
(1967) 04 BOM CK 0004

In the Bombay High Court

Case No : Special Civil Application No. 548 of 1966

Maharashtra State Electricity Board Engineers' Association, APPELLANT
Nagpur

Vs

Maharashtra State Electricity Board RESPONDENT

Date of Decision : 19-04-1967

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Electricity (Supply) Act, 1948 — Section 15, 5

Citation : (1968) 1 LLJ 197

Hon'ble Judges : N.L. Abhyankar, J;D.G. Palekar, J

Bench : Division Bench

Judgement

Abhyankar, J.—By this petition under Arts. 226 and 227 of the Constitution, the petitioners pray that the order, dated 11 May, 1966, appointing respondent 2 S. S. Ghisad, as an Executive Engineer, be quashed, and that respondent 2 be restrained from acting as Executive Engineer of respondent 1. Petitioner 1 is an association of Engineers employed by respondent 1, i.e., the Maharashtra State Electricity Board. Petitioners 2 and 3 are employees of the Maharashtra State Electricity Board and also members of the Association. Respondent 1, the Maharashtra State Electricity Board, is a statutory corporation constituted under the Electricity (Supply) Act, 1948 (Central Act 54 of 1948). Respondent 1 issued an advertisement in newspapers, inviting applications for the post of Executive Engineers (E and M) in the Board. Annexure A to the petition is a copy of that advertisement. The advertisements was in respect of several posts to be filled including that of Executive Engineers (E and M). Applications were to be made on or before 10 December, 1965. In the advertisement calling applications for the post of Executive Engineers, the qualifications and the requirements of experience as well as conditions of age-limit have been given. For the post of Executive Engineer, E and M, the following conditions and requirements of the candidates were advertised :

Serial Name of the Qualification. Experience. Age-limit. number. post and pay-

scale. 1 Executive Engineer Degree in Experience in 40 years. (E.& M.) Rs. 500- Electrical or Electrical 50 - 800 - E.B. Mechanical Eng- Eng Engineering for - 50 - 1,100. Engineering of an 7 years out of Indian or Foreign which 3 years University or its should have equivalent. been in a position of responsibility connected with -

(i) Design, erecti- on and mainten- ance of trans- mission and distribution systems. or (ii) Design, constr- uction and/or operation and maintenance of hydro or thermal station. or (iii) Commercial acti- vities like load, survey, tariff calculati- ons, power sales and development, etc.

2. Petitioner 2 R. C. Gupta has been serving with respondent 1 Board since about 7 years as a Deputy Executive Engineer, Testing Division. Petitioner 3 S. P. Shinde, who is a graduate in Eng Engineering (Electrical) from Usmania University, was appointed as a Junior Engineer with the Board in 1961 and has since been promoted and was serving as an Assistant Engineer when the advertisement was issued. Petitioner 2 R. C. Gupta had made an application for being considered for the post of Executive Engineer advertised by the Board; apparently, he sent his application through his superior officers as he was already serving in the department with respondent 1 Board. Petitioner 2 was not called for interview, nor was any intimation given to him about his application. Petitioner 3 Shinde did not apply at all, but according to Shinde he did not make any application for the post as he had only 5 years' experience to his credit, whereas the minimum period of experience as per advertisement was not less than 7 years. He has also alleged that in view of the specific regulations by which the recruitment is governed, he did not consider himself eligible to make the application because of the condition of minimum experience.

3. It appears that respondent 2 Ghisad received an appointment order some time in May, 1966, appointing him as an Executive Engineer on probation, for a period of two years. The actual order issued under the signature of the Secretary of the Board is annexure C to the petition. Now, the grievance of the petitioners is that respondent 2 has been appointed to one of the posts of Executive Engineers in pursuance of the advertisement calling applications issued by respondent 1 Board, in violation of the terms and conditions of the appointment as advertised, and that petitioners 2 and 3 and other members of the petitioner 1 association, who were otherwise eligible for being considered for appointment if the condition of minimum experience of 7 years was to be relaxed, have been in any case denied a fair, equal and reasonable opportunity of competing for these public posts. In other words, the fundamental right of petitioners 2 and 3 and other members of the association who were eligible otherwise has been infringed by the manner in which respondent 1 Board had appointed respondent 2 in this case.

4. Separate returns have been filed on behalf of respondents 1 and 2. Respondent 1 resists the petition on several grounds. According to it, the petition under Art. 227 is not tenable because the order of appointment is not a judicial or a quasi-judicial order. But this objection is no longer tenable as the petition is

also under Art. 226 of the Constitution. Respondent 1 also disputes the right of petitioner 1 which is an association, to file the petition as it is not a juristic person. As regards the grievance of petitioner 2, the case of respondent 1 is that there was no bar to either of petitioners 2 and 3 making an application. According to the regulations for filing of posts, framed by the Board, out of 4 posts 3 posts are reserved for departmental candidates and though the fourth vacancy is to be filled by direct recruitment, in the case of a post of Executive Engineer the departmental candidates are also eligible to make application for the fourth post. But in case of departmental candidates their applications are to be forwarded by their superiors because the Board could not otherwise have any data or record in respect of these candidates, and it is for the superior officers of the departmental candidates to speak about the calibre, work, initiative, etc., of the departmental candidates while forwarding their applications. The applications of the departmental candidates could be forwarded for being considered for appointment to higher posts if the superior officer found that they are suitable and deserving. Even if the departmental candidate did not have the requisite experience or qualification for the post, these deserving departmental candidates, who had a chance or whose applications could be considered by the selection committee, have not been shut out from consideration by the selection committee. Their specific case is that the application of petitioner 2 was forwarded by the superior officer but without any recommendation, and so the appointing authority did not think him suitable. As regards petitioner 3, the case of the Board is that he was not prevented from making an application as he was aware of the regulations and the recruitment rules. In fact, respondent 1 has stated that there was no specific bar either in the regulations or in the rules for candidates who had less experience to apply for the posts. As petitioner 3 did not apply at all, he could have no grievance and the petition at his instance is, therefore, not tenable. As regards the actual selection of respondent 2 and the appointment made by the Board, it is alleged that he was a very superior candidate having had a brilliant career and having secured first division at all examinations and having secured 73 per cent marks in the B.E. (Honours) Electrical Eng Engineering Examination in the first class. So far as experience of respondent 2 was concerned, he was promoted in the organization in which he was employed within a short period of service of three years, and the charge he held in the company of repute was taken into consideration by the selection committee. So far as the satisfaction of the condition regarding experience is concerned, the selection committee had a right to select a candidate on relaxing the condition required by respondent 1 Board, and having exercised their discretion in recommending relaxation of the condition of experience, there was no infringement of any regulation or right as claimed by any of the petitioners.

5. Respondent 2 has characterized the petition as mala fide. According to him, all the petitioners knew the regulations by which the recruitment is governed, and in particular, Regn. 21 under which the selection committee has been empowered to relax the condition in suitable cases. As petitioners 2 and 3 are governed by

these regulations, they cannot make a complaint when the appointment is made in pursuance of the powers given to the various authorities by the regulations for recruitment, in order to help the Board. In the alternative, respondent 2 has urged that there is no question of discrimination or denial of equal opportunity to petitioners 2 and 3, or any other member of petitioner 1 association, inasmuch as under the recruitment rules there are two well-defined categories from which candidates are selected. Candidates like petitioners 2 and 3, who are already in the employment of the Board, form a distinct and separate class from other candidates who are not employees of the Board and who are not governed by the regulations of the Board. It is urged that the very fact that petitioners 2 and 3 are employees of the Board and form a different class shows that in the matter of filling of posts even by direct recruitment they cannot make any grievance against the selection committee in the matter of exercise of their right of relaxing the condition or any qualification in the case of any outside candidate. So far as departmental candidates are concerned, their applications are required to be routed through superior officers and provision has been made by instructions for departmental officers to make recommendations in respect of deserving departmental candidates to condone or relax conditions in the matter of qualifications or experience. Thus, the power of relaxation having been vested in the selection committee in the regulation itself by which the recruitment is governed, the petitioners could make no grievance if this power is utilized in a proper case like that of respondent 2. Petitioners 2 and 3 and respondent 2 are not of the same class as they come from two separate and distinct categories of candidates, and, therefore, there is no denial of equality of opportunity in filling this post inter se between departmental candidates. There can be no complaint of discrimination. It is further urged that the petitioners cannot claim any fundamental right when respondent 1 recruits its employees and Art. 16 will be applicable only to those cases where the recruitment is at the instance of "State" as defined in Art. 12 of the Constitution. According to the respondents, the Maharashtra State Electricity Board, though a statutory authority, does not come within the definition of "State" under Art. 12 of the Constitution and no question of infringement of fundamental right, therefore, arises.

6. It is first necessary to consider whether the Maharashtra State Electricity Board, which is a statutory corporation, would answer the definition of the word "State" defined in Art. 12 of the Constitution, for interpretation of Part III of the Constitution. Article 12 says :

"In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and Legislature of each of the States and all the local and other authorities within the territory of India or under the control of the Government of India."

7. According to the petitioners, respondent 1 is "other authority" within the territory of India and, therefore, fully answers the description of "State" within the meaning of Art. 12 of the Constitution. To examine this contention it will be

useful to see how the Board is constituted and what are its powers under the statute under which it takes its birth. Under S. 5 of the Electricity Supply Act, 1918, the State Government is under a duty bound to constitute by a notification in the official gazette the State Electricity Board, and the Board is to consist of not less than three and not more than seven members. After providing for the term of office and conditions for appointment of members, the State Government is empowered to suspend from office or remove from office any member of the Board for specified reasons. The Board under S. 12 shall be a body corporate, having perpetual succession and a common seal, with power to acquire and hold property, both movable and immovables, and can sue and be sued in its name. Chapter IV deals with powers and duties of the State Electricity Board and among its other duties S. 18 makes it a specific duty of the Board, with the general duty of promoting the co-ordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner. In order to perform this duty, some specific powers are vested in the Board. For example, under S. 36 the Board may at any time declare to a licensee owning a generating station within an area for which a scheme is in force that the station shall be permanently closed down. Again under S. 37, the power of compulsory purchase by the Board of main transmission lines belonging to the licensee under stated conditions has been invested with the Board. Again under S. 41, where the Board considers it necessary to use for any of its purposes any transmission lines or main transmission lines of a licensee, the Board has been given the power to use such lines to the extent to which the capacity thereof is surplus to the requirements of the licensee. Under S. 45, if a licensee fails to close down his generating station pursuant to the declaration under S. 36, the Board may authorize any of its officers to enter upon the premises of such station and shut down the station or the plant or works. Section 60 is indicative of the nature of the functions and responsibilities undertaken by the Board under that section in respect of debts and obligations incurred, of all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of the Act before the first constitution of the Board shall be deemed to have been done, entered into or engaged to be done by, with or for the Board, and all suits or other legal proceedings instituted by or against the State Government may be continued or instituted by or against the Board. In other words, so far as the function of production, supply and distribution of electrical energy is concerned, whenever that was done by the Government may now be done by the Board as the statutory duty of the Board. Under S. 61 the Board is required to submit to the State Government a statement in the prescribed form of the estimated capital and revenue receipts and expenditure for the ensuing year. On receipt of this statement, it is to be laid before the house of the State legislature; the statement is open to the discussion in the house and the Board is required to take into consideration any comments made on the stated statement in the State legislature. Thus, the control of the representatives of the people in the form of criticism and suggestions as to the manner in which the Board functions is

ensured by this provision. The borrowing power of the Board is being made subject to the previous sanction of the State Government and the State Government is empowered to guarantee the loans that may be raised by the Board. The distribution of the Revenues of the Board are also controlled by the statute according to the provisions of S. 67, and the accounts and audit of the Board are to be carried out in the manner prescribed by the State Government in consultation with the Controller and Auditor-General of India. Under S. 74, any officer of the Board has the power of entry for the purpose of lawfully using any transmission lines or main transmission lines. The Board is required to be guided in discharge of its functions by such directions on questions of policy being given to it by the State Government. The regulations made by the Board under Cls. (a) and (b) of S. 79 are subject to previous approval of the State Government. The members of the Board and servants are constituted public servants under S. 81 and a statutory protection is given to the acts of such servants of the Board done in good faith and they are immune from suit, prosecution or legal proceedings. Detailed provisions have been made in Sch. VI of the Act regarding the financial position and the management of the Board's finance. It is thus clear that the statutory authority created under the Electricity Supply Act, namely, the Board, has been invested with certain public functions and has to discharge them as public authority in the matters connected with the generation and supply of electricity. Certain powers of remission of delay are also invested with the Board in discharge of its functions.

8. According to the respondents, however, the Electricity Supply Board constituted under the Electricity Supply Act is not covered by the definition of "State" under Art. 12 of the Constitution because it does not discharge any of its sovereign functions. The test that the respondents would apply in order that an authority may be considered as "State" within the meaning of Art. 12 is whether it discharges any of the sovereign functions of the State. The respondents have invited our attention to the following decisions in support of their contention : Krishan Gopal Ram Chand Sharma Vs. Punjab University and Another, ; The University of Madras Vs. Shantha Bai and Another, ; Surendra Kumar v. Central Board of Secondary Education AIR 1957 Raj 206 ; Ena Ghosh Vs. State of West Bengal and Others, and Devadas v. Karnatak Eng Engineering College AIR 1964 Mys. 6 . In this connexion reference was also invited to the observations on p. 326 of Maxwell's Interpretation of Statutes, 11th Edn., and of Craie's at p. 178. In our opinion, the contentions raised on behalf of the respondents are not well-founded. In the Punjab case, the question was whether the Punjab University constituted under the Universities Act, was a "State" within the meaning of Art. 12 of the Constitution. The Division Bench apparently followed the reasoning in the Madras case in The University of Madras Vs. Shantha Bai and Another, and also a decision of the Calcutta High Court in Ena Ghosh Vs. State of West Bengal and Others, . Apparently the Division Bench accepted the observation of Narayana Pai, J., in Devadas v. Karnatak Eng Engineering College (vide supra) to the effect that the term "State" was an abstract political conception and it could

act only through the agencies or instrumentalities through which it exerted its political power on those whom it governed or ruled. There the question was under Art. 14 of the Constitution and therefore it was further observed that Art. 14 necessarily sought to control State action or the action of the State through its agencies or instrumentalities. Now the Madras decision purports to interpret the connotation of the word "State" in Art. 12 by reference to certain decisions of the American Supreme Court. Making a pointed reference to these decisions in America, regarding universities, the Division Bench observed as follows (p. 69) :

"The question has also been considered in America with special reference to universities. Where the university is maintained by the State any regulation or law made by the university which is repugnant to the Fourteenth Amendment has been held to be unconstitutional and appropriate writs have been issued . . . But where the university is not one maintained by the State, their regulations are not open to attack under the Fourteenth Amendment because such a university cannot be considered to be a State."

9. Then in Para. 7 the Division Bench observed as follows :

"It will be abundantly clear from the provisions enacted in Part III, that the Indian Constitution has also recognized the distinction between State-maintained institutions and State-aided institutions. Thus, while Art. 28(1) enacts that no religious instruction shall be provided in any educational institution wholly maintained out of State funds. Art. 28(3) provides that religious instruction might be given in educational institutions recognized by the State or receiving aid out of State funds, but that no person should be compelled to take part in such instructions. Article 29(2) also recognizes that educational institutions might be either State-maintained or State-aided. Adopting therefore the principles laid down in the American authorities, it must be held that educational institutions will be within the purview of Art. 15(1), only if they are State-maintained and not otherwise; and that the regulations of the University of Madras, which is State-aided and not State-maintained are not within the prohibition enacted in Art. 15(1)."

10. Now, whatever be the relevancy of the State-maintained as opposed to State-aided educational institutions, in considering whether universities or educational institutions erected as a result of statutory provisions, are immune from the requirements of Art. 14 of the Constitution, we fail to see how that consideration is relevant in the present context. We may also mention that Sri Basu, the learned commentator on the Constitution of India, has observed at p. 141, Vol. I, of 5th Edn. of his treatise, that the distinction made in the specific provisions of Arts. 28 and 29 cannot be imported to interpret the general provisions of Arts. 12 and 15(1). According to the learned author, the test for the application of Art. 12 is whether the authority has the power to make "laws" as defined in Art. 13 or the power to administer such laws. It is further observed that where a body exercises power conferred by a statute, it is obvious that it is exercising governmental power in its ordinary sense; there is the authority of the State

behind its acts (assuming that the acts are held *intra vires*). Then the learned author refers to the Board of Trustees constituted by a statute in the United States, being taken as agents of the State. The learned author has also referred to later decisions of the American Supreme Court in *Lucy v. Adams* (1955) 350 U.S. 1 100 L. ed. 3] and *Florida v. Board of Control* (1956) 350 U.S. 413 100 L. ed. 486] where the American Supreme Court has held that the Fourteenth Amendment is applicable to aided universities if they are vested with statutory powers.

11. We would prefer to take the view that where a statute authorizes a person or a body corporate to exercise a statutory power to issue orders and to exercise at least some of the governmental functions such as eminent domain or a right of entry or to make rules which are required to be obeyed, such an authority is "the other authority" within the meaning of Art. 12 of the Constitution and must be held to answer the description of the word "State" within the meaning of that article. The Rajasthan High Court in dealing with a similar question in the matter of Rajasthan State Electricity Board has taken the view that the Rajasthan Board was the "other authority" and therefore the State within the meaning of Art. 12 of the Constitution - see *Mohan Lal v. State* [reported elsewhere in this issue]. Similar statutory authorities have been held to be "other authorities" within the meaning of Art. 12, such as Cochin Devaswom Board in *Namboodripad v. Cochin Devaswom Board* AIR 1956 T.C. 19 and Port Trust Board constituted under the Madras Port Trust Act in *R. Sarangapani and Another Vs. The Port Trust of Madras*, . These decisions indicate the principle to be applied in such cases. Their lordships of the Supreme Court have also indicated in a recent case the test that may be applied in determining whether an authority would be "other authority" within the meaning of Art. 12 of the Constitution.

12. In *K.S. Ramamurthi Reddiar Vs. The Chief Commissioner, Pondicherry and Another*, , their lordships observed as follows in Para. 11 :

". . . Art. 12 gives an inclusive definition of the words "the state" and within these words of that article are included :

- (i) the Government and Parliament of India,
- (ii) the Government and the legislature of each of the States, and
- (iii) all local or other authorities.

These are the only authorities which are included in the words "the State" in Art. 12 for the purpose of Part III. Then follow the words which qualify the words "all local or other authorities." These local or other authorities which are included within the words "the State" of Art. 12 are of two kinds, namely,

- (i) those within the territory of India, and
- (ii) those under the control of the Government of India.

There are thus two qualifying clauses to "all local or other authorities." These

clauses are,

(i) within the territory of India, and

(ii) under the control of the Government of India.

It would, in our opinion, be grammatically wrong to read the words "under the control of the Government of India" as qualifying the word "territory." From the scheme of Art. 12, it is clear that there classes of authorities are meant to be included in the words "the State" there; and the third class is of two kinds and the qualifying words which follow "all local or other authorities" define the two types of such local or other authorities as already indicated above. Further, all local or other authorities within the territory of India included all authorities within the territory of India whether under the control of the Government of India or the Governments of various States and even autonomous authorities which may not be under the control of the Government at all."

13. The portion italicized above would suggest that their lordships had under consideration autonomous authorities which can be created under statutes of the State or Central legislature. If that be the correct interpretation of Art. 12, it must follow that the category of authorities under the "other authorities" would include all those authorities which are created under the statute or in general for the discharge of public functions are amenable to the control of the State and whose acts are capable of scrutiny by public authority like Executive Government or the Legislature of the State and which have been invested with the power of eminent domain, viz., right of entry or enforcing shutting out of transmission lines or taking over transmission plant in the instant case. We are, therefore, satisfied that respondent 1 is "State" within the meaning of Art. 12 of the Constitution, and is bound by the provisions of Part III of the Constitution and its actions can be subject to judicial review if challenged as violative of any fundamental rights guaranteed by the Constitution.

14. The next and most important question canvassed before us was whether in making appointment of respondent 2, the Board has really denied a fair and equal opportunity be petitioners 2 and 3 or other members of petitioner 1 association, in being considered for appointment as an Executive Engineer.

15. In this connexion we must first dispose of the contention of respondent 2 that no question of equality of opportunity arises so far as petitioners 2 and 3 or other departmental candidates are concerned, for they form a class by themselves. If this contention of respondent 2 were to be accepted, then there would be no grievance, it is urged, as the two types of candidates are governed by different conditions. That there can be a valid classification in making recruitment to public office from different channels need not be a matter of serious debate. But the question is whether in the particular case the regulations for recruitment to service made by respondent 1 Board do make such a distinction. Respondent 2 argues that there is no similarity of circumstances between petitioners 2 and 3 on the one hand and respondent 2 on the other. In

order to understand the implication of this contention it is necessary to examine in some details the regulations made by the Board to govern the recruitment of its employees. Section 15 of the Electricity Supply Act empowers the Board to appoint a secretary and such other officers and servants as may be required to enable the Board to carry out functions under the Act, and the appointment of the Secretary shall be subject to the approval of the State Government. Under S. 79, Cls. (c) and (k), the Board is empowered to make regulations not inconsistent with the Act and the rules made thereunder, to provide for :

"(c) the duties of officers and servants of the Board and their salaries, allowances and other conditions of service; "

"(k) any other matter arising out of the Board's functions under the Act for which it is necessary or expedient to make regulations."

16. Now, regulations have been made by the Board and they have been annexed by respondent 1 to its return. The regulations are called the Maharashtra State Electricity Board (Classification and Recruitment) Regulations, 1961, and the regulations come into force from 1 October, 1961. But the regulations themselves provide under S. 1(iii) that if any of these regulations come into conflict with the provisions of law for the time being in force, the later shall, be deemed to be operative. Under Regn. 5, all appointments to posts in the service of the Board shall normally be made in accordance with the provisions of the regulations, but appointments may be made either by promotion of persons holding lower posts in the respective cadre or by direct recruitment, as the case may be, in the manner specified in Sch. A. Then there is a note added to this Regn. 5 which is as follows :

"Note. - Nothing in this regulation shall be deemed to restrict the authority of the Board to adopt other methods or standards of recruitment in such cases as it considers necessary."

17. Now, Sch. A referred to in Regn. 5 divides posts in the service of the Board into different categories such as technical posts of various pay grades. The post of Executive Engineer, E. and M., is at serial 5 among the technical posts. Its pay-scale is Rs. 500 - 50 - 800 - E.B. - 50 - 1,100. The category is Executive Engineer, E. and M., the qualifications are Degree in Electrical or Mechanical Eng Engineering of an Indian or Foreign University or its equivalent, and the experience required is experience in Electrical Eng Engineering for seven years out of which three years should have been in a position of responsibility, connected with

- (i) design, erection and maintenance of transmission and distribution systems, or
- (ii) design, construction and/or operation and maintenance of hydro or thermal stations, or
- (iii) commercial activities like load survey, tariff calculations, power sale and development, etc.

18. Then in Col. (8) it is provided :

"By departmental promotion and by direct recruitment subject to the condition that every fourth vacancy shall be filled by direct recruitment."

19. Regulation 6 provides the age-limits, the lower age-limit being 20 years and the upper age-limit 40 years for pay-group I, in which the post of Executive Engineer is included. Regulation 8 is an important regulation and is as follows :

"Subject to such modifications as the Board may decide, the minimum qualifications and/or experience required for the various categories of posts shall be as shown in Sch. A."

20. Under Regn. 9 it is provided that where no special qualifications in respect of education are prescribed, it is left to the discretion of the selection committee concerned to select such persons as appear to it to be suitable for the duties that are assigned to the posts or that the candidates if appointed are required to perform. Regulation 12 requires that the posts intended to be filled by direct recruitment shall be advertised and filled according to the prescribed procedure. Regulation 19, which is relevant in the context of powers claimed for selection committee, is as follows :

"All appointments or promotions to posts in the respective pay groups shall be made by the competent appointing authorities concerned on the recommendations of the competent selection committees concerned, subject to such conditions as may be laid down by the Board.

Provided that, in the case of vacancies of purely temporary nature and of leave vacancies where no person recommended by the selection committee concerned for inclusion in the waiting list is available, the competent appointing authority may at its discretion appoint suitable persons for a period not exceeding six months, subject to the conditions -

(i) that no candidate who has completed total service of six months shall be reappointed or continued unless he is selected by the competent selection committee,

(ii) that the services of such a person appointed on purely temporary basis are discontinued, no sooner a selected candidate is available :

Provided further that, in the case of an immediate necessity when no person from the waiting list is available, a purely temporary appointment may be made by the competent appointing authority pending selection by the appropriate selection committee."

21. Under Regn. 20, the Board is empowered for the purpose of the regulations to constitute from time to time different selection committees to select and recommend candidates for appointments to posts in respective pay-groups under the Board. Then follows Regn. 21, which is the sheet anchor of the defence of the respondents, and it is as follows :

"The selection committee may, besides selecting and recommending candidates, also recommend in deserving cases grant of higher starting pay, condonation of physical defect and/or relaxation of age-limit and educational or other qualifications."

22. Regulation 23 is important inasmuch as it provides that when the posts required to be filled by direct recruitment are advertised, departmental candidates may apply for the same, provided they possess the prescribed qualifications and experience. We may now notice one more Regn. 36, under which, when a post is being filled by departmental promotion, the competent authority may relax the academic qualifications if the departmental candidate to be appointed is otherwise suitable and qualified by reason of adequate experience and/or by having passed the prescribed departmental examination.

23. According to respondent 2, candidates who are not employees of the Board when a post is to be filled by direct recruitment, form a class or category entirely different and distinct from departmental candidates who are enabled to compete when the post is to be filled by direct recruitment. According to respondent 2, Regn. 28 which throws open an opportunity to the departmental candidates when the posts are required to be filled by direct recruitment or advertised, itself postulates that they must possess the required qualification and experience. The departmental instructions issued in this connexion, of which a copy has been filed, also require such an application to be routed and forwarded through the immediate superiors of the candidates concerned, and that superior officer has to make an endorsement while forwarding the application whether the departmental candidate satisfied the requirements and qualifications for the post. We have found it difficult to accept this contention urged on behalf of respondent 2. In this connexion it is also urged that the departmental candidates like petitioners 2 and 3, who must be fully aware of the regulations governing the requirements to services under the Board, cannot make any grievance if their applications are not considered by the selection committee, because it is one of the conditions of their employment that when the question of considering their applications for posts to be filled by direct recruitment or as advertised arises, the regulations do not permit the departmental candidate to be considered eligible if the departmental candidate does not possess the prescribed qualifications and experience. In other words, such a construction would be tantamount to saying that Regn. 21 does not apply when the candidate to be considered by the selection committee is a departmental candidate but only applies when the candidate is a non-departmental candidate when the post is to be filled by direct recruitment. We are unable to appreciate the justification for such a construction of Regns. 21 and 23. The return submitted on behalf of the Board itself is also destructive of such an argument. In Para. 3 of the return respondent 1 has stated as follows :

"It is submitted that the petitioner 2 was recently promoted to a post next below the post advertised from a lower post and the petitioner 3 himself did not apply

in spite of the fact that the rules and the official circular No. Estt./III/Misc./3506, dated 13 April, 1962, did not prohibit him from applying for the post even though he did not have the qualification and the experience prescribed by the rules and mentioned in the advertisement."

24. If that is the interpretation of the employer himself, i.e., respondent 1, then it is difficult to uphold the contention of respondent 2 that even though candidates may come from two different channels, i.e., departmental candidates and non-departmental candidates when the post is advertised, it is to be filled by direct recruitment. It must, therefore, be held that respondents 2 cannot avoid the application of Art. 16 of the Constitution, infraction of which is complained by the petitioners on the ground that the petitioners form a separate class different and distinct from candidates like respondent 2 in the matter of appointment by direct recruitment and advertisement. Our attention was invited after the arguments were over, to a short note printed at note No. 399 in the Supreme Court Notes, at pp. 390 and 391, in the issue of 15 November, 1966, Vol. VIII, No. 19. The very brief description in the note is not of much assistance. Merely because the recruitment to a certain post is from different sources, Art. 16(1) would not be violated by reason of the ratio to be filled by each source not being equal. That is not the question before us. The question before us is whether for the same post candidates from different categories are eligible for competition and whether they can be treated differently in the matter of qualifications and experience by the relaxations of requirements advertised for the post.

25. Thus, the only crucial point that remains to be considered is whether in making selection of respondent 2 accepting that recommendation, the appointing authority was justified in appointing respondent 2 even though he failed to satisfy one of the conditions for appointment as per advertisement inviting applications. Reliance is heavily placed in this connexion on Regn. 21 of the Recruitment Regulations which we have extracted above. If Regn. 21 can be considered as repository of an overriding power in the selection committee to recommend any deserving cases for condonation or relaxation of the condition of age-limit or educational or other qualifications, then it is urged that the selection committee, having exercised this power which the regulations vested in it, no grievance could be made for having exercised this power. The first question therefore is whether there is such a power in the selection committee.

26. According to the learned counsel for the petitioner, Regn. 8 invests the power of modification of the minimum qualifications or experience required for the various categories of posts only in the Board and not in the selection committee. The qualifications and the period of experience in respect of each post as given in Sch. A of the regulations are described as the "minimum" qualifications. It is meaningless to suggest that this minimum can be further reduced or qualified by some authority other than the Board. What Regn. 8 does is to invest the Board which is the supreme authority in the matter of employment, with a power to make a modification in the minimum qualification in the matter of education or

age or experience. But we fail to see how such a power can be claimed for the selection committee as a matter of course. We must notice one more argument which, in our opinion, has some substance, urged on behalf of the petitioners. Regulation 8 seems to make a distinction between the requirements, such as "qualifications" and "experience." The argument is that under Regn. 21 the power of relaxation or condonation that is claimed for the selection committee is only in the matter of qualifications but not of experience. Now, Sch. A to these regulations prescribes qualifications for several posts in Col. (5) and the nature and period of experience in Col. (6) for different posts. If it were intended that the selection committee should have power to relax or condone the requirements with regard to experience as prescribed in Col. (6) in respect of several posts in the schedule, the regulation ought to have so stated explicitly. As the power claimed by the selection committees is entirely discretionary, it is to be strictly construed, and in the absence of the reference to experience as one of the considerations regarding which the selection committee may condone or relax the requirements of the regulation, it is urged that the selection committee has no power to condone the deficiency of a candidate even if otherwise suitable in the matter of minimum experience prescribed by the regulations. It appears the regulation considered the qualification of experience as of considerable importance. Under Regn. 36 with reference to the post to be filled by departmental promotion, the competent authority has been empowered to relax academic qualifications if the departmental candidate is otherwise suitable and qualified by reason of adequate experience and has passed the prescribed departmental examination. Even in the case of departmental promotion, it is pointed out that the competent authority has not been given the power to condone or relax the requirement of minimum experience required for the post. Thus, emphasis being on the qualification of minimum experience being satisfied by all candidates, it is not permissible, as claimed by the respondents, for the selection committee, even assuming that Regn. 21 is applicable, to relax the requirement of minimum experience in the case of any candidate for the post which is to be filled by direct requirement.

27. But we are not satisfied that Regn. 21 can be called in aid by the selection committee once the Board issues an advertisement prescribing the educational qualification and experience required of a candidate for a particular post, which Regn. 8 itself prescribes as a minimum condition for candidature. It is argued that an employer should have an inherent right in case of an exceptionally suitable candidate to relax some of the conditions which ordinarily govern requirement for the post. That there may be a need for such a power in the employer may not be disputed, but when the recruitment is governed by statutory regulations, the regulations themselves must make prior provision for such contingencies. If under Regn. 8 minimum qualifications and period of experience are fixed in the matter of recruitment to any of the posts given in the schedule, we fail to see how the selection committee in purported exercise of its power under Regn. 21 can ignore the requirement of minimum qualification or

experience as given in Sch. A. Once regulations are made for regulating the recruitment to the services, both the Board and the candidates are bound by the regulations. The selection committee, which is the creature of the Board, is also bound by the regulations. We are, therefore, unable to accept the suggestion that Regn. 21 is in then nature of residuary power in the selection committee to relax or condone educational qualification or, as claimed, the condition regarding minimum of experience required for the post in the case of a deserving candidate. Regulation 8 being worded as it is, the only authority to effect modification in the minimum qualifications prescribed for the post would be the Board itself. The Board, therefore, could in a given case call for applications stating the ordinarily the qualifications should be those as are mentioned in Sch. A but clearly indicating in the advertisement itself that the Board reserves to itself the power in suitable case on recommendation of the selection committee to relax or condone the conditions regarding qualifications or experience in exceptional cases. If it is given out in the advertisement itself that there is no rigidity in the matter of educational qualification or experience required of a candidate for a particular post, opportunity is thrown open to everyone who considers himself fit and qualified for the post to compete with confidence that his deficiency in a particular qualification or in the matter of experience may be considered and more than mitigated by superiority of his claim in other respects. But so long as the advertisement does not give any such indication that the Board itself would relax the condition of minimum qualification or experience, there is no opportunity for those who may not have minimum qualification or experience to compete at all. When such is the case, it is not permissible for the appointing authority to condone or relax any of the conditions to the detriment of equal opportunity being made available to other candidates whose cases for similar condonation or relaxation could not be considered by the selection committee for want of proper advertising.

28. Equality of opportunity will be determined for the purpose of Art. 16 of the Constitution by the representation made in the advertisement calling for applications for filling up a post. The advertisement at annexure A, calling applications, nowhere suggests that the educational qualifications mentioned in Col. (5), or the period of experience mentioned in Col. (4), for the post of Executive Engineer (E. and M.), was liable to relaxation or condonation in deserving cases. In the absence of such a representation, if a candidate like petitioner 3 considered himself ineligible, the fault cannot be laid at the door of such candidate.

29. We are not impressed by the statement made on behalf of respondent 1 in Para. 3 of its return that candidates like petitioners 2 and 3 were not debarred from applying for the post even though they did not have qualifications and experience prescribed by the rules. How, at what stage and by what means persons like petitioners 2 and 3 were likely to come to know that the rigidity of minimum qualification or experience is likely to be condoned or relaxed by the selection committee is shrouded in mystery ? The procedure prescribed does not

give any opportunity to such persons to have any knowledge of the possibility of relaxation or condonation of minimum requirements.

30. As we have already held, Regns. 8 and 21 cannot be simultaneously operated unless the Board, which is the only authority entitled to modify the minimum requirements regarding qualifications and experience, consciously exercises its power under Regn 8, and proclaims in the advertisement calling applications for a particular post that the minimum requirements are liable to be relaxed or condoned in suitable cases. What Regn. 21 does is to create an enabling powder in the selection committee to make a recommendation, but the recommendation is required to be accepted by the Board, the appointing authority. It was not explained during the course of lengthy arguments at what stage and in what manner the Board would be in a position to exercise its power of relaxation or condonation in respect of a particular candidate or candidates the minimum requirements of qualifications and experience, and how the decision of the Board to exercise this power of modifying the requirements was to be made known to the candidates. In our opinion, the power of the Board under Regn. 8 has to be exercised before the advertisement is issued. If the Board considers that it is advisable to relax the rigidity of minimum requirements regarding qualification and experience in respect of a particular post, that decision cannot be taken subsequently to the prejudice of the rights of candidates who are shade away or kept from making even an applications when the advertisement speaks of minimum requirements from a candidate for a particular post.

31. We are also unable to appreciate the validity of the contentions of respondent 1 that the regulations permit the interdiction of any other authority such as the superior of a departmental candidate, to withhold an application or to make any endorsement regarding the qualifications or the experience of the departmental candidate, which is prejudicial. The return seems to suggest that in the case of petitioner 2 his application was forwarded without any endorsement on the ground that petitioner 2 did not have the requisite qualification and period of experience. This procedure, for which no statutory power is shown, creates an unnecessary handicap for the departmental candidates when applying for posts to be filled by direct recruitment by advertisement. As far as we can see, in view of the clear provision of Regn. 23, when posts are required to be filled by advertisement, departmental candidates may apply. But the provision in the regulation that such candidates may apply provided they possess the prescribed qualifications and experience clearly shows that in the case of departmental candidates nobody would be able to apply if the candidate did not possess the prescribed qualification and experience. In view of the statement of respondent 1, the departmental candidates and the direct candidates are no a par. We fail to see how a direct candidate having less than minimum experience as advertised could at all be considered for the post for which minimum qualification were advertised. Regulation 23 itself postulates that when posts are advertised prescribing minimum qualifications, departmental candidates cannot apply if they do not possess the prescribed qualifications and experience. But the

advertisement does not say that the qualification and experience as advertised are not rigid and are liable to relaxation and condonation, or that ordinarily the prescribed qualifications and experience were expected but not necessarily insisted. Such an advertisement effectively prevents departmental candidates from making even an application at all. It is in this sense that equality to opportunity has been denied to the departmental candidates in this case in competing for the post to be filled by direct recruitment. If the advertisement were to show that there is no rigidity regarding minimum qualification and experience, and that in suitable cases they are liable to be relaxed or condoned the petitioners would have no legitimate grievance. That not having been done, it must be held that the petitioners have been denied fair opportunity of competing for the post to be filled by direct recruitment by advertisement. Thus the right of petitioners 2 and 3 under Art. 16(1) has been infringed and the action of respondent 1 in making appointment of respondent 2 to a public office in violation of this right is required to be struck down.

32. It is regrettable that a highly qualified candidate like respondent 2 suffers on account of this order, but the public authorities who have a constitutional obligation to discharge in exercise of their functions cannot act to the detriment of constitutional right of other citizens. But in upholding the constitutional right no undue injury should be suffered by any other citizen. We, therefore, feel that respondent I will take adequate steps, without loss of time to readvertise the post in the light of the observations made above and will be in a position to employ the most deserving candidate.

33. The petition is allowed, but in the circumstances there will be no order as to costs.