

(2008) 10 OHC CK 0061
In the Orissa High Court

Saroj Kumar Padhi and Others

APPELLANT

Vs

State of Orissa and Others
 Bama Prasad Biswal Vs
Orissa Administrative Tribunal and Others

RESPONDENT

Date of Decision : 15-10-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Citation : (2009) 1 OLR 5

Hon'ble Judges : N. Prusty, J;I.M. Quddusi, J

Bench : Division Bench

Judgement

I.M. Quddusi, J.—The relief claimed by the petitioner(s) in all the writ petitions being more or less the same, they were heard together and are being disposed of by this judgment.

2. The petitioners in W.P.(C) No. 12706 of 2006 were initially appointed as Junior Engineers and while in service they acquired degree qualification and were allowed to remain in-charge of Subdivisions/Upgraded Sectional Posts pending finalization of amendment to Orissa Service of Engineers Rules. They were promoted to the post of Assistant Engineers on ad hoc basis. When the stipendiary engineers were regularized by virtue of the Validation Act, 2003 and no decision was taken with regard to the Degree-holder Junior Engineers, they filed O.A. No. 1575 of 2002 before the Orissa Administrative Tribunal to regularize their promotion as Assistant Engineers on ad hoc basis by amending the Rules or by bringing their case within the scope of the Validation Act by implementing the decision of the High Level Committee dated 5.8.1992, the Cabinet decision dated 3.12.1994. The Tribunal disposed of the O.A. directing that the petitioners be allowed to continue as Assistant Engineers on ad hoc basis and face O.P.S.C. along with their immediate promotee junior engineers. They have prayed for quashing of the order of the Tribunal and for regularization of their services in the cadre of Assistant Engineers with all consequential service benefits.

The petitioners in W.P.(C) No. 16742 of 2006 after passing the Diploma Course in Engineering were appointed as Junior Engineers in the State Government service. They were promoted as Assistant Engineers in 1994. They were regularized as Assistant Engineers on the recommendation of P.S.C. in 2006 under the 33% quota. They filed O.A. No. 2802 of 2006 praying to quash the Validation Act, 2003 and to place them in the gradation list below the Assistant Engineers whose promotion has been regularized on the recommendation of the P.S.C. on 16.6.1998 and not to place the names of the Stipendiary Engineers and Graduate Engineers above them. The Tribunal dismissed the O.A. holding that it has no jurisdiction to adjudicate upon policy decision of the Government.

W.P.(C) No. 11093 of 2006 has been filed by some in-service Junior Engineers who possessed the qualification of Degree in Engineering and claimed promotion against the 5% quota. It was alleged by them that while considering the validation of the appointment of the Stipendiary Engineers, case of the petitioners were not considered. They filed O.A. No. 1112 of 2006 before the Tribunal for a direction to implement the 5% quota. The Tribunal dismissed the O.A. on 22.6.2006. They have prayed for quashing of the impugned order of the Tribunal as well as the Validation Act, 2003 and for a direction to keep 5% vacancies reserved to be filled up from amongst the Junior Engineers having degree qualification.

Petitioners in W.P.(C) No. 8630 of 2006 were initially appointed as Junior Engineers/Sub-Assistant Engineers having completed the Diploma in Engineer. While in service they passed AMIE which is equivalent to Degree in Engineering. Since 1988 Government stopped the process of direct recruitment of Assistant Engineers. In 1990 Government issued advertisement through O.P.S.C. for recruitment to the post of Assistant Engineers and the petitioners having possessed the degree qualification were intimated to appear at the said recruitment as per Clause (a) of Rule 9 of the 1941 Rules. The said process was stopped and till date no direct recruitment to the post of Assistant Engineers has been done under the 1941 Rules. Petitioners were promoted as Assistant Engineers on ad hoc basis. They filed O.A. before the Tribunal to regularize their ad hoc appointment as Assistant Engineers in the analogy of Stipendiary Engineers who were regularized by the Validation Act or by amending the rules of appointment by reckoning their continuous ad hoc officiation as Assistant Engineer for long period against the earmarked quota for the direct recruitment of Assistant Engineers. They have filed the present writ petition for a direction to the State Government to notify the draft Orissa Engineering Service (Recruitment and Conditions of Service) Rules, 1941 in the official gazette, to regularize the service of the petitioners in the cadre of Assistant Engineers alongwith all consequential service benefits from the date of their ad hoc promotion, to quash the order of the learned Tribunal dated 16.8.2005 in O.A. No. 404 of 2003 and connected matters except in directing the continuance of the petitioners until their services are regularized in the cadre of Assistant Engineers and to restrain the State Govt. to give any further promotion to the post of Assistant Executive

Engineer out of the gradation list of Assistant Engineer (PH) as on 2005.

The petitioners in W.P.(C) No. 9514 of 2003 are Degree holder Junior Engineers promoted to the post of Assistant Engineers on ad hoc basis. They filed O.A. before the Tribunal for a direction to regularize their services as Assistant Engineers with consequential benefits from the date of their initial ad hoc appointment either by amending the O.S.E. Rules, 1941 or by modifying Annexure-11, the resolution dated 4.1.2002 issued by the Govt. in Water Resources Department for regularization of Stipendiary Engineers. They further prayed to declare that the assurance held out by the Govt. in the High level Committee meeting dated 5.8.1992 and Cabinet decision dated 3.12.1994 and resolution dated 12.3.1996 are still in force. The second prayer was refused by the Tribunal but the O.A. was admitted on the first prayer. They have filed this writ petition for a declaration that the principles enunciated by this Court in O.J.C. No. 8373 of 1995 are equally applicable to the cases of the present petitioners and therefore to direct the opposite parties to validate/ regularize their services from their initial date of ad hoc promotion to the cadre of Assistant Engineers and to quash the order dated 1.5.2003 passed by the Tribunal in O.A. No. 614 of 2003 in refusing the second prayer of the petitioner as mentioned above.

The petitioner in W.P.(C) No. 12494 and 12495 of 2005 joined service as Junior Engineer. Subsequently acquired degree qualification. Thereafter promoted as Assistant Engineer on ad hoc basis. They have prayed for a writ holding that the principle enunciated by this Court in O.J.C. No. 8373 of 1995 are applicable to them and they are therefore entitled to be regularized in the cadre of Assistant Engineer with all consequential benefits.

The petitioner in W.P.(C) No. 12627 of 2005 is a Junior Engineer with Engineering Degree and has been promoted as Assistant Engineer on ad hoc basis. He has filed this writ petition for a direction to the opposite parties to regularize his service in the cadre of Assistant Engineer (Civil) along with all consequential service benefits from the date of initial ad hoc promotion and to quash the order of the Tribunal dated 16.8.2005 in O.A. No. 404 of 2003 (Annexure-15) except in directing the continuance of the petitioner until his services are regularized in the cadre of Assistant Engineers.

3. Shorn of unnecessary details, the facts necessary for deciding the controversy raised in all the writ petitions are that the recruitment and conditions of service, pay, allowances and pension of the Orissa Service of Engineers is regulated by the Orissa Service of Engineers" Rules, 1941. Rule 5 of the 1941 Rules provides that first appointment to the Service shall ordinarily be made to the rank of Assistant Engineer. Rule 6 of the aforesaid Rules provides that the recruitment to the rank of Assistant Engineers shall be made partly by direct recruitment in accordance with Rules 8 to 15 thereof and partly by promotion from the cadre of Junior Engineers in accordance with Rules 16 to 18 thereof. Rule 7 of the aforesaid Rules provides that the vacancies to be filled up by the promotion of

Junior Engineers shall be so fixed that the promoted Junior engineers do not exceed thirty-three per cent of the total strength of permanent and temporary Assistant Engineers including the leave and training reserve at the time of each promotion. The remaining vacancies shall be filled up by direct recruitment. Since the year 1988 the State Government stopped the process of direct recruitment of Assistant Engineers as a result of which the fresh graduate Engineers and Junior Engineers having degree qualification could not get scope for appointment as Assistant Engineers. In the year 1990 the State Government had issued advertisement through the O.P.S.C. for direct recruitment to the post of Assistant Engineers and the Junior Engineers having degree qualification were also asked to appear at the said examination but the same was not materialized and stopped by the Government. On 15.5.1990, the Council of Ministers took a decision to absorb some unemployed Graduate Engineers as stipendiary Engineers in Government Departments and Undertakings on fixed stipend of Rs. 2000.00 per month. There is no tug of war about the decision of the High Power Committee dated 5.8.1992 in which it has been reported that as desired by the Chief Minister in a file of the I & D Department a meeting was held with Minister, Works, Minister, Energy and Minister (P & C) to discuss the method of filling up the direct recruitment quota of Assistant Engineers in the context of the claim of the Stipendiary Engineers to be appointed as Assistant Engineers and it was decided that the present ratio between the direct recruitment and promotion quotas is 67:33. Further it was decided therein which is quoted as under.

We have to reconcile two objectives of giving relief to the Graduate Stipendiary Engineers and recruiting Engineers on merit. The promotion quota of Junior Engineers should not be disturbed. Keeping all these in view, we would suggest the following.

- (a) The promotion quota may continue at 33% of annual vacancy;
- (b) In addition there should be a selection quota of 30%. This quota will have two components -5% for Junior Engineers who have acquired an Engineering Degree or equivalent qualification and 25% which will be earmarked exclusively for Stipendiary Engineers;
- (c) Direct recruitment quota will be 37%. Stipendiary Engineers can also compete against this quota. They may be allowed age relaxation up to five years. This will ensure that Stipendiary Engineers have the facility of recruitment, both against the selection quota and direct recruitment quota;
- (d) Departments may not fill up vacancies in the post of Stipendiary Engineers caused by appointment of the incumbents as Assistant Engineers. If they want to do so, they may obtain candidates from the panel of the P & C Department.
- (e) This will be a transitional provision because appointment of Stipendiary Engineers may not be a permanent feature. After such time as, Government may decide the present quotas of recruitment will be restored;

(f) Public Sector Undertakings should frame their own recruitment rules which should broadly correspond to Government's policy of promotion of Junior Engineers and appointment of Stipendiary Engineers through selection. If there are no Stipendiary Engineers or Junior Engineers with Degree or equivalent qualification, quotas for these categories will be added to direct recruitment quota.

I have consulted the Works Minister and the Planning Minister and they are of the opinion that the foregoing note is a correct record of the consensus arrived at in the meeting. If these suggestions are approved by the Chief Minister, follow-up action including design of modalities of selection quota will be taken. It may not then be necessary to trouble the Chief Minister with another meeting on the subject.

In obedience to the aforesaid decision, the rule was recast and vetting of General Administration Department and Law Department was obtained and Rules, namely. The Orissa Engineering Service (Recruitment and Condition of Service) Rules, 1994 complete in all respect and enclosed to the memorandum were placed before the Cabinet for approval and the Cabinet in their 27th meeting on 3.12.1994 approved the same. In the mean time some of the Stipendiary Engineers filed O.J.C. No. 8373 of 1995 before this Court praying for a direction to absorb them in the existing vacancies against the posts of Assistant Engineers. This Court considering the various resolutions, especially the resolution dated 12.3.1996 of the Government, disposed of the writ petition on 18.12.1996 with the following directions:

(i) Opposite party No. 1 should take expeditious steps to implement the Resolution as per Annexure-B at an early date, preferably within a period of four months.

(ii) Pending finalization of the matter, the petitioners who are admittedly working as Stipendiary Engineers under opposite party No. 2 may be appointed as Assistant Engineers in the scale of Rs. 2000-2500/- on ad hoc basis, as indicated in Annexure-C.

The draft rule was sent to the O.P.S.C. on 5.6.1996 for concurrence. The Commission by letter dated 31st July, 1996 returned the same with some suggestions, inter alia, as under:

2. The proposal to reserve 5% of the vacancies in Assistant Engineers' Grade to be filled by degree holding Junior Engineers is also inadvisable. Persons with higher than the minimum prescribed qualification serve practically in all fields of administration including technical services such as Medical and Engineering. It is neither necessary nor desirable to provide for them a reserved channel for promotion to higher grade, except the one available to all those serving in the feeder grade. The right way of rewarding those with higher qualification is to give them advance increments at the time of entry.

4. If Government feel that the quota for promotion of Junior Engineers to the level of Asst. Engineers needs to be larger than 33% in consideration of the large body of Junior Engineers, some of whom are Degree holders, it may be increased to 40%. But that should not be fragmented to cater to separate streams like Degree holders and those without Degree.

The Commission requested the State Government to send the revised draft rules in the light of the suggestions for perusal of the Commission. But the State Government without taking any action on the basis of the suggestions of the O.P.S.C. for amendment of the Rules, by resolution dated 4.1.2002 of the Department of Water Resources, decided as under:

In respect of those stipendiary engineers already in service, regular appointments will be considered through a Validation Act.

But in future no Stipendiary Engineers will be recruited. The service Rules will be followed strictly and Engineers will be recruited on the basis of merit through O.P.S.C.

Those graduate Engineers who are already in the panel, will be allowed age concession up to ten years to enable them to appear before O.P.S.C.

Thereafter, the Orissa Service of Engineers (Validation of Appointment) Act, 2002 (Orissa Act 9 of 2003) was enacted to validate the ad hoc appointment of 881 Assistant Engineers, i.e., the Stipendiary Engineers under direct recruitment quota, enclosing the list of incumbents like an executive order without laying down any law or norms in the said Validation Act. But no decision as regards those ad hoc Assistant Engineers, who were given appointment from the post of Junior Engineers having degree qualification under the 5% quota of direct recruitment i.e. 67% was taken.

4. Different sets of learned Counsel appeared for the parties in the respective cases. The gist of the contention raised on behalf of the petitioners is that the law has been well settled that the object of regulating the recruitment and conditions of service by statutory provisions is to rule out arbitrariness, provide consistency and crystallize the rights of the employees concerned. Where the recruitment rules are unworkable, inoperative and cannot achieve the objectives, the Government can exercise its executive power so as to make recruitment and promotions in removing stagnations and to afford an opportunity to the eligible persons to enter into the service. In this case on the basis of the decision of the High Power Committee dated 5.8.1992, Cabinet decision dated 3.12.1994 and resolution dated 12.3.1996, the Degree holder Junior Engineers and the Stipendiary Engineers were appointed as Assistant Engineers on ad hoc basis against the quota decided by the Government. Though the Public Service Commission while considering concurrence did not agree with the quota fixed and made certain advice, the same was not binding on the State Government and the State Government being the ultimate authority to make recruitment and promotion as per its policy, the petitioners are entitled for regularization of their

service as Assistant Engineers as was done in the case of Stipendiary Engineers appointed as ad hoc Assistant Engineers. The plea of the State Government that due to disagreement of O.P.S.C. the draft amendment rule was not finalized is totally baseless, motivated and an afterthought. When the State Government as a matter of policy has decided to frame separate quota for the Degree holder Junior Engineers and Stipendiary Engineers, it is discriminatory to follow the same in respect of one class while ignoring the quota fixed for the other class on the plea that the Public Service Commission has not agreed with the same. As a matter of fact in the framing of recruitment and promotion rules which is a subordinate legislation in view of the provision under Article 309 and proviso thereof which provides that it shall be competent 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, consultation with the Public Service Commission is not necessary. As per the rules of business of the State Government, the Public Service Commission has no role. Therefore, the action of the Nodal Department in sending the draft recruitment rules being approved by the Cabinet to the OPSC instead of sending the same to the Governor so as to notify the same in the official gazette to make it enforceable is purely an ulterior motive and mala fide actions of the authorities. In any case since the Government has not accepted the advise of O.P.S.C. and proceeded ahead in accordance with its policy to validate the ad hoc appointment of the services of the Assistant Engineers from the Stipendiary Engineers, it cannot deny the benefit of the same policy decision so far as the Degree holder Junior Engineers are concerned.

Learned Counsel for the opposite parties contended that the Validation Act of 2003 is neither arbitrary nor against public policy but the said Act has been passed in furtherance of a greater public purpose and interest. It is further submitted that the Degree holder Junior Engineers was a class apart from those unemployed Degree Engineers who were enrolled as Stipendiary Engineers. Even though the names of various ad hoc Assistant Engineers have been mentioned in the Validation Act, the same was passed for the regularization of appointment of all ad hoc Assistant Engineers as a class but not specifically designed to regularize the appointment of individuals. Further the Assistant Engineers form a class by themselves and any benefit accruing in their favour cannot be challenged on the ground of discrimination by the present petitioners who are undisputedly a class apart. The regularization of services of the ad hoc Assistant Engineers like the present opposite parties may at best be termed as an irregularity by the State Government but it can by no stretch of imagination be treated as an illegal action especially when the Stipendiary Engineer turned Assistant Engineers having the eligibility criteria to be appointed as direct recruit Assistant Engineer have been appointed by facing interviews conducted by different committees at different point of time and the Validation Act has been published after specific directions of this Court in Jayant Kumar Dey's case 83

(1997) CLT 435 and Bijoy Krishna Das and Anr. v. State of Orissa and Ors. O.J.C. Nos. 6354 and 6355 of 1999 decided on 2.7.2002. If the Validation Act will be struck down, the consequence will be uprooting a large number of graduate Engineers from their permanent employment and depriving them from earning their regular livelihood who had all the essential/requisite qualifications to be appointed as Assistant Engineers and, therefore, their appointment basically was in conformity with the prescribed eligibility criteria under the Recruitment Rules. It is further submitted that the State government under Rule 23 of the Orissa Service of Engineers Rules, 1941 has the power to relax any of the provisions of the said Rules if the Government is of the opinion that the said move is expedient in public service. Therefore, it is not a case where the Government does not have the power to relax or modify any of the provisions of the Recruitment Rules. Lastly it was submitted that the Legislature was well within its competence to enact the Validation Act in respect of a class/category of persons in the interest of public service. Learned Counsel for the opposite party in W.P.(C) No. 11093 of 2006 contended that regularization of Stipendiary Engineers through Validation is an exceptional decision by the State Government to alleviate the hardship caused to qualified degree engineers who served the State on a meagre salary of Rs. 2000.00 per month for quite a good length of time. The Validation Act was brought about in order to implement the policy decision of Government as directed by this Court since urgent protection was needed for the Stipendiary Engineers. The Stipendiary Engineers were appointed as ad hoc Assistant Engineers whereas the degree holder Junior Engineers were promoted to the post of ad hoc Assistant Engineers which is a part of career enhancement. Validation is enacted by legislature to validate the appointments which are not coming under the prevailing rules and validation cannot be done to the promotions to a higher grade which is the case of the Junior Engineers having degree qualifications. It has further been contended that promotion is not required to be validated. Lastly, it has been submitted that the inservice degree holder Junior Engineers are not similarly situated like that of the Stipendiary Engineers turned Assistant Engineers and do not have any locus standi to challenge the Validation Act which is an act of the legislature. They belonged to an incomparable group to that of the Stipendiary Engineers and cannot claim equality.

Shri B. Routray, learned Counsel for the intervenors in W.P.(C) No. 8630 of 2006, has submitted that the intervenors were appointed as Assistant Engineers on ad hoc basis between 1984 and 1988 as against the 67% quota through a recruitment process and continued as such in Works Departments and by the Orissa Service of Engineers (Validation of Appointment) Act, 2001 vide Law Department Notification dated 5th of February, 2002 published in the Orissa Gazette dated February 6, 2002 the ad hoc appointment of 39 Assistant Engineers including the intervenors continuing in Works Department and Housing and Urban Development Department was validated. The intervenors-belonged to the Housing and Urban Development Department. Though the 31st Assistant

Engineers continuing in Works Department whose appointment was validated by the aforesaid Validation Act of 2001 along with the intervenors have already been promoted to the post of Assistant Executive Engineers and thereafter to the post of Executive Engineers and though the D.P.C. has already considered the case of promotion of the intervenors to the post of Assistant Executive Engineer, they have been deprived of promotion because of the interim order passed by this Court in Misc. Case No. 12737 of 2006 arising out of W.P.(C) No. 8630 of 2006. Their further case is that the petitioners in W.P.(C) No. 8630 of 2006 were promoted to the cadre of Assistant Engineer on ad hoc basis from the cadre of Junior Engineer in the year 1997. Their appointment as Assistant Engineer being contrary to the Orissa Engineering Rules, 1941, the same is irregular and till date their services having not been regularized, they cannot be equated with the intervenors who are not only senior to them as Assistant Engineers but their services have been regularized by the Validation Act, of 2001. Therefore, they have no locus standi to challenge the gradation list or the decision of the D.P.C. in recommending the name of the intervenors for promotion to higher post. The petitioners have not prayed for quashing of the Validation Act of 2001 validating the ad hoc appointment as Assistant Engineers of the intervenors.

5. Orissa State Public Service Commission was consulted. However, they had advised that Stipendiary Engineers and the Junior Engineers are competing with the candidates from the open market. However we are of the opinion that the advice of the Commission is not binding on the State Government more so when the State Government decided to oust those posts from the purview of the Public Service Commission. But there would be illegality if the State Government would make discrimination between the persons working as ad hoc Assistant Engineers appointed during a particular period. Vide Memo dated 6.6.1990 of the Government of Orissa in General Administration Department, it was informed that the Council of Ministers inter alia decided that all posts of Assistant Engineers referred to the Orissa Public Service Commission and advertised by them may be withdrawn, 14 posts of Stipendiary Engineers may be created " one in each Block and 100 posts of Stipendiary Engineers may be created in the Irrigation Department for survey and investigation and 200 posts of Stipendiary Engineers may be created for the initial infrastructure work of Paradip Port-based Steel Plant and in all, 714 posts of Stipendiary Engineers will be available for recruiting from the unemployed Degree Engineers on a consolidated stipend of Rs. 2,000/- per month. Absorption into regular posts may be considered after two years on the basis of their performance.

However the Stipendiary Engineers were given ad hoc appointments as Assistant Engineer in the pay scale of Rs. 2000-3500/-. The Degree holder Junior Engineers were also given ad hoc appointment on the post of Assistant Engineers in that pay scale even before the appointment of Stipendiary Engineers as Assistant Engineers. Since the State Government decided to withdraw the post from the purview of the Public Service Commission, there was no occasion for the Government to discriminate these ad hoc appointees on the post of Assistant

Engineer.

6. Counter affidavit has been filed on behalf of the opposite parties 24 to 31 by Sri Binay Kumar Rout who is opp party No. 24 in W.P.(C) 12706 of 2005 annexing therein Annexure B/24, the copy of the Minutes of discussion on regularization of in-service Stipendiary Engineers of various disciplines including other allied matters held on 6.6.1995 in the Chamber of the Chief Minister. In the minutes inter alia the following has been mentioned.

7.4. As per the rules approved by the Cabinet earlier Appointment to the cadre of Assistant Engineers in a recruitment year shall be made as follows:

- (a) By promotion from among the Junior Engineers to the extent of 33% of the vacancies required to be filled up in any recruitment year;
- (b) by selection from among the Junior Engineers having Degree or equivalent qualification to the extent of 5% of the vacancies required to be filled up in that particular recruitment year;
- (c) by selection from among the Stipendiary Engineers to the extent of 25% of the vacancies required to be filled up in that particular recruitment year;
- (d) by direct recruitment to the extent of 37% of the vacancies required to be filled up in that particular recruitment year;
- (e) provided that where suitable candidates are not available to fill up the vacancies under Clauses (a), (b) and (c) above, the vacancies shall be filled up by direct recruitment in addition to the quota specified under Clause (d).

But in paragraph 7.5 of the Minutes dated 6.6.1995 it was decided as under:

Since it has been agreed that recruitment of Stipendiary Engineers will be one time affair and in future no recruitment of Stipendiary Engineer will be made and all vacancies of Asst. Engineer shall be filled up through Orissa Public Service Commission, it was decided that the Stipendiary Engineers who have been recruited before 30.9.1994 may be regularized and posted as Asst. Engineer. Subsequently a Validation Act has to be passed to regularize this. The Act may be drafted in consultation with Law Department. Since the earlier Cabinet decision is to fill up the Assistant Engineer cadre by selection of Stipendiary Engineers (25%) and by direct recruitment of Asst. Engineers (37%) of the vacancies of Asst. Engineers in a recruitment year, this has to be kept in abeyance till such time all the Stipendiary Engineers are absorbed in to the cadre.

7. Perusal of the above quoted paragraphs of the minutes of the meeting shows that in Paragraph 7.4 (b) it was decided by the Cabinet that 33% of the vacancies in the cadre of Assistant Engineers in a recruitment year shall be filled up by promotion from among the Junior Engineers and out of the remaining 67% vacancies, 5% of the vacancies required to be filled upon that particular recruitment year shall be filled up by selection from among the Junior Engineers having Degree or equivalent qualification and 25% of the vacancies required to

be filled up in a particular recruitment year shall be filled up by selection from among the Stipendiary Engineers and 37% of the vacancies required to be filled up in a particular recruitment year shall be filled up by direct recruitment. Therefore, the Cabinet decided that 5% of the vacancies out of the 67% under the quota of direct recruitment was reserved for Degree holder Junior Engineers and 25% for Stipendiary Engineers and, accordingly, the degree holder Junior Engineers were given appointment as Assistant Engineers against 5% quota on ad hoc basis and the Stipendiary Engineers were given appointment on ad hoc basis against the 25% quota. After being appointed, they were not liable to be discriminated as all of them became at par as ad hoc Assistant Engineers for the same condition of service and, thus, became equal.

8. Before proceeding further, we have to consider whether the Validation Act is valid one or void. In this regard, the provisions of Article 309 of the Constitution are liable to be reproduced as under:

309. Recruitment and conditions of service of persons serving the Union or a State:

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, any rules so made shall have effect subject to the provisions of any such Act.

9. A bare perusal of Article 309 shows that Legislature has no independent jurisdiction, but they are subject to the other provisions of the Constitution. Therefore, opening words of Article 309 imply that rules framed under Article 309 would give way to the other provisions of the Constitution, if and when question regarding their conflict inter se is raised. Therefore, if an Act is violative of Articles 14 and 16 of the Constitution, the same cannot be held to be a valid law.

10. In the case of State of U.P. Vs. Manbodhan Lal Srivastava, which was relied upon by the Kerala High Court in K.M. Joseph, Trivandrum and Another Vs. State of Kerala and Another, , it has been held by the Hon"ble Apex Court that the provision of Article 320(3)(c) is not mandatory and non-compliance with those provision does not afford a cause of action to a civil servant in a Court of law. In paragraph 11, the apex Court held as under:

An 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.

11. In the case of *I.N. Saksena v. State of M.P.* AIR 1976 SC 2250, the Hon'ble Supreme Court has held that the validity of a validating law is to be judged by three tests. Firstly, whether a legislature possesses competence over the subject-matter, and secondly, whether by the validation the legislature has removed the defect which the Courts had found in the provisions of law and thirdly, whether it is consistent with the provisions of Part III of the Constitution. In Paragraph-23, it has been held as under:

23. In *Hari Singh and Others Vs. The Military Estate Officer and Another*, , a Bench of seven learned Judges of this Court laid down that the validity of a validating law is to be judged by three tests. Firstly, whether a legislature possesses competence over the subject-matter, and secondly, whether the validation the legislature has removed the defect which the Courts had found in the provisions law. To these, we may add a third: Whether it is consistent with the provisions of Part III of the Constitution.

12. In the case of *Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others*, , the Hon'ble Supreme Court has held that the rules made by the President in exercise of his power under proviso to Article 309 whether of prospective or retrospective operation, are open to challenge on the ground of violation of the Constitution, including the Fundamental Rights contained in Part III of the Constitution. The relevant portion of the judgment is quoted as under:

18. This means that even though the President, in exercise of his power under proviso to Article 309, can make rules which may have prospective or retrospective operation, the said rules may be open to challenge on the ground of violation of the provisions of the Constitution, including the Fundamental Rights contained in Part III of the Constitution.

13. Therefore, if the legislature has made law validating the appointment of a few ad hoc Assistant Engineers working with those ad hoc engineers without laying down any principle merely by attaching a list of incumbents to the

Validation Act, the same is discriminatory and violative of Article 16(1) of the Constitution which provides that there shall be equality of opportunity for all the citizens in matters relating to employment or appointment to any office under the State.

14. There is no reason as to why appointments of a few persons working as Assistant Engineers on ad hoc basis have been validated ignoring the other similarly situated persons working on ad hoc basis as Assistant Engineers. There cannot be discrimination or classification amongst the persons working on ad hoc basis on the post of Assistant Engineers. Once unequal became equal, the State has no authority to discriminate them and make equals as unequal.

15. In the case of State of Punjab Vs. Joginder Singh, and in the case of State of Mysore Vs. M.H. Krishna Murthy and Others, , the Hon''ble Apex Court has held that once two different services or cadres are integrated into one any subsequent discrimination amongst the two groups would be violative of Article 16(1). In paragraph 11 of State of Mysore (supra), it has been held as under:

Other cases mentioned by the Mysore High Court i.e. State of Punjab Vs. Joginder Singh, and K.M. Bakshi v. Union of India 1965 Supp. (2) SCR 169, also shows that inequality of opportunity of promotion, though not unconstitutional per se, must, be justified on the strength of rational criteria correlated to the object for which the difference is made. In the case of Government servants, the object of such a difference must be presumed to be a selection of the most competent from amongst those possessing qualifications and backgrounds entitling them to be considered as members of one class. In some case, quotas may have to be fixed between what are different classes or sources for promotion on grounds of public policy. If, on the facts of a particular case, the classes to be considered are really different, inequality of opportunity in promotional chances may be justifiable. On the contrary, if the facts of a particular case disclose no such rational distinction between members of what is found to be really a single class no class distinction can be made in selecting the best. Articles 14 and 16 to be violated when members of one class are not even considered for promotion. The case before us falls, in our opinion, in the latter type of cases where the difference in promotional opportunities of those who were wrongly divided into two classes for this purpose only could not be justified on any rational grounds. Learned Counsel for the State was unable to indicate any such ground to us. High Court rightly held that the impugned notifications were unconstitutional.

16. In view of the above mentioned facts and circumstances, this Court is of the opinion that the Validation Act, 2003 is violative of Article 16 of the Constitution, as it does not constitute a law or norm and also by ignoring consideration of regularization of other ad hoc Assistant Engineers and enclosing a list of 881 ad hoc Assistant Engineers with the said Act, the State has discriminated them and thus equals have been made unequals which ultra vires the Constitution.

17. The Government had appointed Assistant Engineers on ad hoc basis from those junior engineers who had degree in engineering treating them under the quota of direct appointment for which 5% vacancy was reserved vide Cabinet decision dated 3.12.1994. The stipendiary engineers who were appointed on stipendiary basis were also given ad hoc appointment as Assistant Engineers. Therefore, all the persons were working on ad hoc basis on the post of Assistant Engineers when the Validation Act came into force. But by the Validation Act only the appointment of 881 ad hoc Assistant Engineers indifferent disciplines, as specified in the schedule of the Act, i.e. the Stipendiary Engineer turned Assistant Engineers, were validated. Therefore, it is alleged that validation of ad hoc appointments of only those ad hoc assistant engineers, who were earlier stipendiary engineers, and not those assistant engineers who were earlier junior engineers, made equals as unequals. Since all were working as ad hoc assistant engineers and if the Government wanted to regularize the services of ad hoc assistant engineers, the same should have been done uniformly without any discrimination or by making a law laying down the principles for regularization and thus there is violation of Article 16 of the Constitution in enacting the Validation Act with a list of 881 ad hoc assistant engineers and not all though some of the engineers were given ad hoc appointment prior to the ad hoc appointment of those assistant engineers who were initially appointed as stipendiary engineers on stipend of Rs. 2000/- per month basis.

18. In view of the above discussion, since the Validation Act is violative of Article 16 the Constitution, the same is ultra vires the Constitution and is declared as invalid and hence a writ of mandamus is issued commanding the opposite party-State to treat the same in operative. All consequential actions taken pursuant to the said Validation Act are hereby quashed. However, it will be open for the State Government to enact suitable law under Article 309 of the Constitution or under the proviso thereto laying down the principle/provision for consideration of regularization of ad hoc Assistant Engineers following the provision of Article 16 of the Constitution and also make suitable provision ousting the posts from the purview of the Orissa Public Service Commission of making amendment in the Orissa Public Service Commission (Limitations of Functions) Regulations, 1989. The question of preparation of gradation list will only come in case the opposite party-State enacts a law and considers the regularization of the ad hoc Assistant Engineers thereunder.

19. The writ petitions are allowed to the extent indicated above.

There would be no order as to costs.

N. Prusty, J.

20. I agree.