

CASE NO.:
Appeal (civil) 3228 of 2005

PETITIONER:
Diploma Engineers Sangh

RESPONDENT:
State of U.P. & Ors

DATE OF JUDGMENT: 20/03/2007

BENCH:
H.K. SEMA & R.V. RAVEENDRAN

JUDGMENT:
J U D G M E N T

H.K.SEMA, J.

The challenge in this appeal is to the order dated 16.7.2004 passed by the division bench of the High Court of Allahabad in Civil Misc. Writ Petition No. 9127 of 2003 quashing the Office Memorandum dated 11.2.2003 as being violative of Rule 5(iv) and Rule 9(ii) of the Rules of U.P. Service of Engineers (Building and Roads Branch) Class-II Rules, 1936 (hereinafter referred to as the 1936 Rules). The Office Memorandum was challenged by the graduate junior engineers on the ground that the aforesaid circular has the effect of exempting the diploma junior engineers from undergoing and passing the qualifying examination for promotion from the post of Junior Engineer to the post of Assistant Engineer as it provided for assessment of their eligibility only by holding viva voce, and therefore, illegal. Aggrieved by the order of the High Court this appeal has been preferred by the diploma holder junior engineers. The present controversy revolves around the question as to whether the office order dated 11.2.2003 runs into the teeth of the 1936 Rules.

The following questions have been posed before us for determination:

- (a) Whether the 1936 Rules were in existence at the time when the office order dated 11.2.2003 was issued?
- (b) If the 1936 Rules were subsisting, what is the effect of the office order dated 11.2.2003?
- (c) What is the meaning of the words "qualifying examination" prescribed under Rule 9(ii) of the Rules read with Rule 5(iv) of the Rules?
- (a) Whether the 1936 Rules were in existence at the time when the office order dated 11.2.2003 was issued?

Before we proceed further on this question we may point out that it was not the case of the appellant either before the High Court or before this Court that 1936 Rules had ceased to be in existence. Before the High Court it was the contention of the appellant that the 1936 Rules empowered the Governor of the State to grant relaxation and therefore the Office Order dated 11.2.2003 was nothing but grant of relaxation from the

rigours of Rule 5(iv) read with Rule 9(ii) of the 1936 Rules. The High Court also noted that it was nobody's case that Rule 9(ii) ceased to exist nor had anyone challenged its validity. Even before this Court, the questions of law that have been raised are:-

(A) Whether the writ petitioner had locus standi to challenge the Office Memorandum dt. 11.2.2003 issued by the State Government for purpose of the promotion of Diploma Holder's Junior Engineers from the post of Junior Engineers to the post of Assistant Engineers according to U.P. Service of Engineers (Building and Roads Branch) Class-II Rules, 1936?

(B) Whether qualifying test as prescribed in the 1936 rules, for the purpose of promotion from Junior Engineer to Assistant Engineer meant merely written examination or any type of test like interview etc.?

(C) Whether the High Court failed to correctly interpret the provisions of 1936 Rules for the purpose of the promotion from the post of Junior Engineer to Assistant Engineer?

(D) Whether the Doctrine of desuetude is applicable when the promotions were being made for 30 years without holding any qualifying test as prescribed in the 1936 Rules, and the subsequent modified Service Rules ?

In the grounds also no plea was taken that the 1936 Rules were not in existence. Having realised this difficulty, Mr. Vijay Hansaria, learned senior counsel for the appellant, filed I.A.No.6 of 2006 seeking permission to urge additional grounds. The stand taken in the additional ground is that since this Court struck down the amended Rules 3(c), 5 and 6 inserted by the 1969 Amendment to the 1936 Rules, and Rule 23 which was substituted by the 1971 Amendment, in P.D. Aggarwal vs. State of U.P. (1987) 3 SCC 622, the 1936 Rules ceased to exist in entirety. Technically speaking such somersaulted contention cannot be accepted at this stage and on this score alone the appeal deserves to be dismissed. Be that as it may, we have permitted the appellant to urge the additional ground, we will deal with the said contentions.

To decide the question, it is essential to make a quick survey of the amendments brought to 1936 Rules. The 1936 Rules has undergone a sea change due to several amendments. 1969 Amendment inserted Rules 3(c) to (k) and substituted Rules 5 and 6 in the 1936 Rules. Rule 23 was substituted by the 1971 Amendment. This Court categorically struck down Rules 3(c), 5 and 6 of the 1936 Rules as substituted by 1969 Amendment and Rule 23 substituted as per 1971 Amendment, holding them to be per se arbitrary on the ground that these amendments were violative of Articles 14 and 16. Consequently, a writ of mandamus was issued directing the government to prepare a fresh seniority list of Assistant Engineers in accordance with the service rules, meaning thereby the 1936 Rules. It may be noted that the controversy in P.D. Aggarwal's case was with regard to seniority between direct recruits appointed on permanent vacancies and direct recruits appointed on temporary vacancies; and the seniority gained by the latter was being wiped out by reasons of 1969 and 1971 Amendments, which led to the challenge. This Court after discussing the amendments brought by 1969 and 1971 Amendments, held as follows :-

29. We direct the authorities concerned to

prepare a fresh seniority list of all the members of the service in the cadre of Assistant Engineer in the PWD Department on the basis of their length of service from the date they have become members of the service fulfilling all the requirements laid down in the service rules. We cannot but observe in this connection that though the temporary Assistant Engineers have been duly selected by the Public Service Commission after they are appointed as temporary Assistant Engineers yet in spite of several directions given by this Court, the authorities concerned did not think it fit and proper to prepare the seniority list in accordance with the directions given by this Court and as a result no seniority list in the cadre of Assistant Engineer has yet been prepared following the directions made even by this Court as embodied in the decision in *Baleshwar Dass & Ors. v. State of U.P. & Ors.* On the other hand amendments have been made to the existing 1936 service rules which per se seem to be arbitrary and this led to a spate of litigations. We do hope and expect that considering all these, the Government will take effective steps for preparation of seniority list as early as possible in order to create incentive for the members of the service by holding out prospects of future promotions in the interests of the service.

30. In the premises aforesaid we dismiss these appeals and affirm the judgment and order of the High Court of Allahabad quashing the said seniority list dated 29.7.1980 together with supplementary seniority lists dated 18.12.1980 and 19.12.1980 relating to Civil Engineering Wing. Rules 3(c), 5 and 6 of 1969 Rules as well as Rule 23 of 1971 Rules are also quashed. The condition in Office Memorandum dated 21.1.1980, Annexure 2 of Writ Petition No. 2447 of 1980 providing that for the selection for the post of Superintending Engineer the officer must be a confirmed Executive Engineer is quashed. A writ of mandamus be issued directing the Government to prepare a fresh seniority list of Engineers in the Civil Engineering and E.M. Wing respectively in the light of the observations made hereinbefore. This order, however, will not affect any confirmations or promotions (other than ad hoc promotions) made before 29.11.1979. In the facts and circumstances of the case, there will be no order as to costs.

(emphasis supplied)

Thus, this Court proceeded on the premise that the 1936 Rules, except to the extent struck down remained undisturbed and continued to apply.

Mr. Hansaria contended that the original Rules 3(c), 5 and 6 which were material provisions of 1936 Rules were deleted by substitution of corresponding new rules by the 1969 amendment, and subsequently when the substituted/amended rules were struck down, the old rules would not revive. In this connection he has referred to the

decisions of this Court in Firm A.T.B. Mehtab Majid And Co. vs. State of Madras 1963 Suppl.(2) SCR 435, T. Devadasan Vs. Union of India AIR 1964 SC 179, B.N. Tewari Vs. Union of India, AIR 1965 SC 1430, Indian Express Newspapers (Bombay) Pvt.Ltd. Vs. Union of India (1985)1 SCC 641, West U.P. Sugar Mills Assn. vs. State of U.P. (2002) 2 SCC 645 and hosts thereof. On the other hand, Sri Vinod Bobde appearing for the respondents relied on State of Maharashtra vs. The Central Provinces Manganese Ore Co. Ltd (1977) 1 SCR 1002 and Bhagat Ram Sharma vs. Union of India (1988) Sup. SCC 30, to contend that where the amendment is found to be stillborn and void, the amendment will be totally ineffective, so as to leave intact what was intended to be replaced by the amendment. We need not enter upon this controversy, as the question with which we are concerned in this case, relates to Rule 9 dealing with technical qualification, which was not struck down. It is clear that the decision in P.D. Aggarwal's case (supra) that only Rules 3(c), 5 and 6 inserted by 1969 Rules and Rule 23 inserted by 1971 Rules were quashed. It is therefore evident that the 1936 Rules continued to exist at the time when the Office Order dated 11.2.2003 was issued. This was also the understanding of the Government inasmuch as the impugned Office order dated 11.2.2003 itself was issued in exercise of the power under Rule 9(ii) read with Rules 5(iv) of the 1936 Rules. In view of the above, we find no merit in the contention of Mr. Hansaria that the 1936 Rules was not in existence when the office order dated 11.2.2003 was issued. (b) As 1936 Rules were subsisting, what is the effect of the office order dated 11.2.2003.

The relevant portion of the office order dated 11.2.2003 reads thus :

"OFFICE ORDER

By the order dated 22.3.2002 in Writ Petition No.42762/2000 Aruvendra Kumar Garg & Ors. Versus Govt. of U.P. & Ors and other related writ petitions, High Court of Allahabad has set aside the amendment made in Uttar Pradesh Service of Engineers (Building and Roads Branch) Class-II, Rule 1936 vide notification dated 4.8.87 and dated 25.9.97. Therefore, under the remaining provisions while leaving the provisions set aside by the Hon'ble High Court, the promotion of junior engineer (civil) to the post of Asstt. Engineer (Civil) can be made. 2. Accordingly, under the effective rule-9 there is a provision of technical qualification, in which Rule 9(i) is relating to direct recruitment and Rule 9(ii) is related to promotion. In Rule 9(ii) there is a provision that under rule 5(iv) and 5(v) an officer will not get promotion until he has passed such qualifying examination as determined by the Governor or he is holding technical qualification under para (i) of this rule. 3. Therefore in the aforesaid facts and circumstances Hon'ble Governor has been pleased to approve the following procedure for the qualifying examination for the promotion of Jr.Engineers, coming under the umbrella of Part (I), to the post of Asstt. Engineer. (1) For the aforesaid promotion for the post of Asst. Engineer personnel interview will be organized. (2) The Selection Committee constituted for the purpose of interview will constitute following

members:
xxxxxx"

Rule 5(iv) and 9(ii) of the 1936 Rules, referred to in the said order dated 11.2.2003 are extracted below :-

"5. Source of Recruitment : Recruitment to the service shall be made by the Government :

x x x x x

5(iv) by promotion of members of the United Provinces Subordinate Engineering Service in the Public Works Department Buildings and Roads Branch, who have shown exceptional merit.

9(ii) No officer shall be promoted to the service under rule 5(iv) and 5(v) unless he has passed such qualifying examination as the Governor may prescribe, or possesses the technical qualification prescribed in clause (i) of this rule."

We may also extract Rule 12 of the 1936 Rules as substituted in the U.P. Service of Engineers (Buildings and Roads Branch) Class II (Second Amendment) Rules, 1992 :

"Recruitment by promotion to the post of Assistant Engineer shall be made on the basis of "Seniority subject to the rejection of unfit" in accordance with U.P. Promotion by selection in consultation with Public Service Commission (Procedure) Rules, 1970, as amended from time to time."

The U.P. Service of Engineers (Buildings & Roads Branch) Class II Rules, 1936 were amended by 1987 Amendment Rules and 1997 Amendment Rules providing for separate quotas for promotion. The said Amendment Rules of 1987 and 1997 were challenged in CMWP No.17949/1998 (Atibal Singh vs. State of U.P. and connected cases). On the other hand the diploma holder Junior Engineers had filed CMWP No.42762/2000 (Arvendra Kumar Garg v. State of U.P.) seeking a mandamus directing the State Government to consider them for promotion to the post of Assistant Engineer in accordance with the 1936 Rules (as amended by the 1987 and 1997 Rules). A Division Bench of the Allahabad High Court, by common judgment dated 22.3.2002 allowed CMWP No.17949/1998 and connected cases challenging the 1987 Amendment Rules and 1997 Amendment Rules, but dismissed WP No.42762/2000 filed by the diploma holder Junior Engineers. It held that the Amendments made in 1987 and 1997 were invalid and deemed not to have come into force. It is in view of the said decision dated 22.3.2002, that the State Government issued the office order dated 11.3.2003 proposing to promote Junior Engineers (Diploma-holders) to the post of Assistant Engineers under the 1936 Rules by holding 'interview' as qualifying examination.

It is contended by Mr. Hansaria, learned senior counsel for the appellant that Rule 9(ii) contemplates the qualifying examination being prescribed by the Governor; and the Government order dated 11.2.2003 contains the prescription of the Governor and therefore there is no inconsistency. Reliance is also placed on Article 162 of the Constitution relating to the executive power of the State which enables the Executive to make laws.

On the other hand, Mr. Bobde, learned senior counsel appearing for respondent No.5, contended that the office order is merely an executive instruction and it cannot run counter to the provisions of Rule 9(ii). It is contended that the office order dated 11.2.2003 attempts to nullify the requirement of Rule 9(ii) by superseding the rule by an executive instruction. It is also contended that the office order provides for an interview without specifying the total and passing marks and lacks guidelines and if such office order is allowed to stand, it will not only be violative of Articles 14 and 16 but will also open floodgates for nepotism, favouritism and corruption. A careful reading of office order dated 11.2.2003 shows that it does not supercede or override Rule 9(ii) but purports merely to be a prescription of the 'qualifying examination' by the Governor as contemplated under Rule 9(ii). Therefore, the question is not whether the office order dated 11.2.2003 supersedes Rule 9(ii) or not, but whether the office order is in conformity with Rule 9(ii), as the office order itself states that the Governor is prescribing the qualifying examination as contemplated under Rule 9(ii). This means that the limited question that arises for consideration is whether interview can be considered as a 'qualifying examination'.

Meaning of the words 'qualifying examination' in Rule 9(ii)

Under the Rules, recruitment to the post of Assistant Engineer is through more than one source. We are not concerned with the source of direct recruitment in this case. Rule 5(iv) provides for recruitment by promotion of members of the Sub-ordinate Engineering Services who have shown exceptional merit. Rule 9(ii) provides that no officer shall be promoted to the service under Rule 5(iv) unless he has passed such qualifying examination as the Governor may prescribe, or possesses the technical qualification prescribed in clause (i) of that Rule. Admittedly, the Diploma Holders working as Junior Engineers do not possess the technical qualification prescribed in Rule 9(i). Therefore, for promotion, they will have to pass the qualifying examination. Earlier, the procedure was that members belonging to the sub-ordinate engineering services who had completed a certain number of years and who were recommended by their superior officers on the ground of exceptional merit were permitted to appear in an examination to qualify for promotion to the post of Assistant Engineers. Those who secured prescribed minimum percentage of marks in such qualifying examinations were promoted to the post of Assistant Engineer.

After substitution of Rule 12 by the 1992 Amendment to the 1936 Rules, 'seniority subject to rejection of unfit' is the criterion for promotion. This is similar to as 'seniority-cum-merit' and 'seniority-cum-suitability'. Application of such criterion does not mean that promotion is automatic, on the basis of seniority. It means that a list of all candidates in the feeder post should be prepared in the order of seniority, and each candidate as per the rank in seniority is considered on merit. Whoever is found unfit, is rejected. Whether the candidate is 'fit' or unfit is determined by adopting the procedure prescribed by the Rules. It can be by requiring the candidates to undergo a qualifying examination. It can also be by an interview. It can be with reference to the grades assigned in the Annual Confidential records. It can be by any other reasonable and relevant method prescribed. In B.V. Sivaiah v. K. Addanki Babu [1998 (6) SCC 720], this Court observed :

"We thus arrive at the conclusion that the

criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

In this case, qualifying examination is prescribed as the method of ascertaining the minimum necessary merit. The question is whether 'interview' can be considered as 'qualifying examination'.

The contention of the learned counsel for the appellant is that the rules do not require the candidates to undergo a "written examination". It is pointed out that rule 9(ii) merely uses the word 'qualifying examination' and not "written examination". According to the appellant, the word 'examination' can be either written or by an interview. Reliance is placed on the decisions of this Court in A.P. State Finance Corporation vs. C.M. Ashok Raju [1994 (5) SCC 359], Anjur Ahmed vs. State of Bihar [1994(1) SCC 150], Surinder Singh vs. State of Punjab [1980 (3) SCC 418], Siya Ram vs. Union of India [1998 (2) SCC 566], and Sardar Singh vs. State of Punjab [1991 (4) SCC 555] to contend that 'interview' alone can be the basis for promotion. Reliance was also placed on the decisions in Lila Dhar vs. State of Rajasthan [1981 (4) SCC 159] and Kiran Gupta Vs. State of U.P. [2000 (7) SCC 719] to contend that for promotions to senior positions or promotion of persons of matured personality, prescription of interview alone as the method of assessment is recognized and valid. It is pointed out that all the aggrieved diploma Junior Engineers have put in more than 20 years of service and are mature persons and therefore 'interview' can be a suitable method for ascertaining whether they are 'fit' or 'unfit' and therefore there is no infirmity in the office order dated 11.2.2003. But the question here is not whether interview can alone be the criterion for ascertaining fitness for promotion. The rule requires a 'qualifying examination'. The office order prescribes 'interview' as qualifying examination. The aforesaid decisions are not of any assistance to decide whether interview can be a 'qualifying examination'. It is also unnecessary to consider the several decisions cited by Mr. Bobde to contend that 'interview' alone should not be the criterion for selection. That issue does not arise in this case.

'Qualifying examination' in the context of promotion refers to an examination which when passed, qualifies or makes the candidate eligible for promotion. The purpose of a qualifying examination is not to determine the comparative inter se merit of the candidates. When the minimum prescribed marks are secured in the qualifying examination, it confers eligibility on those who secure the minimum marks in such an examination in the order of seniority. Therefore, when

a 'qualifying examination' is provided, it presupposes that the questions will be identical and all candidates shall have identical opportunity to answer the same questions and pass such examination to secure eligibility. This can only be by means of a written examination and not an 'interview'. Therefore, in the absence of any specific provision prescribing interview as the means of ascertainment of fitness for promotion, 'interview' cannot generally be considered to be a qualifying examination nor can it take the place of a qualifying examination. 'Qualifying examination' in the circumstances would necessarily refer to a written examination. We therefore uphold the decision of the High Court (though for different reasons) that the officer order dated 11.2.2003 is contrary to the Rules and interview cannot be the method of ascertaining fitness.

We see no reason to interfere with the order of the High Court quashing the office order dated 11.2.2003 and requiring the diploma-holder Junior Engineers to undergo a qualifying examination. We direct the first respondent-Government and third respondent (UP.PSC) to conduct the qualifying examination within a period of four months from today in accordance with the Rules. We, however, clarify that if any of the diploma-holder Junior Engineers have already been promoted as Assistant Engineers in pursuance of the interim order dated 27.9.2004 and are functioning in that capacity as on today, they may continue to hold the said posts on ad hoc basis till regular promotions are made in accordance with the rules. We further clarify that if any of them fails to pass such qualifying examination, they shall stand reverted as Junior Engineers. Subject to the aforesaid observations, this appeal is dismissed. No costs.