rule 5 of 1941 Rules. This current duty charge was subsequently withdrawn by orders dated 22.06.2005. This order was challenged by the diploma holders (outstanding category) and various writ petitions came to be filed by these persons. All these writ petitions were decided by this Court on 18.10.2005. This Court took the view that since vacancies arose under the 1941 Rules, and the same should be filled up on the basis of 1941 Rules. Accordingly, while quashing order dated 22.6.2005, a direction was issued to the Government to fill up the posts under the Government instructions issued on 1.10.1999, 29.12.2000 and 25.9.2003. It was further held that the vacancies becoming

available prior to 31.3.2001 should be filled up by following the criteria indicated by instructions dated 1.10.1999 and 29.12.2000 for determination of outstanding merit in terms of the 1941 Rules.

(18) The matter traveled upto the Supreme Court and it is this judgment of the Supreme Court which is the focal point of discussion in the present appeal, namely, the judgment in Arun Kumar Aggarwal's case (supra).

(19) A perusal of this judgment would show that the Apex Court specifically formulated two questions of law for determination which are as under:-

“(1) Whether any indefeasible right has been (sic) accrued to the diploma-holder (outstanding categories) for promotion to the post of SDO by virtue of being given current duty charge by an order dated 21.6.2001 and whether any cause of action arose by withdrawing the same by an order dated 22.6.2005.

(2) Whether old 1941 rules or new 2004 Rules which became effective from 9.7.2004 will be applied for filling up the vacancies which arose during 2000-01 under old 1941 Rules for promotion to the post of SDO (Irrigation) Department) in the State of Punjab.”

(20) On the first question, in para 15 of the judgment in Arun Kumar Aggarwal's case (supra) it has been held that no right much less indefeasible right had accrued to the diploma-holder Junior Engineers by virtue of giving them CDC of the post of SDO warranting because it was purely a stopgap arrangement. According to the dicta of the Supreme Court, it was based on seniority nor efficiency and no cause of action had arisen on the withdrawal of CDC by the order dated 22.6.2005.

(21) Dealing with second question, it has been observed that under the 1941 Rules there was no provision for promotion quota for diploma holders. A proviso to Rule 5 provided for relaxation of the Rules for diploma holders in favour of those who were of outstanding merit. However, under the 2004 Rules the criteria of outstanding merit has been done away with and the diploma-holders are entitled to 25% out of 40% promotional quota. In para 22 of the judgment the stand taken by the respondent State in the

writ petition filed by the present petitioner-appellants has been noticed that regular promotion on the posts of SDO's would be considered after finalization/amendment of the Departmental Service Rules by a Committee of 3 Chief Engineers. It has further been noticed in para 23 that the Government also constituted DPC for the category of candidate of outstanding merit on various dates, namely, March 2001, 30.4.2001, 8.11.2001, 21.11.2001, 9.1.2002 and 29.5.2002. But no DPC was conducted on the said dates. In this way, their Lordships' have formed an opinion that the Government has taken conscious decision not to fill up the vacancies under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case. Ultimately, the judgment dated 18.10.2005 passed by this Court has been set aside.

(22) It is clear from the above that the view taken by this Court, namely, since the vacancies arose under 1941 Rules, it should be filled up on the basis of those very rules from amongst the degree holders/AMIE only, was set-aside by the Supreme Court. The Supreme Court took note of the fact that 1941 Rules were repealed by 2004 Rules. The reason why 1941 Rules were repealed by the new Rules appears to be that there was no channel of promotion for diplomaholders under old Rules. The only provision on which diploma-holders could be accommodated was proviso to Rule 5, which deals with the relaxation of the Rules. Proviso to Rule 5 reads:-

“Provided that this rule may be relaxed by Government on the recommendations of Chief Engineer in order to admit the promotion of a member of the Overseas Engineering Service or Irrigation Branch, Punjab or Irrigation Branch (Provincial Draftsman and Tracers) Service of ‘outstanding merit’ who may not possess the qualifications specified in Rule 3.

...(emphasis supplied)”

Now under 2004 Rules the diploma-holders are entitled to 25% out of 40% promotional quota. The criteria of outstanding merits are also done away with by the new 2004 Rules and now the criteria applicable for promotion is seniority-cum-merit.

(23) Taking note of these facts and further even showing that the intendment of the authorities which could be gathered from various background and circumstances was that the Government had taken a conscious decision not to fill up the post on the basis of 1941 Rules and was keeping in mind the impending new Rules of 2004. In view of such a conscious decision taken by the Government, the Government did not conduct any DPC for promotion to the post of Sub Divisional Officers. The Supreme Court held that such a decision was perfectly valid and justified referring to its earlier judgment in the case of *Dr. K.Ramulu versus Dr. S.Suryaparkash Rao (2)*, wherein it was held as under:-

“15. Thus, we hold that the first respondent has not acquired any vested right for being considered for promotion in accordance with the repealed Rules in view of the policy decision taken by the Government which we find is justifiable on the material available from the record placed before us. We hold that the Tribunal was not right and correct in directing the Government to prepare and operate the panel for promotion to the post of Assistant Directors of Animal Husbandry Department in accordance with the repealed Rules and to operate the same.”

(24) The argument of the respondents in the said case for applicability of the normal Rule namely that the vacancies accruing earlier to the promulgation to the new Rules have to be filled up in accordance with the old Rules was held not applicable in the instant case. The reason is also traced in the following passages of the judgment:-

“30. There is no quarrel over the proposition of law that normal Rule is that the vacancy prior to new Rules would be governed by the old Rules and not by the new Rules. However, in the present case, we have already held that the Government has taken conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case.

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38. We hold the Government has taken conscious decision not to fill up the posts under the old 1941 Rules. The impugned order of the High Court is set aside. We may at this stage point out that the problem seems to have been compounded by the inaction/casual approach of the Government detrimental to public interest. The State Government shall now fill up the vacant posts in accordance with the 2004 Rules within a period of three months from today. All the eligible candidates who satisfy the criteria laid down under 2004 Rules shall be considered. The entire process of recommendation and appointment shall be completed within three months from today.”

All the judgments cited by the respondents based on “old vacancy old Rules” principle were thus held not applicable.

(25) It is abundantly clear that the judgment of Arun Kumar Aggarwal’s case (supra) pertains to the same service and raising same issue. However, Mr. Patwalia, learned counsel appearing for the appellants has made a fervent plea to the effect that the said judgment is still not applicable as it pertained only to the vacancies which arose during 2001-01 under old 1941 Rules, whereas the present case concerns the vacancies prior to 2000. He has made an attempt to show that in this case an earlier judgment of this Court in Gurmej Singh’s case (supra) which had been upheld by the Supreme Court as well and had attained finality has to be preferred and applied and the mandate of this Court in the judgment that the vacancies could not be filled from amongst the diploma holders and had to be filled from those eligible under 1941 Rules, namely, BE/AMIE has to be implemented.

(26) We are afraid Mr. Patwalia has not been able to succeed in this endeavour.

(27) No doubt, in question No. (2) which was framed by the Supreme Court and answered in Arun Kumar Aggarwal's case (supra) specifically mentions the vacancies arising during 2000-01 but the reason for stating so is that the Supreme Court dealt with the issue taking into consideration the facts of Civil Appeal No. 2336 of 1987 whereas two other Civil Appeals Nos. 2337 and 2338 of 2007 were also decided by the common judgment rendered by the Supreme Court. The parties in other appeals were those who were concerned with the vacancies prior to 2000 as well. It is pertinent to note that in para No. 22 of the judgment, the Supreme Court took note of Civil Writ Petition No. 11644 of 1999 filed by Satbir Singh (AMIE Holder) and which case pertains to the vacancies prior to 2001 as is clear from the order of the writ petition itself. Following discussion pertains to this Writ Petition No. 11644 of 1999 is contained in paras No. 22 and 23 of the judgment:-

"22. Civil Writ Petition No. 11644 of 1999 was filed by Satbir Singh (AMIE Holder) praying for a mandamus to allot 31% of the promotional quota to their category. The counter affidavit was filed by one Mr. Samir Kumar IAS on 31.5.2000 before the High Court in Civil Misc. No.10810 of 2000 in C.W.P.No.11644 of 1999. It is stated in paragraphs 1 to 3 as under:

1. That the Government is considering to amend the PSE Class II Rules 1941 and Committee of 3 Chief Engineers namely Shri P.K. Singla, Chief Engineer, Canals IW, Punjab, Shri Sarup Singh, Chief Engineer National Highways, Patiala and Shri Jatinder Singh, Chief Engineer/Public Health, Patiala has been constituted for making recommendations with regard to fixing the quota for different categories and its due incorporation in the PSE Class I rules by amending the same.
2. The regular promotion on the posts of SDO's will be considered after finalization/amendment of the Departmental Service Rules as explained in para 3 of the Preliminary objection.
3. The regular promotions of SDOs cannot be considered at this stage because the Government is considering the amendment/finalization of departmental service rules as explained in preliminary objections.

23. From the record it appears that the Government also constituted DPC for category of outstanding merit candidates on various dates namely March, 2001, 30th April, 2001, 8th November, 2001, 21st November 2001, 9th January 2002 and 29th May, 2002. On all these days although the date was fixed but no DPC was conducted. This would also indicate that the Government was keeping in its mind the impending new Rules of 2004.”

It is thus apparent that while deciding the issue the Supreme Court was not limiting to the vacancies of the year 2000-01 only but all the vacant posts. This further becomes apparent from the directions contained in the said judgment in para No. 38 which we have already reproduced above wherein direction to the State Government is “to fill up the vacant posts in accordance with 2004 Rules within a period of 3 months from today”. This direction pertains to all the vacant posts and not only those posts which pertain to the year 2000-01.

(28) It would also be pertinent to mention that in the said writ petition, the decision whereof became the subject matter of appeal in Arun Kumar Aggarwal’s case (supra), a Civil Misc. Application No. 10810 of 2000 was filed wherein a prayer was made to fill up all the available vacancies and the stand of the Government was categorical namely the decision was taken to fill up all the available vacancies as per 2004 Rules and there was deliberate decision not to fill up these vacancies till impending Rules are finalized. It would also be referred to orders dated 29.07.2005 passed in Civil Misc. Application No. 11131 of 2005 in Civil Writ Petition No. 11644 of 1999. By that order the writ petition was adjourned when it was pointed out that similarly situated decree-holders had filed Civil Writ Petition No. 10132 of 2005 which was pending consideration before the Motion Bench. It is that writ petition No. 10132 of 2005 the decision whereof was the subject matter of appeal in Arun Kumar Aggarwal’s case (supra).

(29) In any case, we are of the opinion that the ratio of the judgment in Arun Kumar Aggarwal’s case (supra) would cover the vacancies prior to 2000-01 as well. The Supreme Court has held that the Government had taken a conscious decision not to make any promotion and did not hold the DPC for all these years because of new Rules were on the anvil. Once

that is the position qua 2000-01 vacancies, we fail to understand as to how it would not be applicable for the vacancies prior thereto. The principle of "old vacancy old Rule" has been revisited once again by the Supreme Court in the recent judgment in the case of *Deepak Aggarwal and another versus State of Uttar Pradesh and others (3)*, in a elaborate discourse on this proposition. The Court has clarified in no uncertain terms that principle "old vacancy old Rule" as enunciated in *V.V. Rangaiiah versus J. Sreenivasa Rao (4)*, is not a mantra which is of universal application and the Government can take a decision for filling up vacancies in view of old rules as and when new rules are in contemplation and even on the basis of new draft rules.

Few passages from that judgment will make the position amply clear:-

"26. We are also unable to accept the submissions of Dr. Dhawan that the conscious decision taken herein is not grounded on the relevant facts. A perusal of the Counter Affidavit filed by the Respondent herein shows that the recruitment of the Appellant No. 1 has been made purely with the objective of looking after the technical work pertaining to pharmacies and industrial units. Therefore, the requisite qualification for the post is Degree in Chemical Engineering. Appellant No. 2 has been recruited for compilation, analysis and maintenance of statistical data of the Excise Department. The basic qualification for the post of Statistical Officer is Graduation in Statistics. It appears that the two categories of posts have been eliminated as the incumbents on the said posts do not have any administrative experience. The decision was taken clearly in public interest. Since the decision has been taken after taking into consideration the view points of both the sides, it can not be said to be arbitrary or based on irrelevant considerations. We also do not find any merit in the submission of Dr. Dhawan that the amendment has been given a retroactive operation as the vacancies which arose prior to the amendment are sought to be filled under the amended rules.

(3) (2011) 6 SCC 725

(4) (1983) 3 SCC 284

27. This Court in the case of *Jai Singh Dalal v. State of Haryana* (supra) has held as under:

It is clear from the above pleadings that in 1990 the State Government resolved to resort to special recruitment to the Haryana Civil Service (Executive Branch) invoking the proviso to Rule 5 of the rules. Pursuant thereto, it issued the notifications dated December 20, 1990 and January 25, 1991. The names of the candidates were forwarded by the State Government to the HPSC for selection. The HPSC commenced the selection process and interviewed certain candidates. In the meantime, on account of an undertaking given by the Advocate General to the High Court at the hearing of C.W.P. No. 1201 of 1991 and allied writ petitions, the State Government was required to forward the names of the candidates belonging to two other departments of the State Government. Before it could do so, the new Government came into power and it reviewed the decision of the earlier Government and found the criteria evolved by the earlier Government unacceptable and also noticed certain infirmities in the matter of forwarding the names of eligible candidates. It, therefore, resolved to rescind the earlier notifications of December 20, 1990 and January 25, 1991. It will thus be seen that at the time when the writ petition which has given rise to the present proceedings was filed, the State Government had withdrawn the aforesaid two notifications by the notification dated December 30, 1991. The stage at which the last-mentioned notification came to be issued was the stage when the HPSC was still in the process of selecting candidates for appointment by special recruitment. During the pendency of the present proceedings the State Government finalised the criteria for special recruitment by the notification of March 9, 1992. Thus, the HPSC was still in the process of selecting candidates and had yet not completed and finalised the select list nor had it forwarded the same to the State Government for implementation. The candidates, therefore, did not have any right to appointment. There was, therefore, no question of the High Court granting a mandamus or any other writ of the type sought by the Appellants. The law in this behalf appears to be well settled.

28. Similarly, this view has been reiterated by this Court in the cases of *State of M.P. and Ors. v. Raghuvveer Singh Yadav and Ors.* (supra), *H.S. Grewal v. Union of India and Ors.* (supra) and *Rajasthan Public Service Commission v. Chanan Ram and Anr.* (supra). This Court in Rajasthan Public Service Commission's case (supra) has held that it is the rules which are prevalent at the time when the consideration took place for promotion, which would be applicable. In Para 17, it has been held as follows:

In the case of *State of M.P. v. Raghuvveer Singh Yadav* a Bench of two learned Judges of this Court consisting of K. Ramaswamy and N. Venkatachala, JJ., had to consider the question whether the State could change a qualification for the recruitment during the process of recruitment which had not resulted into any final decision in favour of any candidate. In paragraph 5 of the Report in this connection it was observed that it is settled law that the State has got power to prescribe qualification for recruitment. In the case before the Court pursuant to the amended Rules, the Government had withdrawn the earlier notification and wanted to proceed with the recruitment afresh. It was held that this was not the case of any accrued right. The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered according to the rules then in vogue. The amended Rules had only prospective operation. The Government was entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State was entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules. In the case of *J&K Public Service Commission v. Dr. Narinder Mohan Anr.* Division Bench of two learned Judges of this Court consisting of K. Ramaswamy and N.P. Singh, JJ. considered the question of interception of recruitment process earlier undertaken by the recruiting agency. In this connection it was observed that the process of selection against existing and anticipated vacancies does not create any right to be appointed to the post which can be enforced by a mandamus. It has to be recalled that in fairness learned Senior Counsel, Shri Ganpule for the Respondent-writ Petitioner, stated that it is not his case that the writ Petitioner should be appointed

to the advertised post. All that he claimed was his right to be considered for recruitment to the advertised post as per the earlier advertisement dated 5-11-1993 Annexure P-1 and nothing more. In our view, the aforesaid limited contention also, on the facts of the present case, cannot be of any assistance to the writ Petitioner as the earlier selection process itself had become infructuous and otiose on the abolition of the advertised posts, as we have seen earlier. The second point, therefore, will have to be answered in the negative in favour of the Appellants and against the Respondent-writ Petitioner.

(30) Therefore, even otherwise on the facts of this case we felt that the judgment in V.V. Rangaiah's case (supra) has no application and it is *Dr. K. Ramulu* case (supra) which will apply as followed in Arun Kumar Aggarwal's case (supra) and Deepak Aggarwal's case (supra).

(31) The argument predicated on Gurmehj Singh's case (supra) by Mr. Patwalia is without any substance. That was a case where the Court was concerned with the administrative order based on earmarking quota for diploma holders who were otherwise ineligible under the Rules for promotion to the post of Assistant Engineer. In that context the Court held that the administrative instructions to this effect contained in the order dated 23.04.1992 were ultra-vires to the statutory rules i.e. Rules 1941. However, it would not be followed there from that the posts were to be filled from amongst the degree-holders/AMIE. In that very judgment itself, the Court had observed that the remedy was to amend the Rules. It is because of this exercise started for amending the Rules and in the meantime decision was taken not to fill up the posts as the Government wanted, as a policy matter, to fill these posts on the basis of new Rules. This judgment, therefore, would not come to rescue of the appellants.

The upshot of the aforesaid discussion is that there is no merit in the appeal.

In so far as Civil Writ Petitions No. 16606 and 17666 of 2012 are concerned, these are filed by the diploma holders seeking directions to the Government to act in accordance with the directions given by the Supreme Court in Arun Kumar Aggarwal's case (supra). In view of our decision in Letters Patent Appeal No. 1598 of 2010, it is obvious that the Government will now fill up the posts as per 2004 Rules. No further directions are needed in these petitions which are accordingly disposed of.