
(1968) 12 PAT CK 0016

In the Patna High Court

Case No : Civil Writ Jurisdiction case No's. 572, 591 and 681 of 1967 and 535 of 1968 along with C.W.J. Case No's. 706, 716 and 774 of 1967

M.G. Sharan and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 05-12-1968

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1), 162, 166

Citation : AIR 1970 Patna 25

Hon'ble Judges : S.C. Misra, C.J;B.D. Singh, J

Bench : Division Bench

Advocate : C.K. Raman, J.N.P. Verma, Vasudeo Prasad, Tarkeshwar Deyal and Ramesh Chandra Sinha, for the Appellant; Lal Narain Sinha, General, S. Sarwar Ali and K.P. Verma, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Singh, J.—All these seven writ petitions were heard together on the re-request of the parties as they chiefly arise out of the notifications appointing officers from the Irrigation Department to River Valley Project Department (hereinafter referred to as "R. V. P. D.") and placing them senior to the petitioners.

2. C. W. J. C. Nos. 572 and 681 of 1967 were filed by M. G. Sharan impleading the State of Bihar as respondent No. 1 and S. K. Banerji as respondent No. 2. C. W. J. C. 572 was admitted on 14-9-67 and in this petition the petitioner has challenged the validity of the notification dated the 26th August, 1967 (Annexure A to the main application) placing the services of respondent No. 2, who belonged to the cadre of the Irrigation Department, at the disposal of R. V. P. D., and he has asked this court to quash the said notification, and to command respondent No. 1 by a writ of mandamus to fill up the vacancy of the post of Chief Engineer in Gandak and Sone Barrage Project after considering the rightful claim of the petitioner over the said post. Subsequently it appears that the State Government, by notification dated the 27th of September, 1967 appointed

respondent No. 2 as Chief Engineer of Gandak and Sone Barrage Projects. Hence the petitioner filed another petition bearing C. W. J. C. No. 681 of 1967, which was admitted on 2-11-67 wherein he has marked the said notification as Annexure C challenging the same and has asked this Court for an appropriate writ as in the case of C. W. J. C. 572.

3. This very petitioner filed a third petition bearing C. W. J. C. No. 591 of 1967, which was admitted on 21-9-67, impleading the State of Bihar as respondent No. 1 and U. K. Verma as respondent No. 2. In this petition he has challenged the notification dated the 23rd of February, 1966 (Annexure A thereof) by which the State Government in the R. V. P. D. promoted U. K. Verma, Superintending Engineer, Sone Barrage Circle, R. V. P. D., to officiate as Chief Engineer in the same department, and posted him as Chief Engineer incharge of Tenughat Dam Project. In this petition the petitioner claims to be senior to respondent No. 2 and he has asked this Court to quash the said notification contained under Annexure A and to command respondent No. 1 by a writ of mandamus to act in accordance with law and to give the petitioner his rightful claim, to be appointed in place of respondent No. 2.

4. G. P. Vimal and 25 others filed a petition bearing C. W. J. C. No. 706 of 1967 which was admitted on 7-11-67. In this petition petitioners 1 to 5, 10 to 13 and 17 to 24 are Assistant Engineers whereas petitioners 3, 6 to 8, 16, 25 and 26 are Executive Engineers, and the remaining petitioners 9, 14 and 15 are Superintending Engineers of R. V. P. D. They have impleaded the State of Bihar as respondent No. 1 and S. K. Banerji as respondent No. 2. In this petition they have challenged the placing of services of respondent No. 2, who belonged to the Irrigation Department, at the disposal of R. V. P. D. by the same notification dated 26th August, 1967 and have made it Annexure C thereto. They have also challenged the appointment of S. K. Banerji to the same department as Chief Engineer by the notification dated the 27th of September, 1967 which they have marked as Annexure C/1 thereto. They have asked this Court to quash the said two notifications. Similarly, their grievance is that the officers of the Irrigation Department, who have their own cadre should not be appointed to the R. V. P. D., which has its own separate cadre.

5. A. Hayat and 47 others have filed petition bearing C. W. J. C. No. 716 of 1967. They all belong to R. V. P. D. in one capacity or the other. They have impleaded the State of Bihar as respondent No. 1, Narayan Thakur, Executive Engineer, Canal Division, Kdsi Project as respondent No. 2, Gurudeo Saran Singh, Executive Engineer, Canal Division, Kosi Project as respondent No. 3, Kaushal Kishore Srivastava, Executive Engineer, Canal Division, Kosi Project as respondent No. 4, Sukhdeo Narain Verma, Executive Engineer, Canal Division, Kosi Project as respondent No. 5, S. K. Banerji, Chief Engineer, Electricity Board as respondent No. 6 and Sarju Saran Singh, Superintending Engineer, Canal Circle 1, Kosi Project as respondent No. 7. They have challenged the notification dated the 1st November, 1965 of the Government of Bihar in the R. V. P. D., by

which respondent Nos. 2 to 5 have been promoted to officiate as Executive Engineer in the R. V. P. D.

They have also challenged notification dated 27th September, 1967 (Annexure C/1) by which the Government of Bihar in the R. V. P. D. has appointed respondent No. 6 as its Chief Engineer and the notification of the Government of Bihar in the R. V. P. D. dated 21-9-67 by which respondent No. 7 was placed at the disposal of the R. V. P. D. They have asked this Court to quash these notifications contained under Annexures C, C/1, and C/2 because according to the petitioners all these respondents, originally belonged to the irrigation department, and they had no claim over the cadre post of the R. V. P. D. and because by their appointments the future chances of promotion of these petitioners are unjustly marred. They have also asked this Court for appropriate order in this application.

6. B. H. V. Krishnaiah and 85 others have filed application bearing C. W. J. C. No. 774 of 1967 which was admitted on 6-12-67. Petitioners 2, 24, to 26, 45, 52 and 56 are Executive Engineers and the remaining petitioners are Assistant Engineers in the R. V. P. D. In this application they have impleaded the State of Bihar as respondent No. 1 and Sarju Narain Singh, Superintending Engineer, Canal Circle No. 1, as respondent No. 2. The petitioners have challenged the notification of the State of Bihar dated 21-9-67 (Annexure C thereto) by which respondent No. 2, who belonged to the Irrigation Department was appointed as Superintending Engineer in the Kosi Project. The petitioners' grievance similarly is that the officers of the Irrigation Department have no claim over the cadre post of the R. V. P. D. and because of the appointment of respondent No. 2 their future chances of promotions have been marred. Therefore, they have asked this Court to quash the said notification (Annexure C) or to pass appropriate order.

7. Lastly we come to the application bearing C. W. J. C. No. 535 of 1968 which was admitted on the 22nd of July, 1968. In this case the sole petitioner is R. S. Pathak who has impleaded the State of Bihar through the Chief Administrator-cum-Secretary, R. V. P. D., as respondent No. 1 and S. K. Banerji, Chief Engineer, Gandak and Sone Barrage Projects, as respondent No. 2. The petitioner in this case has stated that he is at present Assistant Engineer in the R. V. P. D. with long years of service; the employees of the irrigation Department have no claim over the R. V. P. D. which has a separate cadre and, therefore, he has challenged the notification dated the 26th August, 1967 by which the Government of Bihar in the Irrigation Department has placed the services of respondent No. 2 at the disposal of the R. V. P. D. and he has marked this as Annexure 1 to his application. He has also challenged the appointment of respondent No. 2 as Chief Engineer of the same department by notification dated the 27th September, 1967, which he has marked as Annexure 2 and he has asked this Court to quash the said two notifications and has also prayed for issue of a writ of quo warranto to ousting respondent No. 2 from the office of the Chief Engineer, Gandak and Sone Barrage Project or to pass any other appropriate order or orders.

8. From all these petitions it appears that the main point to be decided is as to whether the Irrigation Department and the R. V. P. D. each have separate cadre or not and whether the petitioners have better claim over the respective respondents. Therefore, the points involved in all these applications are more or less common.

9. For the sake of convenience I wish to take up first the petitions in C, W. J, C. Nos. 572 and 681. The claim of the petitioner in the petitions is that at present he is Superintending Engineer, Tenu-ghat Dam, Circle No. 2, Tenughat in the District of Hazaribagh and he is the senior-most officer in the cadre of the R. V. P. D. and he has put in twenty-seven years of specialised service in engineering and construction works. He has further stated that the R. V. P. D. has been created with an object of executing big projects and it came into existence in the year 1954 when it was known as the Kosi Project Department. Subsequently, works of (1) Kosi Project, (2) Gandak and Sone Project, and (3) Tenughat Project were all assigned to R. V. P. D. and they were treated as the three wings of the same department. For each of the three wings separate Chief Engineer is appointed with the strength of other cadre officers such as, Superintending Engineers, Executive Engineers and Assistant Engineers.

There are permanent posts for one Chief Engineer, 4 Superintending Engineers, 17 Executive Engineers and 67 Assistant Engineers. According to him, Irrigation Department and R. V. P. D. have separate cadres. R. V. P. D. Schemes are very big in magnitude and are concerned with the execution of major river valley projects, dams, barrages and hydraulic structures which require special technique and experience for their execution; whereas the Irrigation Department is concerned with running of canal and construction of minor irrigation schemes.

Prior to the present appointment, respondent No. 2 was the Chief Engineer, Gandak & Sone and was officiating as Chief Engineer (civil). State Electricity Board, but even then he was holding only the substantive post of Executive Engineer of Irrigation Department. He was promoted as a temporary Engineer in the Irrigation Department and then again promoted to officiate as Chief Engineer (Civil) in the Electricity Board, which was going to return the services of respondent No. 2 to his substantive post. In that event he would have been only a Superintending Engineer. Therefore, according to the petitioner the present appointment of respondent No. 2 as Chief Engineer of Gandak and Sone Project amounts to transfer as well as promotion in a different cadre.

10. The main grievance of the petitioner is that according to the Civil list respondent No. 2 is junior to him even as Superintending Engineer. The petitioner claims that he has better service record than respondent No. 2 which will be evident from the statement of qualification and experience of the petitioner contained in Annexure F to the reply filed on behalf of the petitioner to the counter-affidavit of respondent No. 1.

11. How the respondent No. 2 was appointed as Chief Engineer in R. V. P. D. will

be evident from paragraph 14 of the counter-affidavit filed on behalf of respondent No. 1. Shri B. L. Singh who was the Chief Engineer of Gandak & Sone Project was to retire from September, 1967. Therefore, a question arose for filling up the vacancy. The Council of Ministers in the cabinet discussed the proposal for the appointment of Shri Banerji (respondent No. 2), The Chief Engineer of Irrigation Department, to the post of Chief Engineer, Kosi Project and it was further ordered by the Cabinet that Shri B. D. Pandey, the Chief Secretary should examine the matter thoroughly and then give his recommendation. Accordingly, the Chief Secretary discussed the matter with the Chief Administrator, R. V. P. D., the Secretary, Appointment Department and the Secretary, Irrigation Department and after discussion they have given their unanimous opinion the substance of which is given in paragraph 14 of the counter-affidavit and their unanimous opinion is contained in Annexure Q to the said counter-affidavit. It will be beneficial to quote here the English version of Annexure Q in extenso because this has been referred frequently by both the parties in most of these cases :

"Appointment of Chief Engineer in the River Valley Project Department. The Cabinet discussed the proposal for appointment of Sri Banerji, the Chief Engineer of the Irrigation Department to the post of the Chief Engineer, Kosi Project, and it was ordered that the Chief Secretary should examine the matter thoroughly and then give his recommendation. Accordingly the Chief Secretary discussed the matter with the Chief Administrator, River Valley Project Department, the Secretary, Appointment Department and the Secretary, Irrigation Department. After discussion they gave the following unanimous opinion.

2. The task of executing big river valley projects was entrusted, from the beginning, to River Valley Project Department. Hence it was deemed necessary that very experienced and successful Chief Engineers be appointed and placed incharge of these projects. In the beginning, therefore, for several years, able, successful and experienced Chief Engineers were appointed. Direct appointments were made against the following posts and side by side experienced Engineers of the Irrigation Department were deputed thereto. Meanwhile it was being considered that the cadre of Irrigation Department should be amalgamated with the cadre of the River Valley Project Department; but due to several difficulties, it was not found possible. The present state of affair is that several Engineers appointed by the River Valley Project Department are on different posts, and about 20 or 25 Engineers of the Irrigation Department are deputed to several posts. Of the three posts of Chief Engineers, Senior Chief Engineers viz. Sri B. L. Singh and Sri Akhouri Par-meshwari Prasad of the Irrigation Department were deputed to the two posts, and Sri U. K. Verma the Engineer of the cadre of River Valley Project Department was promoted to the post of Chief Engineer, Tenughat. Sri Akhouri Par-meshwari Prasad went on leave preparatory to retirement. Hence the appointment to the post of the Chief Engineer of the project became necessary. The Department selected Sri Banerji, the Chief Engineer of the Irrigation Department for this post. In this context the question arises whether

any senior Engineer of the River Valley Project Department is fit for this post or not. The opinion of the River Valley Project Department is that the post of Chief Engineer is a selection grade post. Therefore the most experienced person should alone be appointed for the successful working of the project works, no matter, whether he belongs to the cadre or is beyond the cadre. This opinion is proper for successful working also. Although the cadre of the River Valley Project Department is separate (though it is not duly constituted), and although an officer of the cadre has been promoted to the post of Chief Engineer, it is necessary for the satisfaction of the cadre that enquiries be made in respect of the fact whether or not there is any such officer, as is capable for being appointed to the post of Chief Engineer, and in case there is such a person, why should he not be appointed. Sri Rameshwar Dutt is the senior-most among the Superintending Engineers of the River Valley Project Department. He was at first appointed as an Assistant Engineer of Damodar Valley Corporation and from there he was directly appointed in the River Valley Project. He continued to remain on the post of Executive Engineer for several years and for about five years he is on the post of Superintending Engineer. In his character roll, it has been separately mentioned that his honesty is beyond doubt and his aptitude and inclination to work is also praiseworthy, but side by side, it is also mentioned therein that he is a bit slow and the quality of his work is average. Even then considering his aptitude, inclination and honesty, and the experience in the River Valley Project Works it cannot be said that he is not fit for promotion to the post of the Chief Engineer.

3. Two Superintending Engineers viz. Sri Saran and Sri Prasad, Junior to him, are not fit for appointment to the post of Chief Engineer since their service records are not good.

4. Secondly, Sri B. N. Chatterji and Sri S. N. Rai, the senior most officers in the Irrigation Department are working as Chief Engineers of the Irrigation Department and Agriculture (Minor Irrigation) Department, and it is not proper to disturb them in the interest of the work. Thereafter comes Sri Banerji. He is also posted- to the rank equal to the post of Chief Engineer, since September, 1963 and at present he is deputed to the Electricity Board. His service record is very good, and he is in every way fit for appointment to the post of the Chief Engineer.

5. Now the question arises whether to the post vacated by Sri Akhauri Parmeshwari Prasad, Sri Dutt of the cadre, be promoted or Sri Banerji, the most experienced Chief Engineer of the Irrigation Department be deputed thereto. To come to the final conclusion in this connection, it was enquired into whether any other post of Chief Engineer of the River Valley Project Department is going to fall vacant in the near future. It transpired that the post held by Sri B. L. Singh will be vacant in September, since Sri Singh would attain the age of 58 years by then. Although the Chief Administrator, River Valley Project Department is of opinion that even after Sri B. L. Singh's attaining the age of 58 years, he be reemployed for the good of the work, but according to the decision of the

Government, it is not possible on principle. Therefore, it has been arrived at that the proposal which stand in the record of River Valley Project Department be accepted and Sri Banerji be deputed to post of the Chief Engineer of the River Valley Project Department. Side by side it may also be held that when another post of "Chief Engineer falls vacant in September Sri Dutt may be promoted to that post.

Sd. Bhairav Dutt Pandey Sd. A. F. Abbas. Sd. N. Nagamani. Sd. M. N. Rai. "

12. It Is further stated in the said paragraph 14 that the Council of Ministers while making the appointment of respondent No. 2, gave due consideration to the claims of officers working in the R. V. P. D. including that of the petitioner and the said appointment was made after the opinion contained in Annexure Q was obtained. It is further stated that the Gandak Project is the largest irrigation project under execution in India, the estimated cost of which is 140 crores of rupees including the cost to be incurred in the portion lying in Uttar Pradesh. Therefore, according to the State the very best available Chief Engineer has to be selected for the said assignment.

13. The decision of these cases will mainly rest upon the finding as to whether there were two separate cadres in the R. V. P. D. and the Irrigation Department and whether the petitioner had a right to be considered for appointment as Chief Engineer of the R. V. P. D. in place of respondent No. 2.

14. Mr. C. K. Raman, learned counsel appearing on behalf of the petitioner has challenged the impugned notifications mainly on the following grounds :

(i) Both R. V. P. D. and Irrigation Department have separate cadres of their own. Therefore, according to him, a person from one cadre cannot be appointed to the other because a non-cadre or ex-cadre man has no claim over % cadre post.

(ii) In the instant case, in the appointment of respondent no, 2, the Bihar Public Service Commission was not consulted in violation of the provisions of Article 320(b) of the Constitution of India.

(iii) Employees of the Irrigation Department are appointed in the R. V. P. D. but none of the officers belonging to R. V. P. D. is appointed in the Irrigation Department. He describes this as a oneway traffic. According to him, this principle laid down by the State Government bars the future chance of promotion of the employees in the R. V. P. D. and is violative of Article 311(2) of the Constitution of India.

(iv) The impugned notifications are violative of Articles 14 and 16 of the Constitution of India.

(v) Adverse remark against the petitioner in his character roll was not communicated to the petitioner;

(vi) The opinion of the Committee headed by Shri B. D. Pandey contained in Annexure Q. quoted above, is mala fide. According to him, this Committee

cannot take the place of the Bihar Public Service Commission.

15. I take up first the ground No. (i) (iii) for consideration. These points have assumed importance, because the contention on behalf of the petitioner is that the persons working in the R. V. P. D. constitute a separate Cadre, and any appointment in the department to a higher post must be confined to those, who are working in the department. There is acute controversy between the parties whether a separate cadre exists in the R. V. P. D. According to the petitioner it has a separate cadre of its own. All the formalities which are required for establishment of a cadre in other departments have been observed in this department also. Mr. C. K. Raman, learned Counsel for the petitioner has referred to paragraph 18 of the petition in C. W. J. C. 572 wherein it is specifically stated that the R. V. P. D. has its own cadre and as a rule, a cadre officer satisfying the minimum criterion of suitability will have precedence over outsiders. According to him, this fact regarding the existence of cadre can also be gathered from the various annexures and the counter-affidavits filed on behalf of the State of Bihar, respondent No. 1. In this connection he has referred to Annexure Q which has been quoted earlier, wherein it is mentioned that sometime before it was being considered that the cadre of Irrigation Department should be amalgamated with the cadre of the R. V. P. D., but due to several difficulties it was not found possible. He has further invited our attention to another passage occurring therein, wherein it is mentioned :

"The opinion of the River Valley project Department is that the post of Chief Engineers is a selection grade post. Therefore the most experienced person should alone be appointed for the successful working of the project works, no matter, whether he belongs to the cadre or is beyond the cadre. This opinion is proper for successful working also. Although the cadre of the River Valley Project Department is separate (though it is not duly constituted)..."

He has drawn my attention to Rule 12 of the Bihar Service Code, Chapter II, wherein "cadre" has been defined as follows :

"Cadre means the strength of the service or a part of a service sanctioned as a separate unit."

He has urged that the fact that the R. V. P. D. is a part of service sanctioned as a separate unit cannot be disputed in view of the Government notifications issued by the Governor under Articles 162 and 166 of the Constitution of India (vide Notification dated 30-9-54 issued by the Government of Bihar, Appointment Department; Government orders dated 22-9-60 and 22-9-60 (sic) Annexures C. C/1 and C/2 respectively, to the reply to the counter-affidavit of respondent No. 1, filed by the petitioner). He has contended that R. V. P. D. has a separate cadre is also established from the fact that in the Civil List Irrigation Department officers and R. V. P. D. Officers have been shown separately. He has invited our attention to the Government's own admission in different letters, true copies of which he has filed along with the supplementary affidavit dated 28-10-68, The

letter dated 25-9-68 issued by Shri R. C. Frasad, Joint Secretary to the Government in the Irrigation Department addressed to all Secretaries, R. V. P. D., has been marked as Annexure G, the relevant portion of which reads as follows :

"I am directed to enclose a copy of memo No. I/C-I-1026/67-A-11575 dated 17-8-68 together with a copy of its enclosure and that of I/CI/1026/67-A-12664 dated 6-9-68 from the Appointment Department and to request you kindly to send the requisite information in the prescribed proforma in respect of engineers, who were initially appointed in the cadre of R. V. P. Department/B. S. E. Board and are working under them." Similarly, Annexure G/1, which is a letter from Shri A. R. Sarangi, Under-secre-tary to the Government of Bihar, R. V. P. D., addressed to all Superintending Engineers, R. V. P. D., mentions that certain information was required in the prescribed form in respect of Engineers who were initially appointed in the cadre of the R. V. P. D. This fact is also corroborated from the fact that there is separate budget head of Irrigation Department and R. V. P. D. in the budgets of the Government of Bihar for the years 1964-65 and 1966-67. He has further submitted that even in the counter-affidavit dated 4-11-67, the respondent No. 1, State of Bihar, has not specifically denied about the separate cadre of R. V. P. D; and he has invited our attention to paragraph 8 thereof which reads as follows :

"That with reference to paragraph 8 of the petition I say that it is a fact that at present Shri M. G. Sharan is the senior-most Superintending Engineer among those who were appointed directly in the River Valley Projects Department as Shri U. K. Verma and Sri R. Dutta who are seniors to the petitioner are now Chief Engineers. However, no formal constitution of a cadre has yet been made and there are three Superintending Engineers on deputation to River Valley Projects Department who are senior to Shri Sharan."

Likewise, in paragraph 17 of the said counter-affidavit it is stated :

"That with reference to paragraphs 17 and 18 of the petition I say that the circumstances relating to the appointment of Shri Banerjee have already been explained in previous paragraphs. I further say that there has been no formal constitution of a cadre in the River Valley Projects Department."

16. That petitioner in reply to the said counter-affidavit has reiterated about the R. V. P. D. having separate cadre, in paragraph 4 of his affidavit dated 4-12-67, Learned counsel has submitted that for creation of a cadre no formal resolution or rules are required. Even assuming that there has been no de jure formation of cadre in the R. V. P. D. it is clear, according to him, from the facts mentioned above that de facto cadre exists in the R. V. P. D., and it is the substance rather than the form which would be taken into account while deciding whether a cadre exists in this department or not. In this connection he has contended that the State Government having conceded in the various letters, circulars and Annexure Q mentioned above, cannot resile from its own admission and set up a different case on a plea that there has been no formal creation of the cadre, and he has

relied on a Bench decision of this Court in Ramanugrah Jha Vs. State of Bihar and Others, where their Lordships at page 101 in paragraph 7 observed :

"In the written statement the defendants made it clear in paragraph 38 that the Government were empowered to retire him under Note 1 to Rule 465A of the Civil Service Regulations. Learned Government Advocate appearing for the defendants wanted to resile from that position and attempted to argue that Rule 465A was not the empowering provision under which the order was valid but Rule 4 published in the India Gazette on the 15th of November, 1919, under Government Resolution No. 1085-E. A. was the real source of authority to compulsorily retire a Civil servant after he completed 25 years" service without necessity to give reasons and without any claim for compensation in addition to pension. The material part of that rule was :

"Government will have an absolute right to retire any officer after he has completed twenty-five years" service without necessity to give reasons and without an.v claim for compensation."

This change of front cannot be permitted in view of the specific case pleaded in defence in the written statement. Besides, the note of the Chief Secretary of the 14th December, 1947 on which the Prime Minister (the Chief Minister was then so known) recorded his minutes and the Council of Ministers passed the order of compulsory retirement. (Ext. D) clearly shows that action was taken against the plaintiff under Rule 465A, Note 1 which was fully quoted in that note. There are many other notings on the file with reference to this compulsory retirement, at later stages, when it was discovered that the order was defective and in all of them it was noted that the order had been passed under Note 1 to Rule 465A (see Ext. 9 (d) dated 9th to 13th November 1948, Ext. 9 (e) dated 19th March 1949 and Ext. 9 (f), note of defendant No. 2, dated 22nd March 1949). There cannot be the least doubt that the State Government took action under Note 1 to Rule 465A, and when the Government did so, it cannot be open to them to say that they had taken action under some other provision of law. No party can be allowed to depart from his definite case stated in his pleading. During trial the defendants also did not contend a different position. We have, therefore, to examine the validity of the order with reference to Note 1 to Rule 465A." He has further developed his argument by submitting that no doubt people from outside could be brought by direct appointment by open advertisement, but if it is a case of promotion, the cadre officers have right to be considered for the same. Wherever there are rules, as in All India Service Rules, the appointments have been kept restricted to the cadre only. Even when no rule has been framed regarding the appointments in the R. V. P. D., rules regulating conditions of employment of analogous services should apply as a general fundamental principle, and in such circumstance he urged that the rules relating to the Bihar Engineering Service class I rules, 1939 should apply and he has made particular reference to rules 24 and 27 of the said Rules which read as follows :

Rule 24 -- "Promotion to the posts of Superintending Engineer and Chief

Engineer shall be made by selection and seniority alone shall confer no claim." Rule 27 -- "Seniority in the service shall be determined by the date of the officer's substantive appointment to the service irrespective of the pay drawn by him provided that a member of the service who holds a superior post substantively shall always be deemed senior to an officer who holds an inferior post substantively. The seniority of officers appointed on the same date shall be determined according to the order of merit in which they were placed at the time of their selection for appointment."

He has further emphasised that the appointments should normally remain confined to cadre officers if the appointments are not to be made by open advertisement. A non-cadre or ex cadre man has no claim over a cadre post. When a post in the cadre is to be filled up, cadre employees must be considered and their rightful claim must be taken into account. According to him, it is evident that the petitioner was the senior most officer in R. V. P. D. which fact is evident from paragraph 8 of the counter-affidavit filed on behalf of respondent No. 1 quoted earlier as well as from the opinion of the Committee regarding the appointment of the Chief Engineer contained in Annexure Q. In order to fortify his contentions he has relied, apart from Rule 12 of the Bihar Service Code which has been quoted above, on Rules 56 and 72 of the Code, which read as follows--

"56. (a) The State Government may transfer a Government servant from one post to another; provided that, except--

(1) on account of inefficiency or misbehaviour, or

(2) on his written request :

(a) Government servant shall not be transferred substantively to, or except in a case covered by Rule 103, appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien, had his lien not been suspended under Rule 70.

(b) Nothing contained in Clause (a) of this rule or in Rule 28, shall operate to prevent the re-transfer of a Government servant to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of Clause (a) of Rule 70."

"72. Subject to the provisions of Rule 56, the State Government may, transfer to another permanent post in the same cadre the lien of a Government servant who is not performing the duties of the post to which the lien relates, even if that lien has been suspended."

According to him, a Hen can be transferred from one permanent post to another permanent post, but the cadre should be the same. He has further relied on Rule 270 which reads as follows :

"270. (1) A Government servant transferred to foreign service shall remain in the cadre or cadres in which he was included . in a substantive or officiating capacity

immediately before his transfer, and may be given such substantive order (sic) promotion may decide. In giving promotion, such authority shall take into account--

(a) the nature of the work performed in foreign service; and

(b) the promotion given to juniors in the cadre in which the question of promotion arises.

(2) Nothing in the rule shall prevent a member of a subordinate service from receiving such other option in Government service as the authority who would have been competent to grant the promotion had he remained in Government service may decide."

He has referred to a decision of the Supreme Court in *Nohiria Ram Vs. The Union of India (UOI) and Others*, where their Lordships have observed that the post to which the appellant was appointed permanently in 1930, was a post outside the cadre of the regular establishment of the Director General, Indian Medical Service and as such he was not entitled to claim seniority in the department. Their Lordships further held that since the appellant held a lien on additional post in which he was confirmed, his transfer on foreign service was admissible under Fundamental Rule 111. He did not, however, belong to a cadre immediately before his transfer, and Fundamental Rule 113 had no application in his case.

17. He has further relied on another decision of the Supreme Court in *P.C. Wadhwa Vs. Union of India (UOI) and Another*, where their Lordships while dealing with Indian Police Service (Pay) Rules (1954), Indian Police Service (Cadre) Rules (1954) etc., observed :

"Deducing the precise legal position from the Rules, it is clear beyond doubt that so far as the Indian Police Service is concerned there is only one cadre, and the transition of a member of the Service from the junior scale to the senior scale does not depend upon the consideration of the comparative merits of a group of officers in the junior scale inter se but only upon a consideration of their seniority. No element of selection is involved in promoting an Assistant Superintendent of Police to the post of Superintendent of Police. The whole scheme of the rules indicates that a person borne on the junior scale of pay has a right to hold a post on the senior scale of pay depending upon the availability of a post and his seniority in the junior scale of pay. If a person holding a post in the senior scale, though in an officiating capacity, is found to be unfit to hold that post, action will have to be taken against him as required by Rule 5 of Discipline and Appeal Rules because his reversion to a post in the lower scale would amount to reduction in rank within the meaning of Article 311 of the Constitution."

18. Learned counsel has also submitted that in the level Lists the irrigation department officers shown as on deputation in the R. V. P. D. also indicate that there was separate cadre in the R. V. P. D. because the word "deputation" implies

existence of separate cadre, as it is obvious that there can be no deputation within the cadre (vide Rule 70 (b) of the Bihar Service Code). According to him, change of cadre is possible only in case of proved necessity and he relies on Fundamental Rules 14 and 40 which read as follows :--

"F. R. 14(a) A local Government shall suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity--

(1) to a tenure post, or

(2) to a permanent post outside the cadre on which he is borne, or

(3) provisionally, to a post on which another Government servant would hold a lien had his lien not been suspended under this rule.

* * * * *

"F. R. 40. When a temporary post is created which will probably be filled by a person who is already a Government servant, its pay should be fixed by the Local Government with due regard to--

(a) the character and responsibility of the works to be performed, and

(b) the existing pay of Government servants of a status sufficient to warrant their selection for the post."

He has further submitted that the Irrigation Department officers are not allowed to cross the efficiency bar without prior sanction of the Irrigation Department. He has also contended that the Officers of the R. V. P. D. are not allowed to go to the Irrigation Department; whereas the officers of the Irrigation Department are frequently appointed to the R. V. P. D., blocking the chance of future promotion of the officers of the R. V. P. D.

19. It will also be relevant to refer to paragraph 13 of the petition filed by the petitioners in C. W. J. C. 716 of 1967 where they have more or less similar grievance that although there is a separate cadre in the R. V. P. D. the officers of the Irrigation Department were being appointed in the R. V. P. D. ignoring the claims of the officers. In paragraph 13 they have stated :

"That the effect of such manipulation was that the officers of Irrigation Department having only three to four years of experience in Executive Engineers" rank were proposed to be promoted as Superintending Engineers, in R. V, P. Department in preference to those officers of the River Valley Project Department cadre who had more than seven years experience as Executive Engineers besides having specialised technical knowledge and experiences in major construction works. This in addition gave scope to the Administration to promote anybody of choice belonging to Irrigation Department in River Valley Project Department irrespective of seniority."

The State Government, respondent No. 1, in their counter-affidavit dated 1-3-68

have stated in paragraph 10.

"That with reference to paragraph 13 of the petition, it is stated that since the promotion is being given according to the combined gradation list there is no ground for apprehension as mentioned in this paragraph. Since the petitioners have not specifically mentioned the names of the officers who have been promoted earlier than others, it is difficult to examine the question."

20. From this it appears that the stand of the State in this case was that a combined gradation list of the two departments was made. Therefore, learned counsel has submitted that the State Government has substantially admitted the case of the petitioner that there were two separate cadres in the Irrigation Department and R. V. P. D. because, he has submitted that only when there are two cadres the question of combined gradation list arises. Further he has contended that the State of Bihar has taken different stands in all these cases, from time to time.

21. On the other hand, the learned Advocate General appearing on behalf of the State has submitted that the submissions made on behalf of the petitioners are untenable as they presuppose that there is a separate and duly constituted cadre in the R. V. P. D. At the very outset he contended that no separate cadre in R. V. P. D. has been constituted. According to him, it has been clearly and categorically stated on affidavit on behalf of the State that there has been no formal constitution of a cadre in the R. V. P. D. He invited our attention to Paragraphs 4, 8 and 17 of the counter-affidavit, the last two of which have already been quoted earlier. In Paragraph 4 it is stated that there has been no formal constitution of a cadre. He emphasised that formal constitution is mandatory and it is a condition precedent to the existence of a cadre, which will give right to the petitioner to a post in the cadre. He further argued that Annexure Q which has been referred to by learned counsel for the petitioner, instead of supporting the submissions made on behalf of the petitioner, corroborates the statements made in the counter-affidavit filed on behalf of the State, because in Annexure Q it is clearly mentioned that although the cadre of the R, V. P. D. is separate (yet it is not duly constituted).

He submitted that the expression *fa the brackets* clearly shows that no formal constitution of a cadre had been made. The civil list which has been relied on behalf of the petitioner can only indicate the different departments and different posts held by the persons working in the different departments and the budgets also are similarly based upon the Civil list. On the basis of these, it cannot be held that a duly constituted cadre exists. According to him, the constitution of a cadre and the breaking up of one cadre into two, virtually means determining the condition of service of those included in the cadre. As such, cadre can only be constituted either by an Act of the Legislature or by a rule made by the Governor under Article 309 of the Constitution. He emphasised that admittedly this had not been done. Article 309 of the Constitution of India reads as follows :

"Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

22. He further submitted that this does not mean that the State cannot act in the matter of appointment, promotion. etc. or in giving administrative instructions in the absence of cadre, or, in the, absence of rules There may be administrative difficulties. Therefore. the State derives power under Article 162 of the Constitution of India to issue administrative instructions and to act in the matter of appointment, promotion etc. in such circumstances. In order to support his contention he has relied on a decision of the Supreme Court in *Sant Ram Sharma Vs. State of Rajasthan and Another*, where their Lordships at page 1914 observed :

".....It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that 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.

In *B.N. Nagarajan and Others Vs. State of Mysore and Others*, it was pointed out by this Court that it is not obligatory under the proviso to Article 309 of the Constitution to make rules of recruitment, etc., before a service can be constituted or a post created or filled, and secondly the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power to make laws. It follows from this that the State Government will have executive power in respect of Schedule 7, List II, Entry 41. State Public Services and there is nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law"

23. He further contended that even assuming that there was a separate cadre, admittedly no rule has been framed by the State Government regulating the

mode of the appointment. In the absence of such a rule he urged that there would be three normal methods of recruitment, (a) by direct recruitment, (b) by promotion, and (c) by inter se transfer, subject to any violation of constitutional provision or any statutory rule governing the matter of appointment. If the State has exercised such a power bona fide, the petitioner has no right to challenge it. He further contended that the whole assumption of the argument advanced on behalf of the petitioner was that in the matter of appointments of superior posts State is confined merely to make a choice from the existing members of the cadre which, according to him, is unsound and untenable.

He submitted that there is neither a principle nor any authority has been cited on behalf of the petitioner to support the argument. The learned Advocate General has referred to a decision of the Supreme Court in the State of Punjab Vs. Joginder Singh, wherein their Lordships observed :

"The second also, is, in our opinion, unsound. If, for instance, an existing service is recruited on the basis of a certain qualification, the creation of another service for doing the same work, it might be in the same way but with better prospects of promotion cannot be said to be unconstitutional, and the fact that the rules framed permit free transfers of personnel of the two groups to places held by the other would not make any difference. We are not basing this answer on any theory that if a Government servant enters into any contract regulating the conditions of his service he cannot call in aid the constitutional guarantees because he is bound by his contract. But this conclusion rests on different and wider public grounds, viz., that the government which is carrying on the administration has necessarily to have a choice in the constitution of the services to man the administration and that the limitations imposed by the Constitution are not such as to preclude the creation of such services. Besides, there might for instance, be a temporary recruitment to meet an exigency or an emergency which is not expected to last for any appreciable period of time. To deny to the government the power to recruit temporary staff drawing the same pay and doing the same work as other permanent incumbents within the cadre strength but governed by different rules and conditions of service, it might be including promotions, would be to impose restraints on the manner of administration which we believe was not intended by the Constitution." He has further relied on a decision of the Supreme Court in Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports and Others, where their Lordships in paragraph 12 at page 842 have observed :

".....The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification....."

They have further observed at page 843 in paragraph 16 :

"But. it is said that if the system of rotation was necessary, the Government should have applied the ratio of 50 : 50 and not 75 : 25. When the recruitment to certain posts is from different sources, what ratio would be adequate and equitable would depend upon the circumstances of each case and the requirements and needs of a particular post Unless the ratio is so unreasonable as to amount to discrimination, it is not possible for this Court to strike it down or suggest a different ratio. Nothing has been placed before us to show that the ratio of 3 : 1 is so flagrant and unreasonable as to compel us to interfere with the order of the Government."

24. He has also submitted that certain cases of the All India Service Rules referred to on behalf of the petitioner have no application to the instant case, because those are cases where the service rules restricted the choice within the cadre itself. There is no restriction in the rules applicable in the present case. He has invited our attention that the petitioner has himself cited numerous Instances where the appointments of Chief Engineers have been made of persons who were not working in the department and he has referred to paragraphs 4, 5 and 6 of his petition. It will be relevant to quote here paragraphs 4 and 5 of the petition :

"4. That the Projects under the charge of this Department are too big in magnitude and require special technique and experience for their execution. Engineers specially experienced in heavy constructional works and specially trained in the art of harnessing rivers are its dire necessities for the successful implementation of the schemes in the charge of this Department.

5. That in view of the aforesaid requirements and for the purpose of appointments in the River Valley Project Department, very experienced and renowned Engineers like Shri K. V. Ekam-baram, Shri Malhotra and Shri D. Mukherjee, who were engineers of country fame, having specialised knowledge in river valley projects works were brought from Madras. Punjab and Bengal, respectively, and were appointed as Chief Engineers".

25. He has urged that In such circumstances the only right that the petitioner could possibly claim is that he should have been considered for the post of Chief Engineer before another person was appointed and he has invited our attention to a decision of the Supreme Court in The High Court, Calcutta Vs. Amal Kumar Roy, where their Lordships at page 1708 in paragraph 5 have observed :

"At the threshold of his arguments, the learned Counsel for the appellants contended that the suit was not maintainable because the controversies raised by the plaintiff are not justiciable. We have therefore, to determine the question whether the issues raised in the pleadings of the parties were justiciable. The answer to this question must depend upon the answer to the questions whether the plaintiff had a right to promotion, which right had been withheld from him, thus giving him a cause of action. Was the plaintiff subjected to a penalty,

without taking the necessary proceedings, as contemplated by Article 311(2) of the Constitution, or the Service Rules? Was there any breach of procedure, laid down by law, in determining the plaintiff's right, if any?....."

Their Lordships have held in the same paragraph :

".....One thing is clear with reference to Article 235 read with the service rules, that there is no right of promotion which the plaintiff could have claimed to enforce by action in a Court....."

26. He also referred to Annexure Q in order to show that the case of the petitioner was considered elaborately before the appointment of respondent No. 2 was made.

27. Mr. Raman in reply to the Advocate General's contentions has submitted that no doubt people from outside could be brought by direct appointments by open advertisement, but if it is a case of promotion the cadre officers have the right to be considered for the same. He further submitted that since no rules have been framed for appointments and promotions in the R. V. P. D., rules regulating conditions of employment of analogous services should apply as a general fundamental principle. Therefore, Bihar Engineering Service Rules should apply in the R. V. P. D. Further, he also contended that Article 309 of the Constitution has not excluded the powers which the State Government have under Article 162. Article 162 reads as follows :

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof,"

For his contention he has relied on a decision of the Supreme Court in B.N. Nagarajan and Others Vs. State of Mysore and Others, wherein their Lordships at page 1944, paragraph 5 have observed :

"It would be convenient to deal with this argument at this stage. Mr. Nambiar contends that the words "shall be as set forth in the rules of recruitment of such service specially made in that behalf clearly show that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First it is not obligatory under proviso to Article 309 to make rules of recruitment etc. before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from

this that the State Government will have executive power in respect of List II, Entry 41, State Public Services"

Therefore, basing his argument on the above observations of their Lordships, he contended that the State Government can create cadre by executive power and under rules of executive business, under Article 162 of the Constitution of India.

He further urged that in the absence of any local rule, the fundamental Rules prevail and regulate the conditions of employment because they have been framed u/s 96(b) of the Government of India Act, 1915 and are saved by the subsequent constitutional enactment and he refers to Articles 313 and 366(10) of the Constitution of India.

28. Mr. Basudeva Prasad appearing for the petitioner in C. W. J. C. Nos. 706, 715 and 774 of 1967, who has advanced similar argument regarding the existence of separate cadre in the R. V. P. D., has relied upon Rule 12 of the Bihar Service Code, which has been quoted earlier. He also urged that the R. V. P. D. admittedly being a separate department has a separate cadre, and, therefore, there can be no recruitment to it by deputation of officers from the Irrigation Department. He has referred to paragraph 5 of the counter-affidavit filed on 1-3-68 by the State of Bihar in C. W. J. C. 716. Although it is a long paragraph it will be useful to quote it in extenso :--

"5. That with reference to paragraphs 6 & 7 of the petition, it is stated that for the execution of the Kosi Project, a separate Department of Government has been created which is now called the River Valley Project Department. This Department had to manage the work particularly in the initial stages, with the staff recruited from diverse sources, such as open recruitment, through advertisement or deputation of officers from the sister Irrigation Department. Because of rapid expansion that took place in the volume of work, and for various other reasons, such as absence of a properly constituted combined gradation list, recruitment even at the level of Executive Engineer has been made sometime by open competition through advertisement, on the advice of the Bihar Public Service Commission, Some of the directly recruited officers had worked elsewhere, for example, in the Damodar Valley Corporation besides, of course, in the Irrigation Department. It has also happened that where officers at the level of Executive Engineer were directly recruited, the Commission did not follow the seniority of the candidates in their present cadres, whether of the Irrigation Department or of the River Valley Projects Department and recommended names in order of preference, strictly on merit, as assessed by the Commission.

As a result of appointments made In this manner and considering the diverse sources from which the officers were drawn to man this department as also their experience, it is but obligatory for the River Valley Projects Department to provide promotional opportunities to the officers working in this Department in respect of their service. For the purpose of fixing seniority and deciding promotion, a provisional gradation list has been prepared and in doing so the

rankings made by the Commission have been kept in view. So far direct recruits were concerned, whether of the River Valley Projects Department or of the Irrigation Department, seniority in a particular grade has been determined on the basis of length of continuous officiation. It is, therefore, incorrect to say that promotional opportunities are being mostly utilised by the Irrigation Department and its officers. It is also denied that there has been organised mala fide efforts to fill up posts in the River Valley Projects Department with the officers of the Irrigation Department ignoring the claims of the officers of the River Valley Projects Department."

29. Therefore, he has contended that the State of Bihar has admitted in the above paragraph that for the execution of Kosi Project a separate department of the Government was created which was then known as Kosi Project and now called the River Valley Projects Department.

He emphasised that Rule 12 of the Bihar Service Code defines "cadre" to mean "the length of the service or a part of the service sanctioned as a separate unit". Thus, according to him, it would be clear that the R. V. P. D. from the very time it was created being a new service, had a new cadre. He also submitted that a cadre need not necessarily be constituted separately after the creation of a new service in exercise of powers under Article 162 read with item 41 of List II of the Constitution of India. A cadre, according to him, may, however, be created under a statute and also under Article 162 of the Constitution, No formal constitution of cadre is necessary. He has also referred to Rule 56 read with Rule 72 of the Bihar Service Code, which has already been quoted earlier, in order to shew that there could be no recruitment to a department by transfer of an officer from another department, because transfer is permissible only from, one post to another in the same cadre.

30. Mr. J. N. P. Verma, who appeared on behalf of the petitioner in C. W. J. C. 681, has adopted the argument advanced by Mr. Raman and further relying on Rules 12, 56 and 72 of the Bihar Service Code, has urged that all these rules have been framed under Article 309 of the Constitution. Further he submitted that notifications contained under Annexures C, C/1 and C/2, by which the new department was constituted under Article 162 read with Article 166 of the Constitution of India, will also amount to creation of a separate cadre for the R V. P. D. He has also submitted that a non-cadre man has no claim over the post and has relied on a decision of the Supreme Court in Nohiria Ram Vs. The Union of India (UOI) and Others,

31. Mr. Dayal who has appeared on behalf of M. G. Sharan in C. W. J. C. 591, has also contended that in the absence of the rules framed under the R. V. P. D., the Bihar Engineering Service Rules should be made applicable and he has referred to rules 19, 20 and 27 thereof. He has laid stress upon Rule 27 which has already been quoted earlier. Further he contended that promotion is a fundamental right of the petitioner.

32. In view of the above discussions and in the circumstances of the instant case. I am inclined to agree with the submissions made on behalf of the State. It appears to me that cadre has not been formally constituted by the State Government for the R. V. P. D. It is true that there are various documents to indicate that from time to time the State Government treated R. V. P. D. as having a separate cadre; but, in my opinion, that is not enough. In order to confer legal right upon the petitioner, it is essential that cadre should also be legally constituted under Article 309 of the Constitution. It cannot be assumed that due to the notification contained under Annexures C, C/1, and C/2 by which the new department was constituted under Article 162 read with Article 166 of the Constitution of India, a separate cadre was created for the R. V. P. D. In my view, a cadre has to be expressly created as it is of vital importance for conferring fundamental rights upon the employees. It is true that although it may be under Article 309 of the Constitution, or it can be created by the State Government under the executive power conferred under Article 162 of the Constitution as observed by their Lordships of the Supreme Court in *Sant Ram Sharma Vs. State of Rajasthan and Another*, the relevant passage of which I have already quoted earlier. The learned Advocate General has also relied on it. But even under Article 162 of the Constitution, it is essential that the cadre should be formally constituted. This view is also supported by a recent decision of Andhra Pradesh in *P. Radhakrishna and Others Vs. State of Andhra Pradesh and Others*, where Gopal Rao Ekbote, J., at page 352 in paragraph 7 while dealing with the question whether a particular Government order can be treated as a rule made under Article 309 of the Constitution, has said :--

"..... While the source of power can be taken into account merely because such a source exists, every act done by the authority cannot be said to be law. In order to have the validly made rule under Article 309, the Governor and not the Government must first of all exercise the powers vested in him under Article 309 and made a rule regulating the recruitment, etc., to the services and then publish the same in the official gazette or in any other prescribed manner for the purpose of informing the public. If in the instant case, it is found that the Governor has not made any rule in exercise of the power under Article 309, nor was it intended to be a rule under that provision of the Constitution and that it was not published in the official gazette, there could be little difficulty in reaching the conclusion that the G. O. lacks all the postulates of a rule under Article 309 of the Constitution."

It is also admitted case of the parties that no rules regarding recruitment, promotion etc. for the employees of the R. V. P. D.. have yet been framed by the State Government, It is also admitted case of the parties that the projects under the charge of this department are big in magnitude, and require special technique and experience for their execution. Engineers specially experienced in heavy construction works, and specially trained in the art of harnessing rivers for the successful implementation of the scheme were required to be appointed. Therefore, experienced engineers like Shri K. V. Ekambaram, Shri Malhotra and

Shri D. Mukherjee, who were engineers of country fame, having specialised knowledge in river valley project works, were brought from Madras, Punjab and Bengal respectively and were appointed as Chief Engineers in the past (vide paragraphs 4, 5 & 6 of the petition in C. W. J. C. 572) (See paragraphs 5 & 7 of the counter-affidavit filed on behalf of the State in C. W. J. C. 572--See also paragraph 5 of the counter-affidavit filed on behalf of the State in C. W. J. C. 716 which has already been quoted earlier). From this it is apparent that the State Government was anxious to bring in best men in this department even from outside the State as also from the Irrigation Department, mainly on the basis of merit, as the project and the scheme to be executed were of immense importance and that may be the reason that the State was not anxious to formally constitute a cadre and to frame rules under Article 309 of the Constitution, because, in that event the hands of the State Government would have been fettered.

Since a long time has now elapsed to the creation of this department by the aforesaid notifications, which have been marked as Annexure C series referred to above, in my opinion, it was desirable for the State Government to have formally constituted a cadre and framed the rules for the recruitment, promotion etc. of the officers in the R. V. P. D. also under Article 309 of the Constitution. Unless this is done, the petitioner has no legal right to claim for promotion to a post in the department.

33. Now I will turn to the consideration of ground No. fiv) wherein learned counsel for the petitioner has challenged the impugned notifications on the ground that they are violative of Articles 14 and 16(1) of the Constitution of India. Learned Counsel for the petitioners has urged that the State Government has not followed the procedure while making the appointments and promotions in R. V. P. D. which they follow in case of other departments. According to them, even if there is no rule framed for this department. Articles 14 and 16(1) of the Constitution are there, as safeguards, and these articles are equally applicable in the matter of selection grade posts. Reliance has been placed on various decisions of the Patna High Court and the Supreme Court, viz., in Sukhnandan Tha-kar v. State of Bihar AIR 1957 Pat 617 and in The General Manager, Southern Railway Vs. Rangachari, In the latter, their Lordships at pages 40-41 in paragraph 15 observed :--

"This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Article 16(1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or the appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity; but in regard to employment, like other terms and conditions associated with and incidental to it. the promotion to a selection post is also included in the matters relating to employment, and even in regard to

such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service."

Further, reliance was placed on a decision in *Kishori Mohanlal Bakshi Vs. Union of India*, but in that case their Lordships have observed that it may very well be that "matters relating to employment or appointment to any office" in Article 16(1) are wide enough to include the matter of promotion. Inequality of opportunity for promotion as between citizens holding different posts in the same grade may, therefore, be an infringement of Article 16. Thus, if of the Income Tax Officers of the same grade, some are eligible for promotion to a superior grade, and others are not, the question of contravention of Article 16(1) may well arise. But no such question can arise at all when the rules make Income Tax Officers of Class I, eligible for appointment as Assistant Commissioners, but make Income Tax Officers of Class II eligible for promotion as Income Tax Officers of Class I, but not for promotion to the post of Assistant Commissioners. There is no denial in such a case of equality of opportunity as among citizens holding posts of the same grade. As between citizens holding posts in different grades in Government service there can be no question of equality of opportunity. Article 16 does not forbid the creation of different grades in the Government service. Their Lordships were considering the rules regarding promotion in respect of Income Tax Officers. As their Lordships further held that Article 16 does not forbid the creation of different grades in the Government service, this case, in my view, does not help the petitioners.

34. In *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, their Lordships relying on *The General Manager, Southern Railway Vs. Rangachari*, observed at page 1431 in paragraph 9 :--

"The relevant law on the subject is well settled. Under Article 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office thereunder. Article 16 of the Constitution is only an. incident of the application of the concept of equality enshrined in Article 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. It follows that there can be a reasonable classification of the employees for the purpose of appointment or promotion. The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification"

In my opinion, their Lordships have clearly held that the concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source, and they are similarly circumstanced. But, in the instant case we have seen that they have not been drawn from the same sources and

they are not similarly circumstanced. Therefore, in my view, this case does not help the petitioner. He has further relied on another decision reported in the same volume which begins at Sant Ram Sharma Vs. State of Rajasthan and Another, where their Lordships at page 1914 in paragraph 6 held :--

".....In our opinion, the respondents are right in their contention that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to selection post and that it is a well-established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available....."

In my opinion, this judgment also does not help the petitioner because, in the case before their Lordships there were specific rules which were violated. Even then their Lordships held that the ranking or position in the gradation list does not confer any right on the petitioner to be prompted to the selection post. Further, reliance was placed on the latest decision of the Supreme Court in the State of Mysore and Another Vs. P. Narasing Rao, where their Lordships at pages 351-52 have observed :--

".....Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. It is true that the selective test adopted by the Government for making two different classes will be violative of Articles 14 and 16 if there is no relevant connection between the test prescribed and the interest of public service. In other words, there must be a reasonable relation of the prescribed test to the suitability of the candidate for the post or for employment to public service as such. The provisions of Article 14 or Article 16 do not exclude the laying down of selective tests, nor do they preclude the Government from laying down qualifications for the post in question"

So, this observation also, in my opinion, is of no assistance to the petitioner in this case. Then, reliance was also placed on a Full Bench decision of the Punjab High Court in Brijlal Goswami Vs. State of Punjab and Others, where their Lordships have observed that it is fairly well settled that the equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State is confined not only to the initial appointments but includes also the terms and conditions of service as well as promotion to selection posts and that the words of Article 16(1) are wide enough to include all matters relating to employment including promotion. Their Lordships relied on The General Manager, Southern Railway Vs. Rangachari, and Kishori Mohanlal Bakshi Vs. Union of India, It may be noted that in this case also their Lordships were dealing with Punjab Service Integration Rules, 1957. Therefore, this also does not help the petitioners because, we have seen that in the instant case neither cadre has been constituted nor any rules have been framed by the State Government.

35. The learned Advocate General has, therefore, rightly contended that every case which has been cited by the petitioners relates to violation of certain rules. According to him, Article 16 cannot be violated unless there is certain rule. A right can arise only from a statute, statutory rules or from the provisions of the Constitution. It being a selection post appointment could not have been made on the ground of seniority alone. Merit is also an important consideration in such posts. Therefore, according to him the only right that the petitioner could possibly claim is that he should have been considered for the post of Chief Engineer before another person was appointed. Relying on the judgment of the Supreme Court, in *The High Court, Calcutta Vs. Amal Kumar Roy*, the relevant passage of which has been quoted earlier, he has urged that this has been done, as it will appear from Annexure Q, the contents of which have been set out earlier in extenso. It clearly indicates that after thorough consideration the conclusion arrived at was that neither Shri M. G. Sharan nor Shri Prasad were suitable to be promoted to the high and responsible post of Chief Engineer. The opinion contained in Annexure Q was again considered and accepted by the Government. In the circumstances, according to him, the petitioners cannot challenge the validity of the appointment of Shri Banerji.

In my view, the contention of the learned Advocate General is well founded. Reference may be made to a decision of the Supreme Court in *Probhudas Morarjee Rajkotia and Others Vs. Union of India (UOI) and Others*, where their Lordships at page 1047 in paragraph 8 have observed :

"..... The plea of violation of equal protection of laws under Article 14 of the Constitution has not been properly pleaded in this case. It cannot be too strongly emphasised that to make out a case of denial of the equal protection of the laws under Article 14 of the Constitution, a plea of differential treatment is by itself not sufficient. An applicant pleading that Article 14 has been violated must make out that not only he had been treated differently from other but he has been so treated from persons similarly circumstanced without any reasonable basis and as such, differential treatment is unjustifiably made."

Therefore, this ground of the petitioner also fails. Hence, the notifications cannot be challenged on the ground that they are violative of Articles 14 and 16 of the Constitution.

36. Now I take up ground Nos. (v) and (vi) together. Learned counsel appearing on behalf of the petitioner has contended that the adverse remark in the character roll, if any, was not communicated to the petitioner. Some of the adverse remarks which were against the petitioner, were communicated after the writ applications were filed and much beyond the prescribed time. He further contended that it was against the natural justice that the adverse remark, if any, was considered by the sub-committee in Annexure Q without informing the petitioner or giving the petitioner opportunity to show cause to that adverse remark. He has further urged that the adverse remarks which were against the petitioner prior to his promotion as Superintending Engineer, would be deemed to

have been washed out along with his promotion as Superintending Engineer. He has further laid stress that adverse remarks must be communicated within three months failing which it will not affect the concerned officer in any way and he has drawn our attention to paragraph 10 of the affidavit of the petitioner dated 4-12-67 which was filed in reply to the counter-affidavit of respondent No. 1. In the said paragraph inter alia he has stated that the Government had made it clear by memos dated the 11th November, 1958 and 1st of October, 1966, that an adverse remark must be communicated within three months and if not communicated within the said specified period, it will not have any adverse effect on the career and promotion and the officer concerned will not be made to suffer on that account; the true copies of which have been marked as Annexures D and D/I to the said affidavit. He has further submitted that these memos have the force of law as held by the Supreme Court in *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, Further, he has urged that it cannot be considered without giving opportunity to the concerned officers. It is against the principles of natural justice. For his contention, he has relied on a decision of the Supreme Court in *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, where their Lordships have observed at page 1272 :--

".....It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence....."

In order to support his contention, he has also referred to some other judgments viz.. *State of Jammu and Kashmir Vs. Bakshi Ghulam Mohammad*, *State of Mysore Vs. K. Manche Gowda*, . He has also drawn our attention to the observation made in *Gopalrao Damodarji v. State Government - of Madhya Pradesh AIR 1954 Nag 90* which is as follows :--

"It was not disputed that the competent authority is entitled to take into consideration the record of a civil servant's past service in order to determine the quantum of punishment. What however. was contended was that if the civil servant is not at all apprised of the record of his past service, nor is he informed that it will be taken into account in order to decide the question of punishment, he cannot be deemed to have been given a "reasonable opportunity" to show cause against the proposed action"

He has further submitted that the remarks in the character roll were given by Shri U. K. Verma whose seniority he has challenged. Therefore, according to him, the adverse remarks given by Shri U. K. Verma were due to bias.

37. Lastly he submitted that the subcommittee while giving the opinion in Annexure Q have acted mala fide. The service record and the qualification of the petitioner were better than those of Shri Banerji. Moreover, the committee have

exceeded its jurisdiction because, the question of Shri Banerji's promotion was not before them. He further argued that when Shri Banerji was not considered more suitable than Shri Verma and Shri Dutta, how could Shri Banerji be considered more suitable than the petitioner who had better record and was senior to Shri Verma. According to him, the subcommittee could not assume the jurisdiction of the Public Service Commission.

38. On the other hand, the learned Advocate General has urged that the subcommittee which gave opinion under Annexure have thoroughly gone into the question and have found the petitioner not a fit person to be appointed to the post of Chief Engineer. According to him, they were entitled to look into the adverse remarks in the service record of the petitioner. The remarks made in the service record were communicated to the petitioner who, after the receipt of the said remark, even made representation in that regard which was rejected (vide paragraph 9, wrongly numbered as paragraph 8, of the counter-affidavit of respondent No. 1 in C. W. J, C. 572). He has further submitted that even if the adverse remark was not communicated to the petitioner within the prescribed time that will not make the petitioner suitable for the appointment to the selection post. The basic policy for such appointment is service to be rendered to the society. The adverse remark against the petitioner will not disappear due to delay in communication to the petitioner. It does not become barred by limitation. The three months' period mentioned in Annexure D/1, on which the petitioner has relied, is merely advisory in character. It does not say what will happen if the adverse remark is not communicated. He further urged that it cannot be legitimately argued on behalf of the petitioner that since he was promoted as Superintending Engineer the adverse remark which was against the petitioner in 1958 was washed out. The entire record of the various officers including that of the petitioner were before the sub-committee, which, after thorough investigation made the recommendation on merit-cum-seniority and the State on the receipt of that recommendation and after due consideration, made the appointment in administrative capacity. Which of the adverse remarks against the petitioner weighed with the committee, it is difficult to say. It will be mere speculation in the absence of any materials to show the uncommunicated remarks were taken into consideration by the committee. Even if there was any such uncommunicated remark before the committee it would not vitiate the appointment made by the State Government. In order to support his contention he has relied on the recent unreported judgment dated the 22nd of August, 1967, of the Supreme Court in Writ Petn. No. 233 of 1966 (SC), Prakash Chand Sharma v. Oil and Natural Gas Commission. In that case also the petitioner had referred to a memo relating to the confidential reports, their preparation and maintenance. According to para 8 of the memo it was necessary that every employee should know what his defects were, so that he could remove the same, if possible. Paragraph 9 of the memo indicated that it was open to an employee to make representation against adverse remarks. Therefore, the petitioner in that case places reliance upon that paragraph of the memo for showing that if

the petitioner had been given an opportunity of making representation against the adverse remarks, he might easily have satisfied the higher authorities that the remarks were uncalled for and unjustified. In that case also, the petitioner had alleged that it was only when the affidavit in opposition was filed that he came to know that he had not been given promotion because of those remarks. He had also submitted that there was a clear violation of the instruction regarding confidential remarks and the petitioner had been discriminated against, on the basis of the remarks which should never have been made or should never have been allowed to remain in the confidential reports or stand in the way of his promotion, if an opportunity had been given to him to explain the same.

Their Lordships, however, held :--

"It was not disputed that the instructions as to confidential reports have not been properly observed in this case. It is not suggested that the departmental promotion committee acted mala fide. If the adverse remarks were there in the confidential reports it was the duty of the departmental promotion committee to take note of them and come to a decision on a consideration of them. The committee could not be expected to make investigation about the confidential report. It appears to us that in this case there was no discrimination, purposeful or otherwise, and at the best, the committee taking into consideration confidential reports with respect to which the petitioner had been given no chance to make a representation was merely fortuitous. In such a state of affairs, we are not satisfied that any interference is called for and the rule will therefore be discharged."

As directed by this Court, the entire character roll from the very beginning was made available to us by respondent No. 1 and we have perused them. Some of the remarks are very much adverse against the petitioner. No doubt, some of the remarks are also in his favour but nothing turns on that, as this court under its writ jurisdiction will not examine these materials to find out as an appellate Court as to whether the sub-committee was right or wrong, in giving the recommendation contained in Annexure Q. The Advocate General, in reply to the allegation of mala fide, has submitted that the petitioner has not made any concrete allegation of mala fide against the members of the sub-committee or against the respondent No. 1. The mala fide is a question of fact and the same has been denied by the State Government. He further submitted that there was heavy onus on the petitioner to establish the allegation of mala fide. He also contended that the sub-committee was competent to make the said recommendation and in fact they fairly considered the case of all the officers concerned. In this case he submitted that the State Government itself would have made the appointments, but in order to be fair to all the officers concerned the State Government got the above subcommittee constituted so that there may not be any prejudice to any of the officers concerned. In my view, there is great force in the contention of learned Advocate General which has got to be

accepted. Therefore, these grounds which were submitted on behalf of the petitioners have no substance.

39. Lastly, I turn to ground No. (ii) under which the petitioner has challenged the appointment of respondent No. 2, because the Bihar Public Service Commission was not consulted as required under Article 320(3)(b) of the Constitution. Learned Counsel has submitted that in the instant case the commission was not consulted either for rejecting the claim of the petitioner or for making the appointment of Shri S. K. Banerji (respondent No. 2). The relevant provisions of Article 320(3)(b) of the Constitution read as follows :--

"(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted--

(a) * * * * * (b) On the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

* * * * *

Learned counsel has submitted that the above provisions contained under Article 320 are mandatory. He has also drawn our attention to regulations 7 and 8 of the Bihar Public Service Commission (Limitation of Function) Regulation, 1957, which clearly mentions the cases in which the consultation with the commission is mandatory. He has argued that it was the legal right of the petitioner to get his claim considered by the commission. According to him, the appointment of respondent No. 2 amounted to transfer as well as promotion. He was only a Superintending Engineer, and was holding officiating charge of the Chief Engineer in the State Electricity Board. As such, he contended, that his appointment as Chief Engineer in the R. V. P. Cadre amounted to transfer as well as promotion. On the other hand, the learned Advocate General has submitted that the provisions contained under the said Article are not mandatory. He has also urged that the aforesaid regulations 7 & 8 are only applicable to the three methods of appointment, namely, appointment by promotion, or transfer from another service, or in case of direct recruitment. According to him, the impugned appointment is not covered by any of the three categories. He has drawn our attention to paragraph 22 of the counter-affidavit which has been filed on behalf of the State in C. W. J. C. 572 where it has been stated :--

"22. That with reference to paragraphs 26 and 27 of the petition I say that the River Valley Projects Department is entrusted with the execution of major irrigational projects and in the interest of the work of this Department most suitable Engineers with brilliant service records have been selected for the post of Chief Engineer. Even Engineers from outside the State had to be appointed In the present case Shri S. K. Banerjee was found most suitable as has been mentioned in para 14 above. Since Shri Banerjee was holding "equivalent post of Chief Engineer with effect from December 1963 and then appointed as Chief Engineer

(civil) Bihar State Electricity Board, question of taking concurrence of the State Service Commission does not arise. It is also not necessary to obtain concurrence of political department for such appointment. Since Shri Banerjee was already holding the post of a Chief Engineer the question of supersession of Shri Sharan is not involved."

He has submitted that when an appointment is made from one service to another, as for Instance, from the Bihar Engineering Service Class II to the Bihar Engineering Service Class I, the Commission is invariably consulted but where a person holding a permanent post in Bihar Engineering Service Class I is appointed to a higher or equivalent post, the consultation envisaged in the rules is not necessary. According to him, the petitioner could possibly make a valid complaint if the commission had been consulted in other instances of similar appointments, but had not been consulted in the instant case. The petitioner has not made any such allegation in his petition. On the other hand, affidavit has been filed on behalf of the State stating in clear term that where officers who are confirmed in Bihar Engineering Service Class I are appointed to a higher post, consultation has not been made with the State Public Service Commission. Thus, there is no departure from the established practice in the present appointment. He has further argued that even if it is assumed that the above article and the rules are applicable in the instance case, according to him, it is now well established by the decision of the Supreme Court that the consultation envisaged under Article 320 is not mandatory. He submitted that it has been held by the Supreme Court that in default of consultation with the service commission the action of the Government in making the appointment does not become null and void. In order to fortify his contention he has relied on a decision of the Supreme Court in State of U.P. Vs. Manbodhan Lal Srivastava, where their Lordships in paragraph 11 at page 917 have observed :--

"As examination of the terms of Article 320 shows that the word "shall" appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320(3)(c) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory.

If they are so held, any appointments made to the Public Services of the Union or a State, without observing strictly the terms of these sub-clauses in Clause (3) of Article 320, would adversely affect the person so appointed to a Public Service without any fault on his part and without his having any say in the matter.

This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid."

Their Lordships further observed in paragraph 12 :--

"We have already indicated that Article 320(3)(c) of the Constitution does not confer any right on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a court of law, or entitled him to relief under the special powers of a High Court under Article 226 of the Constitution or of this Court under Article 32. It is not a right which could be recognised and enforced by a writ."

Their Lordships, therefore in para 13 on the same page i. e. at page 918, held :--

"In view of these considerations, It must be held that the provisions of Article 320(3)(c) are not mandatory and that non-compliance with those provisions does not afford a cause of action to the respondent in a Court of law."

40. He has also referred to another decision of the Supreme Court in Major U.R. Bhatt Vs. Union of India (UOI), where their Lordships in paragraph 3 at page 1346 have held :--

"The question whether the order dated December, 3, 1947, discharging the appellants from service was void because of failure to consult the Public Service Commission is not now open to be canvassed in view of the decisions of this Court, and has, therefore, rightly not been raised by the counsel for the appellant. In State of U.P. Vs. Manbodhan Lal Srivastava, this court held that Article 320(3)(c) of the Constitution of India, (which is substantially the same as Section 266 of the Government of India Act) is not mandatory and that It does not confer any rights on the public servant, and the absence of consultation, or any irregularity in consultation does not afford him a cause of action in a Court of law. It was also held that Article 311 of the Constitution is not controlled by Article 320. The content of the protection afforded to civil servants u/s 240, Clause (3) of the Govt. of India Act was the same as afforded by Article 311 of the Constitution, to civil servants."

41. In reply to the above argument Mr. Raman appearing on behalf of the petitioner has contended that the above decisions of the Supreme Court related to Article 320(3)(c) of the Constitution on disciplinary matters. Therefore, they are not applicable to Article 320(3)(b) which relates to the matter of appointment, transfer and promotion and in order to support his contention he has relied on a decision of the Supreme Court in Chandra Mohan v. State of Uttar Pradesh AIR 1966 SC 1987. But in my opinion, this decision related to the interpretation of Article 233 of the Constitution. Therefore, this cannot be of any assistance to the petitioner. In the instant case, we are concerned with Article 320. It has been held in State of U.P. Vs. Manbodhan Lal Srivastava, that the word "shall" occurring in the several clauses of Article 320 does not indicate that the provisions contained therein are mandatory. Similarly, he has further relied on a decision of the Supreme Court in the State of Assam Vs. Ranga Mahammad and Others, but this case also related to the interpretation of Articles 233, 234 and 235 of the Constitution. For the same reasons. In my opinion, this case also does not help the petitioners,

42. In my view, there is no reason why the ratio in the case reported in State of U.P. Vs. Manbodhan Lal Srivastava, should also not be extended to Clause (b) of Article 320(3) of the Constitution as the language of both these Clauses (b) and (c) is the same. This view also finds support from the decision in State of Bombay Vs. N.T. Advani, where his Lordship at page 16 in paragraph 14 observed :

"It has been very seriously argued by Mr. Kotwal that since while making Ms appointment the procedure of referring the matter to the Public Service Commission was not followed, the appointment was invalid. He relies on Article 320 of the Constitution, para (3)(b). It has been held by the Supreme Court in State of U.P. Vs. Manbodhan Lal Srivastava, , that the provisions of Article 320(3) (c) of the Constitution of India are not mandatory and that they do not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation does not afford him a cause of action in a court of law. There is no reason why the ratio in that case should not apply to para (b), language or which is the same as that of para (c). I am not, therefore, prepared to hold that on this ground the order dated 14th October 1953, was an invalid order and therefore inoperative."

In view of the above observations, the contentions of the learned Advocate General are well grounded and have got to be accepted. Thus, ground No. (ii) raised on behalf of the petitioner also fails,

43. However, learned counsel appearing on behalf of the petitioner has further raised an additional ground that only the officers of the irrigation department are given higher posts in the R. V. P. D. whereas the officers of R. V. P. D. are not marred (sic) which has caused injustice and the action of the State Government is violative of Article 311(2) of the Constitution. He has relied on a decision of the Supreme Court in Parshotam Lal Dhingra Vs. Union of India (UOI), but in my opinion this decision is not applicable to the instant case. I have already held that the sub-committee and the State Government after due consideration appointed respondent No. 2 as Chief Engineer of R. V. P. D. I have already indicated earlier that in the instant case we cannot sit as an appellate court and examine the opinion which the sub-committee has given in Annexure Q, or interfere with the order of the State Government appointing respondent No. 2 as Chief Engineer, particularly when there is no violation of rules, regulations or the provisions of the Constitution. It may be possible that by co-incidence so far only, the officers of the Irrigation Department have been found suitable for the appointment in the R. V. P. D. But that is no reason for holding that it is due to any bias that none of the officers of the R. V. P. D. has so far been selected for being appointed in the Irrigation Department. Therefore, this contention of learned counsel cannot be accepted.

44. In conclusion, therefore, there is no merit in the application in C. W. J. C. cos. 562 and 681.

45. Now I will revert to the consideration of the application in C. W. J. C. 535, which was filed by Shri R. S. Pathak praying therein for a writ of quo warrant-to ousting Shri S. K. Banerji respondent No. 2, from the office of the Chief Engineer, about which I have already referred earlier in paragraph ante. Since I have already held while dealing with C. W. J. C. 572 that the appointment of Shri S. K. Banerji is valid, this application is also devoid of any merit and it has got to be dismissed.

46. Then I revert to C. W. J. C. 591 about which I have referred in paragraph 3 ante. It may be recalled that this application was also filed by N. G. Sharan impleading the State of Bihar as respondent No. 1 and Shri U. K. Verma as respondent No. 2 and the ground of attack on his appointment is also more or less similar, which I have dealt in C. W. J. C. 572 But in the instant case even the Public Service Commission was consulted. Some of the contentions raised by Mr. Dayal learned counsel for the petitioner in this case, have already been referred earlier. Most of the facts stated in the petition have been controverted by the State Government in the counter-affidavit which was filed on " the 4th November, 1957" (vide paragraphs 11, 15, 17 and 18 of the said counter-affidavit). A supplementary counter-affidavit dated 23-3-68 was also filed on behalf of the State of Bihar the relevant portion of which is contained in paragraph 2 in which it is stated :--

"That as regards paragraph 3 of the reply to counter-affidavit, I say that there has been no supersession of the petitioner by the notification Annexure "A" inasmuch as the petitioner is iunior to Sri U. K. Verma. The representation filed by the petitioner challenging the promotion of Sri U. K. Verma as Chief Engineer, Tenughat was examined in all its aspects and after careful consideration the representation was rejected. Since the decision rejecting the representation was based on office records of unimpeachable character, the question of providing opportunity to the petitioner before rejecting the representation does not arise. All the same the petitioner was personally heard by the Chief Administrator as admitted by the petitioner in his petition dated 6-9-1966."

It will also be useful to quote paragraphs 3 and 4 which read as follows :--

"3. That with reference to paragraph 4 of the reply to counter-affidavit, I say that in the initial stages, this department had to manage the work with staff recruited from diverse sources, such as, open recruitment through advertisement, appointment by selection and deputation of officers from State Irrigation Department. In the interest of the Project work and in recognition of good work, promotion had to be given to officers according to their length of service and merit irrespective of the source from which they were drawn. It has also happened that where officers at the level of executive Engineers were directly recruited, the commission did not follow the seniority of the candidates in their parent cadres whether of the Irrigation Department or River Valley Projects Department and recommended names in order of preference, strictly on merit as assessed by the Commission. For the purpose of promotion a combined gradation

list has been adopted and officers drawn from different sources have been given seniority according to length of service rendered either to the River Valley Projects Department or in their parent Department.

4. That the petitioner was given officiating promotion in leave vacancy of Shri P. R. Guha, Superintending Engineer in this department notification No. 4998, dated 21-6-1956, copy of which is enclosed as Annexure 1. It was made clear in that notification that this officiating promotion would not mean supersession of any senior Executive Engineer in the Department and would not entitle the petitioner to any special claim for promotion on this account in vacancy of longer duration. In pursuance of this notification the petitioner officiated as Superintending Engineer only from 16-6-56 to 24-6-56 and made over charge again to Shri P. R. Guha on 25-9-56. It is incorrect to say that this officiating promotion was given against long term vacancy. It is also incorrect to say that there was no senior officer above the petitioner who could be considered for promotion. As has been mentioned above no separate cadre for River Valley Projects Department has been formally constituted either for Civil Engineers or for Mechanical Engineers. There are some posts which have been manned by Civil Engineers as well as Mechanical Engineers according to suit ability of the officers for the post. As regards Shri U. K. Verma, it may be stated that he has all along continued to work as Civil Engineer in this Department.

Further, in this affidavit it is specifically stated that no separate cadre for the R. V. P. D. has been formally constituted either for Civil Engineers or for Mechanical Engineers. The learned Advocate General has contended that by the Government Notification dated 21-6-56, which has been marked as Annexure 1 to this affidavit, only a stop-gap arrangement for eight days was made and that will not give a right to the petitioner.

46-A. In this case it was also urged on behalf of the petitioner that U. K. Verma was appointed as Executive Engineer in the R. V. P. D. on 22-11-56, whereas the petitioner was appointed as Executive Engineer on 9-8-54 and, therefore, the petitioner being senior to Verma, he should have been appointed as Chief Engineer in preference to Verma. Learned Advocate General in reply to the said submission has drawn our attention to paragraph 6 of the supplementary affidavit filed on behalf of the State on 5-8-68 which reads as follows :--

"That Shri Verma was confirmed as Executive Engineer with effect from 1-3-1958 and notification dated 1-2-1963 was issued to the said effect and published in the official gazette. A copy of the said notification is enclosed and marked by letter "X". Since there was some objection by the Accountant General in respect of the actual language of the notification, substituted notification was issued on 31-8-1966/2-9-1966 (a copy of the substituted notification has been annexed as Annexure B to the petition for amendment of the writ petition filed by the petitioner.)"

He has urged that the petitioner has not annexed the above notification to his

petition. No doubt, he has enclosed the notification dated 31-8-66 marked as Annexure I to his supplementary affidavit dated 3-7-68. The Advocate General has submitted that this notification was issued by the State Government only because the Accountant General objected to the language of the earlier notification dated 1-2-63. This is why the notification dated 31-8-66 also refers to the date 1-2-63. Therefore, he has contended that Verma having been confirmed as Executive Engineer by the said notification dated 1-2-63 (annexure "X") with effect from 1-3-58, the petitioner cannot claim to be senior to Verma unless he can successfully show that the confirmation of Verma as Executive Engineer was invalid and the petitioner had a right to challenge the said notification of confirmation. He has further submitted that previously both petitioner and Verma were working in the Damodar Valley Corporation. Although in the said corporation the petitioner was appointed earlier than Verma as Assistant Engineer, Verma was appointed as Executive Engineer on 1-12-50, whereas the petitioner was promoted as Field Engineer (equivalent to Executive Engineer), three years later on 13-6-53 vide paragraph 4 of the affidavit dated 5-8-68. He has also invited our attention to paragraph 11 of the counter-affidavit filed on behalf of the state dated 4-11-67, wherein it is mentioned that the services of Verma were obtained in the public interest and in the interest of the department, because of his past experience, and length of service in the Damodar Valley Corporation. He was given a starting salary of Rs. 895/-. Further, he urged that his appointment was made with full concurrence of the Public Service Commission, which fact is stated in the supplementary counter-affidavit dated 28th of March, 1968, filed by the State (vide paragraph 6 thereof and its Annexures 3 and 4). He also submitted that at the time of confirmation of Verma two posts of Executive Engineer were vacant. A copy of the gradation list of the temporary Executive Engineers of the Department along with the upto date character rolls of the first six officers including that of the petitioner was forwarded to the Commission. The State Government according to the recommendation of the Commission, appointed Verma and Dutta as two permanent Executive Engineers (vide paragraph 7 of the counter-affidavit dated 5-8-68). He also urged that since the confirmation of Verma was made by the notification dated 1-2-63, if there was any grievance against his confirmation the petitioner ought to have filed a writ application much earlier than 19-9-67 when it was actually filed. According to him, on the ground of delay alone this application deserves to be dismissed. In reply to this, it has been submitted on behalf of the petitioner that he had filed representation against the same which was disposed of by the State Government in 1967. Therefore, according to him, there was no delay in filing this writ application. Even assuming that this may be a sufficient explanation, but as indicated above, Verma was appointed Superintending Engineer with effect from the year 1958 and the petitioner has not specifically alleged that he made any representation against the said appointment. Apart from these considerations, from the facts stated above, it is evident that Verma was appointed as Superintending Engineer in 1958, while the petitioner was appointed as such about four years later, i. e. on 5-1-62, which

clearly establishes the seniority of Verma.

Learned counsel for the petitioner has also contended that Verma was not adequately qualified, whereas the petitioner was better qualified and experienced. In my opinion, these facts cannot be examined by us because these things have been duly considered by the Public Service Commission, before they made the recommendation. We have also looked into the character roll of Verma, wherein we find good as well as adverse remarks against him, but as indicated above nothing will turn upon the character rolls. He cannot sit as an appellate court and examine the merits and demerits of recommendation of the Public Service Commission. In my opinion, the contentions of the learned Advocate General are well grounded. Besides, all the other points raised in this application have already been covered while dealing with C. W. J. C. 572. Therefore, this application also cannot be entertained.

47. Now, I revert to the consideration of the writ application filed by the various petitioners in CWJC 708 referred to in paragraph 4 ante, CWJC 716 referred to in paragraph 5 ante and CWJC 774 referred to in paragraph 6 ante. In all these three applications, Mr. Basudeva Prasad, learned counsel for the petitioners, has raised more or less similar contentions which were raised by Mr. Raman in CWJC 572. It will be relevant also to mention the contentions in these three applications, raised by Mr. Prasad which are--

(i) The R. V. P. D. admittedly being a separate department, has a separate cadre and, therefore, there can be no recruitment to it by deputation of the officers from the Irrigation Department.

(ii) If there be a combined gradation list of officers of the two departments, the Government in operating it only partially for promotions or appointments of officers from Irrigation Department to R. V. P. D. and not vice versa overlooking the claims of some of petitioners for promotion to higher posts in R. V. P. D. and in delegation of the rights of some others to maintain their prospects of promotion by retaining their seniority in the list of officers of R. V. P. D. have acted in violation of the fundamental rights of equal treatment guaranteed to the petitioner by Articles 16(1) and 14 of the Constitution of India.

(iii) The two Departments having admittedly not merged into one, no combined gradation list of officers of the two Departments which even in fact was not prepared could be legally prepared, and so the promotion and appointments of officers from the Irrigation Department to the R. V. P. D. on the basis of an imaginary combined gradation list amounted to denial of equality in matters relating to prospects of promotion guaranteed to the petitioners under Article 16(1) of the Constitution of India.

(iv) The impugned appointments being admittedly only deputations from the Irrigation Department to the R. V. P. D. which at the most amounted to appointments merely on officiating basis in the R. V. P. D. posts, the respondents concerned did not in the eye of law acquire any seniority in the cadre of R. V. P.

D. and, therefore, their promotions or appointments in derogation of the rights of the petitioners to the prospects of promotion in their cadre amounted to violation of equality guaranteed in Articles 14 and 16(1) of the Constitution of India. Further, even if by any stretch of imagination deputation be considered as a method of recruitment, it falls in category of direct recruitment and as the ratio of the decision in *Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others*, suggests the seniority inter se direct recruitments must be determined with reference to their actual date of recruitment.

As regards his contention No. (i) I have already held while dealing with C. W. J. C. Nos. 572 and 681 that no cadre has been formally constituted in the R. V. P. D. Therefore, his this contention fails.

48. Now I will take up points Nos. (ii) to (iv) together for consideration. The main contention of learned counsel is that the impugned order making the appointments of respondents are violative of Articles 14 and 16(1) of the Constitution of India. In my opinion, in order to make out a case of denial of equal protection of laws under Article 14 of the Constitution, a plea of differential treatment is by itself not sufficient. A petitioner pleading that Article 14 has been violated must make out that not only he had been treated differently from others but he has been so treated differently from similarly circumstanced without any reasonable basis and as such differential treatment has been unjustifiably made. Therefore, in the petition the petitioners must give such data and it must also be admitted by the respondents. But in the instant case I find that the State has filed counter-affidavit denying allegations regarding unequal treatment and had disputed these facts vehemently. In these circumstances it is difficult to hold that the impugned orders are violative of Articles 14 and 16 of the Constitution. This view also finds support from the judgment of the Supreme Court reported in *Probhudas Morarjee Rajkotia and Others Vs. Union of India (UOI) and Others*, the relevant portion of which I have already quoted earlier while dealing with CWJC Nos. 572 and 681. Besides, Article 16 cannot be violated unless there is a rule; but in the instant case we have already seen that the State Government has neither framed the cadre nor the rules for governing the recruitment, promotion, etc. in the R. V. P. D. Learned counsel in absence of specific rules for the R.V. P.D. has relied on Rules 56 and 72 of the Bihar Service Code. I have already quoted these rules earlier Learned Advocate General has contended that Rule 56 is not applicable to the instant case and he has referred to exceptions to Rule 56 and has contended that it applies to a disadvantageous transfer. For example, if a person carrying higher pay is transferred to post of lesser pay, then only the person who has been so appointed can make a grievance. He urged that the main part of the rule gives power to the State to transfer Government servant from one post to another. As regards Rule 72, he has submitted that this rule is subject to Rule 56 and then it will be applicable only when if it is held that R. V. P. D. has a separate cadre. But it has already been held as mentioned earlier, that no separate cadre has been formally constituted for the R. V. P. D. Therefore, in my opinion, the contention of the learned Advocate General is well

founded. Besides these rules do not specifically apply to the facts and circumstances of the instant case. In all these three cases the Bihar Public Service Commission was also consulted and after obtaining the opinion of the Commission the appointments were made. In paragraph 5 of the counter-affidavits filed on behalf of respondent No. 1, the State of Bihar. In C. W. J. C. 716, it has been clearly stated that the commission have recommended the names in order of reference strictly on merit and the appointment has been made in accordance with the recommendation of the commission. In that very paragraph the allegation of mala fide has also been specifically denied. Further, reference may be made to paragraph 10 of the counter-affidavit which I have quoted earlier in paragraph 19 ante, in which it has been clearly stated on behalf of the State of Bihar that the petitioners have not specifically mentioned the names of the officers who have been promoted earlier than others and it will be difficult to examine the question. Further, in that very paragraph it is stated that since the promotion was given according to the combined gradation list there was no ground for apprehension on behalf of the petitioner. Therefore, it is clear that even if there was no separate cadre for the R. V. P. D., the State Government in order to safeguard the interest of the petitioners considered the seniority of the officers of the two departments and referred the matter to the Public Service Commission for their recommendation and after such recommendation the State Government have made the appointments. Therefore, in my opinion, the order of the State Government cannot be set aside on that ground. Further, reference may be made to paragraph 7 of the counter-affidavit where it is specifically stated that there has been no formal constitution of separate cadre for the R. V. P. D. Therefore, the stand of the State of Bihar so far cadre is concerned, is consistent in all the cases under consideration, i. e. that there have been no formal contention of the cadre. It has further been repeated in paragraph 8 of the counter-affidavit that inter se seniority in the combined gradation list has been fixed up on the basis of the date of commendations and the ranking given by the Commission. Therefore, the question of supersession does not arise. Further, reference may be made to paragraph 9 of the counter-affidavit where it is stated that the commission, however, concerned is the promotion of the Executive Engineers to the rank of Superintending Engineers on the basis of their seniority in the combined gradation list and they did not accept the proposal of the Government for promotion of one from each of the lists alternatively. Government have accepted the advice of the commission and so the question of fixing 50% quota for Irrigation Department officers does not arise.

49. Similarly, in C. W. J. C. 774 the State of Bihar, respondent No. 1 has filed counter-affidavit. In paragraph 6 it is stated that there has been no formal constitution of cadre in the R. V. P. D. and has denied the statement made by the petitioners in paragraph 8 of their counter-affidavit and the State of Bihar has given in tabular form the correct dates of promotion and deputations of the officers concerned and further it has been stated that the officers deputed to this department were mostly experienced and senior officers and there was nothing

wrong in their retention in R. V. P. D. after they got promotion in their parent department. Again, it has been repeated in paragraph 7 that there has been no formal constitution of separate cadre for the R. V. P. D. it is further stated in this paragraph that it is correct to say that about 75% of promotional opportunities in the R. V. P. D. have been given in favour of the officers of the Irrigation Department. Since Engineers from diverse sources were brought to man this department in the initial stage, promotions have been decided stating the entire strength of Engineers irrespective of their sources and in the best interest of the R. V. P. D. Further in paragraph 11 it has been stated that since the promotion was given according to the combined gradation list there is no ground for apprehension. In this very paragraph it is also stated that there has been no formal constitution or separate cadre in the R. V. P. D. The claim of the officers of the R. V. P. D. have not been ignored. In many cases there have been quick promotions in the R. V. P. D. There is no discrimination against any officer. In paragraph 10 of the counter-affidavit it is also stated that Shri Sarjoo Sharan Singh, respondent No. 2, was already a Superintending Engineer and so the question of a reference to the Public Service Commission did not arise in that case.

50. In C. W. J. C. 706 also I find that a counter-affidavit has been filed on behalf of the State of Bihar, respondent No. 1 and Shri S. K. Banerji, respondent No.

2 The stand of the State of Bihar in this case is also similar to that in C. W. J. C. 774 and the statement in the counter-affidavit is also more or less the same.

In my opinion, there has been no violation of Articles 14 and 16 of the Constitution of India. Therefore, there is no merit in these three applications also.

51. In the result, all the seven writ applications are dismissed, but there will be no order as to the costs.

Misra, C.J.

52. I agree to the order proposed. Annexure Q to which reference is made no doubt mentions that River Valley Projects Department is separate (although it is not duly constituted and that a proposal that the cadres of Irrigation Department and that of River Valley Projects Department be amalgamated has not materialised owing to certain difficulties. But even on this assumption, the petition of Shri Sharan cannot succeed. Shri Banerji's appointment may well be treated as appointment. Even so the contention that direct recruitment could only be made in consultation with the Public Service Commission is not in consonance with the view of the Supreme Court as it has been held that failure to consult the Public Service Commission is a con-donable irregularity unless it can be made out that it was a deliberate action on the part of the department concerned, (vide State of U.P. Vs. Manbodhan Lal Srivastava, In the present case a strong sub-committee of senior officers was appointed to go into the matter and the committee recommended the appointment of Shri Banerii to the post of Chief Engineer of Gandak (Sone Barrage) Project on a consideration of the

records of the officers including the petitioner Shri Sharan and others who were found definitely unfit for appointment to the post of Chief Engineer. In the circumstances, failure to consult the Public Service Commission under Clause 3(b) of Article 320 of the Constitution cannot vitiate the appointment of Shri Banerji.

As to the existence of an independent cadre for the R. V. P. D. which is the sheet anchor of all the petitions and upon which the entire argument of the petitioners in all the applications has been substantially built up. I may state that State of Bihar is in the best position to say whether it is regularly constituted as a cadre. Annexure Q itself shows that in the opinion, of Government it is not yet duly constituted, whatever the reason for it may be and that being so none of the applications has any substance and they must be dismissed.