
(1975) 02 MP CK 0009

In the Madhya Pradesh High Court

Case No : Miscellaneous petition No. 506 of 1970

J.C. Yadav

APPELLANT

Vs

State of Madhya Pradesh and others

RESPONDENT

Date of Decision : 28-02-1975

Acts Referred:

Constitution of India, 1950 — Article 143, 226, 227, 254, 309

Citation : (1979) ILR (MP) 1055 : (1975) MPLJ 450

Hon'ble Judges : S.M.N. Raina, J;M.L. Malik, J;G.P. Singh, J

Bench : Full Bench

Advocate : R.K. Pande, for the Appellant; M.V. Tamaskar, Govt. Advocate for State, for the Respondent

Judgement

G.P. Singh, J.

The petitioner and the respondents 2 to 13 on selection in open competition by the Madhya Pradesh Public Service Commission were appointed as Assistant Directors of Industries. The inter se seniority of these persons was maintained according to the order of merit fixed by the Public Service Commission. According to that seniority, the petitioner was senior to respondents 7 to 13. The respondents Nos. 2, 3 and 10 were promoted as Deputy Director of Industries in 1964. The respondent No. 4 was promoted in 1966 and the other respondents in 1970. The petitioner, however, was not promoted and, therefore, he filed this petition under Articles 226 and 227 of the Constitution for quashing the promotion orders of respondents Nos. 5 to 9 and 11 to 13 and for considering the case of the petitioner for promotion after preparing a fresh list of persons eligible for promotion. During the pendency of this petition, the petitioner was promoted as Deputy Director of Industries from 3rd May 1972 by order dated 26th April 1972. In view of the promotion of the petitioner, the relief claimed by him that he should be considered for promotion after a fresh list of eligible candidates is prepared does not survive. The only relief that now survives and regarding which arguments were heard is the relief for quashing the promotion

order of respondents Nos. 5 to 9 and 11 to 13.

Learned for the petitioner has argued that the respondents Nos. 5 to 9 and 11 to 13 were not entitled for promotion from the posts of Assistant Director to the posts of Deputy Director because they had not passed the departmental examination. It is pointed out that the petitioner passed the departmental examination on 29th April 1966.

Before appreciating the arguments of the learned for the petitioner, it is necessary to refer to certain statutory rules. Rule 8 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961, provided that a person appointed to a service or post by direct recruitment shall ordinarily be placed on probation, and that he shall undergo such training and pass such departmental examinations during the period of his probation as may be prescribed. Rules relating to the departmental examinations and the syllabus therefor for the officers of the Directorate of Industries were made by notification dated 15th September 1961 and were published in the Government Gazette dated 6th October 1961. It was provided in these rules that every Assistant Director etc. whether appointed by direct recruitment or by promotion is required to pass the departmental examination within two years of the date of joining his appointment. It was further provided in Rule 4 that failure to pass within two years of joining his appointment will render an officer liable to lose the appointment at the discretion of the Government, and that passing of the departmental examination by the Officers is a condition precedent to their confirmation. It appears to me that the requirement of passing the departmental examination for confirmation as required by the Civil Services (General Conditions of Service) Rules, 1961, and the Examination Rules referred to above did not apply to the petitioner and the respondents who were appointed Assistant Directors in April 1959, because, the period of two years from the date of appointment within which the examination was required to be passed by these rules had already expired before the rules came into force in 1961.

I then come to the Madhya Pradesh State Industries (Gazetted Service Recruitment) Rules, 1965. These rules were made by notification dated 28th May 1965 and were published in the Madhya Pradesh Gazette dated 8th October 1965. These rules created Madhya Pradesh State Industries service which was divided in two classes; Class I and Class II. Class II service consisted of Assistant Directors and the Class I consisted of Deputy Directors and Joint Directors of Industries. Rule 6 of these rules provided for recruitment to the service by direct recruitment and by promotion. For appointment by promotion, a committee was constituted by Rule 13 for making a preliminary selection of eligible candidates. The conditions for eligibility for promotion were laid down in Rule 14. In case of promotion for the post of Deputy Directors ten years of service as Assistant Director, whether officiating or substantive, was a condition for eligibility for promotion. The committee was required to prepare a list of persons who satisfied the requirements of eligibility under rule 14 and who were considered to be

suitable by the committee for promotion. The list was to be framed so as to cover probable vacancies for two years. The selection for inclusion in the list was required to be based on merit and suitability in all respects with due regard to seniority. The list was required to be reviewed and revised every year. The list prepared by the committee was required to be sent to the Public Service Commission for its approval and it is from this list, as approved by the Public Service Commission, which was called a select list, that promotions were required to be made.

New rules for departmental examination were made by notification dated 7th December 1965 were published in the Madhya Pradesh Gazette dated 4th March 1966. Rules 1, 6 and 7 of these Rules read as under:

Thereafter, by notification dated 29th September 1967 new Recruitment Rules were made and were published in the Madhya Pradesh Gazette dated 9th February 1968. These rules were made in super session of the rules of 1965. The 1965 rules were in Hindi and the 1967 rules are in English, but they substantially contain the same provisions. Conditions for eligibility for promotion and the method of preparation of list are the same in both the rules. The relevant rules are contained in Rules 13 to 18 and 22 which read as follows:

13. Appointment by promotion:--(1) There shall be constituted a committee consisting of the members mentioned in the Schedule IV for making a preliminary selection for promotion of eligible candidates.

(2) The committee shall meet at intervals ordinarily not exceeding one year.

Conditions of eligibility for promotion: The committee shall consider the cases of all persons who on the 1st day of January of that year had completed the period as per annexure attached for Assistant Directors or Industry and ten years of service for Deputy Directors of Industry and joint Directors of Industry's post (whether officiating or substantive) in the post /service mentioned in column 2 of the Schedule IV or any other post or posts declared equivalent thereto by the Government.

Preparation of list of suitable officers: (1) The committee shall prepare a list of such persons as satisfy the condition prescribed in rule 14 above as are held by the committee to be suitable for promotion to the service. This list shall be sufficient to cover probable vacancies for two years.

(2) The selection for inclusion in such list shall be based on merit and suitability in all respects, with due regard seniority.

(3) The names of the officers included in the list shall be arranged in order of seniority in the (as in column II Schedule IV) Service;

Provided that any junior officer who, in the opinion of the committee, is of a exceptional merit and suitability, may be assigned in the list a higher place than that of officers senior to him.

(4) The list so prepared shall be reviewed and revised every year.

(5) If in the process of selection, review or revision it is proposed to supersede any member of the State Subordinate Civil Service, the committee shall record its reasons for the proposed supersession.

Consultation with the Commission:--The list prepared in accordance with rule 16 shall then be forwarded to the Commission by the Government alongwith:

(i) the records of all persons included in the list;

(ii) the records of all members of the (as in column II, Schedule IV) service who are proposed to be superseded by the recommendations made in the list;

(iii) the reasons as recorded by the Committee for the proposed supersession of any member of the (as in column 2 Schedule IV) Service; and

(iv) the observations of the Government on the recommendations of the committee.

Select List:--(1) The Commission shall consider the list prepared by the committee along with the other documents received from the Government and, unless it considers any change necessary, approve the list.

(2) If the commission considers it necessary to make any change in the list received from the Government the commission shall inform the Government of the change proposed and, after taking into account the comments, if any, of the Government may approve list finally with such modification, if any, as may in its opinion be just and proper.

(3)The list as finally approved by the Commission shall form the Select list for promotion of the members of the (as in column 2 Schedule IV) Service to (as in column 3 Schedule IV) Service.

(4) The select list shall ordinarily be in form until it is reviewed or revised in accordance with sub-rule (4) of rule 15:

Provided that in the event of a grave lapse in conduct of performance of duties on the part of any person included in the select list, a special review of the select list may be made at the instance of the Government and the Commission may, if it thinks fit, remove the name of such person from the Select List.

Appointment to the Service from the Select List:--(1) Appointments of the officers included in the Select List to posts borne on the Cadre of the service shall follow the order in which the names of such officers appear in the select list:

Provided that, where administrative exigencies so require, a person whose name is not included in the Select List or who is not next in order in Select List, may be appointed to the Service if the Government is satisfied that the vacancy is not likely to last for more than three months.

(2) It shall not ordinarily be necessary to consult the Commission before appointment of a person whose name is included in the Select List to the service unless during the period intervening between the inclusion of his name in the Select List and the date of the proposed appointment there occurs any deterioration in his work which, in the opinion of the Government, is such as to render him unsuitable for appointment to the service.

Repeal and Saving:--All rules corresponding to these rules and in force immediately before their commencement are hereby repealed in respect of matters covered by these rules:

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

It has not been disputed before us that respondents 5 to 9 and 11 to 13 had not passed the departmental examination as required by the Departmental Examination Rules of 1965. The contention of the learned Government Advocate is that these rules in so far as they provide that officers who will not pass the departmental examination within the prescribed time shall not be eligible for promotion were repealed by the Recruitment Rules of 1967.

Rule 1 of the Departmental Examination Rules, 1965 requires every Assistant Director and other officers of Class II (leaving aside technical officers) to pass the departmental examination within two years from the date of his appointment or from the date of the publication of the rules whichever may be later. The respondents 5 to 9 and 11 to 13 were appointed Assistant Directors in 1959 before coming into force of these rules and, therefore, rule 1 required them to pass the departmental examination within two years from the publication of the rules. Rule 6 of these rules provided a penalty that a person appointed after coming into force of the rules will be liable to lose his office at the discretion of the Government if he does not pass the examination within the prescribed period. It is also provided in this rule that passing of the departmental examination would be a condition precedent for confirmation. Rule 6 does not apply to respondents 5 to 9 and 11 to 13 because they were appointed prior to the coming into force of the rules. Their period of probation could not be extended beyond three years as provided in Rule 8 of the M. P. Civil Services (General Conditions of Service) Rules, 1961 and even in the absence of any order of confirmation the necessary effect was that they must be taken to be confirmed; [Chhatersal Singh v. State of M. P. 1973 MPLJ 98]. In this view of the matter, the respondents must be taken to have been confirmed sometime in 1962, long before the making of the Departmental Examination Rules of 1965. Rule 7 of these rules contains certain exemptions and the material exemption is contained in clause (3). This clause exempts persons appointed and confirmed before the coming into force of these rules in so far as the question of confirmation is concerned. But it is clearly provided therein that it would be necessary for these persons also to pass departmental examination within the

prescribed time otherwise they would not be eligible for future promotion. Thus, it was necessary for the petitioner and the concerned to pass the departmental examination within the time of two years from the coming into force of these rules for becoming eligible for promotion to the higher post of Deputy Director. Here I have left out of consideration the cases of respondents 2 to 4 because they are technical officers and the requirement of passing the departmental examination did not apply to them as stated in rule 1 itself. Thus, when the Recruitment Rules of 1965 and the Departmental Examination Rules of 1965 were in force an Assistant Director for being eligible for promotion could not be promoted, even though he had put in ten years of service, without passing the departmental examination. Indeed, the learned Government Advocate has not disputed this position.

Then comes the question whether when the Recruitment Rules of 1967 came into force the requirement laid down by rules 1 and 7 (3) of the Departmental Examination Rules, 1965 that the respondents should pass the departmental examination for becoming eligible for promotion ceased to be effective on the ground that these provisions were repealed to that extent by the 1967 rules.

The Recruitment Rules, 1967 are made in supersession of the Recruitment Rules, 1965 and the 1965 rules are clearly repealed. Rule 22 of 1967 Rules repeals all rules corresponding to these rules in respect of matters covered by them. I have already stated that the Recruitment Rules, 1967 are almost identical with the Recruitment Rules, 1965. The Recruitment Rules of 1965 are, therefore, the Rules corresponding to the Recruitment Rules, 1967 and stand repealed. But Rules 1 and 7 (3) of the Departmental Examination Rules, 1965 cannot be said to be the rules corresponding to any of the rules in the Recruitment Rules, 1967 and the former cannot be said to be repealed by the latter. When a new Act provides for repeal of any prior corresponding Act, the test to be applied is whether the prior Act which is alleged to be repealed provides substantially for all matters contained in the later Act; there need not be any identity for bringing about correspondence, but the matters dealt with by the two Acts must substantially be the same; [See *A.B. Abdulkadir and Others Vs. The State of Kerala and Another*, If the two Acts are of differing scopes, there cannot be correspondence; [See *Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others*, Reference may also be made to *Sackville-West v. Viscount Holmesdale Appeal Cases (H. L.)* 543 at p. 576, where Lord Chancellor pointed out "that to correspond does not usually or properly mean to be identical with but to harmonize with or to be suitable to". Applying these tests, it cannot be said that Rules 1 and 7 (3) of the Departmental Examination Rules of 1965 were Rules corresponding to any of the provisions in the Recruitment Rules of 1967. The Departmental Examination Rules, 1965 provide for the necessity of passing the departmental examination within the period of two years and they also provide penalty for not passing the examination. The Recruitment Rules of 1967 do not deal with the subject of departmental examination at all. Rule 14 of these Rules provides that the promotion committee is to consider the cases of all

persons who had put in ten years service for promotion to the post of Deputy Director. But this rule does not provide that all persons who have put in ten years or more of service must be included in the list prepared by the committee for purposes of promotion. As provided in rule 15, officers who have put in ten years or more service can be given a place in the list only if they are considered suitable for promotion by the committee. The committee while considering suitability cannot ignore the fact of not passing the departmental examination where the Departmental Examination Rules require that a person for being considered for promotion must pass the examination. What I am stressing here is that the Recruitment Rules do not provide that every person who has put in more than ten years must be placed in the select list of the officers from whom promotions are to be made. As already stated, the question of departmental examination is not covered by the subject-matter dealt within the Recruitment Rules, 1967 at all. In this context it is a very important factor to be taken into account that identical Recruitment Rules of 1965 stood along with these very Departmental Examination Rules without affecting each other. For these reasons, I am clearly of opinion that Rules 1 and 7 (3) of the Departmental Examination Rules, 1965 do not correspond to any provision in the Recruitment Rules, 1967 and are not repealed by Rule 22 of the latter rules.

The learned Government Advocate then contended that Rules 1 and 7 (3) of the Departmental Examination Rules, 1965 must be taken to be repealed by implication by the Recruitment Rules, 1967. Repeal by implication occurs when the provisions of the latter legislation are so inconsistent with or repugnant to the provisions of the earlier legislation that the two cannot stand together; [See *Municipal Council Palai Vs. T.J. Joseph and Others*, *Suntharilingam v. Inspector of Police* (1971) 3 W L R 896 (P C) 901 and *Foodend v. I. R. C.* (1970) 2 All. E R 801 (P C).p. 807]. The Supreme Court in *Municipal Council, Palai v. T. J. Joseph* has further indicated that the tests applied for determining repugnancy under Article 254 of the Constitution may be applied for solving a question of implied repeal and that it may be seen: "(1) whether there is a direct conflict between the two provisions, (2) whether the Legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law and (3) whether the two laws occupy the same field." The examination of the two sets of rules does not satisfy any of the tests stated above. Further, we have already noticed that the Departmental Examination Rules, 1965 stood side by side with the Recruitment Rules, 1965 which were almost identical with the Recruitment Rules, 1967. When two sets of rules stand side by side, it would be a novel method of repealing one by implication by the simple device of repealing and re-enacting the other. The Recruitment Rules, 1965 were repealed and re-enacted by the Recruitment Rules, 1967 which are substantially in identical terms as the repealed rules and it cannot be inferred that the intention of the rule making authority was to affect any provision of the Departmental Examination Rules, 1965 which had stood side by side with the earlier Recruitment Rules. In my opinion, there is no ground for holding in favour of the argument regarding repeal by implication.

It was also hinted that the requirement of passing the departmental examination for purposes of promotion is not mandatory. I have already referred to the relevant rules. The requirement of passing the examination is provided in Rule 1 and the penalties and exemptions are provided in Rules 6 and 7. The intention of the rule-making authority appears to be quite clear from these Rules that officers who do not pass departmental examination should not be confirmed and in case of those who had already been confirmed, they should not be considered eligible or qualified for promotion until they pass the examination. The relevant part of rule 7 (3) provides that in case of officers whose dates of confirmation may be prior to the publication of the rules and who may have been considered otherwise suitable for promotion, the condition of passing the examination will not apply for their confirmation, but even for them passing of departmental examination is necessary otherwise they will not be eligible for future promotion. The words in Hindi are These words point out the necessity of passing the examination within the time prescribed in Rule 1, (which can be extended under Rule 2), and they also provide the consequence of not passing the examination. The consequence of non-eligibility for promotion which arises on not passing the examination is worded in the negative. When the Rules provide for a requirement to be fulfilled by a person and when they also provide as to what is to happen if the requirement is not fulfilled, the consequence so provided must be given effect to more so when it is worded in the negative. Negative words are ordinarily used as a legislative device to make a statute imperative; [M. Pentiah and Others Vs. Muddala Veeramallappa and Others, and Haridwar Singh Vs. Bagun Sumbrui and Others, . Moreover, the object of the rules also shows that the condition of passing the departmental examination is obligatory for making a person eligible for promotion. I, therefore, do not accept the suggestion that the requirement is only directory.

My conclusion, therefore, is that respondents 5 to 9 and 11 to 13 could not be promoted because they had not passed the departmental examination and their promotion orders are, therefore, liable to be quashed.

It was also canvassed that the petitioner is not entitled to challenge the promotion orders of these respondents. The petitioner having passed the departmental examination in 1966 was eligible for promotion in 1970 when these respondents were promoted and his case for promotion should not have been considered along with these respondents because they were not at all qualified for promotion. The petitioners case should have been considered only with qualified candidates and these respondents' cases should not have been at all considered. Further, the promotion of these respondents in 1970 has affected the petitioner's seniority as he was promoted in 1972. He has, therefore, sufficient interest to challenge the promotion orders of these respondents.

In the result, the petition is allowed to this extent that the promotion orders of the respondents 5 to 9 and 11 to 13 are quashed. There shall be no order as to costs of this petition. The amount of the security deposit shall be refunded to the

petitioner.

P. S. I have read the opinion prepared by my learned brother Malik, J. The point on which we differ was unfortunately not argued by the Government Advocate; it was only hinted by my learned brother at the time of hearing. I am, therefore, adding a few words to explain the difference. The Rule, on the interpretation of which we differ is in Hindi and no official translation of the rule in English is available. Malik J. has translated the relevant portion of it to read in English as "may not deserve future promotion" whereas I translated it to read as ""shall not be eligible for future promotions". I will at once concede that if my learned brother's translation is correct, he is certainly right in his conclusion that the rule is directory. I have also no quarrel with the principles of interpretation stated by my learned brother. I have not said that negative words must always be construed as mandatory but only that they are ordinarily construed as mandatory. What I have stressed is that when an enactment provides a requirement and also provides the consequence of not complying with that requirement and when that consequence is worded in the negative, the consequence so provided must be given effect to. I also do not dispute that the aim and object of the enactment and the inconvenience flowing from strictly adhering to it may be seen in deciding whether the enactment is mandatory or directory. But then what is the object when qualifications are prescribed for appointments to posts in public service ? Numerous examples are found where the Constitution, the Statutes and Statutory Rules provide for such qualifications. The qualifications so prescribed are not merely for the benefit of the employer, i.e. the Government, but the object in such cases is to protect public interest by bringing about efficiency in public service and the Government has no dispensing power unless the relevant enactment or rule confers that power. Further, a provision laying down qualifications cannot be held to be directory on a hypothetical consideration as to what will happen if no person of prescribed qualifications is available. One must begin with the assumption that persons of requisite qualifications will be available otherwise the qualifications will not have been prescribed by the legislature or the rule making authority as the case may be. Moreover, in case of a rule prescribing qualifications there is hardly any question of inconvenience to the Government if no person of prescribed qualifications is available, for the Government can easily amend the rule. Strict adherence to a rule prescribing qualifications will only result in causing inconvenience to persons who are not qualified, but that can hardly be any relevant consideration. The relevant rule here itself provides the exemptions and limits of the exemptions; it confers no power on the Government to exempt a person from the operation of the rule; the Government can only extend the period within which a person should qualify himself for future promotion by passing departmental examination. The exemption of persons above a particular age does not also show that for others the provision is directory; it only shows that the rule making authority feels that experience in service gained with age will bring in nearly the same proficiency as will come by passing the

departmental examination. I have also difficulty in finding that the Government in fact exempted the respondents from the operation of the rule or that the Government has construed the rule as directory. The Government proceeded on the basis, as was argued by the learned Government Advocate, that the Examination Rules, 1965, were repealed by the Recruitment Rules of 1967; it was never argued that the Government has construed the Rule as directory or that it has granted exemption to the respondents on that basis. Further, there is no provision in the Examination Rules reserving to the Government a power of interpretation or relaxation as is contained in Rules 20 or 21 of the Recruitment Rules and we are concerned here with the Examination Rules and not with the Recruitment Rules. With these few words and with utmost respect to my learned brother, I regret my inability to accept the conclusion reached by him,

OPINION

Malik J-- I have had the advantage of reading the judgment prepared by my learned brother Singh J. I regret, I am unable to agree with him both on the construction he has placed on Rule 7 (3) of the Departmental Examination Rules (Annexure R-1) and on the ultimate conclusions.

To reiterate facts in brief, the petitioner and the respondents Nos. 2 to 13 belong to the Industries Department of the State, They appeared before the Public Service Commission and were selected for the posts of Assistant Directors, The petitioner was placed senior to respondents Nos. 7 to 13. The selection took place in 1959. As would be clear from the comparative chart filed by the respondent State, some of the including the petitioner were already in service holding inferior posts. Selection of the candidates, it appears, was not against permanent strength of the cadre or for whatever reason, the appointments came to be made on temporary basis. This would be obvious from Annexure P-1, which is a copy of the gradation list as on 31st July, 1965. They have all been shown in the gradation List as officiating Temporary Assistant Directors. They were not placed on probation, and Rule 8 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961, would not apply to them nor would they automatically stand confirmed after the period of three years as assumed by my learned brother. They, instead, continued to be shown as officiating Temporary Assistant Directors till sometime after 1965. It would appear from Annexure P-2 that by an order dated 29-11-1968, the respondents Nos. 2 to 13 were confirmed with effect from 20-3-1964. The petitioner, on account of adverse confidential reports in the Service Book, was not confirmed and Annexure P-2 is the representation that he had made. The respondents Nos. 2 to 13 by virtue of their earlier confirmation, became senior to the petitioner.

I would exclude from consideration the cases of respondents Nos. 2 to 4 and No. 10 who were technical persons and who were not required to pass the Departmental Examinations. The petitioner has no grievance with their promotion as Deputy Directors of Industry. In 1970, the respondents Nos. 5 to 9 and 11 to 13 came to be promoted as Deputy Directors. The petitioner has made

a grievance that they were not eligible candidates for the promotion since they had not passed the Departmental Examinations and the Rule 7 (3) of the Departmental Examination Rules published on 4th March, 1966, (Annexure R-1) was mandatory in its meaning. The petitioner says that he had passed the Departmental Examination and was eligible for consideration along with those who had likewise passed the examination. He prays that the promotion orders of the respondents Nos. 5 to 9 and 10 to 13 be quashed and the Government be directed to prepare a fresh list of selection out of the candidates who have passed the Departmental Examination.

My learned brother has exhaustively quoted the relevant Departmental Examination Rules in para. 5, and the Recruitment Rules which cover appointment by promotion, in para. 6 of his judgment. I need not repeat them here. It was contended by the respondents" learned that the Recruitment Rules of the year 1967 which governed appointment by promotion, impliedly repealed the Departmental Examination Rules of 1965 since the condition prescribed for eligibility for promotion as a Deputy Director in Rule 14 of the Recruitment Rules was 10 years" service in the Department. The selection was required to be made on the basis of merit and suitability with due regard to seniority. The Rules of Recruitment nowhere said that the candidates who had not passed the Departmental Examinations shall not be selected. By implication it followed that selection could be made from amongst those who had completed 10 years service irrespective of the fact whether they or any of them had not passed the Departmental Examination.

The Recruitment Rules of 1965 which were replaced by the Recruitment Rules 1967 were in terms and letter alike in so far as appointment by promotion was concerned and since the Departmental Examination Rules of 1965 and the Recruitment Rules of 1965 could stand side by side, the replacement of the Recruitment Rules of 1965 with those of 1967 did not alter the position. I am in respectful agreement with Singh J., in holding that the Departmental Examination Rules of 1965 do not stand expressly or by implication repealed by the Recruitment Rules of 1967. I am also of the view that the two Rules are not mutually destructive; are not so plainly repugnant to each other; are not so incompatible that they cannot stand together. The disagreement arises in the construction of the Rule 7 (3) of the Departmental Examination Rules which my learned brother holds mandatory and I hold it directory. I will presently give my reasons.

It has to be borne in my mind that the Recruitment Rules and the Rules relating to conditions of service have always been treated separately and the reason is that the conditions of service would apply only after the recruitment or appointment is made. The Rules relating to recruitment generally are required to be rigidly observed, so also the conditions of service which secure to the services constitutional guarantees. But there are rules which are in the nature of administrative orders or directions, which create no right in the servant though

framed under Article 309 of the Constitution and which may confer benefit as distinguished from a right, and which demand on the discretion of the appointing authorities; such rules are not mandatory.

I may also advert to the of quoted passage from *Howard v. Bodington*. Lord Penzance observed:

I believe, as far as any rule is concerned, you cannot safely go further than that, in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act: and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

In Halsbury's Laws of England it is stated that "affirmative statutes are sometimes regarded as prima facie directory and negative statutes as mandatory. At the same time affirmative words may be so absolute and peremptory that they make the statute mandatory. On the other hand, a provision derived from inference from negative language may be merely directory."

I will also quote here with advantage the following observations from *Bowditch v. New England Mutual Insurance Co.* (cited from Page 488 of Bindra's Interpretation of Statutes, 5th Edition of 1970):

Each statute must be Judged by itself as a whole, regard being had not only to its language, but to the objects and purposes for which it was enacted If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purpose of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract. The statute we are considering, does not, in terms, prohibit the corporation from lending money to its officers, or declare that such contracts shall be void. It is directed to the officers, and by its terms seems intended to furnish rules to regulate the duty of the officers to the corporation and its members. It does not say that the corporation shall not lend, but that the officers shall not borrow It is designated to forbid officers who are charged with the duty of investing funds of the corporation borrowing for themselves and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy-holders from the dishonesty or self-interest of the officers. It is intended as a shield to the corporation. To construe it as making the promises of the officers, who borrow money in violation of its provisions void, would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers not upon themselves, but upon the corporation for whose protection the statute was made. It would require a plain expression of the legislative intention to lead us to such a construction.

My object in citing these authorities is that negative words in any provision do

not necessarily convey an imperative meaning. The language employed is not always a sure index. Broadly speaking the tests to be applied are the scheme and purpose of the enactment, the considerations of justice and balance of convenience and whether the provision confers any right or privilege or affects performance of a public duty.

Reverting to the case in hand, the candidate under the Departmental Examination Rules, is required to pass the examinations within two years from the date the Rules have come into force or from the date he has assumed charge of his office. The time factor is not a rigid rule since it is provided that the State Government can in their discretion extend time within which the candidate is expected to pass the examination. For allocated servants, the period prescribed is 4 years. The penalty for not passing the examination is provided in Rule 6. It says that on failure to pass (lie examinations within the prescribed period, it would be within the discretion of the State Government to terminate the services of the candidate. Passing of the examination would be a condition precedent to his confirmation.

Rule 7 does not purport to be a penal clause as per marginal note which is "Exemptions". Those who have reached the age of 45 have been exempted from passing the examination and are eligible for promotions along with those who have passed the examinations, without incurring any disability. The allocated servants likewise incur no disability under certain conditions. The Sub-clause (3) is important. It says that those persons who have been appointed, promoted and confirmed before the coming into force of these Rules, need not pass the Departmental Examinations yet they must pass the Departmental Examinations within the stipulated period or else they may, shall not deserve future promotions. The expression in Hindi is " My learned brother has translated the expression to mean "shall not be eligible for future promotions", whereas I have preferred to put it in a milder form as meaning "may not deserve future promotions". The expression makes all the difference in approach. The persons on probation or officiating on the date the Rules came into force are required to pass the Departmental Examination before they could be called deserving for confirmation.

What should be the scheme and object of these Rules? If persons over the age of 45 of allocated servants could be considered for promotion without passing the examinations, should it make any difference if a person below the age of 45 who is otherwise an excellent executive and whose performance for long number of years was exceptionally meritorious, but who has unfortunately failed in the examination, is selected? Passing Departmental examination is not made an exclusive test of ability nor have provisions been made that a person passing the Departmental Examination would automatically stand promoted as and when a vacancy occurs. If such were the provisions, a person passing the examination would acquire a right which he could enforce in a Court of law. But where he acquires no such right but incurs disability on failure to pass, the condonation of

which depends on the discretion of the appointing authority, it would not be a justiciable matter. As between two rival claimants of equal merit, one who has passed the examination would ordinarily be preferred. But where the person passing the examination is otherwise a useless fellow, it would be within the discretion of the appointing authority to reject him and prefer one who has not passed the examination but who is otherwise more competent.

in the matter of appointment by promotion, the Rules of Recruitment may be conjointly read with the Rules of Departmental Examination. The Rules of Recruitment nowhere say that the person who has not passed the Departmental Examination shall not be selected. If the prohibition were so worded, the interpretation would have been different. What the examination Rules say is that the person may/shall not deserve future promotion. The selection has to be made on merit and suitability basis and the only condition necessary is that he should have completed ten years of service. The principal criteria for selection is the efficient service record of the candidate rather than the passing of the Departmental Examination. Failure to pass the examination does not seem to prescribe an absolute disability but would be a blemish on service record which may be taken into account. If promotion is made despite the candidate's failure to pass the examination but who is otherwise deserving, it cannot be struck down. As in the case of Bowditch referred to above, the Act did not prohibit the corporation from lending money to its officer and making the contract void but regulated the conduct of the officers by directing them not to borrow from the Corporation and the contract when surreptitiously entered was held enforceable and the rule was read as directory, so also in the present case, on the same analogy, the Rules of Examination are directed towards increase in the efficiency in service without prohibiting the Government to grant promotion if a person is otherwise deserving and exigencies of service so require. The Rule is for the benefit of the Government and the Government may waive that benefit. Had the Rule conferred any right or privilege to the Government Servant or had it been a rule towards constitutional guarantees as provided under Article 311 of the Constitution, the considerations would have been different. (I may advert to two authorities which may be read with advantage: *State of U.P. Vs. Manbodhan Lal Srivastava*, and AIR 1945 67 (Privy Council) These authorities are not directly on the point).

In interpreting the Rules, considerations of justice and balance of convenience play an important part. If substantial rights depend on the Rules and no injury can result from ignoring them and the purpose can be achieved otherwise than following the Rules rigidly, the Rules would be directory. Balance has to be struck between the inconvenience of rigidly adhering to and the inconvenience of sometimes departing from them. Imagine a situation when at the relevant time no candidate is available or requisite number of candidates are not available who have passed the Departmental Examination, should the Government have no power to promote him or them though the exigencies of service so require? Similarly, what should the Government do if the candidate who has passed the

Departmental Examination is otherwise found unsuitable for promotion and one who has not passed the examination is considered exceptionally good? Imagine a third situation when the Government do not find it convenient to hold examination for a couple of years, should a candidate rush to this Court for a writ in the nature of mandamus to direct the Government to hold the Examination? The fourth situation that could possibly arise in respect of a candidate who has completed 10 years of service and became eligible for consideration in the year 1966 or 1967 before the examinations could be held.

Rigid adherence to the Rules would cause greater hardship and inconvenience as compared to the inconvenience of sometimes departing from the Rules, The rules should, therefore, be construed as directory.

Another aspect of the matter is that the Recruitment Rules provide for Relaxation in Rule 21, which says:

Relaxation:--Nothing in these Rules shall be construed to limit or abridge the power of the Government to deal with the case of any person to whom these rules apply in such manner as may appear to it to be just and equitable:

Provided that the case shall not be dealt with in any manner less favourable to him than that provided in there rules.

A similar Rule is contained in the M. P. Civil Services (General Conditions of Service) Rules, 1961. It is Rule 16. It is under these Rules, the Government have power to condone the disability incurred by a servant by failure to pass the examination. It appears, the Government did exempt the from passing the Departmental Examination as would appear from para 2 of Annexure P-2. That being so, they could be considered for promotion. It may be noted that exemption was granted sometime before 1963 after the coming into force of the Rules of 1965.

It may be argued that the exemption was granted for the purposes of confirmation and not for making them eligible for promotion. If such a doubt is incurred, it would be for the Government to resolve. The fact is that the have been promoted though they had not passed the Examination. The Government had the knowledge of it and yet promoted them. It means that the Government were pleased to condone the fault. That follows logically.

Besides, if the Rules are silent and it is doubtful as to whether exemption once granted would accrue to the benefit of the servant even for the purposes of promotion, the matter must be referred to the Government to fill up the gap by amendment or by administrative instructions.

Under the Rules of Recruitment, the Government have reserved a right of interpretation of the Rules. That is Rule 20. How far should the parties be bound by the interpretation put by the Government may well be stated on the authority of the Calcutta High Court reported in Basanta Kumar Pal Vs. Chief Electrical Engineer and Others,

The Code itself provides by Rule 2002 that the power of interpreting the rules contained in it, shall be in the President. If it falls to a Court to give its independent opinion as to the proper construction of the rule, it will not be bound by the President's interpretation, but there is another point of view from which it may be proper, even for counsel to give effect to the President's interpretation in a question between a Government Servant and the State. The rules contained in Railway Establishment Code are the conditions of service which the Railway servants accept when they take up employment under the Railways and which thus govern and control their rights. If those rules contain an interpretation clause and such clause provides that the rules shall be taken to mean what the President may interpret their meaning to be, it would seem to follow that it is one of the conditions of service of Railway servants that they shall accept the President's interpretation of the rules and that what they are really governed by are not the rules, as such, but the rules as interpreted by the President. If so, the Courts may, in a question between a Railway servant and the employer Railway, properly give effect to the President's interpretation of the rules as a matter of agreement between the parties".

It may also be seen that the promotions which are sought to be challenged are temporary appointments until further orders. (Please see Ex. P-6A). Persons officiating on the promotion posts are supposed to be on trial for suitability. The Government have a choice to retain them on the promotion posts or to revert them. If passing of the Departmental Examinations is considered absolutely necessary by the Government, they can insist upon the promotees to pass those examinations. No challenge could be made to such appointments which are temporary and made on ad-hoc basis. The petitioner is a person who was found unsuitable by the Selection Committee when the respondents were considered and found of better merit. It would not be sound exercise of jurisdiction to strike down the selection made by the Selection committee on the basis of merit and suitability and give an unfair advantage to a person who was rejected by the Committee.

For all these reasons, I hold that the Rule 7 (3) of the Departmental Examinations Rules 1965, is not mandatory. It was within the discretion of the Government to relax the Rule in favour of the respondents and to promote them. Their promotion orders cannot, therefore, be struck down. The petition deserves to be dismissed. There shall be no order as to costs.

ORDER of REFERENCE

For the reasons given in our separate opinions, we differ on the question whether the part of Rule 7 (3) of the Departmental Examination Rules, 1965, which reads is mandatory or directory. Consequently, we also differ on the question whether the promotion orders of the respondents 5 to 9 and 11 to 13 are valid or invalid.

The case shall now be laid before Hon'ble the Chief Justice for nominating a

judge to resolve the difference.

OPINION

Raina J.--This case has come before me on a difference of opinion between Singh and Malik JJ. in respect of a question arising in connection with the petition before them. The question, as stated in the order of reference, dated 30-10-1973, is as follows:

Whether the part of Rule 7 (1) of the Departmental Examination Rules, 1965, which reads is mandatory or directory ?

Before proceeding to deal with the aforesaid question, it is necessary to set out the facts which are material for a proper appreciation of the controversy relating to the question. The petitioner and respondents 2 to 13 were appointed as Assistant Directors of Industries on selection in open competition by the Madhya Pradesh Public Service Commission. The inter se seniority of these officers was maintained, according to the order of merit fixed by the Public Service Commission. The petitioner was senior to respondent 7 to 13, according to the list prepared by the Public Service Commission. Respondents 2, 3 and 10 were promoted as Deputy Director of Industries in 1964; Respondent 4 was promoted in J 966 and the other respondents in 1970. The petitioner, however was not promoted; and, therefore, he filed the present petition under Articles 226 and 227 of the Constitution for quashing the promotion orders of respondents 5 to 9 and 11 to 13 and for certain other reliefs. During the pendency of the petition, the petitioner was also promoted as Deputy Director of Industries by an order dated 26-4-1972. After the promotion of the petitioner, the only relief was pressed by him was that the promotion orders of respondents 5 to 9 and 11 to 13 be quashed.

A return has been filed on behalf of the State of Madhya Pradesh, respondent No. 1, opposing the petition. The other respondents did not file any return and were not represented at the hearing of the petition.

The main point that was urged by Shri R.K. Pandey, learned for the petitioner, before the Bench consisting of Singh and Malik, JJ. was that respondents 5 to 9 and 11 to 13 were not eligible for promotion as Deputy Director of Industries as they had not passed the departmental examination and, therefore, their appointments to the said post were liable to be quashed. This contention is mainly based on the construction of paragraph (3) of Rule 7 of Departmental Examination Rules framed by the State Government under Article 309 of the Constitution vide notification No. 14758-4782-XI-B, dated 7-12-1965, published in the Madhya Pradesh Rajpatra, dated 4th March, 1966 (hereinafter referred to as "the Departmental Examination Rules"). Rule is reproduced below for facility of reference-

The title of this rule is " i. e. Exemptions, and sub-rules (1) and (2) thereof specify the officers who are exempted from the requirement of passing the

Departmental Examination. Sub-rule (3) lays down the consequence of not passing the Departmental Examination within the specified period. The material part of this sub-rule, on which the controversy has arisen is reproduced below;

Sub-rule (3) of Rule 7 has been construed by Singh, J. to mean that an officer is not eligible for promotion unless he has passed the Departmental Examination; and he arrived at the conclusion that rule is mandatory and, since respondents 5 to 9 and 11 to 13 had not passed the Departmental Examination, they were not qualified for appointment as Deputy Directors, and, therefore, their appointments were liable to be quashed. Malik, J., on the other hand, construed the clause as meaning that officers, who had not passed the Departmental Examination, may not deserve future promotions. He, therefore, held that, in any case, the provision was not mandatory and, therefore, the appointments were not liable to be quashed.

So far as the English translation of the aforesaid sub-rule is concerned, I am inclined to agree with Singh, J. that it means that the Officers, who have not passed the Departmental Examination, shall not be eligible for future promotions. The sub-rule is in two parts. The first part lays down that it is necessary for an officer to pass the Departmental Examination within the specified period. The second part makes it clear that the officer concerned would not be eligible for promotion otherwise. I do not think there is any scope for diluting the rigor of this sub-rule in the process of translation. The question of interpretation, however, remains; and the main point for consideration is whether the aforesaid provision is mandatory or merely directory.

The question whether a statute is mandatory or directory depends upon the intent of Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, design and the consequences which would follow from construing it the one way or the other. Vide Crawford on "Statutory Construction" and In Re Under Article 143 of the Constitution of India In the matter of: Under Article 143 of the Constitution of India, . The scope and object of the statute furnish a useful guide in determining whether a particular provision is directory or imperative. No universal rule can be laid down for the construction of statutes as to whether a particular provision shall be construed as mandatory or directory only. In each case, the Court has to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

In Dr. S.C. Barat and Another Vs. Hari Vinayak Pataskar and Others, , it was held, while construing the provisions of the Jabalpur University Act, that the question whether a statutory provision is absolute or merely directory has to be determined not only on the language of the provision but also on the relation of that provision to the general object intended to be secured by it.

Thus one thing is certain that the language of a statutory provision is not conclusive of the matter whether it is mandatory or directory; and the Court must also take into account the scheme of the Act and the object intended to be achieved by it.

Departmental Examinations are usually a condition precedent to confirmation in a particular post. They are rarely a condition of eligibility to a certain post, because in the case of direct recruitment, the officer concerned can be expected to appear at a Departmental Examination only after his appointment. He is not entitled to appear at such an examination before his appointment in service. Shri Tamaskar, learned Government Advocate, referred in this connection to Sub-rule (6) of Rule 8 of the Madhya Pradesh Civil Service (General Conditions of Service) Rules, 1961 which lays down that a probationer shall be confirmed on successful completion of probation and the passing of the prescribed Departmental Examinations. He urged that departmental examinations have, in fact, been prescribed in pursuance of this rule; and the passing of such examinations is necessary before confirmation only. Clause (b) of Rule 3, however, makes these rules inapplicable to persons in respect of whose appointment and conditions of service special provisions have been made. Since the Recruitment Rules under consideration are in the nature of special provisions, it is obvious that Rule 8 is not applicable.

While considering Sub-rule (3) of Rule 7 of the Departmental Examination Rules, it is necessary to bear in mind that they were framed for the purpose of prescribing departmental examination for the officers of the Industries Department. There were separate rules governing the recruitment to such posts. Originally, the said rules, which were framed under Article 309 of the Constitution, were notified in the Madhya Pradesh Gazette dated 8th October, 1965, vide Commerce and Industries Department notification No. 6193-XI-B, dated 28th May, 1965. These rules (hereinafter referred to as "the Recruitment Rules of 1965") were called "Madhya Pradesh Rajya Udyog (Rajpatrit) Seva Bharti Niyam". These rules dealt with the recruitment of gazetted officers in the Industries Department. Thus, while the Departmental Examination Rules mainly related to departmental examination, the Recruitment Rules of 1965 dealt with the question of recruitment; and as such it is these rules which govern the question of recruitment and eligibility to appointment and promotion to various posts in the Department. It appears that these rules were replaced by the M. P. State Industries (Gazetted) Service Recruitment Rules, 1967 published in Madhya Pradesh Rajpatra dated 1-3-1968 by notification No. 12480-4361-XI-B, dated 29th September, 1967 (hereinafter referred to as "the Recruitment Rules of 1967"). In the preamble of the notification it is expressly stated that the said Rules were framed in supersession of the earlier Recruitment Rules of 1965. I have not been able to find out the object and purpose of replacing the earlier Recruitment Rules which were in Hindi by these Rules which are in English because they appear to be identical with the only difference in language. It seems to me that the Recruitment Rules of 1967 were notified in English for the

convenience of officers concerned as the construction of Rules in Hindi might be presenting some difficulty. Whatever may be the reason it was not disputed before me that the subject-matter of both the Rules is identical.

Rule 14 of the Recruitment Rules of 1967 lays down the conditions of eligibility for promotion. It reads as follows:

14. Conditions of eligibility for promotion; The committee shall consider the cases of all persons who on the 1st day of January of that year" had completed the period as per annexure attached for Asstt. Directors of Industry and ten years of service for Deputy Directors, of industry and Joint Directors of Industry's posts (whether officiating or substantive) in the post/service mentioned in column 2 of Schedule IV or any other post or posts declared equivalent thereto by the Government.

It is significant that the passing of the Departmental examination was not specified in this rule as a condition of eligibility for promotion. No other provision in the said Rules to this effect was brought to my notice. Thus there is nothing in the Recruitment Rules of 1967 to suggest that an Assistant Director Industries is not eligible for promotion as Deputy Director of Industries unless he passes the Departmental Examination. It would be pertinent to take note of two other material provisions in the Recruitment Rules 1967 which are contained in Rules 21 and 22. Both these rules are reproduced below.

21. Relaxation:--Nothing in these Rules shall be construed to limit or abridge the power of the Government to deal with the case of any person to whom these rules apply in such manner as may appear to it to be just and equitable:

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

Repeal and Saving.--All rules corresponding to these rules and in force immediately before their commencement are hereby repealed in respect of matters covered by these rules:

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

Rule 21 makes it clear that the Government have "a plenary power" to deal with the case of any person to whom these rules apply in such manner as may appear to it to be just and equitable and this power is, not, in any way, affected or curtailed by these rules. Rule 22 on the other hand lays down that all rules in respect of the matters covered by these rules are hereby repealed. Thus these recruitment rules must be construed as superseding all earlier rules relating to recruitment, promotion, etc., of the Gazetted Officers in the Industries Department. Since the Recruitment Rules of 1967 deal not only with direct recruitment but also with promotion it can be urged that Rule 7 of the Departmental Examination Rules of 1965 in so far as it deals with the question of

promotion, stands superseded by the Recruitment Rules of 1967. It appears that both Singh and Malik JJ. have held that Rule 7 of the Departmental Examination Rules of 1965 has not been repealed by the Recruitment Rules of 1967. I shall, therefore, assume for the purpose of this case that the aforesaid provision has not been superseded and confine myself to the question of construction thereof.

If we construe Sub-rule (3) of Rule 7 of the Departmental Examination Rules in isolation, it may, in view of the language thereof, appear by force of logic that the provision relating to passing of the departmental examination is a mandatory one and that an officer, who has not passed such an examination, is not eligible for promotion. But, as pointed out above, the question whether a statutory provision is mandatory or merely directory provision is not to be determined on the basis of its language alone. We must construe the said provision in the light of the various provisions of the Recruitment Rules of 1967 as well as the preamble of the Departmental Examination Rules which indicate that the purpose of the said rules was merely to prescribe departmental Examinations. Thus taking into account the preamble of Departmental Examination Rules; as well as Rules 14, 21 and 22 of the Recruitment Rules of 1967 it is clear that the provision relating to the passing of departmental examination as a condition of eligibility for promotion is merely directory and not mandatory. In any case, it does not fetter the power of the Government to promote an officer who has not passed the prescribed departmental examination.

The fact that the passing of the departmental examination was not considered a basic qualification for eligibility to an office is amply borne out by sub-rules (1) and (2) of Rule 7 of the Departmental Examination Rules. Sub-rule (1) exempt officers above the age of 45 years from the requirement of passing the departmental examination; while Sub-rule (2) makes an exemption in favour of allocated Government servants.

It appears to me that the object of making a provision in Sub-rule (3) of Rule 7 regarding passing of the departmental examination as a condition for eligibility for promotion was that an officer, who has not passed the departmental examination, cannot claim a right to be considered for promotion: and if the Government chooses to ignore him he is without a remedy. But, this does not mean that if the Government chooses to appoint an officer, who has not passed the departmental examination, the appointment itself is invalid.

Singh J. observed in his post script note as under:

The qualifications so prescribed are not merely for the benefit of the employer, i.e. the Government, but the object in such cases is to protect public interest by bringing about efficiency in public service and the Government has no dispensing power unless the relevant enactment or rule confers that power.

In the slant case such an over riding power has been conferred on the Government by Rule 21.

Thus if we read Rule 7 of the Departmental Examination Rules along with Rules 14 and 21 of the Recruitment Rules of 1967. it would appear that Sub-rule (3) of Rule 7 is directory and docs not fetter the power of the Government to promote an Assistant Director of Industries who has not passed the departmental examination, as Deputy Director of Industries. I answer the reference accordingly.

ORDER

By the Court. -In view of the difference between us, the case was referred under clause 26 of the Letters Patent to Raina, J. In accordance with the majority opinion, the petition fails and is dismissed. There shall be no order to costs. The amount of the security deposit shall be refunded to the petitioner.