

GAHC030003162021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/93/2021

Lalbiaknikimi and Anr.
Dinthar, Aizawl, Mizoram 2: Darthangvunga
S/o Thangluaia (L)
R/o ITI Veng
Aizawl
Mizora

VERSUS

State of Mizoram and 12 Ors.
r/b Chief Secretary to the govt. of Mizoram, Aizawl 2:Commissioner and
Sectetary
PHE Dept.
Govt. of Mizoram
Aizawl

3:Engineer-in-Chief
PHE
Govt. of Mizoram
Aizawl

4:Secretary to the Govt. of Mizoram
Dept. of Personnel and Administrative Reforms
Govt. of Mizoram
Aizawl

5:MPSC r/b its Chairman
Govt. of Mizoram
Aizawl

6:Sh C.Lalchhuanmawia
S/o Chalkima (L)
Mualpui
Aizawl

Mizoram

7:Sh Allan Lalthalura
S/o Thangzela
Chawlhmun
Aizawl

8:Sh Z.D.Dengthuama
S/o Z.D.Sanglura
Chaltlang
Aizawl
Mizoram

9:Smt Lalzuimawii
W/o Lalhruaitluanga
Bawngkawn
Aizawl
Mizoram

10:Sh C.Zothantluanga
S/o Zirtluanga
Mission Veng
Aizawl
Mizoram

11:Sh F.Lalfakawma
Sh Sh Buanga
Kulikawn
Aizawl
Mizoram

12:Sh Lalchhanhima
S/o Sh V. Kapthanga
Kulikawn
Aizawl

13:Sh L Zatluanga
S/o Sh. Gosiama
Upper Kanan
Aizawl
Mizora

Advocate for the Petitioner : Mr. Joseph Lalchhanhima Renthlei

Advocate for the Respondent : Mr C Zoramchhana (Addl. AG/GA, Mizoram) for R1-R4

:::B E F O R E:::

HON'BLE MR. JUSTICE NELSON SAILO

Date of Hearing : 14.09.2023

Date of Judgment : 05.12.2023

JUDGMENT & ORDER (CAV)

Heard Mr. Joseph L. Renthlei, learned counsel for the petitioners, Mr. C. Zoramchhana, learned Addl. Advocate General for the respondent Nos. 1 to 4 and Mr. A.R. Malhotra, learned counsel for the respondent Nos. 6 to 10. The two (2) petitioners have filed the instant writ petition with the following prayers:-

“In the premises, it is most humbly prayed that your Lordships may graciously be pleased to admit this Petition, issue notice, call for the records and issue rule calling upon the Respondents to show cause as to why the impugned Notification No. A.23021/1/2021-PHE/5 dt. 17.3.2021 fixing the Provisional Inter-se-seniority of Graduate Engineers & Diploma Engineers in the Senior Grade of MES under the PHE Dept., the Notification dt. 16.6.2021 fixing the Final Inter-se-seniority of Graduate and Diploma Engineers in the Senior Grade and should not be set aside and quashed and a fresh seniority list be made distinguishing Senior Grade and Senior Grade (Non-Functional) and determining the date of seniority from the date of regular promotion to a cadre post in the Senior Grade, and as to why the letter dt.12.7.2021 bearing No.F-20015/1/2017-E-in-C/PHE/Pt/61 & the List of Candidates eligible for promotion

to Junior Administrative Grade of MES (Non-Functional) dt.23.6.2021 shall not be set aside and quashed and after hearing the parties be further pleased to make the rule absolute by allowing the Writ Petition.

-And-

In the interim, be further pleased to stay the operation of the Notification dt.16.6.2021 fixing the final Inter-se-seniority of Graduate and Diploma Engineers in the Senior Grade as well as the letter dt.12.7.2021 bearing No.F.20015/1/2017-E-in-C/PHE/Pt/61 & the List of Candidates eligible for promotion to Junior Administrative Grade of MES (Non-functional) dt.23.6.2021 until final disposal of the Writ Petition."

[2.] Brief facts of the case is that the petitioners as well as the private respondent Nos. 11, 12 & 13 are Diploma holders in the field of engineering. They were appointed as Junior Engineers under the Public Health Engineering Department (PHED) and after serving for several years in the said capacity, they were promoted to the Junior Grade of the Mizoram Engineering Service (MES) in the post of Sub-Divisional Officers (SDOs). The petitioner No. 1 was promoted on 01.01.1997 while the petitioner No. 2 was promoted on 29.03.2000. As for the private respondent Nos. 11 to 13, they were promoted on 15.10.2004, 05.05.2004 and 17.02.2010 respectively.

[3.] The respondent Nos. 6 to 10 are Degree holders in the field of engineering and they joined the PHED directly as SDOs on 02.11.1994, 11.10.1994, 18.12.1995, 25.01.1996 and 02.09.1996 respectively. The Governor of Mizoram in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India framed the

Mizoram Engineering Service Rules, 2013 (Rules of 2013) and the same came into force on 23.09.2013 i.e., the date on its publication in the Mizoram Gazette. According to Rule 2 of the Rules of 2013, the rules are applicable to all person appointed to the service either before or after promulgation of the Rules of 2013. As per Rule 22(6), 65% of the total duty post in the Junior Grade of each cadre/wing of the service is to be filled up by direct recruitment of graduate engineers of the appropriate line of engineering as per Sub-rule (2) of Rule 4 through competitive examination and personal interview conducted by the Mizoram Public Service Commission (MPSC) in accordance with the Mizoram Engineering Service (Competitive examination) Regulations, 2013 (Regulations of 2013). The remaining 35% of total duty post in the Junior Grade of each cadre/wing of the service is to be filled up by promotion from Junior Grade or Draftsman Grade-I by selection method, who have completed 5 years regular service as Junior Engineer/Draftsman Grade-I and have passed departmental examination in Engineering & Accounts unless otherwise exempted.

[4.] As per Rule 22 (5) of the Rules of 2013, the next grade for promotion from the Junior Grade of the MES is to the Senior Grade. To fill up the vacancies in the Senior Grade, members of the service in the Junior Grade who have completed not less than 5 years continuous regular service in the Junior Grade and have passed departmental examination in Engineering & Accounts conducted by the MPSC shall be eligible for consideration for promotion by selection method provided that 80% of the post shall be reserved for graduate engineers and 20% for non-graduate engineers.

[5.] The next promotion grade from Senior Grade is to the Junior Administrative Grade (JAG) (non-functional) as per Rule 22(4) of the Rules of 2013. Members of the service in the Senior Grade who have completed 12 years regular continuous service calculated from the date of entry into the Junior Grade of the service, out of which 5 years should be in the Senior Grade shall be eligible for promotion to JAG (non-functional). The ceiling limit for JAG is fixed at 23% of the effective strength of the post of Junior Grade and Senior Grade of the MES. It further provides that 80% of the post shall be reserved for graduate engineers and 20% for non-graduate engineers.

[6.] The private respondent Nos. 6, 7 & 8 on the recommendation of the MPSC were promoted to the Senior Grade of the MES on officiating basis vide Notification dated 28.10.2014. The State respondents having felt necessity to have time bound promotion/non-functional promotion in respect of Assistant Engineers/SDOs under the Engineering Departments constituted a Sub-Committee to study its feasibility vide Notification dated 04.08.2015 and pursuant to such a step and also pursuant to the decision of the Council of Ministers in its meeting held on 23.07.2015, the Governor of Mizoram in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India vide Notification dated 04.08.2015 allowed non-functional upgradation in respect of the members of Junior Grade of MES to the Grade Pay of Rs. 66,00/- subject to the Junior Grade member of the MES having completed unblemished continuous service of at least 10 years in the Junior Grade. On such upgradation, the member concerned shall be designated as Senior SDO/Senior AE.

Further, any member of the Junior Grade of the service who has already availed second stage in the MACP, 2010 shall be deemed to have been upgraded on non-functional basis to the Senior SDO/Senior AE. Also, any member of the Junior Grade of the service promoted on non-functional basis to the senior grade of the service shall be allowed to avail the benefit of MACP Scheme, 2010 thereafter (second upgradation) on completion of the required qualifying service.

[7.] Thereafter, the State respondents in continuation of the earlier Notification dated 04.08.2015 issued a Notification dated 12.08.2015 clarifying that the effective date for implementation of non-functional upgradation to the grade pay of Rs. 66,00/- in respect of members of the Junior Grade of the MES shall be 04.08.2015 and the actual monetary benefit will also be given from that date. The bench mark for such upgradation will be as per the prescribed bench mark under paragraph No. 3.5(i) of the DPC Guidelines issued vide Office Memorandum dated 15.07.2010. Further, a Screening Committee for grant of non-functional upgradation will comprise of the Secretary to the Govt. of Mizoram of the concerned department as the Chairman and the Secretary, DP&AR and the Head of Departments as members.

[8.] Subsequently, the contents of the Notifications dated 04.08.2015 and 12.08.2015 came to be incorporated in the Mizoram Engineering Service (Amendment) Rules, 2017 (Rules of 2017) as Rule 22(5)(b). There was also an addition to the effect that promotion/upgradation to the Senior Grade (non-functional) of the MES will also be subject to passing of departmental examination in Engineering & Accounts

conducted by the MPSC.

[9.] In terms of the said Notifications, the petitioners as well as the private respondents were upgraded from Junior Grade of the MES to the Senior Grade of the MES through different notifications. However, in view of the effective date of 04.08.2015 provided through Notification dated 12.08.2015, the petitioners as well as the private respondents have all be shown to be promoted/appointed to the Senior Grade of the MES on 04.08.2015. Subsequently, the petitioner Nos. 1 & 2 were promoted/placed in the functional post of the Senior Grade of MES (E.E) under the PHED with immediate effect and with effect from 07.03.2019. As for the private respondents, they remain as Senior Grade (non-functional) in the post of Senior SDO. Therefore, it is the case of the petitioners that they cannot be put on the same seniority list along with the private respondents as they belong to a separate class for having occupied functional post. The petitioners therefore demand that the provisional and final seniority list of graduate and diploma engineers in the Senior Grade of the MES, PHED dated 17.03.2021 and 16.06.2021 respectively be set aside. The petitioners further pray that a fresh seniority list be made clearly distinguishing those in the Senior Grade and those in the Senior Grade (non-functional) and by determining the seniority from the date of regular promotion to the cadre post in the Senior Grade. The petitioners further pray that the Communication dated 23.06.2021 by which two (2) posts of JAG (non-functional) of the MES has been sought to be filled up by forwarding the names of the respondent Nos. 6 to 10 for consideration be set aside.

With these prayers, the petitioners are before this Court.

[10.] Mr. Joseph L. Renthlei, learned counsel for the petitioners by referring to Rule 26(i) of the Rules of 2013 submits that the promotion from lower grade to higher grade of the service has to be made from the confirmed members of the service on the basis of inter-se-seniority and on the basis of the recommendation made by the MPSC. That all promotions are to be recommended by the MPSC directly on the basis of merit-cum-seniority. He submits that as per the State respondents, both the petitioners and the private respondents are covered by Serial No. 5 of the Schedule to Rules of 2017 but the fact remains that Rule 22(5)(a) provides for promotion from the Junior Grade to the Senior Grade against vacancies on the basis of merit-cum-seniority while Rule 22(5)(b) provides for upgradation from the Junior Grade to the Senior Grade (non-functional) upon completion of 10 years of continuous regular service in the grade subject to having passed the required bench mark and also having passed the departmental examination in Engineering & Accounts. As there is clearly a distinction between the two provisions, the Schedule to Rule to the Rules of 2017 cannot have an overriding effect or a control over the enactment. In support of his submission, the learned counsel has cited the case of *M/s Aphali Pharmaceuticals Ltd. -Vs- State of Maharashtra & Ors. (1989) 4SCC 378*.

[11.] The learned counsel by referring to Notification dated 07.10.2016 by which the private respondent Nos. 9 & 10 have been promoted from the Junior Grade of the MES to the Senior Grade of the MES on officiating basis submits that even after such

promotion, the said private respondents are still referred to as Junior Grade engineers. Therefore, unless the promotion is made on functional basis, an engineer promoted to Senior Grade (non-functional) remains a Junior Grade engineer. To substantiate his submission, the learned counsel relies upon the Notification dated 01.12.2017 (Annexure-33) by which one Mr. F. Lalramenga, Sr. SDO has been promoted to Senior Grade of the MES and posted as E.O to C.E (Roads) in the Public Works Department (PWD) on being recommended by the MPSC.

[12.] Mr. Joseph L. Renthlei, the learned counsel submits that as per Rule 22(5)(a) of the Rules of 2017, there are four (4) pre-requisites to be fulfilled. The first is that there should be vacancy and secondly, the person concerned has to be a member of the Junior Grade of the MES. Thirdly, the member concerned should have served in the Junior Grade of the MES for not less than 5 years and lastly, he or she should have passed the departmental examination in Engineering & Accounts. The learned counsel further submits that Rule 26(1) of the MES Rules of 2017 provides that the criteria for promotion from a lower grade to higher grade will be directly on the basis of merit-cum-seniority and in the order of merit as recommended by the MPSC. He submits that in case of upgradation from the Junior Grade to the Senior Grade (non-functional) of the MES, as provided under Rule 22(5)(b) of the Rules of 2017, the same cannot be considered to be promotion since there is no selection and that the candidate concerned is required to have his bench mark and be screened by the Screening Committee.

[13.] The learned counsel has also relied upon the decision of this Court rendered in WP(C) No. 63/2019 by submitting that this Court had directed the respondent authorities to consider the petitioners therein for their promotion under Rule 22(5)(a) of the Rules of 2017 despite the fact that the petitioners were already given promotion under Rule 22(5)(b). The decision of this Court in WP(C) No. 63/2019 was subsequently applied in WP(C) No. 63/2020 which was a case of a similar nature. From the direction given by this Court, the learned counsel submits that it is clear that in order to be given functional promotion, one has to be considered under Rule 22(5) (a) of the Rules of 2017. The learned counsel thus submits that the impugned seniority list should be set aside and the respondent authorities be directed to draw fresh seniority list for Senior Grade engineers separately from Senior Grade (non-functional) engineers. In support of his submissions, the learned counsel has relied upon the following authorities:-

(1) Vice-Chancellor, L.N. Mithila University -Vs- Dayanand JHA, (1986) 3 SCC 7.

(2) Union of India & Anr. -Vs- S.S. Ranade, (1995) 4 SCC 462.

(3) Sub-Inspector Rooplal & Anr. -Vs- Lt. Governor Through Chief Secretary, Delhi & Ors. (2000) 1 SCC 644.

(4) Dr. Rashmi Srivastava -Vs- Vikram University & Ors., (1995) 3 SCC 653.

[14.] Mr. C. Zoramchhana, learned Addl. Advocate General on the other hand submits that by referring to Notification dated 04.08.2014 annexed as Annexure-4 to the writ

petition submits that the Sub-Committee to study the feasibility or otherwise of cadre review for time bound promotion/non-functional promotion in respect of Assistant Engineers/SDOs under the Engineering Departments was constituted on account of there being huge stagnation in the Junior Grade of the MES. He submits that as per the said constitution and term of reference, the same was for promotion and not upgradation. Pursuant to the said exercise, a Notification dated 04.08.2015 annexed as Annexure-5 to the writ petition was issued by the State Government to the respondent No. 4 highlighting the decision taken by the Council of Ministers in its meeting held on 23.07.2015. As per the said Notification, which was issued in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, a member of the Junior Grade of the MES who has completed unblemished continuous service of at least 10 years in the Junior Grade shall be eligible for non-functional upgradation to the Grade Pay of Rs. 66,00/- and be designated as Senior SDO/Senior A.E. The learned Addl. Advocate General submits that it is because of the stagnation that engineers serving for 10 years or more have been given such benefit subject to fulfillment of the other criteria laid down by the same Notification and also, the subsequent Notification dated 12.08.2015 (Annexure-6). The learned Addl. Advocate General submits that the Notifications dated 04.08.2015 and 12.08.2015 were then incorporated in the Rules of 2017 as Rule 22(5)(b). By further referring to Schedule to the Rules of 2017, the learned Addl. Advocate General submits that Senior Grade of the MES under the PHE cadre includes the sanctioned strength of 29 posts as well as

those promoted to Senior Grade (Non-Functional) and the posts included under the Senior Grade includes the posts of Executive Engineer, Architect, Under Secretary, Senior SDO/Senior Assistant Engineer/Senior Architect and posts of equivalent Grade. Therefore, the promotees under Rule 22(5)(a) and Rule 22(5)(b) both belonged to the common Grade of Senior Grade and therefore, no separate seniority list can be made between those promoted to the functional post and those promoted on non-functional basis. He thus submits that the petitioners cannot have any legitimate grievance and the writ petition should be dismissed.

[15.] Mr. A.R. Malhora, learned counsel for the private respondents adopts the arguments of the learned Addl. Advocate General and submits that the amended Rules of 2017 nowhere provides that those promoted by Rule 22(5)(b) should be again screened for being promoted under Rule 22(5)(a) to hold functional post. In other words, the Rules of 2017 does not make any distinction and those promoted under the two (2) provisions are considered to be in the Senior Grade.

[16.] The learned counsel further submits that the Notification dated 04.08.2015 was issued by the Governor of Mizoram in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. In continuation of the said Notification, Notification dated 12.08.2015 was issued wherein, one has to have the required bench mark in order to be considered for upgradation. Besides this, one has to have 10 years of continuous regular service in the Junior Grade in order to be considered for upgradation and that such consideration is to be carried out by the

constituted Screening Committee. Therefore, there being clearly the provision for selection in order to be considered for upgradation, it is not upgradation simplicitor but promotion for all purpose. He submits that the petitioners as well as the private respondents were promoted under Rules 22(5)(b) and such promotion is with effect from 04.08.2015. The petitioners have not challenged the effective date of their promotion and therefore in absence of the same, they could not have any grievance in the fixation of seniority as per the seniority list notified on 16.06.2021. Although the petitioners claim that they were promoted to the functional post under the Senior Grade of the service unlike the private respondents but the fact remains that the petitioners could move on to the functional post only because of the quota reserved for non-graduate engineers. The learned counsel by further referring to the Notification dated 12.03.2021 by which the petitioner No. 2 was placed in the functional post of Senior Grade (E.E) submits that there was no further selection made by the MPSC for the petitioner No. 2 to be placed as such. Therefore, the claim and contention of the petitioners that one has to be screened again even after being upgraded/promoted to the Senior Grade (Non-Functional) under Rule 22(5)(b) is only misconceived. The learned counsel further submits that from a perusal of Rule 22(5), Rule 26 and Rule 17 (3) & (4) of the Rules of 2017, it is clear that promotion is always from the lower grade to the higher grade and not to the post concerned by name. Since the petitioners have not challenged the Rules of 2017, they could not interpret the Rules in a manner which suits their purpose. The Rules of 2017 is clear and

requires no interpretation. As such, the writ petition being without any merit, the same should be dismissed. Mr. A.R. Malhotra, the learned counsel in support of his submissions relies upon the following authorities:-

(1) Bharat Sanchar Nigam Limited -Vs- R. Santhakumari Velusamy & Ors., (2011) 9 SCC 510.

(2) Union of India & Anr. -Vs- Manpreet Singh Poonam & Ors., (2022) 6 SCC 105.

(3) Rama Nand & Ors. -Vs- Chief Secretary, Government (NCT of Delhi) & Anr., (2020) 9 SCC 208.

(4) Laxmi Devi -Vs- State of Bihar & Ors., (2015) 10 SCC 241.

[17.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record. From the projection made by the petitioners, the issue to be decided is as to whether a separate seniority list has to be made for those promoted to the Selection Grade of the MES under Rule 22(5)(a) and those promoted under Rule 22(5)(b) of the Rules of 2017. In order to understand the issue raised, we may examine what was provided by the Rules of 2013 in this regard. As per the Rules of 2013, the next grade for promotion from the Junior Grade of the MES is to the Senior Grade as per Rule 22 (5). The same may be abstracted hereunder:-

“Senior Grade : Pay Band - 3 in the scale of Rs. 15,600/- Pay

39,100/- with Grade Pay Rs.6,600/- p.m.

To fill up vacancy(ies) in this Grade, members of the Service in the Junior Grade who have completed not less than 5 years continuous regular service in the Junior Grade and have passed Departmental Examinations in Engineering and Accounts conducted by the Mizoram Public Service Commission shall be eligible for consideration for promotion by Selection Method.

Provided that 80% of the posts shall be reserved for Graduate Engineers and 20% for Non-Graduate Engineers.

Provided further that the reservation system shall be discontinued after all the present incumbent Non-Graduate Engineers in Junior Grade as on the date of commencement of these rules get promotion, dead, retired or quitted the Service by any means."

[18.] From the above abstract, it may be seen that to fill the vacancies in the Senior Grade, members of the service in the Junior Grade who have completed not less than 5 years of continuous regular service in the Junior Grade and have passed departmental examination conducted by the MPSC are eligible to be considered for

promotion by selection method. There is also a reservation of 80% for graduate engineers and 20% for non-graduate engineers.

[19.] Subsequently, according to the State respondents, since there was stagnation in the Junior Grade, a Sub-Committee to study the feasibility or otherwise of cadre review for time bound promotion/non-functional promotion of Assistant Engineers/SDOs was constituted and pursuant to the study made and also the decision taken by the Council of Ministers, the Governor of Mizoram in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India issued Notification dated 04.08.2015 providing that members of the Junior Grade of the MES are allowed non-functional upgradation to the Grade Pay of Rs. 66,00/- on the terms and conditions laid down in the Notification. The terms and conditions include unblemished continuous service of at least 10 years in the Junior Grade amongst others. Thereafter, in continuation of the said Notification, a Notification dated 12.08.2015 was issued providing that the members concerned in order to be eligible for such consideration should possess the bench mark as notified vide Office Memorandum dated 15.07.2010. Further, a Screening Committee to screen eligible candidates was also constituted comprising of a Chairman and two (2) other members. On the strength of such Notifications, the petitioners as well as the private respondents were promoted to Senior Grade (Non-Functional) on separate dates but all with effect from 04.08.2015.

[20.] The provisions contained in the two (2) Notifications dated 04.08.2015 and

12.08.2015 were then incorporated in the Rules of 2017, which amended the Rules of 2013 and the same came into force with effect from the date of its publication in the Mizoram Gazette i.e., 30.11.2017. Therefore, apart from the provision for promotion from Junior Grade as provided in the Rules of 2013, Rule 22 (5)(b) came to be inserted in the Rules of 2017, by which another method of promotion or upgradation from Junior Grade to the Senior Grade of the MES was provided. Rule 22(5)(b) of the Rules of 2017 may be abstracted below for ready perusal:-

“b) Notwithstanding anything in sub-rule (5)(a) of these rules, a member of the Service in the Junior Grade who have completed not less than 10 years continuous regular service in the Junior Grade and have passed Departmental Examination in Engineering and Accounts conducted by the Commission shall be eligible for non-functional promotion without linkage to vacancies by Selection Method.

Provided that the provision for non-functional promotion shall be irrespective of the reservation system between direct recruits and promotees and shall be effective from the date of issue of notification No. A. 12018/53/2013-P&AR(GSW) dated 04.08.2015.

Provided further that the posting of Officers to the functional posts in Senior Grade of the service shall be done, as far as possible, on the basis of seniority or as determined by the Government from time to time.”

[21.] From the above abstract, it may be seen that notwithstanding anything contained in Sub-Rule (5)(a) of the Rules, a member of the service in the Junior Grade who has completed not less than 10 years of continuous regular service in the Junior

Grade and who has passed departmental examination in Engineering & Accounts conducted the by MPSC is eligible to be given non-functional promotion without linkage to vacancies by selection method. Such promotion has to be also irrespective of the reservation system between direct recruits and will be effective from 04.08.2015. It further provides that posting to functional post in the Senior Grade shall be done as far as possible on the basis of seniority or as determined by the Government from time to time. As can be seen, a member of the MES in the Junior Grade can be promoted from the Junior Grade either under Rule 22(5)(a) or under Rule 22(5)(b) of the Rules of 2017. The former comes into play when there is vacancy against a functional post and is also governed by the quota reserved for direct recruits and promotes. In case of a promotion under Rule 22(5)(b), a member of MES having not less than 10 years of continuous regular service in the Junior Grade and subject to fulfillment of other criteria laid down, can be upgraded or promoted to the Senior Grade by selection method, and on such upgradation or promotion, the posting to a functional post will be as far as possible on the basis of seniority. The Rules of 2017 nowhere distinguishes between the engineers promoted to the Senior Grade by the two (2) methods. The Grade Pay enjoyed by them is similar and that for want of sufficient post, those promoted under Rule 22(5)(b) have been designated as Senior SDOs and Senior A.Es. Only difference is that for those promoted under Rule 22(5)(b), their posting to the functional post will be based on their seniority.

[22.] It may further be seen that the next promotion from Senior Grade is to JAG

(Non-Functional) as can be seen from Rule 22 (4) of the Rules of 2017. The said provision nowhere distinguishes the promotees promoted under Rule 22(5)(a) and Rule 22(5)(b). In other words, the eligibility for consideration for promotion to the said Grade is common. Therefore, there appears to be no basis for claiming to have a separate seniority list for those who are promoted to the Senior Grade of the MES under Rule 22 (5) (a) and for those promoted under Rule 22 (5) (b).

[23.] The petitioners have relied upon the earlier decision of this Court rendered in WP(C) No. 63/2019, which was later on adopted by this Court in WP(C) No. 63/2020 as well. However, the fact remains that the issue in those writ petitions was regarding the maintenance of quota between graduate (direct) engineers and the diploma (promotees) engineers and therefore, not similar to the issue being considered presently. The learned counsel for the petitioners has heavily relied upon paragraph No. 27 of the Judgment & Order dated 05.02.2021 passed in WP(C) No. 63/2019 to contend that Court had directed the respondent authorities concerned to consider the case of the petitioners therein along with other eligible diploma engineers, if any, as on the date where the private respondents were considered for their placement in the functional post of Senior Grade of the MES under the PHED in terms of Rule 22 (5)(a) of the Rules of 2017. However, such a direction cannot be understood to be a direction to consider the petitioners therein the second time although they were earlier considered under Rule 22 (5)(b), inasmuch as, under Rule 22 (5)(a), there is a quota of 80:20 percent prescribed for the direct and promotee engineers. It was for this

reason that a direction for such reconsideration was made since the private respondents therein had been found to be wrongly promoted against the quota meant from diploma engineers, as they were engineers having degree who were directly appointed to the Junior Grade of the MES.

[24.] The case of *Vice-Chancellor, L.N. Mithila University -Vs- Dayanand JHA* (supra) relied upon by the learned counsel for the writ petitioners is only distinguishable. The issue involved in that case was regarding the power of the Vice-Chancellor under the Bihar State Universities Act, 1976 to transfer any teacher of a department or college maintained by the University from the post of Principal of a constituent college to the post of a Reader in another constituent college maintained by it. The Apex Court held that the two post cannot be equated in status and responsibility although they carry the same pay scale in view of the nature and responsibility of the duties attached to the two posts and accordingly, the decision of the High Court in similar lines were accepted and upheld. However, in the present case, the Rules of 2017 as already stated nowhere distinguishes between Engineers promoted to the Senior Grade by the two methods i.e., under Rule 22(5)(a) and Rule 22(5)(b). Only differences is that for those who are promoted under Rule 22(5)(b), their posting to the functional post is to be done as far as possible on the basis of seniority or as determined by the Government from time to time. Therefore, in the considered view of this Court, the distinction sought to be drawn between those promoted under Rule 22(5)(a) and Rule 22(5)(b) for the purpose of drawing a separate seniority cannot be accepted.

[25.] In the case of *Union of India & Anr. -Vs- S.S Ranade* (supra), the Apex Court in the given facts of that case held that the post of Commandant (Selection Grade) was not a higher post than the post of Commandant for the purpose of Rule 9 of the Border Security Forces Rules of 1969 wherein, retirement age of officers holding the rank higher than the rank/post of Commandant was 58 years and for the rank of Commandant and below 55 years. In the present case, there is also no distinction drawn amongst the Engineers promoted to the Senior Grade under Rule 22(5)(a) and Rule 22(5)(b) and they both enjoy a similar pay scale and are in the Senior Grade of the MES. Therefore, the authority relied upon by the learned counsel for the petitioners is not found to be applicable to the instant case.

[26.] By relying upon the case of *M/s Alphali Pharmacy* (supra), the learned counsel for the petitioners has also sought to impress upon the Court that the Schedule to the Rules of 2017 cannot govern or prevail over the Rules itself. However, it is not a case where the Schedule to the Rules have prevailed over the Rules itself. Both the petitioners and the private respondents are covered by Sl.No. 5 of the Schedule to the Rules of 2017 and the same corresponds to Rule 22(5)(a) and Rule 22(5)(b). In other words, both the provisions provides for promotion to the Senior Grade of the service both functional or non-functional. Therefore, the authority relied upon by the learned counsel for the petitioners is not found applicable to the present case.

[27.] In view of the above discussions and finding arrived at, this Court is of the considered view that further reference to the authorities cited will not be required.

Thus, upon due consideration, the writ petition is found to be without any merit and the same is dismissed. Interim Order passed, if any, stands vacated. Under the facts and circumstances of the case, the parties are directed to bear their own cost.

JUDGE

Comparing Assistant