

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decided on: 17.04.2017**

+ **W.P.(C) 6987/2015 & C.M. Nos. 12812/2015, 6310/2017**

**UNION OF INDIA & ORS**

**..... Petitioners**

Through: **Mr. Arun Bhardwaj, CGSC with Mr.  
A. Sriram and Mr. Nikhil Bhardwaj,  
Advocates.**

**versus**

**SATISH KUMAR & ORS**

**..... Respondents**

Through: **Mr. S.M. Dalal, Advocate.**

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

**HON'BLE MS. JUSTICE DEEPA SHARMA**

**HON'BLE MS. JUSTICE DEEPA SHARMA (ORAL)**

1. In the present writ petition, the petitioners have challenged the order dated 26.09.2014 of Central Administrative Tribunal, Principal Bench, New Delhi ('the Tribunal') passed in Original Application (OA) No.4313/2012 filed by respondents Nos. 1 to 5.

2. The respondents are employees of Central Water Commission (CWC), Ministry of Water Resources. They joined the employment as Junior Engineers between the period from April 1985 to May 1999 on

permanent and regular basis. While respondent nos. 1 to 5 were Diploma Holders at the time they joined the employment and subsequently acquired the engineering degree (Civil/Mechanical) during the course of their employment between the period from July 2001 to September 2003, the Respondents 6 to 9 were degree holders in Engineering (Civil/Mechanical) at the time of joining the employment with petitioners. To join the post of JE, both Diploma Holders and the Engineers were eligible. The next promotional post for Junior Engineers was the post of Assistant Director Grade II (AD-II)/SDE. As per the Recruitment Rules, 50% of these posts were reserved for promotion from cadre of JE Diploma holders with 7 years of regular service, and 50% for Junior Engineers degree holders having 3 years of continuous service as Graduate Engineers.

3. The respondents 1 to 5 were aggrieved by the fact that degree holder JEs who were junior to them were considered for promotion and promoted as AD-II/SDE between the period 28.05.2004 to 21.07.2006 while they were left out and not even considered for promotion at that time and were promoted only between July, 2006 to 1<sup>st</sup> August, 2008. A representation dated 31.08.2010 was made by them seeking promotion, i.e., between 06<sup>th</sup> July to 01<sup>st</sup> August, 2008 from the date their Junior Engineers were

promoted. Their claim was that they were eligible for promotion in 50% quota for Junior Engineers degree holders since they possessed the requisite qualifying service. Their plea was that the service rendered by them as Diploma Holder JE's should be counted while considering them for the 50% quota for JE Engineering Graduates. It was claimed that as soon as they acquired degree in engineering, they become entitled to be considered in 50% quota for JE Engineering Graduate. They prayed for holding of a review DPC for their promotion claiming seniority above their immediate juniors. Their representation was rejected by petitioners vide OM dated 03/06-02-2012. This OM was challenged by respondent Nos. 1 to 5 in the said OA.

4. Before the Tribunal, the case of the respondent nos. 1 to 5 was that their eligibility for consideration for promotion to the post of Grade AD-II/SDE in 50% quota for Graduate Engineers should have been reckoned from the date they acquired Engineering degree and the regular service rendered by them as diploma holder JE should have been counted for promotion in 50% quota of degree holder JEs. It was further contended that the petitioners were bound to follow the DOP&T instructions in OM dated 25.03.1996 and ought to have considered their names, they being seniors

while considering the juniors for promotion to the post of AD Grade-II/SDE. It was also contended that on the harmonious reading of the Recruitment Rules along with the instructions in OM of DOP&T dated 28.03.2009 and others, it is clear that the requirement of three years regular service in the grade of JE means three years of regular service for consideration in 50% quota for Degree Holders JE's, irrespective of the fact whether the JEs were holding the degree at the entry level, or the same was acquired by them during service. It was contended that the interpretation of the Recruitment Rules by the department that the respondents were required to have three years of regular service after acquiring degree, is erroneous and defeats the incentive granted to the employees to acquire higher education while in service. They contended that the service rendered and experience gained by both- the degree and diploma holders, are otherwise equal. It was contended on behalf of respondent nos. 1 to 5 that last part of the sentence in Recruitment Rules viz. "*in the capacity of graduate engineer*" is superfluous and have relied on the decision of Supreme Court in the case of ***Bal Kishan versus Delhi Administration and Another*** (AIR 1990 SC 100). They have further contended that the OM dated 18.03.1988 of DoP&T was also not followed by the petitioners.

5. The Department contested the claim of the applicants/respondent nos. 1 to 5 and filed the counter-affidavit before the Tribunal. They took the plea that the Recruitment Rules were statutory in nature and became effective from the date of publication in the official gazette. It was submitted that the DOP&T circulars were incorporated into the service rules for the post of AD Grade II and were published in the gazette on 28.03.2009 and would strictly be applicable from that date, and therefore the relief sought in the OA was not tenable.

6. On these facts and contentions of the parties, the Tribunal allowed the OA and directed the department to convene a DPC for the promotion of the applicants/herein respondents 1 to 5, from the date from which their juniors were promoted.

7. The department has challenged the said findings on the grounds that the Tribunal has erred in its findings on both facts and law. It is submitted that Tribunal has ignored the fact that the Recruitment Rules are statutory rules, and could be amended only by publication in the official gazette, and the instruction of DOP&T in OM's cannot amend the Recruitment Rules. It is contended that no junior to the respondent nos. 1 to 5 had been promoted in the 50% quota of Junior Engineer Diploma Holder, prior to them. It is

submitted that the Recruitment Rules categorically provides that the eligibility criteria for consideration of a degree holder JEs for promotion to the post of AD Grade II/SDE in its 50% quota, is that he has served for three years “*in the capacity of Graduate Engineer*” . It is submitted that since the respondent nos. 1 to 5 had not rendered three years of service as *Graduate Engineer* after they obtained the degree in engineering, on the date respondent nos. 6 to 9 were promoted against the 50% quota for graduate engineers JE, therefore their names were not considered.

8. The respondent nos. 1 to 5 have filed the counter affidavit in which they have not disputed that as per the Recruitment Rules, the qualification for the promotion to AD Grade- II /SDE in the quota of JE with degree in Engineering is three years of service as *Graduate Engineer*. Their contention is that these three years of regular service should include the service which they had already rendered, even though before the date they acquired the degree in Engineering, and on acquiring degree in Engineering, they become eligible for consideration for promotion in the 50% quota of *Graduate Engineers*. They have reiterated their reliance on instruction in DOP&T circulars. They have also submitted a comparative chart (as Annexure R-1) showing that their juniors (who joined as JEs Degree

Holders after them) were promoted before them. Their case is that the said act of the petitioners whereby they had promoted their juniors, is in violation of the Directives contained in DOP&T OM dated 18.03.1988 and OM dated 23.10.1989 and 25.03.1996 and have relied on the Supreme Court's judgments in the case of ***D. Stephen Joseph versus Union of India & Others 1998 (1) SLJ 20 (SC)*** and ***Balkishan (supra)***.

9. It is further contended that the petitioners had promoted similarly placed JEs, namely, RG Dhone and BM Borkar within 07 to 10 months of their acquiring degree in Engineering. It is submitted that the department's stand that unless the Recruitment Rules are amended, the guidelines of DOP&T cannot be considered, is misplaced. It is submitted that the department cannot shift the burden of its inefficiency and inaptitude upon its employees. It is submitted that the impugned order is a reasoned order, and suffered from no legal infirmity, and the present petition is liable to be dismissed.

10. The petitioner filed an additional affidavit wherein they had annexed the seniority list of AD Grade II as on 01.01.2016.

11. It is argued by learned counsel for the petitioner that the statutory rules which are framed under Article 309 of the Constitution are binding and

the executive orders or circulars or instruction cannot override the Recruitment Rules. Reliance has been placed on the findings of the Supreme Court in ***Ajaya Kumar Das vs. State of Orissa and Ors.*** (2011) 11 SCC 136 and it is submitted that the Apex Court has clearly held that Recruitment Rules which are framed under Article 309 of Constitution can be amended only by another notification under Article 309, and not by circulars or executive orders.

12. Learned counsel has also relied on the findings in the case ***N. Suresh Nathan and Anr. vs. Union of India and Ors.*** 1992 Supp (1) SCC 584 and ***Shailendra Dania and Ors. vs. S.P. Dubey and Ors.*** (2007) 5 SCC 535 and argued that in both these cases the similar issue was before the Supreme Court and the Supreme Court has clearly held that the diploma holder junior engineers who have obtained the degree in engineering during the tenure of service would be required to complete three years service on the post after having obtained a degree to become eligible for promotion to the higher post if they claim a promotion in the channel of degree holder junior engineer, since separate quotas are fixed for graduate junior engineers and diploma holder junior engineers for promotion to the post of Assistant Engineers. It

is argued that in view of the settled proposition of law, the Tribunal has erred in law and the order is liable to be set aside.

13. Learned counsel for the respondents 1 to 5 supports the findings of the Tribunal. It is submitted that the decision in ***Shailendra Dania (supra) and Suresh Nathan (supra)*** have no application to the facts of this case, and the said decisions stand distinguished by this Court in ***Biswajit Basu vs. Union of India 2010 SCC OnLine Del 2721***. It is submitted that in ***Biswajit (supra)***, the issue was whether "*the requirement of experience of a particular number of years of service in the grade can be before or has to be after obtaining the degree in Civil Engineering*". It is submitted that CAT on this issue had held that the regular service is not to be counted from the date of acquiring the degree and the regular service rendered in the grade before obtaining the degree has to be considered while dealing with the experience in the grade for promotion. These findings of the CAT were upheld by this Court, distinguishing the findings of Supreme Court in ***Nathan and Shailendra Dania (supra)***. Learned counsel has also relied on the findings of the Supreme Court in ***A.K. Raghuman Singh and Ors. vs. Gopal Chandra Nath and Ors.*** (2004) 4 SCC 30 and argued that even in this case the Apex Court has clearly held even if a person obtains the requisite

experience prior to obtaining the required educational qualification, he satisfies the eligibility criteria and his requisite experience prior to acquiring the qualification should be considered. It is argued that in that case the Court had also discussed its decisions in the case of **Suresh Nathan (supra)** and **M.B. Joshi vs. Satish Kumar Pandey 1993 SCC (LNS) 810** and **D. Stephen Joseph (supra)**. It is further argued that the petitioners were bound to follow the various OMs including O.M dated 19.07.1989 of DoPT which was issued soon after the decision of the Apex Court in **R. Prabha Devi and Ors. vs Govt. of India (1988) SCC 233**, which directs that where the juniors who have completed the eligibility requirement for promotion are considered for promotion then their seniors should also be considered even if the seniors have not completed the eligibility period. The petitioners had failed to follow such instructions while promoting the juniors (respondents No.6 to 9) and not considering the respondents No.1 to 5 for promotion who were seniors. It is submitted that the order of the Tribunal cannot be faulted. Respondent nos. 1 to 5 have also relied on the findings in the case **Union of India vs. Sadhna Khana (2008) (1) SCC 720** and **Garima Singh vs. Union of India** in O.A. 3278/2010 decided on 19.05.2011 in support of their contention.

14. We have heard the arguments of the parties.

15. The two questions for consideration are: (i) Whether under the Recruitment Rules governing the respondents, the respondent nos. 1 to 5 had become eligible for promotion to the post of Grade AD-II/SDE in the 50% quota fixed for promotion for graduate degree holder JEs, on the date when they acquired the engineering degree (during the course of employment as JE Diploma Holders) and the service rendered by them in the grade prior to obtaining degree in Engineering is to be counted for their eligibility and the condition of eligibility in the Recruitment Rules - "*three years of service as graduate engineers*" - is of no consequence;

(ii) Whether the various OM's issued from time to time by DoP&T, and relied upon by the respondents overrides the Recruitment Rules.

16. There is no dispute to the fact that the respondent nos. 1 to 5, the applicants before the Tribunal, were appointed as diploma holder JEs and respondents 6 to 9 as Engineering degree holder JEs. Respondents 1 to 5 were employed between the years 1985 to 1999. During the course of their employment they had acquired the degree in Engineering between the years July 2001 to September 2003.

17. The Recruitment Rules governing the parties, were duly notified and made under Article 309 of the Constitution of India reads as under:-

#### NOTIFICATION

*GSR 383. In exercise of the powers conferred by the proviso to article 309 of the Constitution, the President hereby makes the following rules further to amend the Central Water Engineering(Group B) Services Rules, 1964, namely:-*

- 1. (1) These rules may be called the Central Water Engineering (Group B) Service (Amendment) Rules, 1981.*
- (2) They shall come into force on the date of their publication in the Official Gazette.*
- 2. In the Central Water Engineering (Group B) Service Rules, 1964, against rule 13, under Part III, for the existing entries, the following shall be substituted, namely:-*

#### “MODE OF PROMOTION:

*(1) Recruitment to the Service by promotion shall be made, on the recommendations of the Departmental Promotion Committee (Group B) constituted by the Government, by selection on the basis of merit with due regard to seniority from amongst persons employed in the Commission in the following grades, namely:-*

- a) Design Assistant (Engineering)*
- b) Supervisor, and*
- c) Head Draftsman*

*a. 50% of the posts shall be filled by promotion of officers mentioned in sub-rule (1) of this rule and possessing a Degree in Engineering from a recognized University/Institution or equivalent **and having rendered not less than 3 years regular service in the respective grade in the capacity of a graduate Engineer.** The remaining 50% posts shall be filled by*

*promotion of officers mentioned at (b) and (c) of sub-rule (1) of this rule and possessing a Diploma in Engineering from a recognized Institution or equivalent qualification and having not less than 7 years regular service in the grade of Supervisor and Head Draftsman after acquiring the said Diploma in Engineering.*

*(2) No person employed in the Commission in the above grades shall be eligible for promotion under sub-rule (1) unless he:-*

*a) possesses a degree in engineering from a recognized University or equivalent **and has rendered not less than 3 years continuous service in one or more of these grades in the capacity of a graduate engineer.***

*OR*

*b) Possesses a diploma in Engineering from a recognized institution and has rendered not less than 7 years of continuous service in one or more of these grades.*

*3. If suitable officers are not available for promotion to any post under this rule, the post may be filled by selection through the Service Commission under Part IV of these rules by transfer on deputation or transfer under Part V of these rules.*

*No. 11/78-39/18/74-Adm."*

*(emphasis supplied)*

18. From the Recruitment Rules governing the respondents, it is apparent that for promotion to the post of AD Grade-II/SDE, there are two channels with fixed quotas. 50% quota of the total post of AD Grade-II/SDE were to

be filled by promotion of degree holder Junior engineers having rendered “three years regular service in the capacity of a graduate engineer” and 50% quota of AD Grade II/ SDE by promotion of diploma holder Junior Engineers, who have rendered “not less than seven years of regular service in one or more of these grade in the grade of Supervisor and Head Draftsman”. Sub-rule (2) under the title “Mode of Promotion” further places emphasises on the condition that 50% post of AD Grade II/SDE are to be filled by promotion of JEs who possess a degree in Engineering and “has rendered not less than 3 years continuous service in one or more of these grades **in the capacity of a Graduate Engineer**” (emphasis supplied) or diploma holder JEs who have rendered not less than “seven years continuous service in one or more of these grades”. Recruitment Rules thus categorically state that to fill 50% quota of degree holder JEs besides that they possess degree in engineering, they shall also have worked for three years regularly in the “capacity of a Graduate Engineer” to be eligible for consideration. It means that even if a JE possesses a degree in Engineering, but if he has not worked in the **capacity of the Graduate Engineer** for three years, he is not eligible for consideration for promotion against the 50% post, reserved to be filled by JEs having engineering degree. Admittedly,

the respondents 1 to 5 have put their claim for promotion in 50% quota post of Engineering Graduates and they had not rendered three years of regular service as graduate Engineer after acquiring the degree in Engineering during their employment, while respondents 6 to 9 had rendered three years service as graduate Engineers.

19. The respondent nos. 1 to 5 have relied on the decision in the case of ***Sadhna Khanna (supra)***. The said decision has no relevance on the facts of this case. The facts in that case were entirely different and the findings were based on the facts of that case. In that case, the department, while issuing the letters of appointment to successful candidates, had issued the same on different dates. Even though the respondent was senior to the other appointees in the select list, she was shown junior in the seniority list only on account of her joining the service later than her junior. She had challenged the late issuance of the appointment letter to her and the subsequent denial of seniority as per the select list before the Court. It was on these facts that the Court held that it was the fault of the department who had issued letters of appointment to her junior candidates prior to issuing the letter of appointment to the respondent and thus disturbing the seniority of

the select list, based on the merit of the candidate. It is thus evident that the findings were given on entirely different set of facts.

20. The decision in the ***Balkishan case (supra)*** is also of no relevance, because the facts in that case were entirely different. There, a Constable who was promoted to officiate as Head constable and whose confirmation was delayed on account of certain adverse remarks which were subsequently expunged, challenged its belated confirmation to the post of Head Constable. It therefore is clear that the decision was given on different aspect. It is settled proposition of law that the findings in a case are to be understood with reference to the facts of that case, and cannot be taken in isolation and applied in a different factual context. Unless the material facts are similar, the findings returned in an earlier case do not get attracted as a precedence in a subsequent case. Also, it is clear that in ***Sadhna Khanna (supra)*** and ***Balkishan (supra)***, no findings are given on any question of law.

21. The respondent nos. 1 to 5 have also relied on ***D. Stephen Joseph (supra)***, ***Biswajit Basu (supra)***, ***A.K. Raghmani Singh & Ors vs. Gopal Chandra Nath & Ors, (2000) 4 SCC 30*** and argued that in all these cases, the Courts have given clear findings that while calculating the regular

service rendered, for the purpose of promotion, the service rendered by a diploma holder even before obtaining the degree, has to be counted for considering such an employee against the quota fixed for degree holders. On the other hand, the learned counsel for petitioners has submitted that all these cases are distinguishable because the Recruitment Rules, governing the parties in those cases, were entirely different than the one governing the respondents. It is submitted that in none of these cases, the Recruitment Rules warrants that after obtaining an engineering degree, such an employee has to render three years of regular service in the grade as graduate engineer. The Recruitment Rules in those cases only required the number of years of service to be rendered by the graduate engineer in the grade and it is argued that the facts of this case are akin to the facts of the case in ***Shailendra Dania (supra)***, and the ratio of law laid down by the supreme Court in this case has to be followed.

22. We have given thoughtful consideration to these submissions. In the case of ***A.K. Raghmani (supra)***, the Recruitment Rules governing the petitioner therein were different. In that case, the Recruitment Rules were taken note of by the Court as under:-

" 2.        *The Rules regulating the recruitment to the posts of Superintending Engineers of the State of Manipur*

were notified on 18-10-1977. The Rules called “the Manipur PWD/Irrigation and Flood Control/Public Health Engineering [Superintending Engineer (Civil)/Superintending Surveyor of Works] Recruitment Rules, 1977” provide that the post of Superintending Engineer shall be filled up by promotion from “**Executive Engineer (Civil)/ (Mech.) and Surveyor of Works possessing degree in Civil/Mechanical Engineering or its equivalent from a recognized institution with 6 years’ regular service in the grade**”.

*(emphasis supplied)*

23. In that case, the issue was whether the requirement of “*six years regular service in the grade*” is to be reckoned from the date after educational qualification was obtained, or the services rendered prior to obtaining the educational qualification was also to be counted. The Court held that the requirement of six years service was independent of the requirement of educational qualifications and the eligibility criteria was fulfilled even if the requisite experience had been obtained before obtaining the educational qualification. It is apparent that the Recruitment Rules applicable in the *A.K. Raghmani (supra)* were different than the ones which govern the respondents. In this case, as per the Recruitment Rules, the requirement was “*Surveyor of Works possessing degree in Civil/Mechanical Engineering or its equivalent from a recognized institution with 6 years regular service in the grade.*” It therefore is clear that as per the

Recruitment Rules only *6 years regular service in the grade* was required, while the Recruitment Rules governing the respondents requires that after acquiring the degree in engineering, the person shall have three years of regular service in the *respective grade in the capacity of a graduate engineer.* Thus, the Recruitment Rules governing the respondents envisages that a person should not just have rendered three years of regular service in the respective grade, but shall have worked *in the capacity of a graduate engineer* for 3 years. Thus, the ratio in the case *A.K. Raghmani (supra)* are not applicable to the facts of this case.

In *D. Stephen (supra)* case, the Apex Court while discussing the principle of interpretation of Recruitment Rules has held that the plain meaning has to be given to the rules and the past practice is an exception which is to be applied in exceptional circumstances. Learned counsel for respondents 1 to 5 has relied in para 5 of the findings in the said case in which the Court had discussed *Suresh Nathan Case (supra)* and *M.B. Joshi (Supra)*. The said paragraph is reproduced as under:-

*“5. It appears to us that the State Government is labouring under a wrong impression as to the applicability of the past practice as indicated in Suresh Nathan case [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928] . This Court in the said decision, has only indicated that past practice should not*

*be upset provided such practice conforms to the rule for promotion and consistently for some time past the rule has been made applicable in a particular manner. In our view, the decision in Nathan case [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928] only indicates that past practice must be referable to the applicability of the rule by interpreting it in a particular manner consistently for some time. Any past practice dehors the rule cannot be taken into consideration as past practice consistently followed for long by interpreting the rule. It may be indicated here that a similar question also came up for consideration before this Court in M.B. Joshi v. Satish Kumar Pandey [1993 Supp (2) SCC 419 : 1993 SCC (L&S) 810 : (1993) 24 ATC 688] . The decision in Suresh Nathan case [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928] was distinguished in the facts of that case and it was indicated that when the language of the rule is quite specific that if a particular length of service in the feeder post together with educational qualification enables a candidate to be considered for promotion, it will not be proper to count the experience only from the date of acquisition of superior educational qualification because such interpretation will violate the very purpose to give incentive to the employee to acquire higher education.”*

Relying on these findings, learned counsel for respondent nos. 1 to 5 have argued that by giving any other interpretation to the Recruitment Rules than the one adopted by the Apex court in that case, would have the effect of killing the incentive of acquiring higher education. It is submitted that if the period of three years is to be reckoned from the date of acquiring

engineering degree it would discourage the diploma holders to acquire higher education.

24. In ***D. Stephen (supra)***, the short question was whether for the post of Assistant Engineer in 50% promotional quota reserved for persons possessing degree in Electrical Engineering from a recognized University or an equivalent with three years regular service in the grade of Junior Engineers in the electricity department, the three years experience as JE in the grade is to be counted from the date of acquisition of degree in electrical engineering or the length of service in the grade of JE before the degree was obtained is to be considered for promotion in the 50% quota for degree holder JE's. In this case again, the Recruitment Rules governing the parties stated that for consideration to the post of Assistant engineer in quota of degree holders, the degree holders have to render "*three years regular service in the grade of Junior Engineers*". These rules, therefore, differ from the rules governing the parties in this case. The rules which were interpreted by the Apex Court in ***D. Stephen (supra)*** did not qualify "*three years regular service in the capacity of Graduate Engineers*" which is the requirement in the Recruitment Rules governing the respondents. Therefore, findings in the ***D. Stephen (supra)*** case supra are distinguishable.

25. Again, in the case of ***Biswajit Basu (supra)***, the Recruitment Rules governing the petitioners were entirely different. The Recruitment Rules governing the petitioners in that case are reproduced as under:-

*"2.....The relevant clause 12 of the Rules is reproduced as under:*

*“ (ii) Junior Engineers holding Degree in Civil Engineering with 5 years regular service in the grade; or  
(iii) Junior Engineers holding diploma in Civil Engineering with 8 years regular service in the grade.  
(The departmental officers in the feeder category who are in the direct line of promotion will not be eligible for consideration for appointment on deputation. Similarly, deputationists shall not be eligible for consideration for consideration for appointment by promotion. Period of deputation including period of deputation in another excadre post held immediately preceding this appointment in the same or some other organization/department of the Central Government shall ordinarily not exceed 3 years). ”*

It is apparent that the said Recruitment Rules do not require that a degree holder junior engineer has to render regular service for five years in the grade in the ***capacity of a graduate engineer*** for being eligible. It was sufficient if a JE holding degree has rendered five years regular service in the grade, while the Recruitment Rules governing the respondents requires that the degree holder shall render *three years of regular service in the grade in the capacity of graduate engineer.* Since, the Recruitment Rules in the

case *supra* were different than the Recruitment Rules in ***Biswajit Basu (supra)*** case, the findings are distinguishable.

26. In the ***Suresh Nathan case (supra)***, the Recruitment Rules governing the promotion of Section Officers (JEs) were as under:-

*“For appointment by promotion of Section Officers now called Junior Engineers, the qualification prescribed is as under:*

- 1. Section Officers possessing a recognised Degree in Civil Engineering or equivalent with three years' service in the grade failing which Section Officers holding Diploma in Civil Engineering with six years' service in the grade — 50 per cent.*
- 2. Section Officers possessing a recognised Diploma in Civil Engineering with six years' service in the grade — 50 per cent.”*

The Court gave its findings on the basis of the past practice prevalent in the department, the Court has held as under:-

*“5. The Recruitment Rules for the post of Assistant Engineers in the PWD (Annexure C) are at pages 57 to 59 of the paper book. Rule 7 lays down the qualifications for direct recruitment from the two sources, namely, degree-holders and diploma-holders with three years' professional experience. In other words, a degree is equated to diploma with three years' professional experience. Rule 11 provides for recruitment by promotion from the grade of Section Officers now called Junior Engineers. There are two categories provided therein — one is of degree-holder Junior Engineers with three years' service in the grade and the other is of diploma-holder Junior Engineers with six*

*years' service in the grade, the provision being for 50 per cent from each category. This matches with Rule 7 wherein a degree is equated with diploma with three years' professional experience. In the first category meant for degree-holders, it is also provided that if degree-holders with three years' service in the grade are not available in sufficient number, then diploma-holders with six years' service in the grade may be considered in the category of degree-holders also for the 50 per cent vacancies meant for them. The entire scheme, therefore, does indicate that the period of three years' service in the grade required for degree-holders according to Rule 11 as the qualification for promotion in that category must mean three years' service in the grade as a degree-holder and, therefore, that period of three years can commence only from the date of obtaining the degree and not earlier. The service in the grade as a diploma-holder prior to obtaining the degree cannot be counted as service in the grade with a degree for the purpose of three years' service as a degree-holder. The only question before us is of the construction of the provision and not of the validity thereof and, therefore, we are only required to construe the meaning of the provision. **In our opinion, the contention of the appellants degree-holders that the rules must be construed to mean that the three years' service in the grade of a degree-holder for the purpose of Rule 11 is three years from the date of obtaining the degree is quite tenable and commends to us being in conformity with the past practice followed consistently. It has also been so understood by all concerned till the raising of the present controversy recently by the respondents. The tribunal was, therefore, not justified in taking the contrary view and unsettling the settled practice in the department**".*

It is apparent that the Court has clearly held that the junior engineers obtaining degree while in service are not entitled to count his

service prior to obtaining of the degree for computing the period of three years for the purpose of promotion and also held that the said interpretation is in consonance with the long standing practice prevailing in the department. No doubt, these findings has been distinguished by this Court in ***Biswajit Basu (supra)*** case on the ground that the Court had given its findings on the basis of previous past practices .

27. The petitioners have also relied on ***Shailendra Dania (supra)*** on the ground that the Recruitment Rules in this case were akin to the Recruitment Rules of the present case.

The facts of ***Shailendra Dania (supra)*** case as recorded in the judgment are reproduced as under:-

“2.....For recruitment of various staff members in DDA, vide its Resolution No. 574 dated 13-11-1963, DDA adopted the Recruitment Rules of CPWD qua the posts of Junior Engineer, Assistant Engineer and Executive Engineer. In the hierarchy of Engineering cadre, the initial post is of Junior Engineer (Section Officer or SO). The post is meant for 100% direct recruitment and the qualification prescribed was “diploma-holders in Civil Engineering with two years' experience”. However, there was no bar for persons possessing higher qualification viz. degree in Engineering, for applying to the post of Junior Engineer and such persons were not required to have any prior experience for appointment to the cadre of Junior Engineers in DDA. The next higher post is that of Assistant Engineer. The rule provided filling up of 50% vacancies on the post of Assistant Engineer by those who acquired a

*graduate degree in Engineering by means of direct recruitment or by deputation. The remaining 50% vacancies were to be filled up on promotional basis from the pool of Junior Engineers. Out of 50% of the promotional feeder cadre of Junior Engineers, one-half of such posts would be filled up by promotion of diploma-holders with eight years' qualifying service and remaining 50% quota would be filled up from the Junior Engineers who were graduate Engineering degree-holders with three years' qualifying service. Thus, the diploma-holders having eight years of qualifying service and graduate Engineering degree-holders with three years' qualifying service would be considered for promotion to the post of Assistant Engineer within their quota of 25% each. Further promotion in the Engineering Branch is from the post of Assistant Engineer to the post of Executive Engineer. The minimum qualifying experience for promotion to the post of Executive Engineer for graduate Engineers is eight years' experience in the grade of Assistant Engineer, whereas for diploma-holders it is ten years' service in the grade of Assistant Engineer”.*

*(emphasis supplied)*

28. In this case, the Court has discussed its earlier judgments in **A.K. Raghumani (supra)**, **D. Stephen (supra)**, **Suresh Nathan (supra)** and **M.B. Joshi (supra)**. In this case, the Apex Court while discussing the Recruitment Rules for promotion in quota for degree holder JEs, has held that when diploma holder JEs claim promotion in the quota for degree holder on acquiring a degree while in service, the three years experience required for promotion in the quota of graduate engineer is to be reckoned from the date of obtaining the degree to become eligible for promotion in the

quota of degree holders, regardless of number of service of years rendered as a diploma holder. The learned counsel for respondent nos. 1 to 5 has argued that the findings in ***Shailendra Dania (supra)*** are not applicable on the case before us because the issue before the Supreme Court in ***Shailendra Dania (supra)*** was related to the seniority. This argument of learned counsel has no force in it. The Supreme Court in ***Shailendra Dania (supra)*** formulated the following question for consideration:-

*“37. The only question involved in these appeals and transferred cases can be stated thus: whether a diploma-holder Junior Engineer, who obtains a degree while in service, becomes eligible for promotion to the post of Assistant Engineer on completion of three years of service after he obtained the Engineering degree or on completion of three years of service prior to obtaining the degree in Engineering.”*

The said question was answered by the Court in para 43, 44 and 45 which are reproduced as under:-

*“43. Taking into consideration the entire scheme of the relevant Rules, it is obvious that the diploma-holders would not be eligible for promotion to the post of Assistant Engineer in their quota unless they have eight years' service, whereas the graduate Engineers would be required to have three years' service experience apart from their degree. If the effect and intent of the Rules were such to treat the diploma as equivalent to a degree for the purpose of promotion to the higher post, then induction to the cadre of Junior Engineers from two different channels would be required to be considered similar, without subjecting the*

*diploma-holders to any further requirement of having a further qualification of two years' service. At the time of induction into the service to the post of Junior Engineers, degree in Engineering is a sufficient qualification without there being any prior experience, whereas diploma-holders should have two years' experience apart from their diploma for their induction in the service. As per the service rules, on the post of Assistant Engineer, 50% of total vacancies would be filled up by direct recruitment, whereas for the promotion specific quota is prescribed for a graduate Junior Engineer and a diploma-holder Junior Engineer. When the quota is prescribed under the Rules, the promotion of graduate Junior Engineers to the higher post is restricted to 25% quota fixed. So far as the diploma-holders are concerned, their promotion to the higher post is confined to 25%. As an eligibility criterion, a degree is further qualified by three years' service for the Junior Engineers, whereas eight years' service is required for the diploma-holders. Degree with three years' service experience and diploma with eight years' service experience itself indicates qualitative difference in the service rendered as degree-holder Junior Engineer and diploma-holder Junior Engineer. Three years' service experience as a graduate Junior Engineer and eight years' service experience as a diploma-holder Junior Engineer, which is the eligibility criterion for promotion, is an indication of different quality of service rendered. In the given case, can it be said that a diploma-holder who acquired a degree during the tenure of his service, has gained experience as an Engineer just because he has acquired a degree in Engineering. That would amount to say that the experience gained by him in his service as a diploma-holder is qualitatively the same as that of the experience of a graduate Engineer. The Rule specifically made difference of service rendered as a graduate Junior Engineer and a diploma-holder Junior Engineer. Degree-holder Engineer's experience cannot be substituted with diploma-holder's experience. The distinction between the experience of*

*degree-holders and diploma-holders is maintained under the Rules in further promotion to the post of Executive Engineer also, wherein there is no separate quota assigned to degree-holders or to diploma-holders and the promotion is to be made from the cadre of Assistant Engineers. The Rules provide for different service experience for degree-holders and diploma-holders. Degree-holder Assistant Engineers having eight years of service experience would be eligible for promotion to the post of Executive Engineer, whereas diploma-holder Assistant Engineers would be required to have ten years' service experience on the post of Assistant Engineer to become eligible for promotion to the higher post. This indicates that the Rule itself makes differentia in the qualifying service of eight years for degree-holders and ten years' service experience for diploma-holders. The Rule itself makes qualitative difference in the service rendered on the same post. It is a clear indication of qualitative difference of the service on the same post by a graduate Engineer and a diploma-holder Engineer. It appears to us that different period of service attached to qualification as an essential criterion for promotion is based on administrative interest in the service. Different period of service experience for degree-holder Junior Engineers and diploma-holder Junior Engineers for promotion to the higher post is conducive to the post manned by the Engineers. There can be no manner of doubt that higher technical knowledge would give better thrust to administrative efficiency and quality output. To carry out technical specialised job more efficiently, higher technical knowledge would be the requirement. Higher educational qualifications develop broader perspective and therefore service rendered on the same post by more qualifying person would be qualitatively different.*

*44. After having an overall consideration of the relevant Rules, we are of the view that the service experience required for promotion from the post of Junior Engineer to the post of Assistant Engineer by a degree-holder in the*

*limited quota of degree-holder Junior Engineers cannot be equated with the service rendered as a diploma-holder nor can be substituted for service rendered as a degree-holder. When the claim is made from a fixed quota, the condition necessary for becoming eligible for promotion has to be complied with. The 25% specific quota is fixed for degree-holder Junior Engineers with the experience of three years. Thus, on a plain reading, the experience so required would be as a degree-holder Junior Engineer. 25% quota for promotion under the rule is assigned to degree-holder Junior Engineers with three years' experience, whereas for diploma-holder Junior Engineers eight years' experience is the requirement in their 25% quota. Educational qualification along with number of years of service was recognised as conferring eligibility for promotion in the respective quota fixed for graduates and diploma-holders. There is watertight compartment for graduate Junior Engineers and diploma-holder Junior Engineers. They are entitled for promotion in their respective quotas. Neither a diploma-holder Junior Engineer could claim promotion in the quota of degree-holders because he has completed three years of service nor can a degree-holder Junior Engineer make any claim for promotion quota fixed for diploma-holder Junior Engineers. Fixation of different quota for promotion from different channels of degree-holders and diploma-holders itself indicates that service required for promotion is an essential eligibility criterion along with degree or diploma, which is service rendered as a degree-holder in the present case. The particular years of service being the cumulative requirement with certain educational qualification providing for promotional avenue within the specified quota, cannot be anything but the service rendered as a degree-holder and not as a diploma-holder. The service experience as an eligibility criterion cannot be read to be any other thing because this quota is specifically made for the degree-holder Junior Engineers.*

45. As a necessary corollary, we are of the view that the diploma-holder Junior Engineers who have obtained a degree in Engineering during the tenure of service, would be required to complete three years' service on the post after having obtained a degree to become eligible for promotion to the higher post if they claim the promotion in the channel of degree-holder Junior Engineer, there being a quota fixed for graduate Junior Engineers and diploma-holder Junior Engineers for promotion to the post of Assistant Engineers."

29. The principle laid down in ***Shailendra Dania (supra)*** case is squarely applicable on the facts of this case. As discussed above, the rules superimposes an additional requirement of eligibility on diploma holder Junior Engineers who acquire degree during the service to render ***three years of service in that grade in capacity of Graduate Engineer***. The interpretation given by the Tribunal to the Recruitment Rules is therefore erroneous as the Tribunal had not interpreted the rules in the correct perspective and not given the correct meaning to the plain language of the Recruitment Rules and ignored the ratio of the Supreme Court decision in ***Shailendra Dania (supra)***.

30. The next issue for consideration is whether various OMs issued by DoP&T, which are advisory in nature, amend the Recruitment Rules. In ***Ajaya Kumar Das vs. State of Orissa and Others (2011) 11 SCC 136***, the Supreme Court in paragraph 14 has clearly held as under:-

*“14. ....It is well settled that the statutory rules framed under Article 309 of the Constitution can be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars.”*

31. Thus, the Recruitment Rules are of binding nature. If there is conflict between the directions of DoP&T, and the Recruitment Rules, the Recruitment Rules would prevail.

32. There is no dispute that the seniority list of JE Diploma Holders shows that respondents 1 to 5 had put in more years of regular service than many others. However, this service they rendered as diploma holder engineers. Their seniority as diploma holder is relevant for consideration for promotion in the 50% quota for diploma holders,. The respondents 1 to 5 have not claimed their promotion in 50% quota for diploma holders. They are claiming promotion in 50% quota for graduate engineers. They became eligible for consideration in that quota only when they completed three years of regular service as Graduate Engineer after obtaining degree in Engineering during the course of their employment. In view of the Recruitment Rules governing them, which clearly envisages that for the

promotion in the quota of Graduate Engineers, the JE has to render three years continuous service as “*Graduate Engineer*”, the claim made by respondent nos. 1 to 5 before the Tribunal was not justified. It is not the case of the respondents 1 to 5 that the officers who had acquired degree in Engineering after them and had not worked for three years as Graduate Engineer were promoted before them. They rather have failed to point out any case of such nature in the list they have furnished. Only officers who possessed the Engineering degree and were serving in that capacity i.e. as Graduate Engineers, for a longer period than them, were promoted. It is, therefore, apparent that only senior graduate engineers were promoted before them in the quota fixed for graduate engineers.

Even though there was no issue of the nature, whether the amendment in Recruitment Rules w.e.f. 28.03.2009 should be given effect from an earlier date, still the Tribunal wrongly framed the following issue:-

*“12. The sole issue to be decided here is that whether the amendment would take effect from the date of amendment to the rules or from the date of circular of DOP&T.”*

After framing the following issue, the Tribunal had given its findings on this issue in paras 13 and 14 which are reproduced as under:-

*“13. Here, one thing that has to be considered is what would be the effect of acquiring degree? Admittedly, the*

qualifying period for JE (degree holder) is 3 years for promotion to the rank of AE/AD-II. On the other hand, the qualifying period for the JE (diploma holder) is 7 years. However, when the diploma holder acquires a degree, he comes at par with JE (degree-holder). In the instant case, the lead applicant-Satish Kumar, had acquired degree in March, 2003. The applicant had admittedly completed 7 years of service and, therefore, by applying the simple logic, he acquired eligibility in March, 2003 itself. The OMs dated 18.03.1998, 23.10.1989 and 25.03.1996 reiterated at different times, give effect to another principle that where a junior is being considered for promotion by completing the eligibility condition for promotion and the senior is not, the senior, who has completed the probation period would also be considered for promotion along with the junior. This has been obviously inserted with the intention that the seniors will not be made to suffer the anonymity/ignominy of serving under their juniors. That is the purpose of para 3.1.2 of the OM dated 18.03.1988. There is also an accompanying directive to all the departments to insert it in their Recruitment Rules.

14. It is an admitted fact that the department has taken 21 years to insert the provision in the Recruitment Rules, while the original directive has been issued in 1988 and has been reiterated upto 1996. The question that arises here is as to who be made to pay the price of inefficiency. Will it be the applicants and similarly placed persons? The expectation was that the respondents should have been reasonable in not implementing the directives of the DOP&T. It was certainly not bargained that they would take a period of 21 years to do the needful. If they have taken 21 years, they must suffer the consequences of their own inaptitude and inefficiency. We certainly do not accept the arguments of the respondents that change/amendment in the Recruitment Rules is a time taking process and approval has to be taken from all concerned authorities. This appears to be a smoke screen

*created by the respondents for their own inaction. Nothing would justify, to our mind, this kind of inordinate delay.”*

From the findings given by the Tribunal, it is apparent that Tribunal had failed to take note of the settled proposition of law that Recruitment Rules which are framed under Article 309 of Constitution of India and notified cannot be amended by DoP&T orders and it can be amended only by a subsequent notification under Article 309 of the Constitution of India. The petitioners amended the Recruitment Rules w.e.f 28.03.2009 for the post of AD Grade-II/SDE which was published in the Gazette and thus rules stand amended only from that date. Tribunal's direction to apply these rules from any other date clearly shows that the Tribunal has exceeded its jurisdiction. It is also clear that the OMs cannot substitute the Recruitment Rules. The order of the Tribunal cannot be sustained. The Supreme Court has also observed in para 8 of **Dr. Rajinder Singh vs. The State of Punjab & Ors.** (2001 )5 SCC 482

*“8. The settled position of law is that no Government Order, Notification or Circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that*

*even without the amendment of the rules, the Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a Government Order and ignoring the mandate of Article 309 of the Constitution.*

The writ petition is allowed and the order of the Tribunal impugned herein is set aside. There shall be no order as to costs.

**DEEPA SHARMA  
(JUDGE)**

**VIPIN SANGHI  
(JUDGE)**

**APRIL 17, 2017**

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