

(1996) 04 RAJ CK 0040

In the Rajasthan High Court

Case No : Civil Writ Petition No. 4100 of 1994

Kedar Sharma and Others

APPELLANT

Vs

State of Raj. and Others

RESPONDENT

Date of Decision : 16-04-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Citation : (1996) 3 RLW 297 : (1996) 3 WLC 360 : (1996) 2 WLN 28

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Judgement

V.K. Singhal, J.—All the writ petitions mentioned in the Schedule annexed hereto are disposed of by this common order since the validity of Rule 6-C of the Rajasthan Service of Engineers and Allied Posts (Public Health Branch) Rules, 1968 (for short the Rules of 1968) and Rule 7-C of the Rajasthan Service of Engineers and Research Officers (Irrigation Branch) Rules, 1954 has been challenged.

2. Under the proviso to Rules, the direct recruitment has been shown as direct recruitment in the ratio of 50% and by promotion in the ratio of 50%. There is a proviso under Rule 7(1)-C that if the Government is satisfied in consultation with the Rajasthan Public Service Commission that the suitable persons are not available for appointment by either method of recruitment in a particular year, appointment by the other method in relaxation of the prescribed proportion may be made in the same manner as specified in these rules. It is an admitted position that no advertisement was issued for direct recruitment since 1982 and the advertisement which has now been issued on 27.4.1994/ 23.6.1994 in exercise of the power which has been conferred under Rule 6-C of the Rules of 1968 and Rule 7-C of the Rules of 1954 has been challenged. The provisions of Rule 7-C of the Rules of 1954 reads as under:

7-C. Limited direct recruitment to the posts of Assistant Engineer-Notwithstanding anything contained in these rules or the Rajasthan State

Engineering Service (Direct Recruitment by Combined Competitive Examination) Rules, 1991, the posts of Assistant Engineer in direct recruitment quota lying vacant on 31.3.1991 and continuously so lying vacant till the date of this amendment, shall be filled in from amongst the persons who were possessing the qualifications for direct recruitment to the posts of Assistant Engineer and holding the posts of Junior Engineer in the Department on 31.3.1991 through a one time selection to be made by Commission in accordance with the procedure prescribed in par-IV of these Rules limited for such persons if they were otherwise eligible for direct recruitment to the posts of Assistant Engineer on that date without any age limit.

3. The provisions of Rule 6-C of the Rules of 1968 are also having the same language. The grievance of the petitioners is that this one time selection by promotion is contrary to the basic scheme of method of recruitment as provided under the Rules and there was no justification in filling up the vacancies by direct recruitment quota lying vacant till 31.3.91 by promotion.

4. Learned Advocate General has pointed out that formerly on the integration of service from various States generally there were persons who were known as Overseers and lateron they were redesignated as Junior Engineers and Sub-Engineers. Those persons who possessed the qualifications of Degree in Engineering were designated as Junior Engineers and who were Diploma Holders were designated as Sub-Engineers. No preference was given between Junior Engineers and Sub-Engineers except that in the case of Junior Engineers the eligibility for promotion was three years experience as Junior Engineer and in respect of the persons who were Diploma Holders their experience was required to be of 10 years. When the Rules of 1968 were made, the quota for recruitment amongst the direct recruits and by promotion was fixed as 75% direct recruitment and 25% by promotion. This quota of 25% promotion amongst the persons who were holding the posts of Junior Engineers as well as Sub-Engineers was increased to 50% in 1976. In 1982 the Council of Diploma Engineers (Union) of the incumbents working in the three Engineering Departments of the Government of Rajasthan i.e. Public Works Department (Building and Roads) (PWD B & R), P.W.D. (Irrigation) and P.W.D. (P.H.E.D.) raised an objection that all those Diploma Holders who had an experience of 10 years or more and working as Sub-Engineers and consequently who are permissible for promotion quota be also made eligible to compete for the direct recruitment quota posts as the Degree Holders Junior Engineering incumbents are eligible to take part for direct recruitment. By notification dated 7.12.1985 an amendment was made in the Rules and for the expression Sub- Engineer, expression "Junior Engineer (Diploma Holder) and Junior Engineer (Degree holder)" was substituted and in the column relating to recruitment following was substituted:

B.E (Civil) or qualification declared equivalent thereto by the Government.

or

Diploma in Civil Engineering and 10 years experience on the post of Junior Engineer, (Civil) in Government Department.

5. The above was prescribed as qualification eligibility criteria for direct recruitment. It is stated that there was a counter-agitation by the Degree Holder Junior Engineers Union in all the three Engineering Departments and this agitation continued for three years which adversely effected the smooth working of the three departments of the Government and consequently the Government had to withdraw the earlier notification making Diploma Holder Junior Engineers with 10 years or more experience being eligible to compete in the direct recruitment for the post of Assistant Engineers quota and consequently an amendment was introduced by the Government on 21.7.1988. By order dated 3.8.1988 the requisitions of recruitment to the posts of Assistant Engineers to Rajasthan Public Service Commission was with held. Lateron, a committee headed by the Secretary, P.H.E.D, Chief Engineers of all the three Engineering departments as well as the representatives from these departments as well as the Government Finance Department took a decision that the persons by way of working arrangement working as Technical Assistants in the various divisions of the Engineering Departments at the rank of junior Engineers both Degree Holders as well as Diploma Holders with requisite experience of 10 years be upgraded as Assistant Engineers and accordingly such persons who were Degree Holders with three years experience and Diploma holders with 10 years experience were provided to be working on these upgraded posts. This was done because of the fact that the Degree holder Junior Engineers could not have the promotion avenues for 8 years and Diploma holders for 26 years. The recommendations of the committee were taken into consideration by the Government and 173 posts of Junior Engineers were upgraded, 86 by order dated 12.1.1989, 26 by order dated 5.7.1989 and 61 by order dated 13.9.1990.

6. The total posts of Assistant Engineers (Civil) from 1981-82 to 1990-91 were 271 out of which 136 were to be filled in by promotion on the recommendations of the Departmental Promotion Committee and the remaining 135 were to be filled in by direct recruitment on the recommendations of the Rajasthan Public Service Commission. 18 such posts which were required to be filled in under the direct recruitment quota through Rajasthan Public Service Commission had already been filled in by 18 persons because of the recommendations of the R.P.S.C. in excess during the year 1981, 1982 and 1983 and, therefore, 117 posts were to be filled in through R.P.S.C. for direct recruitment. It is also stated that the total number of posts of Assistant Engineers Mechanical & Electrical were 94, out of which 47 were to be filled in by promotion on the recommendations of the Departmental Promotion Committee and 47 were to be filled in by direct recruitment on the recommendations of the R.P.S.C . and 8 of such posts were to be filled in by direct recruitment on the basis of selections made in 1981-82 in excess and thus only 39 posts were to be filled in till the vacancies of 1991. The Departmental Promotion Committee for filling up the vacancies of Assistant Engineers Civil as well as Mechanical and Electrical for the

period 1981-82 to 1990-91 was held on 19.9.1992 and the posts now remained to be filled in by direct recruitment are 114 of Assistant Engineers Civil and 36 of Assistant Engineers Mechanical and Electrical.

7. An amendment in the Rajasthan Service of Engineers and Allied Posts (Public Health Engineering Branch) Rules, 1968 was made by notification dated 28.8.1993 and it is stated that Rule 6-C is in public interest and cannot be said to be arbitrary, un-reasonable or capricious or want on in any manner as the total posts which were continuing of the Assistant Engineers (Civil) 271 and 94 Mechanical & Electrical.

8. An advertisement No. 1/94-95 was issued on 27.4.1994 for 114 posts of Assistant Engineers Civil, Irrigation and 36 posts of Assistant Engineers, Mechanical in Irrigation. Another notification on 23.6.1994 was issued in which 180 posts in Civil were advertised and 17 posts for Assistant Engineers Mechanical were advertised. It is the validity of the provisions of Rule 6-C of the Rules of 1968 and Rule 7-C of the Rules of 1954 and the advertisement dated 27.4.1994/23.6.1994 is in dispute.

9. According to the submission of the learned Counsel for the petitioners it is stated that one time selection by promotion has effected the rights of those candidates who have qualified Engineering during the period from 1982 to 1991 and there was no necessity of converting such posts to be filled in by promotion instead of direct recruitment. In various writ petitions which have been filed the candidates have qualified the examination of B.E. after 1991 and in few of them the candidates have passed the examination before 1991.

10. The submission of the learned Advocate General is that the State has powers to amend the Rules so that the percentage from direct recruitment could have been reduced from 50% and the only thing which has to be seen is the public interest and exigency of service on the basis of which the action of the State is subject matter of judicial review.

11. I have considered over the matter. Article 14 of the Constitution has provided that the State shall not deny to any person equality before the Law or the equal protection of the laws within the territory of India. It is on the basis of this mandate of the Constitution on which the petitioners have claimed that the advertisements which have now been issued depriving them of the vacancies arisen from 1982 to 1991 for direct recruitment and are now sought to be converted by promotion taking away their fundamental rights of equality before law.

12. Under Article 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Such provision is the subject to right of the State for making reservation of appointments or posts in favour of any backward class of citizens. Under Article 309 of the Constitution, the power of the State for recruitment and conditions of service of persons are conferred and it is provided that subject to

the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. From this provision of the Constitution, it is evident that the State cannot discriminate in the matters of employment and can regulate the conditions of such recruitment and employment. That conditions even can be to the extent that the selection by direct recruitment could further be reduced or it can be even to the extent that the entire appointments can be on the basis of promotion or by direct selection for a particular post. For the technical posts lot of expenditure has to be incurred by the State in training those students and, therefore, it becomes the duty of the State to protect the right of the candidates who have qualified the examination by which the eligibility for direct recruitment is to be made. In the welfare state ignoring one section of the class and protecting the other in certain circumstances may amount to discrimination. It was observed in the case of *State of Maharashtra v. Chandrabhan* that the public employment opportunity is national wealth in which all citizens are equally entitled to share and no class or people can monopolise public employment in the guise of "efficiency" or other ground, but the right to equal opportunity to public employment cannot be treated as a new form of private property with its attribute of competitive exploitation.

13. Learned Advocate General has relied the decision given in the case of AIR 1977 251 (SC) where also the dispute was with regard to appointment of government servant and the rules provided 50% by direct recruitment and 50% by promotion. The words "as far as practicable" were taken into consideration and it was observed that the exigencies of administration cannot wait, expediency has a limited role through the use of the words as far as practicable". There by the Government is authorised to make adhoc appointments by promotion or by creation of ex cadre posts to be filled up by promotees, to be absorbed in the 50% portion falling to the promotional category in later years. The words "as far as practicable" were interpreted not to interfering with the ratio which fulfils the interest of administration but flexible provision clothing government with powers to meet special situations where the normal process of the government resolution cannot flow smooth. It is a matter of accent and import which affords the final test in the choice between the two parallel interpretations. The State in tune with the mandate of the rule, must make serious effort to secure hands to fill half the number of vacancies from the open market. If it does not succeed, despite honest and serious effort, it qualifies for departure from the rule. If it has become nonfeasible, impracticable and procrastinatory to get the requisite quota of direct recruits, having done all that it could, it was free to fill the posts by promotion of suitable hands if the filling up of the vacancies was administratively necessary and could not wait. It was further observed by the Apex Court that it has to be seen whether the Government has made effective efforts, doing all that it reasonably can, to recruit from the open market necessary numbers of qualified hands. It was found

that the Government has taken effective steps in the direction of direct recruitment. This decision, rather helping the Government goes against it in as much as in the present case it has not been shown that any effort was at all made from 1981 to 1991 to fill up the posts by direct recruitment. The only thing which has been stated is alleged agitation or dis-satisfaction amongst the in service candidates. To deal with a situation where an employee goes on strike, sufficient provisions of law exists. In my opinion, the Government has miserably failed in making its efforts from 1981 to 1991 in issuing an advertisement to fill up the posts which were meant for direct recruitment to the extent of 50%. The in action of the government has resulted in bringing the above Rule 6-C in the Rules of 1968 and Rule 7-C in the Rules of 1954. It is one time selection and is said to be to meet the urgent need. The main rule which provides 50% recruitment by promotion and 50% by direct recruitment still exists and infact by an advertisement dated 3.10.94 the vacancies from 1991 onwards are to be filled in 50% by promotion and 50% by direct recruitment.

14. Certain posts were up-graded due to stagnation and submission is made on behalf of in service candidates association that if the posts are up-graded and is not allowed to be filled up, the employees would be out of job or may be declared surplus. I am afraid such a view cannot be taken. When the posts were up-graded as stated by the learned Advocate General, the percentage was not changed and the provisions by making the amendment in Rule 6-C and Rule 7-C, referred to above, and if any up-gradation has been done, the proper course for the government in such a case is to adjust those posts against 50% quota of promotion and if it is in excess to that then, it, should be adjusted against the future vacancies.

15. Another objection was also taken that the necessity of bringing the rule was to fill up the posts by promotion of stagnation which the government thought proper. This contention has also no force in as much as by a circular dated 25.1.1992 the benefit of selection scale in a case where there is stagnation has already been given by the government and for any reason the government servant is not promoted the benefit of that circular was available to it.

16. Mr. Asopa, learned Counsel on behalf of the Association has also submitted that because of the change in education pattern, the inservice candidates may not be able to compete with the fresh condidates who have passed the B.E. That cannot be a justifiable argument. The change in the system of education has to be kept in view and the best amongst lot are to be selected. If no selection is made by the direct recruitment, the result would be that the persons who may or may not be having the caliber and who are inefficient would alone continue depriving the rights of the candidates who have acquired the educational qualification during the period from 1982 to 1991. It is true that out of these writ petitions most of the candidates might have qualified after 1991, but still there are candidates who have qualified before 1991 and there are instances where the age limit has been crossed by them. Such of the amendment was not brought in

P.W.D. Rules and it is only in the above two rules that the amendment was made. The amendment under Rule 6-C of the Rules of 1968 and Rule 7-C of the Rules of 1954 cannot be considered to be a reasonable exercise of power and is an arbitrary and hostile discrimination against those candidates who have qualified during the period 1982 to 1991.

17. The decision in the case of O.P. Gupta v. State of Rajasthan, D.B. Civil Writ Petition No. 5682/93 decided on 24.2.1994 has also been relied and it is stated by the learned Advocate General that according to this decision the validity of the provisions of Rule 6-C was up-held. I am afraid that was not the controversy before the Division Bench and the dispute was only with regard to Junior Engineers having degree who have challenged the notification dated 28.8.1993 on the ground of their eligibility. The validity of the rule was not examined and, therefore, no assistance can be taken from that order.

18. In the matter of Mukul Bhargava a further prayer is made that the petitioner is performing the duty of Assistant Engineer and he is being paid the salary of Junior Engineer. This is a factual matter and if this is so, the petitioner will be free to move to the Chief Engineer for making representation in this regard.

19. Mr. Mahendra Singh has stated that if the promotion is made on the basis of increased promotion quota then the diploma holders should be given 60% instead of 30%. This submission of Mr. Singh has no force because I am of the view that Rule 6-C of the Rules of 1968 and Rule 7-C of the Rules of 1954 cannot be said to be a reasonable exercise of power by the State Government. It only shows either the in-efficiency of the respondents or favour to inservice candidates contrary to rules. Since, the power for promotion could have been exercised only when the persons from open market were not available in accordance with the rules. It was the duty of the respondents to have made the efforts in this regard. Such power is an arbitrary exercise and have to be struck off. Accordingly the provisions of Rules 7-C of the Rules of 1954 and Rule 6-C of the Rules of 1968 are declared ultra vires the provisions of Articles 14 and 16 of the Constitution and consequently the advertisement issued on 27.4.1994 and 23.6.1994 are also declared inoperative. The respondents would now proceed to fill up the posts in respect of the vacancies from 1982 to 1991 in accordance with the provisions of the Rajasthan State Engineering Services Direct recruitment by Combined Competitive Examination, 1991.

20. It is expected that now there will not be any delay in the recruitment of vacancies from 1981 to 1991 which has already been considerably delayed and steps would be taken immediately. In respect of candidates who have qualified before 1991 and because there was no advertisement it would be appropriate for the State Government to consider with regard to relaxation of age limit whenever any application is moved in this regard.

21. All the writ petitions are disposed of in accordance with the directions given above.