

(2008) 01 BOM CK 0090

In the Bombay High Court

Case No : Writ Petition No's. 4197 and 6461 of 2007

Ulhas Somwanshi, Smt. Pushpa Manchanda, Child
Development Project Officer, Mohan Jadhav and Sunil Ahire

APPELLANT

Vs

The State of Maharashtra and Others
 Kiran Satappa
Kamble, Child Development Project Officer and Others Vs The
State of Maharashtra and The Secretary, Rural Development
Department

RESPONDENT

Date of Decision : 30-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2008) 2 ALLMR 536 : (2008) 3 BomCR 99

Hon'ble Judges : P.V. Kakade, J;N.V. Dabholkar, J

Bench : Division Bench

Advocate : S.B. Talekar, in Writ Petition No. 4197 of 2007 and V.D. Sapkal, in Writ Petition No. 6461 of 2007, for the Appellant; N.B. Khandare, Govt. Pleader for respondents No. 1 and 2, A.S. Deshpande, for respondent No. 3, G.V. Mohekar, holding for V.D. Salunke, for respondent No. 7, S.V. Kurundkar, in Writ Petition No. 4197 of 2007 and N.B. Khandare, Govt. Pleader in Writ Petition No. 6461 of 2007, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Dabholkar, J.—Both these writ petitions although by different writ petitioners, raise the same challenge to the proposed promotions from Class-II to Class-I in Maharashtra Development Services. For the purpose, they challenge Government Circular dated 14-03-2007, issued by the Secretary to the Government of Maharashtra in the Department of Rural Development and Water Conservation as ultra vires the Articles 14 and 16 of the Constitution of India and also being contrary to the Maharashtra Development Services Class-I and Class-II (Departmental Examinations) Rules, 1991. Both the writ petitions also pray for quashment of the action of the Government deleting/excluding the names of petitioners from the select list prepared by the Departmental Promotion Committee for promotion to the posts in Maharashtra Development Services

Class-I (which was the result of action based on impugned Circular). Both the writ petitions also pray for directions to the respondents No. 1 and 2 to consider the claim of the petitioners for promotion to Class-I posts in Maharashtra Development Services, as per the original select list prepared by the Departmental Promotion Committee.

2. Petitioners are employees presently serving in Class-II posts of Maharashtra Development Services (hereinafter referred to as "MDSs"). Learned Counsel for the petitioners, during the course of their submission, having admitted certain positions, which we are referring immediately hereinbelow, other details as to when petitioners were appointed in MDSs and their present postings and journey upto Class-II Services, are not required to be recorded for the purpose of this judgement.

Admittedly, all the petitioners have crossed age of 45 years at present and even on the date of subject promotions. Admittedly, all petitioners have entered Class-II MDSs after the Gazette date as contemplated by Rule 2 (c) of the Maharashtra Development Services, Class-I and Class-II (Departmental Examinations) Rules, 1991 (hereinafter referred to as "the said Rules") i.e. after 18th July, 1991. Admittedly, all the petitioners have exhausted all their chances for passing Departmental Examination as required by Rule-3 of the said Rules and yet, they did not pass the Departmental Examination. In spite of not having passed the Departmental Examination before completion of age of 45 years, none of the petitioners was reverted by orders as required by Rule 7 (a) of the said Rules. On the contrary, there are orders passed in favour of the petitioners as required by Rule 5 (2) of the said Rules regarding entitlement of the petitioners to exemption from passing the Departmental Examination. Copies of some such orders are filed at paper-book pages 50 to 53 in Writ Petition No. 4197/2007 and at Exhibit-A of the other writ petition. The powers to issue such orders were delegated to the Divisional Commissioners and such orders are passed by respective Divisional Commissioners. This position is not disputed by the learned Government Pleader.

It is the contention of the petitioners that in the month of December, 2006, the Departmental Promotion Committee (hereinafter referred to as "DPC" for the sake of brevity) prepared and finalized a list of 103 (in fact 133) officers of Class-II MDSs for promotion to Class-I MDSs. This list included 28 individuals who had crossed age of 45 years and therefore, were exempt from the condition of passing Departmental Examination. Subsequently, by taking into consideration the Circular dated 14th March, 2007, petitioners are deleted from that select list, by interpreting the said Circular that if the employees have exhausted all their chances of passing Departmental Examination before crossing age of 45 years, they are not entitled to benefit of Rule 5 of the said Rules which exempts the employees from passing the Examination prescribed by the said Rules.

3. Submissions for the petitioners in first writ petition were advanced mainly by learned advocate Shri Talekar, which were fully supported by learned advocate

Shri Sapkal for the petitioners in second writ petition with addition of few points. It was submitted that the said Rules although enacted in the year 1991 were never followed in practice and hence, the State was required to issue the impugned Circular instructing to follow the Rules scrupulously. As a result of the fact that the said Rules are not followed nearly for fifteen years although enacted, there are several instances of consequences as required by Rule 7 of the said Rules not being implemented. Rule 7 of the said Rules requires termination of an appointee and reversion of a promottee, in case of their failure to pass the Departmental Examination as mandated by Rule 3 of the said Rules. There are instances in the past that promotions were allowed by granting exemptions from passing the Departmental Examination. For the present, reliance is placed on a list of 58 promottees dated 04-08-2007 [paper-book pages 75 (54) of writ petition No. 4197/2007], in order to demonstrate that the list of 58 promottees includes only five persons who have passed the Departmental Examination and remaining 53 are the individuals who are granted exemption from appearing for the Departmental Examination. In fact, paper-book page 75 (54 and 55) is a composite list of two lists of promotions comprising 46 individuals in the first list and 12 individuals in the second list. These two separate lists are at paper-book page 75 (56 to 60) and 75 (61 to 63). By virtue of foot-note () in para 2, the promotions are subject to condition that the promottees passed the Departmental Examination under the said Rules as amended in the year 1998. In fact, by virtue of foot-notes () and (), the promotions are also subject to decision of the High Court in pending writ petitions No. 8452/2004 and 4197/2007. According to learned Counsel for the petitioners, the cases of the petitioners are distinguished by the authorities from those included in the promotion list by interpretation of impugned Circular dated 14-03-2007. It is indicated that because petitioners have exhausted all their chances of passing the Departmental Examination, before they attained the age of 45 years, they are not entitled to exemption as permissible under rule 5 of the said Rules. According to learned advocate Shri Talekar, Rule 5 of the said Rules which enables exemption from passing Departmental Examination on attaining age of 45 years, supersedes Rule 4 of the said Rules, and therefore, on completion of age of 45 years in Class-II MDS, although without passing Departmental Examination, petitioners were entitled to be considered as eligible for promotion, by virtue of exemption from passing Departmental Examination under the said Rules. According to him, the petitioners could not have discriminated merely because petitioners have exhausted all their chances and promottees have not. In fact, it was also faintly argued that some of the candidates who had exhausted all their chances were at times promoted in the past and even in the present list. The impugned Circular dated 14-03-2007, it was pointed out, does not refer to Rule 5 of the said Rules at all, but it only instructs and expects strict compliance of Rule 4 of the said Rules.

Learned advocate Shri Sapkal has demonstrated, by relying on paper-book pages 65 to 72 of the second writ petition that all nine petitioners in both the petitions

were recommended by the DPC for promotion, either for regular or for adhoc, by the decision taken in the meeting of the DPC held on 13th and 14th December, 2006. Referring to Government Resolution dated 01-11-1977, Shri Sapkal relied upon its contents in order to submit that the same depicts the intentions of the Government in relaxing the requirement of passing Departmental Examination in case of employees who have completed age of 45 years and the contents of the said Government Resolution, relied upon by him read as follows.

After examining this question fully, the Government has decided that Government servants who have completed 45 years of age, should not be required to appear for Departmental Examination. Government is accordingly pleased to direct (i) that the existing Departmental Examination Rules, both for continuance and confirmation and also for qualifying for promotion to higher posts, should be suitably amended so as to provide therein for the grant of exemption from passing the Departmental Examination on attaining age of 45 years by the concerned Government Servants subject to the condition that the seniority, if lost by such Government Servants as a result of not passing the Examination within the prescribed time limit and the number of chances permissible will not be restored on granting such exemption, and (ii) that the effect to these orders should be given in the proposed amendment of the Rules from the date of these orders.

According to learned advocate Shri Sapkal, the petitioners are discriminated by the action of deletion of their names from the list of candidates recommended for promotion inspite of the fact that others who have not passed the Departmental Examination are still considered eligible for promotion.

4. Learned advocate Shri Ajay Deshpande who represents respondent No. 3 and thereby represents the cause of respondents No. 3 to 9 in first writ petition, pointed out that Rule 4 of the said Rules does not apply to the petitioners in view of the admitted position that the petitioners are promoted to Class-II MDSs after the Gazette date. This is because Rule 4 of the said Rules is titled as "period and number of chances for officers appointed before the Gazette date." According to Shri Deshpande, they are governed by Rule 3 of the said Rules. Referring to Government Resolution dated 01-11-1977, contents of which are reproduced hereinabove, it was submitted by learned advocate Shri Deshpande that the seniority of the petitioners and similarly placed employees who have not passed the Departmental Examination, even if exempted from passing Departmental Examination by virtue of Rule 5 of the said Rules, their seniority is not protected by such exemption, and therefore, they go down in the list of seniority of Class-II MDSs, and hence, they do not come within the zone of consideration for promotion. As against this position, those employees who attained the age of 45 years before exhausting all their chances, not only get exemption under Rule 5 of the said Rules, but they get such an exemption without any adverse effect on their seniority. Those who have exhausted all their chances and fell to pass the Departmental Examination, before attaining age of 45 years, are in fact required

to be reverted and therefore, their seniority must be deemed to have been adversely affected inspite of grant of exemption by orders under Rule 5. In reply to our query, learned advocate Shri Deshpande was not able to point out any provision from either the Examination Rules or Seniority Rules, if any applicable to the employees of MDSs demonstrating the adverse effect on the seniority in case of failure to pass the Departmental Examination by exhausting all the chances. Rule 7 of the said Rules, therefore, appears to be the only provision which indicates the consequences of such failure. Shri Deshpande pointed out that the petitioners approached the Maharashtra Administrative Tribunal (MAT) with a false statement that applicants have passed the Maharashtra Development Services Qualifying Examination some time in 1994 to 1998 respectively, that petitioners have scandalised the M.A.T. by challenging the administrative circular of the Chairman. According to Shri Deshpande, therefore, petitioners should not be entitled to any relief by exercising the plenary powers of this High Court under Article 226 of the Constitution of India. To the case-law, relied upon by learned advocate Shri Deshpande, we may advert at appropriate time in this judgement.

Learned Government Pleader Shri Khandare pointed out that out of 53 candidates as contained in the list dated 04-08-2007, who are candidates having not passed the Departmental Examination, there are 41 individuals who have attained age of 45 years before entering into Class-II MDS, and remaining twelve attained the age of 45 years before exhausting their chances as permissible under the said Rules i.e. two years/four chances plus extra one year/two chances. Learned Government Pleader has provided the details in tabular form (Exhibit-"X"), which is a list of as many as 149 officers. In fact, on examination of 58 cases who are promoted on 04-08-2007 and which are blown by parrot colour in the list (Exhibit-X) for the purpose of attracting attention, we found that seven cases of the individuals are such that they are granted exemption because of attaining age of 45 years and they are not the candidates who had completed age of 45 years before entry into Class-II MDSs. Not only that, they had span of more than two years before attaining the age of 45 years after entry into Class-II MDSs. We enlist them hereinbelow.

Needless to say that in case petitioners fell in securing orders in their favour, the respondents No. 1 and 2 will have to reconsider the cases of these seven officers and similarly placed officers if they are in the select list for promotion, either regular or adhoc.

Learned Government Pleader conceded that all nine petitioners were included in the select list of 133 employees. However, it was later on realized that Rules were not adhered to and hence, the impugned Circular was issued on 14-03-2007. The details of the petitioners as given in Exhibit-X are as follows.

According to learned Government Pleader, in fact, petitioners are liable to be reverted and they were not reverted because of inaction on the part of the respondents. Consequently, they will have to be considered to be Class-III employees and therefore, cannot be considered for promotion to Class-I posts in

MDSs. The orders of exemption issued in favour of the petitioners by respective Divisional Commissioners are also not disputed by the learned Government Pleader but he contended that those were wrongly issued and therefore, petitioners cannot be allowed to take benefit of the same. According to learned Government Pleader, as a result of Rule 3 read with Rule 7 of the said Rules, together, the petitioners are not entitled to any promotion.

5. In reply, it was submitted by learned advocate Shri Talekar that adverse effect on seniority as argued by learned advocate Shri A.S. Deshpande, is not the consequence contemplated by the said Rules, and Resolution dated 01-11-1977 stands superseded by the said Rules which are enacted in the year 1991.

According to learned advocate Shri Sapkal, Resolution dated 01-11-1977 is indicative of the intentions of the State which did not differentiate between the employees who attained age of 45 years before exhausting all the chances and after exhausting all the chances, and therefore, now the petitioners cannot be compelled to appear for the Departmental Examination. Since no action under Rule 7 was taken and exemption orders are issued in favour of the petitioners, they are entitled to all the benefits of exemption. If the Rules are not so interpreted, according to learned Counsel, the Rule 5 of the said Rules would become redundant.

6. As a result of submissions advanced by learned counsel of both sides, the points required to be considered can be crystalized as follows.

(i) Whether, as a result of completion of 45 years of age after exhausting all the chances for passing Departmental Examination and before they could be considered for promotion, petitioners can be deprived of being considered for promotion ?

(ii) Whether the petitioners are not entitled to be considered for promotion because, in fact, they should have been reverted to Class-III posts by compliance of Rule 7 of the said Rules ?

(iii) Whether the petitioners stand discriminated, by considering those employees who have not attained age of 45 years before exhausting all the chances for passing Departmental Examination, as eligible for promotion ?

(iv) Whether failure to pass Departmental Examination inspite of exhausting all available chances before attaining age of 45 years, has any adverse effect on the seniority of the petitioners ?

7. The Rules which are relevant for the purpose of adjudication of the writ petitions can usefully be reproduced hereinbelow.

Rule (2) : Definitions

(c) : "Gazette Date" means the date of official gazette in which these rules are published.

Rule (3) : Period and number of chances : Every officer shall be required to pass the Examination within four chances and within a period of two years from the date of his appointment, either by promotion or nomination.

Rule (5) : Exemption from passing Examination

(1) An officer shall be exempted from passing the Examination if he,

(a) has attained age of forty five years on or after the Gazette date; or

(b) has passed the Maharashtra Development Services Qualifying Examination or Revenue Officers Examination or Revenue Qualifying Examination, or Agricultural Services Examination;

(2) The officer who is qualified for claiming exemption under Clauses (a) or (b) of Sub-rule (1) may apply for grant of such exemption, to the Secretary to Government, Rural Development Department who on being satisfied that such officer is entitled to such exemption, shall pass an order to that effect.

Rule (7) : (a) Consequences of failure to pass Examination :- Where an officer fails to pass the Examination within the period and within the chances specified under Rule 3 or Rule 4, as the case may be, of these Rules, such officer shall be discharged from the services or reverted to the lower post as the case may be.

(b) Consequences when examination not held....

8. Out of four points as framed in para 6 above for consideration, points No. (i) and (ii) can be considered together because finding on those two points depends on eventuality of employees not passing the Departmental Examination before attaining the age of 45 years and before they can be considered for promotion. The finding on these points shall depend on interpretation of Rules 5 and 7 of the said Rules together since, according to submission of learned counsel for the petitioners, these Rules seem to be conflicting with each other and it was also submitted that in case effect is given to the consequences as contemplated in Rule 7 (a), Rule 5 would become redundant. Points No. (iii) and (iv) are required to be considered independently.

We intend to deal with issue No. (iv) first since it was submitted by learned advocate Shri A.S. Deshpande for respondent No. 3 in writ petition No. 4197/2007 that in case of failure to pass the Departmental Examination, the employees lose their seniority to those who have passed the Departmental Examination, and such lost seniority cannot be restored by mere grant of exemption by an order under Rule 5. The arguments in the matter were heard for two days i.e. 15th and 16th January, 2008, and inspite of putting a query as to whether there is anything in the Rules under consideration or any other Rules such as General Service Conditions or Seniority Rules, there is any provision supporting such a proposition, learned Counsel has not been able to draw our attention to any such provision. In that event, ordinarily, consequences upon failure to pass the Departmental Examination within the prescribed limits, in

terms of period and number of attempts, even before attaining the age of 45 years, would be as prescribed by the Rules. As the consequences are prescribed by Rule 7 (a) i.e. a direct appointee would lose the job and a promottee would be reverted, there is no eventuality contemplated in Rule 7 (a) that a person would be allowed to continue in Class-II even after having failed to pass the Departmental Examination. (whether he can continue merely by attaining the age of 45 years, even after enjoying all four attempts to pass the Departmental Examination unsuccessfully, is an issue of controversy).

In order to meet the challenge posed by the learned Counsel for the petitioners that they are discriminated because they are not treated at par with the candidates having passed Departmental Examination, although they are certified to be exempt from passing the Departmental Examination by orders under Rule 5 and as a result of having attained the age of 45 years and that they are also discriminated because candidates who have not passed the Departmental Examination, although they have not exhausted all their chances, by not considering petitioners for promotion, although other two categories are so considered, learned Counsel Shri A.S. Deshpande has come out with this theory of loss of seniority. Eventually, the philosophy has no basis in the said Rules, nor he has been able to point out such a provision from any other set of Rules applicable to the parties. Comparatively, learned Government Pleader has come out with a simpler challenge. According to him, it was a lapse on the part of the office in not reverting and also an error in passing the orders of exemption in favour of the petitioners, inspite of all petitioners having exhausted their permissible attempts to pass the Examination without success, instead of reverting them as required by Rule 7 (a) of the said Rules.

Learned advocate Shri Deshpande has tried to substantiate his argument by relying upon reported judgements.

In the matter of *State of Maharashtra v. Jagannath Achyut Karandikar* AIR 1989 S.C. 1133, learned advocate Shri Deshpande has placed reliance upon the observations in para 9 of the judgement. In the reported matter, respondents No. 1 to 8 were Assistant Secretaries/Section Officers/Superintendents in different Departments of Government of Maharashtra. Departmental Examination was prescribed as condition precedent for promotion to the cadre of Superintendents and the Examinations were required to be conducted every year. Officials were expected to pass the Departmental Examinations within a stipulated period and those who could not pass within time frame, were to lose their seniority, but could be promoted as and when they qualify themselves. The Rules those were applicable to the petitioners are reproduced in para 2 of the judgement. The Government for some reason or the other could not hold examinations every year, particularly in the years 1968 to 1970. Yet, Government did not pass any order extending the period prescribed for passing the Departmental Examination, nor promoted the seniors subject to their passing the Examination. The juniors who qualified themselves were promoted overlooking the case of seniors, and

seniors were promoted only upon their passing the examination. In the cadre of Superintendent, however, Government refused the seniority list so as to reflect rankings in the lower cadre irrespective of date of promotion. This was challenged before Bombay High Court and this High Court conceded the powers to the Government to relax the Rules relating to passing the Examination in case of hardship, but refused to recognize the power of the Government to give seniority to those who could not pass the Examination within the time schedule. Rule 2 specifically laid down that

a candidate who does not pass the Examination at the end of nine years service in the Upper Division, will lose his seniority to those candidates who pass the Examination before he passes it.

and subject to loss of seniority, the candidate was allowed to take further chance to pass the Examination even after completion of nine years service by virtue of Rule 4. The Supreme Court, in para 9 later half, observed thus :

...Rule 2 of the 1962 Rules no doubt states that a candidate who does not pass the examination at the end of nine years service will lose his seniority. But this rule cannot be read in isolation as the High Court did. It has to be read along with the other rules since it is a part of the scheme provided for promotion. Rule 5 requires the Government to hold the examination every year. This rule is the basis of the entire scheme and the effect of other rules depends upon holding the examination. If examination is not held in any year, the rule 2 cannot operate to the prejudice of a person who has not exhausted all his chances. The person who has not exhausted the available chances to appear in the examination cannot be denied his seniority. It would be unjust, unreasonable and arbitrary to penalise a person for the default of the government to hold the examination every year. That does not also appear to be the intent or purpose of the 1962 Rules.

It can be seen that facts in the reported case are different than the one before us. It is not the contention of either party that they could not pass the Departmental Examination because those were not held. So far as loss of seniority is concerned, there was specific Rule applicable, which is not the case in the matter before us.

M.P. Chandoria Vs. State of M.P. and others, . was a matter wherein the Hon''ble the Apex Court was dealing with interpretation of Rule 12 of the M.P. Civil Services (General Conditions of Service) Rules, 1961, and the observations in para 5, relied upon by learned advocate Shri A.S. Deshpande is interpretation of the said Rules. The said Rule governed the seniority of the members of the service of a district branch or group of posts of that service. Sub-clause (i) of Clause (a) envisaged that the seniority of a directly recruited Government servant appointed on probation, shall count during his probation from the date of his appointment. Sub-clause (ii) envisaged that same order of inter se seniority of direct recruits was maintained by confirmation of the normal period of probation. If, however, the period of probation of any direct recruit was

extended, the appointing authority was empowered to determine the date from which the candidate should be assigned seniority. It was held that until the probation period is completed and he is confirmed in the post, he does not become a member of the service on successful completion of the probation and passing of the prescribed tests or conditions precedent to declaration of completion of the probation period. It was, therefore, held that mere passage of time of one year does not entitle a probationer to be a member of the service.

Even the case of Omprakash Shah v. State of M.P. and Anr. AIR 2005 SCW 2397, dealt with the same Rule No. 12 of the M.P. Civil Services (General Conditions of Service) Rules, and para 10 relied upon by learned advocate Shri A.S. Deshpande, therefore, also refers to observations of the Supreme Court in the matter of M.P. Chandoria (supra).

We are of a considered view that the ratio laid down in these two case also is not available for assistance of present respondents because they have not relied upon any provision similar to that with which the Hon"ble Apex Court was dealing in the reported matters. We are, therefore, unable to accede to the submission of learned advocate Shri Deshpande that by failure of passing the Departmental Examination inspite of enjoying permissible chances, the employee could continue in the cadre, but by losing the seniority to those who had passed the Examination.

9. Submission of learned Counsel for the petitioners that there have been instances in the past of candidates not having passed the Departmental Examination being promoted is an argument which is required to be accepted even without being illustrated by individual cases. In fact, the Government Circular under challenge itself supports such a submission. The Circular itself is issued because the said Rules were not being observed at all. That the Rules must have been observed in breach is also evident from the list produced at Exhibit-X and we have pointed out atleast seven cases from 58 promoted candidates, wherein benefit of exemption as a result of attaining age of 45 years appears to have been wrongly conferred i.e. without passing Examination although they had sufficient time to enjoy permitted chances to pass the Examination, before attaining age of 45 years.

It was contention of the learned Counsel for the petitioners that once orders of exemption on attaining the age of 45 years are passed in their favour, they stand at par with the candidates who have passed the Examination, and they cannot be denied an opportunity of being considered for promotion. For supporting such a submission, it was also contended that otherwise Rule 5 would become redundant. We cannot avoid feeling that without assistance of any other set of Rules applicable to the petitioners, the set of said Rules if considered in isolation, apparantly seem to be having quite a good number of lacunae in the sense that the Department can land into a situation for which it may not be able to find solution. Rules are applicable to both Class-I and Class-II and it is not clear as to whether an employee in Class-III who is initially promoted to Class-II and later

on to Class-I post and the direct nominee of Class-II if promoted to Class-I is required to pass the Examination on his entry in each of the classes of service. Rule (2) says that the Rules shall apply to officers appointed either by nomination or promotion to Class-I and Class-II posts in MDSs. Rule-3 requires every officer to pass the Examination within four chances. However, the annexure provides only one composite syllabus and therefore, there is room to infer that probably a person would be required to pass the Departmental Examination only once. If he passes the Examination while in Class-II service, he may not be required to pass the same again on his promotion to Class-I.

Rules do not indicate any parameter in addition to attaining age of 45 years for grant of exemption, nor Rule 5 specifically says that such an exemption can be granted only if all chances are not

The Rules also do not state as to what would happen to the seniority inter se if a senior fails, but before he exhausts his chances, a junior to him passes the Examination. Rules also do not talk about effect on seniority upon senior failing inspite of enjoying all chances, and junior either passing or not exhausting all his chances when it is the time to consider both of them for promotion.

The said Rules do not say that passing of Examination is condition for being eligible to promotion from Class-II to Class-I nor those indicate that passing of such Examination is condition precedent for confirmation and continuation in the Class-II or Class-I as the case may be. [However, if Rule 7 (a) is construed strictly, passing of Examination would be condition precedent for both, either being eligible for promotion to Class-I or for confirmation and continuation in Class-II or Class-I as the case may be. This is because the consequence of failure to pass inspite of exhausting all the chances is discharge from service for a nominee and reversion for a promotee.]

The Rules also do not provide specific solution, in case, an individual does not pass the Departmental Examination when nominated or promoted to Class-II but is promoted to Class-I before exhausting permissible period and chances while in Class-II.... Whether he would get only remaining period and chances to pass the Examination, (this would be so if every officer is to pass the Examination only once in his career, and not upon entry in each Class-I and Class-II) OR he would again get full period of two years and four chances, upon promotion to Class-I? (this would be so if he is to pass the Examination twice i.e. upon entry into each class). Rules do not provide as to what would be the fate of an individual if he fails to pass the Departmental Examination while on promotion to Class-I, although not having passed while in Class-II. Is he liable to be reverted to Class-II or Class-III ?

Last but not the least, although both provisions i.e. Rule 5 (a) regarding exemption from passing Examination on attaining age of 45 years and Rule 7 (a) regarding consequences of failure to pass Examination, are worded by inclusion of "shall be" thereby indicating no option/discretion with the Department, neither

of the two is so worded as to have an overriding effect over the other. Both the provisions are therefore required to be so construed or operated that neither supersedes/nullifies the other.

All these questions would not protrude their heads if we consider and interpret Section 7(a) as a provision imposing passing of Examination as a condition for confirmation/continuation in Class-II or Class-I as the case may be, as also as eligibility for promotion from Class-II to Class-I. So far as seniority is concerned, if a person fails to pass in spite of enjoying all his chances, he would be liable to reversion, not having acquired eligibility for confirmation and continuation in Class-II on promotion. Naturally, the individual would not be borne on Class-II to clash with those who have passed the Examination or with those who are yet to exhaust all their chances. So far as promotion from Class-II to Class-I, passing of Examination should be treated as eligibility condition, automatically, because not passing it would deprive an individual right of confirmation/continuation in Class-II and thus he would not be part of class-II cadre. Naturally, he cannot be considered for promotion to Class-I. And then the questions posed as arising, if a person is promoted from Class-II to Class-I without passing Examination while in Class-II would not arise at all.

For all these reasons discussed, wording "shall be" in Rule 7 (a) is required to be construed with strictness. If the said provision is so construed, position will boil down as under.

- (i) While in Class-II, all chances exhausted without passing Examination.
- (ii) While in Class-II, all chances not exhausted neither reached age of 45 years.
- (iii) While in Class-II, all chances not exhausted, and reached the age of 45 years.
- (iv) Has passed Examination within permissible period or attempts (while in Class-II). - Individual will have to be reverted. - Can continue in Class-II till he exhausts his four chances and then confirmation or reversion in accordance with passing/failure at the Examination - He has reached 45 years and become eligible for exemption under Rule 5 (a) before he loses his right of confirmation/continuance in Class-II - case will have to be considered for exemption positively and will be eligible for promotion if exemption is ordered. - Entitled to confirmation/ continuance in Class-II and also eligible for promotion to Class-I.

[Note : It will not be necessary for him to pass the Examination again, after promotion for Class-II. Consequently, only those who directly enter Class-I will have to pass the Examination while in Class-I]

- (v) Has entered Class-II after completion of age of 45 years. - Will have to be considered for promotion & shall also be eligible for promotion to Class-I if such exemption is ordered.

In entries (iii) and (v), by virtue of language of Section 5 (a), grant of exemption

would be "must" and merely because there is no application or that same is not processed, the career prospects as indicated in those entries, should not be affected adversely.

10. It was argued that if Rule 7 (a) is applied strictly as instructed by impugned Circular dated 14-03-2007, it will make Rule 5 (a) redundant and nugatory. We do not think the proposition is wholly correct. We have indicated by tabularised five entries hereinabove that the two rules can operate within their respective zones and without clashing or overlapping.

We have already indicated that none of the two provisions is given an effect overriding the other.

Legislation in its wisdom have incorporated and retained both on the rule book and hence, those will have to be so interpreted that they can cohabit with harmony.

Contents from Government Circular dated 01-11-1977 relied upon by learned advocate Shri Sapkal, as "object and reason" for incorporation of provision such as Section 5 (a) reads :

After examining this question fully, Government has decided that Government servants who have completed 45 years of age, should not be required to appear for Departmental Examination.

If we are to interpret Rule 5 (a) as attempted by learned Counsel for petitioners, that there can be a declaration of exemption from passing Departmental Examination, even after having exhausted all four chances, by appearing but without success, target as above will not be achieved. This is because, after failure in all four chances, the individual is neither required nor can be permitted to appear for Departmental Examination. On the contrary, purpose stands achieved if Rules 5 and 7 are interpreted to operate as in five entries tabulated in para 9 above. For a person who has not exhausted all his chances before attaining the age of 45 years, on nomination/promotion to Class-II, and also for those who enter Class-II after attaining age of 45 years, there would be need to pass Departmental Examination, but for exemption under Rule 5 (a) of the said Rules. Orders of exemption in such cases, would certainly be exemption. But orders of exemption, after all chances are exhausted without success, would amount to condoning the failure and reward to less competent.

In the matter of construction of Rules 5 (a) and 7 (a) of the said Rules and claim that Rule 7 (a) if construed strictly would make Rule 5 (a) redundant, we may refer to observations in para 9 of the judgement by the Hon"ble the Apex Court in the matter of State of Maharashtra v. Jagannath (supra), which read thus :

We are to use the different rules meticulously, to give effect to the scheme as we use the clutch, brake and accelerator for smooth driving. These rules are to be harmoniously construed. We should not concentrate too much on one rule and pay too little attention on the other. That would lead us astray and result in

hardship. We must avoid such construction.

11. In the judgement of Tribunal, there is reference to the Maharashtra Development Service (Constitution, Classification and Recruitment) Rules, 1973 and more particularly to Rule 5 pertaining to appointment in MDS Class-I. The relevant portion, we may reproduce hereunder, for useful reference.

5. Appointment in the Maharashtra Development Service, Class:

(1) Appointment to the posts in the Maharashtra Development Service, Class-I, shall be made either

(a) by nomination on the result of a competitive examination....

(b) on and after the 15th August, 1973 by promotion of suitable officers with not less than five years of continuous service (including period of probation) in the Maharashtra Development Service, Class II; or

(c) *****"

Sub Rule (5) of the said Rule reads as under.

5(5) Appointment by promotion shall be made from amongst suitable persons holding posts in the Maharashtra Development Service, Class-II, who have passed the Secondary School Certificate Examination or any examination recognized by the Government as equivalent thereto and the qualifying written examination or such other test as the Government may, in consultation with the Commission, prescribe.

The text of Rule 5 (1) (b) confirms our interpretation that a person cannot proceed for promotion to Class-I before he exhausts all his chances of passing Departmental Examination, and therefore, there need be no cases of promotion without exhausting all the chances of passing Departmental Examination unless the individual has passed the Examination at first attempt or within less chances than permissible. Sub Rule (5) of Rule (5) confirms our interpretation that a written examination is eligibility condition for promotion.

Consequently, although as a result of our interpretation as above, petitioners can be considered to be not eligible for promotion and writ petitions may fail, for the Government, it is desirable to re-examine the list prepared on 04-08-2007 in the light of interpretation of the Scheme of said Rules as discussed hereinabove. Eventually, as a result of order passed by this Court on 02-11-2007, we believe that the promotion list must not have been operated.

12. It was vehemently argued that impugned Circular is discriminatory, and therefore, violative of Article 14. In fact, there is no substance in the argument that the Circular is violative of said Rules, which submission was also tried to be advanced. In fact, the Circular insists for application and strict compliance of the said Rules.

So far as the argument that the Circular and implementation of said Rules

thereby discriminates, it must be remembered that when the equals are treated unequally, that would amount to discrimination. Similarly, when unequals are treated at par, even that may be possibly branded as discrimination. It is not possible to say that a provision is discriminatory if unequals are treated on different footing. Petitioners who have exhausted all their chances before reaching age of 45 years, therefore, cannot claim parity with those who have passed the Examination before reaching age of 45 years or who have attained the age of 45 years before exhausting all their chances. We may hasten to repeat that as harmonious interpretation of Rules 5 (a) and 7 (a) of the said Rules, only those persons who enter Class-II after attaining age of 45 years or one who attains age of 45 years before exhausting all his chances to pass Departmental Examination, upon entry into Class-II (before attaining age of 45 years), will be the individuals entitled to declaration of exemption. At the same time, it must be reminded that without passing the Departmental Examination while in Class-II, there cannot be promotion to Class-I. It was tried to be argued that petitioners are being discriminated because the Rules have never been implemented with strictness and there have been cases of undeserving retentions in class-II and promotion to Class-I. In order to grant parity to the petitioners, therefore, they ought to be considered for promotion as they were already in the select list. We are afraid, the Court cannot grant benefit to the petitioners on the ground of equality and parity, which others have earned in breach of the Act or the Rules. On the contrary, we are indicating desirability of re-opening the cases of undeserving retention/promotion, in the operative order.

13. For the reasons discussed hereinabove, both writ petitions fail and are dismissed. The Department should operate the pending select list for promotion only in the light of interpretation of Examination Rules as indicated hereinabove. We believe petitioners in their contentions that there must have been the cases of undeserving continuation in Class-II and promotions to Class-I in breach of the legal position as deducible from the Examination Rules. However, we are not issuing any direction regarding the past incidents as those individuals had no opportunity of being heard. Since we are refusing to quash the Government Circular dated 14-03-2007, it shall be for the Department to examine the cases of continuation in Class-II or promotion to Class-I, in breach of the said Rules i.e. without passing the Departmental Examination as required, on its own and without support of any direction from the Court.