
(2005) 05 J&K CK 0010
In the Jammu And Kashmir High Court
Case No : SWP 429 Of 2005

Kuldeep Kumar and ors.

APPELLANT

Vs

State and Ors.

RESPONDENT

Date of Decision : 18-05-2005

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2005) JKJ 89 Supp : (2005) JKJ 79 Supp

Hon'ble Judges : Y.P.Nargotra, J

Bench : Single Bench

Advocate : Sunil Sethi, S.C.Gupta, F.A.Natnoo, D.C.Raina, A.V.Gupta, Advocates appearing for the Parties

Judgement

1. The dispute in this petition relates to the promotions of Assistant Engineers in P.H.E. Irrigation and Flood Control Departments. The post of

Assistant Engineer is a Gazetted post in the Engineering Service of the State. Recruitment to engineering Gazetted service is regulated by J&K

Engineer (Gazetted Service) Rules 1978,(hereinafter Rules of 1978), framed U/S 124 of the constitution of J&K, amended by SRO No.209

dated 4.9.1992. The appointments to the service under rule 5(2) of the Rules of 1978 can be made by direct recruitment, by promotion/selection

and partly by direct recruitment and partly by promotion, in the manner and ratio as indicated against each post in the schedule. For the post of

Assistant Engineer, the schedule provides three sources for appointment and their respective quota as follows:

1. 20% by direct recruitment from persons Bachelors degree in the relevant branch of the engineers or AMIE(Section A&B) India in the

appropriate branch of engineering;

2. 60% by promotion from Junior Engineers having Bachelor degree in engineering or equivalent qualification with at least three years service as Junior Engineer;

3. 20% by promotion from Junior Engineers having diploma in engineering or equivalent qualification from a recognized institution in the discipline in which appointment is to be made and having at least ten years service in that category. Provided the Junior Engineers who have undergone condensed course in the recognized State Polytechnic institutions shall also be treated as two years diploma holders and the ratio of promotion in a particular recruitment order between three years and two years diploma holders shall be 7:3 respectively;

In a case *Suraj Parkash v. State of J&K* 2000(7) SCC 561 the Supreme Court while adjudicating upon the dispute relating to the posts of

Assistant Engineer and Asstt. Executive Engineers of Engineering Departments of the State issued the following general directions to the State of

Jammu & Kashmir:

84 Apart from the above specific directions, we think this is an occasion to issue certain general directions to the State of Jammu & Kashmir, As

pointed out earlier, the State of Jammu and Kashmir has been flouting basic rules of recruitment by granting relaxation of the rules of direct

recruitment as also the rules requiring consultation with PSC/DPC for promotions/ recruitment by transfer. In order to ensure that this is not done in

future, the following directions shall also issue:

(A) The State of Jammu & Kashmir shall appoint a High Level Committee within a month from today to go into the question as to whether in any

department in government service, direct recruitment of existing vacancies has not been made and if there are unreasonable delay. The State will

consider making direct recruitment expeditiously depending on the needs of the service and other relevant factors. But it will ensure that no

promotees are put in the direct recruitment quota, temporarily or on stopgap or adhoc basis unless simultaneously proceedings are initiated for

direct recruitment through the Service Commission. The committee will recommend in what manner the direct recruitment could keep pace with

promotions as contemplated by rules;

(B) Similarly the Committee will find out in which department the adhoc/stopgap

promotees are languishing without their cases being referred to the Service Commission/DPC for regularization within their quota;

(C) The State of Jammu and Kashmir will ensure that no relaxation of the basic recruitment rules is made for direct recruitment through PSC, or for purposes of regular promotions/recruitment by transfer. The recommendations of the Committee referred to above may be considered by the Government and implemented in accordance with the rules and in accordance with law without reasonable delay.

2. Pursuant to the directions of the Supreme Court the State Government appointed a High Power Committee, which submitted its report to the Government. The Government considered the report of the committee and issued Govt. order No. 107GAD of 2002 dated 16.1.2002 and thereby ordered that the guidelines contained in annexure to the order shall be strictly followed for proper cadre management of all the Gazetted and NonGazetted service. Para (1) of the annexure to this order, which is the subject matter of dispute in this writ petition, reads as under:

(1) All the departments should maintain complete record about the cadre strength of each category of posts in different services administered by them as also of the number of inposition officers from different sources of appointment in each category. This would enable the department to ensure that while working out vacancies from any category of the posts for each quota, the sources of appointment of retirees are taken into account. The quotas for various sources of appointment are usually prescribed under rules as percentage of the total strength of the posts available in that category and not of the vacancies that may be currently available. Therefore it is necessary that each department carefully monitors the number of inposition officers from different sources of appointment in each category of posts where two or more sources of appointment have been prescribed.

3. The grievance of the petitioners is with regard to aforesaid para of the guidelines. The petitioners are degree holder Junior Engineers. Their case is that from the aforesaid para of Govt. order No.107GAD it is evident that the Government is going to make promotions to the posts of Assistant Engineer by following the rule that a vacancy falling vacant by retirement or promotion of an Assistant Engineer is filled up by promotion of a Junior

Engineer of that category out of which such Assistant Engineer had been appointed, meaning thereby that if the Assistant Engineer whose post has

fallen vacant had been appointed against quota of a degree holder Junior Engineers it shall be filled up by giving promotion to a degree holder

Junior Engineer and if such Assistant Engineer had been appointed against quota of diploma holder Junior Engineer then it would be filled up by

diploma holder Junior Engineer.

4. The contention of Mr. Sethi learned counsel for the petitioners, (degree holder Junior Engineers) is that the mode and manner which is going to

be adopted by the State Government for filling up vacancies of JEs is illegal and impermissible in law. He submits that by adopting the aforesaid

mode the State would be providing for reservation in promotions, which is illegal. According to Mr. Sethi the quota rule has to be applied to the

existing vacancies for making appointments to the posts of Asstt. Engineers and not for maintaining quota ratio of three sources into the cadre of

Assistant Engineers.

5. Mr. Raina learned counsel for the interveners who are diploma holder Junior Engineers contends that the approach of the State is perfectly legal,

as according to him, if above said course is not followed by the State in making promotions for filling the vacancies in the posts of Assistant

Engineers the ratio of the appointees from three sources into the cadre of Asstt. Engineer is bound to get disturbed. A situation may arise that there

may not be any diploma holder engineer left in the cadre of Asstt. Engineers because that class of engineers retires in large numbers due to their

late entry into cadre and there may be degree holders Asstt. Engineers more in number than the prescribed ratio of 60% in the cadre strength.

6. A short but important question of law whether a vacancy in the post of Asstt. Engineer occurring due to retirement/promotion of an Asstt.

Engineer can be filled up from the same source from which such Assistant Engineer had come to be appointed? arises for determination in this

petition. From the perusal of the rules of 1978 and the schedule annexed thereto it is significant to note that 80% of the posts of Assistant

Executive Engineers, which is next higher post to the post of Assistant Engineer, are required to be filled up by promotion from degree holder

Assistant Engineers with three years service and 20% of the posts from diploma

holder Assistant Engineers with five years service experience

Similarly 80% of the posts of Executive Engineers are required to be filled up from degree holder Asstt. Executive Engineers with seven years

service experience and 20% by promotion from diploma holder Asstt. Executive Engineers with ten years service experience. While prescribing

the aforesaid quota for the posts of Asstt. Executive Engineers and Executive Engineer provisos have been added whereby it has been provided

that at any point of time the strength of Asstt. Executive Engineers promoted from diploma holder Asstt. Engineers shall not exceed 20%. The

recruitment rules thus expressly restrict the number of diploma holders Engineers in the cadre of Asstt. Executive Engineers and of Executive

Engineers to 20% at any point of time but no such restriction has been provided in the rules for the cadre of Assistant Engineers meaning thereby

that there is no requirement for restricting the number of Asstt. Engineers appointed from any of the three sources prescribed. The rules only

provide for appointment of Asstt. Engineers from three said sources in the given ratio of 20%: 60%: 20% i.e. 1:3:1. Once recruitment is made from

different sources into the cadre of Asstt. Engineer, the appointees to such posts get fused and blended into one single category and their birthmarks

get obliterated. Therefore, the question from which source a particular Assistant Engineer has come to be recruited loses its significance on his

appointment/promotion to the said post.

7. The cadre of service in terms of Rule 4 consists of such number of permanent and temporary posts as stood sanctioned on the day the Rules of

1978 came into force and such number of the posts as have been and may be sanctioned for each of the classes and categories from time to time

by the Government. For filling up the posts of Asstt. Engineers the Rules of 1978 provide for three feeder sources (1) direct recruitment (ii)

promotion from degreeholder Junior Engineers and (iii) promotion from diploma holder Junior Engineers in the ratio of 1:3:1. For initial constitution

of the cadre of each class or category of posts the appointments would be made in the ratio fixed i.e. 1:3:1 from the same sources prescribed. Say

at the time of commencement of the Rules if there was sanctioned strength of 5 posts of Asstt. Engineers, first post would be filled by direct

recruitment, 2nd, 3rd and 4th posts by promotion of degreeholder Junior

Engineers and 5th post by promotion of Diploma holder Junior Engineer.

After the cadre is constituted then future vacancies arising out of retirement, or promotion etc. would be filled up by following the rota rule i.e. 6th

vacancy would go to direct recruit, 7th, 8th and 9th posts to degree holder Junior Engineers and 10th post to Diploma holder Junior Engineer and

the roster shall move forward in the same manner. Wherever recruitment is required to be made from two or more feeder sources in the prescribed

ratio such ratio can be worked out qua the future vacancies by following the rotational system of vacancies within the ratio prescribed.

8. In *State of Punjab v. R.N. Bhatnagar*, AIR 1999 SC 647 the respondent R.N. Bhatnagar was working as Assistant Professor in the

Department of Ophthalmology in govt. Medical College Patiala. He was promoted with effect from 20.6.1984. Earlier he was working as Senior

Lecturer from 6.8.1981. The question arose as to how the vacancy in the post of Professor of Ophthalmology was to be filled in on the retirement

of one Dr. Shiv Inder Singh Rudhra, Professor of Ophthalmology with effect from 31.10.1996. Rule 9(i)(d) of the Punjab Medical College

Education Service (class I) Rules of 1978 prescribed the method of appointment to the post of Professor as follows:

(i) 75 percent posts by promotion from amongst the Additional Professors, or where Additional Professors are not available, from amongst the

Associate Professors, or where Associate Professors are not available from amongst Assistant Professors or by transfer of official already in the

service of the Government of India or the State Government; (ii) 25 percent posts by direct recruitment.

9. In that case there were only 15 Professors including Dr. Rudhra on whose retirement 16th vacancy arose. As per the appellant State on the

operation of quota rule and the roster cycles of 3:1 16th vacancy would be available to a direct recruit. Consequently said vacancy was advertised

for being filled up by direct recruitment. Respondent R.N. Bhatnagar approached the High Court by way of a writ petition and raised the

contention that in the light of the Constitution Bench judgment rendered in *R.K. Sabharwal v. State of Punjab* 1995(2) SCC 745 as there were

total five posts in the cadre of Professors of Ophthalmology 75% thereof namely 3.75 posts had to be reserved for promotees and 1.25% of the

remaining posts had to be reserved for direct recruits. Rounding up these figures by making digits upto .50 as nil and beyond .50 as 1, four posts in the said cadre had to be filled in at a given point of time by promotees and one post had to be filled in by direct recruitment as at that time when the vacancy arose by retirement of Dr. S.S. Rudra there was already one direct recruit holding the post of Professor, the vacancy in question had to go to the departmental promotee as he was the senior most Assistant Professor in the Department of Ophthalmology. His claim to be promoted to the said post should have been processed in accordance with law and the said post should not have been advertised for direct recruitment. The contention of the respondent, writ petitioner was accepted by the Division Bench of High Court of Punjab & Haryana and writ petition was allowed and advertisement notice dated 10.5.1997 was quashed and set aside. The State went in appeal before the Supreme Court. Their Lordships of the Supreme Court after noticing the observations made in R.I.K. Sabhatwal's case supra came to the view that those observations were of no assistance to the appellant State. Their lordships observed as follows:

As per Article 16(4) which carves out a separate field for itself from the general sweep of Article 16(1) which guarantees equality of opportunity in matters of appointments in Govt. Service to all citizens of India, the reservation for these categories in employment has to be achieved by earmarking requisite percentage of posts for the reserved category of candidates and by pitchforking these posts on roster points on requisite points roster and when such a roster takes a full cycle, posts earmarked on reserved points will enable the requisite reserved category of candidates to fill up these posts. After that is done, the roster would be treated to have achieved its purposes. Whenever a reserved candidate vacated a reserved post, the said post was liable to be filled only by a candidate belonging to the reserved category. If after the roster is first operated and thereafter it is again operated on future vacancies also, a situation may arise wherein cadre may get reserved category exceeding permitted quota of reservation. It is to avoid this contingency that the Constitution Bench laid down in the aforesaid decision as indicated therein.

So far as Rule 9 of the Rules in the present case is concerned, it has nothing to do with reservation of posts in the cadre of Professors. It is not a

rule of reservation envisaged for a specified category of persons as permitted by Article 16(4) of the constitution. On the contrary it is a rule of

recruitment from two different sources namely, in case of Professor's cadre 75% of posts has to be filled in by promotion while 25% by direct

recruitment. These two sources of recruitment permit departmental promotees and direct recruits from the open market to get absorbed in the

cadre. They merely serve as two entry points for the cadre. Rule 9 deals with reservation of appointment to the posts of Professor and does not

deal with reservation of posts of Professor for any special class or category of candidates. It is well settled that once recruitment is made from two

sources i.e. departmental promotees and direct recruitment from open market and once the concerned candidates enter into any cadre through

entry point reserved for them, they get fused and blended into one single cadre and their birth marks get obliterated.

Their lordships further observed:

While method of appointment of Professor as provided by R.9 is 75 per cent by promotion and 25 per cent posts by direct recruitment, the quota

of percentage of departmental promotees and direct recruits has to be worked out on the basis of the roster points taking into consideration

vacancies that fall due at a given point of time and as the roster for 3 promotees and one direct recruit moves forward there is no question of filling

up the vacancy created by the retirement of a direct recruit by a direct recruit or the vacancy created by a promotee by a promotee. Irrespective

of the identity of the person retiring the post is to be filled by the onward motion of three promotees and one direct recruit.

10. Similarly in All India Federation of Central Excise v. Union of India, AIR 1999 SC 1204 it was held:

Where a ratio of 6:1:2 was prescribed by 1998 Rules for promotion to Group A in Customs Central Excise Service from three feeder categories

namely (1) Superintendents of Central Excise, Group B (ii) Superintendents of Customs Group B and (iii) Customs Appraisers it cannot be said

that it was intended by terms of the proposals of Union Govt. on the issue that there should always be six promotees from Excise Superintendents

Group B for every nine posts in Group A. In such a case because of frequent retirement at those group A officers who are promoted from

category of Excise Superintendents Group B, it cannot be held that every such vacancy is to be filled only by promotion of another officer from

Central Excise Superintendents Group B. Thus once officer from the three feeder categories are promoted to Group A, they cease to have their

birth marks of Group B in the promoted category of Group A. There would then be no question of filling up a vacancy in Group A created by the

retirement of a promotee Excise Superintendent Group B by another officer from the same group. This is because once promoted to Group A, the

identity of the feeder channel from which they were promoted ceases to exist. The result would be if vacancies arise in the Group A posts (towards

the 50% quota of promotees as distinct from 50% quota for direct recruit to Group A) they are to be filled up from among the three feeder

categories, the first six vacancies by Superintendents Central Excise in Group B, the seventh vacancy Customs (P) Superintendents and the eighth

and ninth the Customs Appraiser Group. That completes one cycle. The further vacancies as and when they arise in Group A are to be filled again

by following the same procedure.

11. Applying the ratio of R.N. Bhatnagar's case and All India Federation of Central Excise case (supra) to the present case it becomes clear that it

is not necessary that a vacancy occurring for the post of Assistant Engineer due to the retirement/promotion of an Assistant Engineer is to be filled

up from that particular entry source from which he came to be appointed. Such vacancy is required to be filled up by following the rule of quota

prescribed under Rules of 1978 for the said three sources for the reason that once an Assistant Engineers comes to be appointed out of any of the

three entry sources he ceases to have his birth mark. For appointment in the future vacancies occurring due to retirement or promotion etc. in the

cadre of Asstt. Engineers the quota percentage of direct recruit, degreeholder Junior Engineers and diploma holder Junior Engineers has to be

worked out on the basis of the roster points taking into consideration vacancies that fall due at a given point of time and the roster for 1 direct

recruit, 3 degree holders Junior Engineers and 1 diploma holder Junior Engineer shall move forward. Irrespective of the identity of Asstt. Engineer

on whose retirement or promotion etc. vacancy is created, the post is to be filled up by onward motion of 1 direct recruit, 3 degree holder Junior

Engineers and 1 diploma holder Junior Engineer.

12. Thus there is no merit in the contention of Mr. Raina learned counsel for the diploma holder Junior Engineers that vacancy of diploma holder

Asstt. Engineers is to be filled up by diploma holder Junior Engineer alone or of direct recruit by a direct recruit and of degree holder by a degree

holder.

13. The contention of Mr. Sethi that existing vacancies have to be filled in by applying quota rule simpliciter is also not tenable legally for the reason

that such course would run counter to the quota rule itself. For example at a given point of time supposing there are only four vacancies, by

applying quota rule to such vacancies in the manner suggested by Mr. Sethi first post will go to direct recruit and the next three to degree holder

Junior Engineers, Diploma holder Junior Engineers though also entitled to 20% reservation would not get any post. Same thing would happen again

if after sometime four more posts become available and roster points are not maintained and quota rule is applied simpliciter.

14. Now let us examine the stand of the State. In the reply filed by the State it has been submitted that Government order dated 16.1.2002

regulated the cadre management in each category of service including the Engineer service. By the said order the Government has not made any

reservation in favour of the diploma holder Junior Engineers for promotion as Assistant Engineers. The grievance of the petitioners against the said

Government order is totally misplaced and misconceived; appointments and promotions to the post of Assistant Engineer shall be as per the rules

of 1978 read with SRO 209 of 1992. It has further been submitted in the reply by the State respondent that there are around 300 posts of

Assistant Engineers lying vacant and the respondents shall fill up such posts in accordance with rules of 1978 read with SRO 209 of 1992.

15. Thus the stand of the State respondent is also not clear as it has not been said as to in what manner the posts of Assistant Engineers from the

three feeding sources shall be filled up and how the ratio of posts to be filled up from each source qua the available vacancies shall be maintained.

Mr. Gupta, learned AAG, submits that for filling up the existing vacancies Recruitment Rules of 1978, as amended by SRO 209 shall be applied in

letter and spirit.

16. In view of the submissions made, this writ petition is admitted and disposed of with the direction to the respondents that the available vacancies of the Assistant Engineers shall be filled up from the three prescribed entry source strictly by following the prescribed ratio as per the Recruitment Rules of 1978, amended by SRO 209 of 1992, in the manner indicated in this judgment. Connected CMPs shall also stand disposed of.