
(2005) 06 GAU CK 0005
In the Gauhati High Court
Case No : Writ Petition (C) No. 142 of 2003

Lalmuanzova

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 27-06-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 166, 226
Mizoram Public Works/Public Health Engineering Departments, (Group B post)
Recruitment Rules, 1979 — Rule 5

Citation : (2005) 4 GLT 567

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : M. Zothankhuma and Liansangzuala, for the Appellant; N. Sailo, K.V. Tlangmawia, George Raju and Ricky Gurung, for the Respondent

Judgement

B.P. Katakey, J.—The Petitioner, who is serving as Executive Engineer in Public Health Engineering Department, Govt. of Mizoram by the present writ petition has challenged the order dated 5.9.2002 issued by the Secretary to the Govt. of Mizoram, Public Health Engineering Department, promoting the Respondent No. 5 to the post of Executive Engineer with effect from 4.4.91 i.e. the date when the Petitioner was promoted to the said post and also for setting aside inter-se-seniority list of Executive Engineers in the said department issued vide notification 9.4.03, placing the Respondents No. 5 over the Petitioner.

2. The facts leading to the filing of the present writ petition, in brief, is that the Respondents No. 5 as well as the Petitioner were initially appointed Asstt. Engineer/Sub-divisional Officer, Public Health Engineering Department on adhoc basis on 3.12.85 and 6.5.86 respectively. Services of the Petitioner and the Respondent No. 5 in the cadre of Asstt. Engineer/Sub-divisional Officer was regularized with effect from 28.7.86 on the recommendation of the selection board constituted as per provision of Mizoram Public works/Public Health Engineering Departments, (Group "B" post) Recruitment Rules, 1979, wherein the Respondent No. 5's name was placed at serial No. 12 and that of the

Petitioner at serial No. 18. The Petitioner was a graduate in Civil Engineering and Respondent No. 5 was a Graduate in Mechanical Engineering. The Petitioner thereafter on 7.12.88, had passed the departmental examination in Engineering and was considered for promotion to the post of Executive Engineer along with the Respondent No. 5 and others by the DPC in its meeting held on 22.3.91, wherein the Petitioner was recommended for promotion but the Respondent No. 5 was not recommended as he had not passed the Departmental examination in Accounts and Engineering. Accordingly, order of promotion dated 4.4.91 was issued promoting the Petitioner to the post of Executive Engineer. The Commissioner and the Secretary to the Govt. of Mizoram PHE department on 18.8.92 has passed an order to the effect that Asstt. Engineer/Sub-divisional Officers working in PHE department are required to pass the departmental examination in engineering and accounts for the purpose of promotion to the next higher rank or to allow to cross efficiency bar at any stage of time scale of pay. The Commissioner vide notification dated 5.6.92 for the first time constituted a board of departmental examination in engineering and accounts for engineering officer of PHE department and requiring the board to prepare the draft syllabus for conducting departmental examination in the level of Asstt. Engineer/Sub-divisional officer and also to conduct the departmental examination yearly starting from the year 1992. Accordingly the departmental examination was conducted by the PHE department for the first time in the year 1992 wherein the Respondent No. 5 appearing in the departmental examination in engineering and has passed the same on the first attempt on 25.9.92. The Respondent No. 5 was there after promoted to the post of Executive Engineer by order dated 7.1.93. The Government of Mizoram vide order dated 14.11.95 relaxed the condition prescribed for passing departmental examination, as condition of eligibility for promotion, to the post of Executive Engineer, in respect of the Respondent No. 5 and another with retrospective effect and advised the department to place the matter before the Public Service Commission for consideration of their promotion to the post of Executive Engineer with retrospective effect. The said decision was taken as no departmental examination was held in respect of mechanical and electronic engineers in Public Health Engineering department prior to 1992. Accordingly, the DPC in its meeting held on 22.12.95 recommended the names of the Respondent No. 5 and another for promotion to the post of Executive Engineer with retrospective effect from 4.4.91 i.e. the date on which the Petitioner was promoted to the said post. The Govt., after the accepting the recommendation of DPC, vide order dated 25.1.96 promoted the Respondent No. 5 and another to the post of Executive Engineer with effect from 10.4.91 by wrongly taking the date of joining of this Petitioner as 10.4.91. The Government thereafter issued a notification dated 5.9.2002 in supersession of the notification dated 21.1.96 giving the promotion to the Respondent No. 5 with effect from 4.4.91 i.e. the date on which the Petitioner took over the charge of Executive Engineer. The Petitioner thereafter submitted a representation dated 16.9.2002 against the said order dated 5.9.2002. The final inter-se-seniority list of Executive Engineer was published on 9.4.2003 placing

the Respondent No. 5 at serial No. 4 and the Petitioner at serial No. 5 and the other person who was promoted with the Respondent No. 5 at serial No. 6. The Petitioner therefore filed the present writ petition challenging the retrospective promotion of Respondent No. 5 and fixation of his seniority over him in the rank of Executive Engineer.

3. I have heard Mr. M. Zothankhuma, learned Counsel for the Petitioner, Mr. N. Sailo learned State counsel appearing on behalf of Respondents No. 1 to 3 and Mr. George Raju appearing on behalf of Respondent No. 5.

4. Mr. M. Zothankhuma, learned Counsel for the Petitioner has submitted that under the provisions of Mizoram Works Department (Group "A") Post Recruitment Rules 1975, as amended in 1989, the Asstt. Engineer/S.D.O.s having 7 years experience and passed departmental examination in Engineering are eligible for consideration for promotion to the post of Executive Engineer. Though initially Public Health Engineering Department was part of the Public works department, the public Health Engineering become a separate department in the year 1982 and the Petitioner, pursuant to the circular dated 17.6.82 issued by the Chief Engineer PWD, after each bifurcation of PHE department, appeared in the departmental examination and passed the same in engineering on 7.12.88. According to the learned Counsel, the Respondent No. 5 never appeared in the departmental examination of engineering though the minimum eligibility criteria for the purpose of promotion to the post of executive engineering is that the Asst. Engineer apart from having 7 year regular service is required to pass departmental examination in Engineering. The departmental promotion committee on 23.3.91 considered the case of the Petitioner and Respondent No. 5 along with others and recommended the Petitioner's name for promotion and rejected the name of the Respondent No. 5 as he has not passed the departmental examination as required under the Rules. The learned Counsel for the Petitioner has further submitted that since he was promoted pursuant to his selection by the DPC vide order of promotion dated 4.4.91 his seniority can not be taken away by the Govt. by relaxing the eligibility criteria in respect of the Respondent No. 5 and by promoting him to the post of Executive Engineer with effect from the date when the Petitioner was promoted, more so when the Respondent No. 5 was not recommended by the DPC in its meeting held on 23.3.91. The further submission of the learned Counsel is that passing of the departmental examination in engineering being the eligibility criteria, the same cannot be relaxed by the authority and retrospective promotion can not be given to the Respondent No. 5, which has the effect of taking away the seniority of the writ Petitioner. It has further been submitted by the learned Counsel for the Petitioner that order of relaxation dated 14.11.95 having not been issued in the name of the Governor as required under Article 166 of the Constitution of India, the very basis for promotion of the Respondent No. 5 with retrospective effect is illegal. According to the learned Counsel since the retrospective promotion of the Respondent No. 5 is not legal and valid his fixation of seniority over the Petitioner vide notification dated 9.4.2003 is also not valid in the eye of law. Mr. Michael,

learned Counsel in support of his contention has placed reliance on State of Maharashtra and another Vs. Chandrakant Anant Kulkarni and others, Ramendra Singh and Ors. v. Jagdish Prasad and Ors.; reported in 1984 (Supp) SCC 142 , Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, , Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, and S.P. Badrinath Vs. Govt. of A.P. and Others etc. etc.,

5. Mr. N. Sailo, learned State counsel for the Respondent No. 1 to 3, relying on the affidavit-in-opposition submitted on their behalf, has submitted that initially Public Health Engineering Department was a part of Public works department. In the said department graduate engineers in civil engineer, electrical engineer and mechanical engineer were appointed as Asstt. Engineer/Sub. Divisional Officers. The P.H.E. Department was though bifurcated in the year 1982, the departmental examination for the graduate mechanical and electrical engineers, who were holding the post of Asstt. Engineer/Sub. Divisional Officers were never held prior to constitution of the board for Board of departmental examination in PHE department vide order dated 5.6.92. It has further been submitted that Public Works Department held the departmental examination in engineering in respect of civil engineers only and electrical and mechanical engineer were not allowed to appear in such departmental examination. The Government with a view to hold the departmental examination in engineering as well as in accounts, has for the first time constituted the board in respect of Public Health Engineering Department on 5.6.92. Thereafter, the departmental examination was held for all the engineers, namely Civil Engineer, Electrical Engineer and Mechanical engineer, thereby enabling them to appear in such departmental examination. The said departmental examination for P.H.E. department was first held in the year 1992 and in such examination Respondent No. 5 appeared and has passed the said examination on 25.9.92. Since the Petitioner, who was junior to Respondent No. 5 in the rank of Asstt. Engineer/Sub Divisional Officer, has cleared the departmental examination in engineering on 7.12.88, as he was allowed to appear in the said examination being a graduate in civil engineering the Government with a view not to deprive the Respondent No. 5 and another similarly placed persons, who are mechanical engineer, from the benefit of the promotion decided to relax the eligibility criteria in respect of the Respondent No. 5 and another retrospectively so that the Respondent No. 5 and another are not deprived from the benefit of promotion for the fault of the department in not holding the departmental examination. Accordingly the order dated 14.11.95 was issued by the Deputy Secretary department of Personnel and Administrative Reforms to that effect. The DPC accordingly considered the case of the Respondent No. 5 and another for retrospective promotion in view of such relaxation and recommended the name of Respondent No. 5 and another in its meeting held on 22.12.95 for retrospective promotion with effect from 4.4.91, consequently the retrospective order of promotion was issued on 25.1.96. As there was a mistake in Government's notification in giving the retrospective operation of the promotion, the said notification was superseded vide notification

dated 5.9.2002 giving the promotion with retrospective effect from 4.4.91 i.e. date when the Petitioner was promoted to the post of Executive Engineer. The Learned State counsel has submitted that since Government had not held the departmental examination in respect of mechanical and electrical engineers prior to 1992, the Government took a decision for relaxation of the eligibility criteria in respect of the candidates who were deprived from consideration for promotion to the post of Executive Engineer, so that they may not suffer for the fault of Government. According to the learned State counsel the said action being not arbitrary or unreasonable or unjust, this Court may not interfere with the same, as the same was passed with a view not to deprive the deserving person from promotion, though they are senior to the Petitioner in the rank of Asstt. Engineer, on the ground that they have not passed the departmental examination in engineering, in view of the fact that no departmental examination was ever held in respect of mechanical and electrical engineering graduates. Mr. N. Sailo, learned Counsel in support of his contention has placed reliance on State Bank of India etc., Vs. Kashinath Kher and others, etc.,,

6. Mr. Raju, learned Counsel appearing on behalf of the Respondent No. 5 has submitted that it is an admitted fact that the Respondent No. 5 was senior to the Petitioner in the rank of Asstt. Engineer/Sub Divisional Officer and as no departmental examination in engineering was held for the mechanical and electrical graduates they were deprived from appearing in such departmental examination and consequently they were deprived from consideration for promotion to the post of Executive Engineer for no fault of their. Since such departmental examination was not conducted by the department, except in case of the Civil engineers, the Government took a policy decision to relax the eligibility criteria in respect of the Respondent No. 5 and another so that for the fault of the Government in not conducting departmental examination in engineering the Respondents No. 5 and others not suffered. According to the learned Counsel the DPC accordingly considered the case of the Petitioner and another for promotion retrospectively with effect from 4.4.91 i.e. the date on which the Petitioner was promoted to the post of Executive Engineer and having recommended his name along with another, the Government has promoted him to the post of Executive Engineer with retrospective effect from 4.4.91. According to the learned Counsel the Writ Court in exercise of its power under Article 226 of the Constitution of India shall not interfere with the policy decision of the Government unless it is mala fide, arbitrary or in violation of any statutory provision. In the instant case, according to the learned Counsel, the said policy decision being not mala fide or arbitrary or violation of any statutory provisions, the same may not be interfered with by this Court, keeping in view the fact that no departmental examination was conducted in respect of the mechanical and electrical engineers.

7. I have considered the submissions of the learned Counsel for the parties and perused the pleadings as well as the materials on record.

8. In the present case the facts are not in dispute. It is also not in dispute that the Respondent No. 5 was senior to the Petitioner in the rank of Assistant Engineer/Sub. Divisional Officer. The Petitioner has also not disputed the fact that he is a graduate in Civil Engineering and the Respondent No. 5 is a graduate in Mechanical Engineering. The Respondent No. 1 to 4 as well as Respondent No. 5 in their affidavit-in-opposition has specifically pleaded that no departmental examination in engineering was conducted either by the Public Works Department or by the Public Health Engineering Department prior to the year 1992 in respect of Electrical and Mechanical Engineers. The Public Works Department, of which Public Health Engineering Department was a part till 1982, conducted departmental examination in engineering in respect of the graduate in Civil Engineering only. The said facts are not disputed by the writ Petitioner by filing any rejoinder affidavit. Therefore, the undisputed fact is that no departmental examination in engineering in respect of Mechanical and Electrical Engineers were held prior to 1992 so as to make them eligible for promotion to the post of Executive Engineer under the relevant Service Rules, which requires passing of departmental examination in engineering. The Petitioner being Civil engineering graduate had the opportunity of appearing in the departmental examination in engineering held on 24.8.88, which was conducted by the Public Works Department. The PHE department for the first time vide notification dated 5.6.92 constituted aboard for holding departmental examination in engineering in PHE department in respect of all the Engineers including Mechanical and Electrical Engineers. Therefore, issued the order dated 18.8.92 to the effect that passing of such examination is mandatory for the purpose of promotion to the next higher rank and also to cross the efficiency bar at any stage in the time scale of pay. The departmental examination in/Engineering, in respect of Electrical Engineers and Mechanical Engineers was for the first time conducted in the month of September 1992 and the Respondent No. 5 has passed said departmental examination in the first batch and in the first attempt on 25.9.92.

9. The Petitioner, as stated above, has cleared the departmental examination on 7.2.88 and he was considered for promotion to the post of Executive Engineer along with Respondent No. 5 and others by the DPC held on 22.3.91. The DPC recommended the name of the Petitioner along with others for promotion to the post of Executive Engineers and did not recommended the name of the Respondent No. 5 as he had not passed the departmental examination in Engineering as required under the relevant Rules. On the basis of said recommendation the Petitioner was promoted to the post of Executive engineer. After passing of departmental examination by the Respondent No. 5 on 25.9.92, the DPC considered his case for promotion to the post of Executive Engineer and accordingly he was promoted to the said promotional post vide order dated 7.1.93. The Respondent No. 5, who is admittedly senior to the Petitioner in the rank of Asstt. Engineer/Sub-divisional officer was not recommended by the DPC on 22.3.91 on the ground that he had not passed the departmental examination of Engineering and since no departmental examination in Engineering in respect

of the Graduate in mechanical and Electrical Engineering was conducted by the department prior to the year 1992, the Govt. with a view not to deprive such senior engineers from promotion, took a decision to relax the qualification of passing the departmental examination in engineering in respect of the Respondent No. 5 and another, who are mechanical engineering Graduates and accordingly order dated 14.11.95 relaxing condition of the eligibility was passed, with retrospective effect and requesting the MPSC to consider the case of the Petitioner and another for retrospective promotion to the post of Executive Engineer.

10. The review selection committee of the MPSC was thereafter held on 22.12.95 for consideration of his names of Respondent No. 5 and another. The said committee recommended the names of Respondent No. 5 and another for promotion to the post of Executive Engineer with effect from 4.4.91 i.e. the date when the Petitioner, who was junior to the Respondent No. 5, was promoted to the post of Executive Engineer. The proceeding of review selection committee meeting dated 22.12.95 is quoted below:

The review selection committee Meeting held on 22.3.1991 considered the cases of three engineers namely, Lalrammawia Sailo, Lalmuanzova and C. Lalremsiama for promotion to the post of Executive Engineer. They recommended only the name of Lalmuanzova for promotion to the post of Executive Engineer and did not recommended the names of Lalremmawia Sailo and C. Lalremsiama for promotion for the reasons that they had not passed the departmental examination in Accounts and Engineering. The Government has since re-examined these cases and have come to the conclusion that denying of promotion chances to these two officers for the said reasons was not very fair any just because the officers were not given chances to pass the departmental examinations since the department did not conduct any departmental examinations. The two engineers had since passed the examinations in Engineering in 1992 when it was first held for them by the department the Government now have come with the proposal for reviewing the decision of the selection committee meeting held on 22.3.91 and clearing the promotion of Pu Lalremmawia Sailo and Pu C. Lalremsiama retrospectively. It was, considered fair and appropriate to accept the proposals of the Government for the reasons said above and it was therefore, accordingly decided to recommend promotion of Pu Lalremmawia Sailo and Pu C. Lalremsiama with retrospective effect from 4.4.91 to the post of Executive Engineer under PHE.

11. It is evident from the records that Government took such decision of relaxation of the eligibility condition for promotion in respect of the Respondent No. 5 and another, with a view not to deprive the mechanical and electrical Engineers who did not get a chance to appear in the departmental examination so as to make their eligible for consideration for promotion to the promotional post of Executive Engineer, as no departmental examination in Engineering was ever conducted by the Public Works Department, of which PHE was a part till

1982, in respect of mechanical and Electrical Engineering Graduates and such departmental examination was conducted for Civil Engineering Graduates only. Such decision was taken with a view not to deprive the mechanical and electrical engineer from getting promotion to the higher post for the fault of the department in not conducting the departmental examination prior to year 1992 and so that such engineers are not deprive for promotion for not of their fault.

12. The learned Counsel for the Petitioner relying upon the decision of the Apex Court in Chandrakant Anant Kulkarni (supra) has submitted that mere chances of promotion are not conditions of service, and reduction in the chances of promotion did not tantamount to a change in the conditions of service and mere passing of the departmental examination conferred no right to promotion, but by passing such examination one became eligible for promotion. The learned Counsel has submitted that since the requirement of passing the departmental examination is the eligibility criteria for the purpose of consideration for the promotion, the Respondent No. 5 having passed the departmental examination on 25.9.92 obtained the basic qualification on that date only and therefore he cannot be promoted with effect from a date prior to that date.

13. In Ramendra Singh (Supra) the Apex Court has held that the State cannot give retrospective appointment so as to effect the seniority of the existing incumbents, which eventually may reduce the chances of promotion. In the said case sub-overseers, who were waiting for the result of the departmental examination were appointed as overseers on provisional basis to meet emergency requirement and others were appointed as overseers on temporary basis after selection by the committee under relevant rules. The Apex Court has held that departmental orders appointing sub-overseer as overseers on temporary basis with retrospective effect from the date of publication of their result of diploma examination. Would violate Articles 14 and 16 of the Constitution of India as it would adversely effect the seniority of those, who are appointed as overseer by the selection committee. The fact in the said case is different from the instant case. As discussed above both the Petitioner and Respondent No. 5 were appointed as Assistant Engineer but the benefit of the promotion to the Petitioner, though he is junior to the Respondent No. 5, was given early as the departmental examination in respect of Civil Engineering graduates was held early. Since the departmental examination in respect of mechanical and electrical engineers was never held prior to year 1992 the Government with a view that not to deprive them from the benefit of promotion for no fault of their, took a decision to relax the requirement of eligibility condition with retrospective effect. Therefore, the decision of the Apex Court Ramendra Singh case is not applicable in the facts and circumstances of the instant case.

14. The Apex Court in Syed Khalid Rizvi (supra) has held that the condition of recruitment cannot be relaxed and such condition has to be strictly complied with for the purpose of consideration for appointment. In Suraj Prakash (Supra) the

Apex Court has held that a direct recruit can claim seniority over the promotee, who were promoted on adhoc basis in excess of quota, though such direct recruitment was made after the appointment of the promotees. The said decision is not applicable in the present case, in view of the fact that the present case does not relate to the fixation of seniority between the direct recruit and promotee but relates to promotion to the post of Executive Engineer and by relaxing the eligibility criteria.

15. In S.P. Badrinath (supra) the Apex Court has held that when the promotion is depend on passing of the eligibility test, passing of the same alone would determine the seniority. The learned Counsel for the Petitioner relying on the said decision of the Apex Court has urged that as the Respondents No. 5 has passed the departmental examination on 25.9.92, which is the condition prescribed for promotion to Executive Engineer, his seniority can not be counted from the date prior to 25.9.92 in the rank of Executive Engineer. The decision of S.P. Badrinath case is also not applicable in the instant case as the Government has taken a decision to relax the eligibility criteria for promotion to the post of Executive Engineer on the ground that no departmental examination prior to 1992 was held in respect of the graduate in Mechanical as well as Electrical engineering.

16. The Hon"ble Supreme Court, in a similar situation like the present case in Kashinath Kher (supra) case has held as under:

10. Having considered the respective contentions, the question arises whether the action taken by the Appellant in making the officers who have not completed the required assignment and rule/semi-urban service and considering their case, found them fit and them in list B is violation of Article 14? We find that the stand taken by the Bank appears to be just and fair on the facts of the case. It would be seen that of 1986 onwards no promotions have been made. Despite directions issued in 1986 was a one-time measure directing all the circles to post the officers on line assignment and for rural/semi-urban assignment from 1989, no steps have been taken at the circle level to comply with the directions given by the Board and Executive Committee. Consequently, officers, who are otherwise eligible and entitled to be considered were made ineligible for no fault of theirs. Under those circumstances, it is necessitated to relieve hardship to such officers due to the inaction or skillful manoeuvre at circle level. Fortuitous circumstances in the case of some officers who completed the criteria would be a ground to steal a march over officers who are otherwise eligible and they can not be made to suffer injustice; denial of their legitimate expectation of consideration of their cases for promotion would be unjust and unfair. It is true, as rightly contended by Ms. Nisha, that the criteria being conditions of service can not be relaxed. Service conditions being essential conditions cannot be relaxed and it is not the case of the Appellant-Bank that they have done that exercise. What the Board has done is giving an opportunity to the officers, who are otherwise eligible, to complete the required service conditions and then they would be given promotion, on completion of requisite condition thereof. In view of the fact that

they did not have the opportunity to serve and complete the qualifying service, with a view to see that those who have the advantage of completing the service would not steal a march over the seniors, they equally adopted an equitable principle of putting the officers in list B and giving them seniority after promotion below his immediate senior in MMGS-II so that injustice will not be meted out to such officers for no fault of theirs. The procedure adopted by the Bank is just, fair and reasonable.

11. The question is: Whether such exercise is in violation of Article 14. The contention of Ms. Nisha is that weightage provided in that criteria for consideration by the committee gets defeated is without force. The Committee is required to consider the overall experience for the period specified therein. The mere fact that the fortuitous factor of officers officiating in MMGS-III would not be a wedge to walk over those who did not have such fortuitous opportunity nor should they be denied equal opportunity. This Court had considered an analogous situation in *Mohd. Usman v. State of A.P.* Therein, the UDCs and LDCs in a district were unitwise. The LDCs were entitled to be considered for promotion as UDCs. The UDCs were eligible to be considered for promotion as Grade-II Sub-Registrars in the Registration department of Andhra Pradesh. Grade-II Sub-Registrars was statewide cadre while LDCs and UDCs were district wise cadre. In some districts where persons appointed as LDCs though seniors, due to lack of opportunities, could not get the chance to become UDCs, but they got the chances lately. In some districts, due to frequent successive vacancies, LDCs appointed later to those in other districts would get chances for promotion as UDCs over their counterpart seniors in other districts and thereby they would steal a march over LDCs working in other districts. With a view to see that all of them would become eligible for consideration as Sub-Registrar Grade-II, The UDCs and LDCs were clubbed together as a unit and for Statewise promotion as Sub-Registrar Grade-II. That criteria was adopted to avoid hardship and injustice to such of those senior LDC candidates. When the validity of the rule was questioned. The High Court declared Rule 5 of the Special Rule to be ultra vires of Articles 14. When the matter had come up, this Court had held thus (SC Cp. 191. Para 7)

On the facts before us we are unable to agree that for the purpose of recruitment with which we are concerned herein the State should have classified the UDCs and LDCs separately. If the State had treated the UDCs as being superior to the LDCs for the purpose of that recruitment it would have resulted in a great deal of injustice to a large section of the clerks. The fortuitous circumstances of an officers in a particular districts becoming an UDC would have given him an undue advantage over the seniors who might have been as efficient than himself, merely because they chanced to serve in some other district. For the reasons mentioned above, we do not think that in the present case the state can be said to have treated unequals as equals. The rule of equality is intended to advance justice by avoiding discrimination. In our opinion the High Court overlooking the reasons behind the Rule 5 came to the erroneous conclusion that the said rule

violated Article 14 of the Constitution.

12. It would thus be seen that it is not a case of ineligible persons made eligible, but a case of giving opportunities to those officers, who for no fault of theirs, were not made eligible to be considered and given opportunity for promotion and after consideration, on fulfillment of the service on line assignment and rural/semi-urban service for a minimum of two years were promoted to MMGS-III. Thus, we hold that the policy adopted by the Board is not violative of Article 14 of the Constitution. But it must be remembered that in considering whether the candidate has completed the line of assignment or rural/semi-urban service for the required period, a clear demarcation be drawn between the officers who either due to volitional refusal to serve and those on account of inaction or deliberate omission on the part of the controlling authority did not have an opportunity as the case may be, to get the required service qualifications. Therefore, an exercise requires to be done by the Appellant to identify this grouping and consider all those candidates who have otherwise become eligible but not get opportunity, for no fault of theirs, to secure the service qualification but should be denied to those who volunteered not to go for line assignment or rural or semi-urban service as the case may be, and then to consider according to the criteria prescribed under the rules or the circulars issued from time to time.

17. In the said case the State Bank of India has decided to relax the condition of requirement of minimum eligibility criteria of working in the line assignment and in the rural service, as many officers, due to unavailability of the posts and due to non enforcement of the conditions have not got the benefit of the working in line assignment and the rural service. The said decision of the board of management of the State Bank of India was successfully challenged in the High Court but the Apex Court on an appeal filed by the SBI has held that though the criteria, being condition of services, cannot be relaxed, as the management of the Bank, in view of the fact that they did not have the opportunity to the serve and complete the qualifying service, with a view to see that those who had the advantage of completing the service would not steal a march over the seniors, equally adopted an equitable principle to give the seniority after promotion so that no injustice is meted out to such officer for no fault of theirs, has refuse to interfere with such decision as the procedure adopted by the Bank was just fair and reasonable.

18. In the instant case also the Respondent No. 5, though admittedly senior to the Petitioner, did not get any chance of passing departmental examination in Engineering, which is the eligibility condition for the purpose of promotion to the post of executive, Engineer prior to 1992, as no such departmental examination was held in respect of mechanical and electrical engineers and was held in respect of the civil engineers only. The Government with a view that the Petitioner being the graduate in Civil Engineering got the chance to appear in departmental examination, does not steal a march over the senior persons like Respondent No. 5, has taken a decision of relaxation of such condition of service.

The said order of relaxation has also not been challenged by the Petitioner. The learned Counsel for the Petitioner during the argument has contended that order relaxing the eligibility criteria being passed violation of the provision contained in Article 166 of the Constitution of India. The same is bad in law. The said ground having not been pleaded in the writ petition, can not be allowed to be taken during argument. The sole purpose of taking such decision for relaxation of the eligibility criteria for promotion was not to deprive the person, who did not get the chance to appear in the departmental examination for no fault of their, as such examination was not conducted prior to 1992 in respect of Mechanical and Electrical Engineering graduate. Therefore, the decision of the Government in relaxing the eligibility criteria cannot be treated as unreasonable, unjust or also not in violation of Article 14 of the Constitution of India, keeping in view the decision of the Apex Court in Chandrakant Anant Kulkarni and Kashinath Kher and Ors. cases.

19. It appears from the pleadings of the parties that the authority before fixation of seniority of the Petitioner vis-a-vis Respondents No. 5 after his retrospective promotion, has not heard the Petitioner. Though the Respondents No. 5 was given the retrospective promotion, the Petitioner has a right to show that in spite of such retrospective promotion the Respondents No. 5 cannot be held to be senior to the Petitioner. The authority before publication of the final inter-se-seniority list vide notification dated 9.4.03 did not published any provisional seniority list after the order dated 5.9.2002 issued by the authority giving the retrospective promotion to Respondents No. 5 with effect from 4.4.91. Thereby the right of the Petitioner to contest the claim of the Respondent No. 5 in respect of the seniority over him has been denied. Therefore, the Government shall hear both the Petitioner and Respondent No. 5 as well as the other similarly placed person in the matter of fixation of seniority and upon consideration of all the relevant materials on record fix the inter-se-seniority of the officers in the cadre of Executive Engineer, more particularly Petitioner and the Respondent No. 5. Such exercise is directed to be made by the secretary to the Govt. of Mizoram, Public Health Engineering Department within a period of 45 (forty five) days from the date of the receipt of this order.

20. In view of the above, I do not find any merit to the challenge made by the Petitioner in respect of the retrospective promotion of the Respondent No. 5 to the post of Executive Engineer and hence the prayer for setting aside such action is rejected. However, the seniority between the Petitioner and Respondents No. 5 is directed to be fixed in terms of the observations made above.

21. The writ petition is accordingly disposed of. No cost.