
(2017) 01 AP CK 0005
In the Andhra Pradesh High Court
Case No : 12336 of 2008

Manoj Kumar Dwivedi and others	Vs	APPELLANT
State of Madhya Pradesh & another		RESPONDENT

Date of Decision : 09-01-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 1 Rule 9](#) -
Madhya Pradesh Public Works Department (Non-Gazetted) Service Recruitment and Conditions of Service Rules 1972, Rule 14(3)(b)

Citation : (2017) 01 AP CK 0005

Hon'ble Judges : S.K. Gangele

Bench : SINGLE BENCH

Advocate : K.C. Ghildiyal, Swapnil Ganguli

Final Decision : Dismissed

Judgement

1. The petitioners have filed this petition against the order dated 24/25-09-2008. By the aforesaid order promotions of 43 Sub-Engineers who were promoted to the post of Assistant Engineers in the quota of degree holder Sub-Engineers were adjusted against the quota of diploma holder Sub-Engineers which is 50%.
2. The contention of the petitioners is that due to aforesaid adjustment of posts, chances of the petitioners for promotion to the post of Assistant Engineers have adversely been affected. The petitioners further prayed a relief for their promotion on the basis of the proceedings of the DPC held on 20/08/2008.
3. The petitioners were appointed on the post of Sub-Engineers (Civil) on 14/09/1983. As per the Recruitment Rules prevailing at that time applicable to Sub-Engineers named as Madhya Pradesh Public Works Department (Non-Gazetted) Service Recruitment and Conditions of Service Rules 1972 (hereinafter called as "Rules of 1972"), there were two categories in the cadre of Sub-Engineers i.e. Sub-Engineers (civil) and Sub-Engineers (Electrical) and Sub-Engineers (Mechanical). The appointment to the post of Assistant Engineer was

governed by the Recruitment Rules named as Madhya Pradesh Public Works Engineering (Gazetted) Service Recruitment Rules 1969 (hereinafter called as "Rules of 1969"). In accordance with the aforesaid Rules, 25% post of Assistant Engineers shall be filled up by direct recruitment and 75% by way of promotion from the cadre of Sub-Engineer and draftsman. Out of aforesaid 25% promotional post 50% posts reserved for diploma holder Sub-Engineers and 20% posts reserved for Sub-Engineers holding degree and 5% for draftsman. Diploma Holder Sub-Engineers become eligible to be considered for promotion after completion of 12 years of service whereas graduate Sub-Engineers become eligible for promotion on completion of 8 years of service.

4. The petitioners pleaded in the petition that the respondent department had arbitrarily promoted more persons from the quota reserved for Sub-Engineers degree holder to the post of Assistant Engineers. 43 persons were promoted against the quota of degree holder Sub-Engineers vide order dated 18/01/2006 and thereafter, 18 persons and 5 persons were further promoted from the quota of degree holder Sub-Engineers vide orders dated 28/12/2007 and 23/09/2008. At the time of filing of the petition near about 10 persons who were working as Assistant Engineers were promoted from the quota of 20% degree holder Sub-Engineers. Subsequently it was noticed that 43 persons promoted vide order dated 18/01/2006 from the quota of degree holder Sub-Engineers to the post of Assistant Engineers were promoted in excess, hence the promotion of the aforesaid persons was adjusted against the quota of Sub-Engineers diploma holder. The aforesaid action is illegal and arbitrary. 26 persons were junior to the petitioners in the cadre of Sub-Engineers, they could not have been promoted to the post of Assistant Engineers from the cadre of Sub-Engineers, hence, adjustment of 43 posts against the quota of Sub-Engineers diploma holder is arbitrary and illegal.

5. During the pendency of this petition the petitioners were promoted to the post of Assistant Engineers and those persons who were promoted to the post of Assistant Engineers have further been promoted to the post of Executive Engineers.

6. The petitioners further pleaded that there were number of vacancies of Assistant Engineers lying in the department but the department has not taken any step to fill up the vacancies by way of promotion.

7. The respondent-State in its reply pleaded that vide order dated 02/03/2009, 17 Sub-Engineers in the quota of diploma holders were promoted to the post of Assistant Engineers and promotion in regard to 61 Assistant Engineers from Group A Diploma Holders is under Process. The respondents further pleaded that there is no prejudice caused to the Sub-Engineers diploma holders. The respondents filed detailed reply as additional reply. The Public Works Department made amendment in Madhya Pradesh Public Works Department (Non-Gazetted) Service Recruitment and Conditions of Service Rules 1972 w.e.f. 07/06/2007. By the aforesaid amendment, Rule 14 was amended and two groups of seniority list

for Sub-Engineers cadre had to be maintained i.e. group A diploma holder Sub-Engineers and group B degree holder Sub-Engineers. In accordance with the rule 14(3)(b) of the Rules of 1972, group B graduate Sub-Engineers who had acquired degree before entering in the service, their seniority on the post of Sub-Engineer shall be fixed from the date of their appointment in the department and diploma holder Sub-Engineers who had acquired degree during their service period shall be asked to give option either to remain in group A or in group B and after receiving option their seniority in group A shall be fixed from the date of their appointment in group B or it shall be fixed from the date of their acquisition of degree/ passing the examination and there shall not be any change in the option once it was given. Prior to the amendment in the Rules of 1972 since 1992 in Public Works Department, the department issued executive instructions for fixing seniority of graduate Sub-Engineers who had obtained degree during the course of their service and who had degree at the time of entering in the service. The executive instructions were issued on 07/10/1992 and as per the aforesaid instructions there shall be two groups of sub engineers i.e. group A diploma holders and group B degree holders Sub-Engineers. In regard to group B degree holder sub-engineers option had to be invited in respect of placement of Sub-Engineers in the aforesaid group. The department issued reminder on 19/02/2003 to the Sub-Engineers and invited their willingness in respect of their placement in group A or group B and Sub-Engineers who acquired degree during the service opt for inclusion in the list of degree holder Sub-Engineers in group B, their seniority is to be counted on the basis of the date of acquisition of degree. Thereafter, on 29/07/2004, the department again issued a letter to the Chief Engineers directing them to invite option from the part time degree holder Sub-Engineers and cut of date was fixed on 10/08/2004. Another instruction was issued on 17/08/2005 and cut of date was extended upto 25/08/2005.

8. The Government submitted proposal for holding DPC for promotion to the post of Assistant Engineers to the Public Service Commission. At the time of preparation of gradation list of degree holder Sub-Engineers 43 promoted part-time degree holder Sub-Engineers had not given option for inclusion of their names in group B. Those 43 persons were part-time degree holders and they were promoted under the quota of degree holder Sub-Engineers, hence, the department considered it factual mistake committed by it in adjusting those Assistant Engineers who were promoted from the quota of degree holder Sub-Engineers from the quota of diploma holder Sub-Engineers. The respondents further pleaded that there was no illegality in adjustment of 43 Sub-Engineers in quota of non-degree holders Sub-Engineers. The respondents further pleaded that the department was considering to revise the promotion orders and review DPC shall be held as early as possible and thereafter 25 superseded diploma holder Sub-Engineers shall also be considered in the review DPC.

9. Learned counsel appearing on behalf of the petitioners has contended that preparation of two list amongst diploma holder Sub-Engineers on the post degree holders Sub-Engineers is arbitrary and illegal. It is further submitted by the

counsel that the respondents have committed an error in passing the order of adjustment and 43 posts of Assistant Engineers were adjusted from the quota of Sub-Engineers who were not holding degree. Due to the aforesaid act the chances of promotion of the petitioners have adversely been affected. The intention of the department was to give benefit to the degree holder Sub-Engineers. In support of his contentions learned counsel for the petitioners relied on the following judgments.

1. K.K. Tiwari v. Union of India (2008) 5 SCC 741.
2. Suraj Prakash Gupta v. State of Jammu & Kashmir (2000) 7 SCC 561.
3. V.B. Badami v. State of Mysore (1976) 2 SCC 901
4. G.S. Lamba v. Union of India (1985) 2 SCC 604.
5. Awadh Prasad Singh v. State of Bihar (1990) 3 SCC 294.
6. K.K. Dixit & others v. Rajsthan Housing Board & Another (2015)1 SCC 474.

10. Contrary to this learned counsel appearing on behalf of the State and intervener have submitted that as per the recruitment rules in regard to promotion to the post of Assistant Engineers there is a quota for degree holders Sub-Engineers and for the aforesaid purpose, the department had issued executive instructions prior to amendment in the Recruitment Rules w.e.f. 2007, hence in the absence of Recruitment Rules the department had power and authority to issue executive instructions. It is further contended by the counsel that 43 persons were promoted to the post of Assistant Engineers from the quota of Sub-Engineers degree holder. After scrutiny it was found that the aforesaid persons did not opt neither submitted their option in accordance with the circular of the department to be included in the group A of Sub-Engineers diploma holder and group B degree holder Sub-Engineers. Hence, their promotion was treated from the quota of diploma holder Sub-Engineers. There is no illegality or irregularity in the aforesaid act of the Government. It is further contended by the counsel that the petitioners have been promoted subsequently to the post of Assistant Engineers and the petitioners have not made party to the persons who were promoted as Assistant Engineers and if the promotion orders be quashed then it would effect them adversely, hence, the petition has no merit and liable to be dismissed.

11. The appointment/promotion to the post of Assistant Engineers are government by the Rules of 1969 referred above. Rule 14 of the Rules of 1969 prescribes conditions of eligibility for promotion to the post of Assistant Engineers. As per schedule 2 of the Rules 1969, 25% posts are for direct recruitment and 75% posts are to be filled up by way of promotion from Sub Engineers. Out of the aforesaid percentage 50% posts reserved for diploma holders Sub-Engineers, 20% for degree holders Sub-Engineers and 5% for draftsman. There is no provision in the recruitment rules in regard to maintaining separate list of degree holder Sub-Engineers and diploma holder Sub-Engineers

prior to amendment in the recruitment rules i.e. 2007 and as per the recruitment rules, the department has to consider the cases separately for promotion to the post of Assistant Engineers from Sub-Engineers holding diploma and degree. In that circumstances in my opinion, the department was competent to issue executive instructions in regard to preparation of list of degree holders Sub-Engineers because in the absence of separate list of degree holder Sub-Engineers and diploma holder Sub-Engineers it was not possible for the department to consider the cases of promotion of Sub-Engineers to the post of Assistant Engineers.

12. The Constitutional Bench of the Apex Court in the case of Lalit Mohan Deb and others v. Union of India and others (1973) 3 SCC 862 has held as under in regard to principle of law of issuing executive instructions in the absence of statutory provisions:-

"9. It is true that there are no statutory rules regulating the selection of Assistants to the selection grade. But the absence of such rules is no bar to the Administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject. The point was considered by this Court in Sant Ram Sharma v. State of Rajasthan, (1968 (1) SCR 111 : 1967 AIR(SC) 1910) and it was declared that in the absence of statutory rules regulating promotion to selection grade posts the Government is competent to issue administrative instructions as long as those instructions are not inconsistent with the rules already framed. Mr. Sen's argument is based on the absence of any statutory rule in this respect. Therefore, there is no question of any inconsistency with existing rules."

This judgment has been followed by the Apex Court in subsequent decisions in the case of S.K. Mathur and others v. Union of India and others 1998(4) SCC 134 and in the case of Dhananjay Malik and others v. State of Uttaranchal and others (2008) 4 SCC 171 has held as under:-

"14. A Constitution Bench of this Court in the case of Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910, has pointed out at p.1914 SC that the Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed." The principle of law is that executive instructions can not be issued to supplant the law and executive instruction can be issued to supplement the statutory rules, Hence, the action of the department of preparation of two separate list of Sub-Engineers i.e. diploma holders and decree holders cannot be said to be arbitrary and contrary to the recruitment rules and without power and authority.

13. By the executive instructions, the department has fixed the seniority of degree holder Sub-Engineers in two categories. One category of Sub-Engineers who were holding degree from the date of appointment and their placement in

the list has been according to the date of appointment and the other Sub-Engineers who acquired the degree during the course of employment, their placement in the list from the date of acquiring the degree on option. The department circular clearly stipulates that the Sub-Engineer who acquired the degree during service has to give his option in regard to his placement in group B list and if Sub-Engineer did not give his option he would not be placed in the list of degree holder Sub-Engineers. List was prepared for the purpose of consideration of the cases of Sub-Engineers for promotion to the post of Assistant Engineers.

14. In regard to issuance of the impugned order the respondents in the additional return pleaded that 43 Sub-Engineers were promoted to the post of Assistant Engineers from the quota of degree holder Sub-Engineers, however, on screening it was found that those Sub-Engineers did not submit their option, but they are placed in the list of degree holder Sub-Engineers, hence, their promotion was treated from the quota of diploma holder Sub-Engineers, however, the department has not given any explanation that whether these persons were eligible to be promoted to the post of Assistant Engineer from the quota of diploma holder Sub-Engineers. The petitioners pleaded in the petition that 26 persons were junior to them in the cadre of diploma holder Sub-Engineers who were promoted to the post of Assistant Engineers, there is no reply in this regard in the return.

15. The petitioners claimed relief of quashment of the order dated 09/02/2010 and order dated 24/25-09-2008. The petitioners further prayed relief of their promotion on the post of Assistant Engineer. The department promoted 43 Sub-Engineers to the post of Assistant Engineers from the quota of degree holder Sub-Engineers. They were adjusted subsequently against the quota of diploma holder Sub-Engineers. In the present case those persons have not been added as party. These persons have further been promoted to the post of Executive Engineers. It is not clear that whether the petitioners were within the zone of consideration. The court cannot grant relief of promotion to an employee, the court can only order for consideration of the case of an employee for promotion by a DPC. In the present case if any relief is granted in favour of the petitioners then the promotion orders issued in regard to 43 persons to the post of Assistant Engineers who were adjusted against the quota of diploma holder Sub-Engineers required to be quashed, but those persons have not been added as party in this writ petition.

16. The Apex Court in the case of Ranjan Kumar and others v. State of Bihar and others, (2014) 16 SCC 187 has held that no adverse order can be passed against the persons who were not made parties to the litigation. The Apex Court has held as under:-

"6. In *Indu Shekhar Singh and others v. State of U.P. and others* it has been held thus: - "56. There is another aspect of the matter. The appellants herein were not joined as parties in the writ petition filed by the respondents. In their

absence, the High Court could not have determined the question of inter se seniority." 7. In *km. Rashmi Mishra v. M.P. Public Service Commission and others*, after referring to *Prabodh Verma (supra)* and *Indu Shekhar Singh (supra)*, the Court took note of the fact that when no steps had been taken in terms of Order 1, Rule 8 of the Code of Civil Procedure or the principles analogous thereto all the seventeen selected candidates were necessary parties in the writ petition. It was further observed that the number of selected candidates was not many and there was no difficulty for the appellant to implead them as parties in the proceeding. Ultimately, the Court held that when all the selected candidates were not impleaded as parties to the writ petition, no relief could be granted to the appellant therein.

8. In *Tridip Kumar Dingal and others v. State of West Bengal and others*, this Court approved the view expressed by the tribunal which had opined that for absence of selected and appointed candidates and without affording an opportunity of hearing to them, the selection could not be set aside.

9. In *Public Service Commission, Uttaranchal v. Mamta Bisht and others*, this Court, while dealing with the concept of necessary parties and the effect of non-implementation of such a party in the matter when the selection process is assailed, observed thus: - "9.....in *Udit Narain Singh Malpaharia v. Board of Revenue*, wherein the Court has explained the distinction between necessary party, proper party and pro forma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order 1, Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called "Code of Civil Procedure") provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of Code of Civil Procedure are not applicable in writ jurisdiction by virtue of the provision of Section 141 Code of Civil Procedure but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh v. State of Gujarat*, *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot* and *Sarguja Transport Service v. Stat*"

10. In *J.S. Yadav v. State of Uttar Pradesh and another*, it has been held that

31. No order can be passed behind the back of a person adversely affecting him and such an order, if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. It was further held that:

31. The litigant has to ensure that the necessary party is before the Court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity.

11. In *Vijay Kumar Kaul and Ors. v. Union of India and Ors.* it has been ruled thus: "36. Another aspect needs to be highlighted. Neither before the Tribunal

nor before the High Court, Parveen Kumar and others were arrayed as parties. There is no dispute over the factum that they are senior to the Appellants and have been conferred the benefit of promotion to the higher posts. In their absence, if any direction is issued for fixation of seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant." 12. Recently in State of Rajasthan v. Uchhab Lal Chhanwal, it has been opined that: - "14...Despite the indefatigable effort, we are not persuaded to accept the aforesaid preponement, for once the Respondents are promoted, the juniors who have been promoted earlier would become juniors in the promotional cadre, and they being not arrayed as parties in the lis, an adverse order cannot be passed against them as that would go against the basic tenet of the principles of natural justice." 13. In view of the aforesaid enunciation of law, we are disposed to think that in such a case when all the appointees were not impleaded, the writ petition was defective and hence, no relief could have been granted to the writ petitioners."

17. In the aforesaid case the unselected candidates challenged the appointment to the post of Medical Laboratory Technician on the ground that the procedure adopted for selection was vitiated as the candidates were selected only by interview without holding any written test. The selected candidates were not made party in the writ petition.

18. The principle laid down by the Apex Court is that unless and until a person is made party in the writ petition, no adverse order can be passed against him. In the present case also the promoted Assistant Engineers have not been made party, hence, this court cannot quash their orders of promotion. Apart from this those persons who have been promoted to the post of Executive Engineers and the petitioners were also promoted during the pendency of the petition to the post of Assistant Engineers.

19. In view of the aforesaid facts of the case, in my opinion, no relief can be granted in favour of the petitioners in the present writ petition. Hence, the petition is dismissed. No order as to costs.