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**HIGH COURT OF CHHATTISGARH, BILASPUR****Order reserved on 18-09-2017****Order delivered on 09-02-2018****CONT No. 222 of 2016**

1. Avinash Kumar Singh S/o Shri Vanshbahadur Singh, Aged About 52 Years R/o K-27, Rajdhani Vihar Saddhu, Raipur Dist. Raipur, Chhattisgarh

**---- Petitioner****Versus**

1. S. N. Shrivastava Presently Posted As Chief Engineer, Rural Engineering Services Office Of Development Raipur, District Raipur, Chhattisgarh
2. Hemant Pahare, Presently Posted As Secretary Chhattisgarh Public Service Commission, Raipur Chhattisgarh,

**---- Respondent**


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| For Petitioner      | Shri Mateen Siddique, Advocate                                     |
| For Respondent No.1 | Shri Shashank Thakur, Advocate                                     |
| For Respondent No.2 | Shri Ashish Shrivastava, Advocate                                  |
|                     | Ms. Pushpa Sahu, Deputy Secretary, PSC, is also present in person. |

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**And****WPS No. 516 of 2017**

1. Avinash Kumar Singh S/o Vanshbahadur Singh, Aged About 53 Years R/o K- 27, Rajdhani Vihar, Saddhu, Raipur, District Raipur Chhattisgarh.

**---- Petitioner****Versus**

1. State Of Chhattisgarh Through The Secretary, Panchayat And Rural Development Department, Mantralaya, Mahanadi Bhawan, Naya Raipur, P O And P.S. Rakhi, District Raipur, Chhattisgarh.
2. Under Secretary, Panchayat And Rural Development Mantralaya, Mahanadi Bhawan, Naya Raipur, P O And P.S. Rakhi, District Raipur Chhattisgarh.
3. Chief Engineer, Rural Engineering Services, Office Of Development Commissioner, Raipur, Chhattisgarh.
4. Superintendent Engineer, Rural Engineering Services, Raipur Division, Raipur, Chhattisgarh.
5. Chhattisgarh Public Service Commission, Through Its Secretary, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh

---- Respondent

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|----------------------|--------------------------------------|
| For Petitioner       | Shri Mateen Siddique, Advocate       |
| For Respondent/State | Shri Shashank Thakur, Govt. Advocate |
| For Respondent/PSC   | Shri Ashish Shrivastava, Advocate    |

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### CAV Order

#### **PRASHANT KUMAR MISHRA, J.**

1. The contempt petition arises out of order dated 17-6-2015 passed by this Court in WPS No.1102 of 2015 whereas in writ petition the petitioner would pray for quashment of the DPC proceedings held on 2-1-2016 and for direction to the respondents to consider petitioner's candidature for promotion on the post of Assistant Engineer.
2. Since in the earlier writ petition i.e. WPS No.1102 of 2015 as well as in the present writ petition the relief prayed was for promotion from the post of Sub Engineer to the post of Assistant Engineer and the

contempt petition arises out of the previous order, both the contempt petition and the writ petition were heard analogously and they are being disposed of by this common order.

3. In WPS No.1102 of 2015 the petitioner had called in question the communication dated 5-1-2015, which has been issued in respect of his application for promotion dated 19-2-2013 and the petitioner was informed that he could not be promoted in the meeting of the DPC (Departmental Promotion Committee) held in the year 2013 because vacant post was not available. In the said earlier writ petition also the petitioner has prayed for consideration of his candidature for promotion on the post of Assistant Engineer w.e.f. 31-12-2012 when persons junior to him were promoted.
4. When the earlier writ petition was heard on 17-6-2015 this Court passed the following order :

S.B. Hon'ble Shri Justice Prashant Kumar Mishra

17.06.2015

Mr. Mateen Siddique, counsel for the petitioner.

Mr. P. Bhaduri, Government Advocate for the State.

Mr. Ashok Verma, counsel for the respondent/PSC.

Heard.

This writ petition has been preferred by the petitioner seeking direction to the respondents to consider the petitioner's case for promotion from the post of Sub Engineer to the post of Assistant Engineer.

He has also prayed for seniority from the date his juniors were promoted to the post i.e. from 31.12.2012.

Mr. Siddique, learned counsel for the petitioner, would draw attention of this Court to the document-Annexure P/9, by which, the Department has sent a proposal for convening a review DPC to consider the names of such candidates whose candidatures were not considered in the DPC meeting held on 29.09.2012.

Mr. Verma, learned counsel appearing for the Public Service Commission, would submit that the Department has sent the petitioner's case also for consideration by DPC and his case shall be considered as and when review DPC meets for consideration of promotion from the post of Sub Engineer to the post of Assistant Engineer in the department of RES.

In view of the above, it is expected that the respondents shall complete the proceedings at the earliest preferably within a period of 3 months.

With the above observations, the writ petition stands disposed of.

Sd/-

Prashant Kumar Mishra  
Judge

5. The petitioner, thereafter, moved a representation on 25-6-2015 (Annexure – C/2) addressed to the Chief Engineer, Rural Engineering Services, office of the Development Commissioner, Raipur, however, his case was again not considered, therefore, the petitioner moved contempt petition No.508 of 2015 in which the respondents Shri M.K.

Raut, Shri S.N. Shrivastava & Shri Hemant Pahare submitted on 8-1-2016 that the contempt has been purged. In view of the statement, the contempt petition was disposed of reserving liberty in favour of the petitioner to file fresh contempt petition, if the contempt is still continuing. It came to the petitioner's notice subsequently that the review DPC for promotion from the post of Sub Engineer to the post of Assistant Engineer was convened on 2-1-2016, but again his candidature was not considered on the ground that the petitioner has not submitted his immovable property details for the year 2007 to 2009 and 2011.

6. Alleging that the said ground for rejection of his candidature was contrary to the direction issued by this Court vide order dated 17-6-2015 passed in WPS No.1102 of 2015 as also for the reason that in the earlier contempt petition it was informed to this Court that the contempt has been purged, it is urged that the petitioner obtained information under the provisions of the Right to Information Act, 2005 along with a document, which is a communication dated 28-9-2012 sent by the Deputy Secretary, Panchayat and Rural Development Department to the Under Secretary, Chhattisgarh Public Service Commission, Raipur, in which a list has been prepared for consideration of the name of the candidates for promotion from the post of Sub Engineer to the post of Assistant Engineer along with a list of candidates in which the petitioner figures at S.No.126 showing his seniority at S.No.149 and in the column of whether property details

have been received or not it has been shown 'received'. On the contrary against the names of Shri O.P. Krishna (125/148) & Shri Devendra Singh Kashyap (140/163) the column of immovable property details has been left blank. Similarly, in respect of candidate at S.No.90/115 Shri Narayan Prasad Behra and candidate at S.No.137/187 Shri Anil Kumar Mishra also the column of immovable property details has been left blank meaning thereby all these persons had not submitted property details yet they have been promoted.

7. The respondent No.1 Shri S.N. Shrivastava, Chief Engineer, RES, at the relevant time, would state in his reply to the contempt petition that in the DPC dated 2-1-2016 petitioner's name was not considered for the reason that he has not submitted details of his immovable assets/property for the year 2007 to 2009 and 2011. Referring to the instructions issued by the General Administration Department of the State of Chhattisgarh (henceforth 'the GAD') on 17-7-2012 (Annexure – R/1-4) and other documents Annexure – R/1-2 & R/1-3, which are communications of the year 2011, it is stated that for want of immovable property details petitioner's case could not have been considered by the DPC.
8. According to the contemnor No.1, the petitioner vide communication dated 7-12-2011 addressed to the Executive Engineer, RES, Mahasamund, submitted details of immovable properties held by him vide Annexure – R/1-7 (Annexure – P/4 in WPS No.1102 of 2015), which would make it apparent that the petitioner had submitted the

details of immovable property of the year 2010 and for the entire 5 years i.e. 2007 to 2009 & 2011. This contemnor has not made any comment as to the document Annexure – P/9 in the earlier writ petition by which the Department had sent a proposal for convening the review DPC to consider names of such candidates whose names were not considered in the DPC dated 29-9-2012 and the statement made by the PSC counsel that since the Department has already sent the petitioner's case for DPC his case shall also be considered as and when the review DPC meets. No comment has either been made as to why statement was made before this Court while hearing Cont.No.508 of 2015 that the contempt has been purged.

9. Contemnor No.2 Shri Hemant Pahare, Secretary, Chhattisgarh Public Service Commission, would also state that in compliance with the direction issued by this Court in WPS No.1102 of 2015, a review DPC was convened on 2-1-2016 and the case of the petitioner was placed before the PSC, but could not be considered because the details of his immovable property for the year 2007 to 2009 and 2011 were not available. It is also stated that in the DPC held on 29-9-2012 also the petitioner's case was not considered for want of details of his immovable property for the subject years along with 133/134 other similarly placed candidates and that such consideration was not permissible in view of the GAD instructions dated 17-7-2012.

10. Referring to the document filed with the rejoinder, Shri Mateen Siddiqui, learned counsel appearing for the petitioner, would project that at least 4 similarly paced candidates namely; Shri O.P. Krishna, Shri Devendra Singh Kashyap, Shri Narayan Prasad Behra and Shri Anil Kumar Mishra did not submit property details yet they were promoted on the post of Assistant Engineer. Out of above 4, Shri Devendra Singh Kashyap and Shri Anil Kumar Mishra are juniors to the petitioner, therefore, the arbitrariness, *mala fide* and deliberate contempt is writ large. It is also highlighted by referring to Annexure – C/7 (Colly.) that at least 8 candidates at S.No.3, 7, 53, 76, 91, 99, 100 & 101 were promoted despite the said candidates submitting their property details as late as 21-9-2015 and some of them have even not submitted the entire 5 years property details, therefore, there is patent violation and disobedience of the order passed by this Court.
11. Shri Mateen Siddiqui would also argue that the State Government has amended the Rules by inserting sub-rule (6-a) and sub-rule (7-a) after the existing sub-rules (6) & (7) of Rules 6 & 7 of the Chhattisgarh Public Service (Promotion) Rules, 2003 (for short 'the Rules, 2003') to provide that every Government servant shall submit details of immovable property of last 5 years and such candidates whose annual return of the immovable property of last 5 years is not received, his case for promotion shall be kept in circulation for consideration only after receipt of details of immovable property of last 5 years, therefore, there being no such provision at the time of DPC meeting

dated 29-9-2012, non consideration of petitioner's case for promotion is not backed by any statutory provision.

12. Shri Shashank Thakur, learned counsel appearing for the respondent/contemnor No.1 and Shri Ashish Shrivastava, learned counsel appearing for the respondent/contemnor No.2, would reiterate their submission, as stated in their respective returns, with additional submission that there is no willful or *mala fide* violation of the order passed by this Court and that non consideration of the case of the petitioner is on account of circular dated 17-7-2012 issued by the GAD.

**WPS No.516 of 2017 :**

13. Prayer for quashing the DPC proceedings held on 2-1-2016 and for direction to the respondents to consider the petitioner's candidature for promotion from the post of Sub Engineer to the post of Assistant Engineer is sought in this writ petition mainly on the ground that the petitioner being fully qualified and eligible for promotion on all required criteria, he is entitled to be considered for promotion in the DPC dated 29-9-2012, however, his case was wrongly kept pending or not considered due to non availability of details of immovable property for preceding 5 years, which is arbitrary and illegal.
14. Shri Mateen Siddiqui, learned counsel would vehemently put forth that persons junior to the petitioner namely; Bhagwan Charan Agrawal (S.No.159), Dilip Kumar Bilgoya (S.No.160), Devendra Singh Kashyap

(S.N.163), Subhash Chandra Dixit (S.No.170), Anil Kumar Mishra (S.No.187), Y.K. Shukla (S.No.228) and Sudhir Kumar Tiwari (S.No.273) have been promoted in the DPC dated 29-9-2012 and in the subsequent review DPC held on 2-1-2016, therefore, there is violation of Articles 14 & 16 of the Constitution of India. He would also submit that the candidates who have not submitted the details of immovable property for the last 5 years before the DPC dated 29-9-2012 have been promoted, which is proved by the respondents documents that they have submitted their property details as late as on 21-9-2015. Such candidates whose names are mentioned in the list with Annexure – P/11 are K.K. Shinde (S.No.3), Girishchandra Pandey (S.No.7), O.P. Krishna (S.No.53), S.L. Kanwar (S.No.76), B.S. Kanwar (S.No.91), Shatrughan Dhruw (S.No.99), Dilip Kumar Minj (S.No.100) and Mehattar Ghormade (S.No.101).

15. In addition, it is also argued that from the respondents documents it is proved that the petitioner has submitted details of his immovable property of last 5 years on 1-10-2015 and the review DPC was held on 2-1-2016, therefore, non consideration or rejection of his name for promotion is absolutely illegal. The petitioner has been picked up for hostile discrimination only because he has filed the contempt petition before this Court. It is further put forth that the amendment has been made by incorporating sub-rule (6-a) & (7-a) in existing sub-rule (6) & (7) of Rules 6 & 7 of the Rules, 2003 by issuing notification dated 26-10-2015, therefore, for any promotion, prior to this date, there was

no statutory requirement for submission of immovable property details of last 5 years. In para 9.39 of the petition the petitioner has named Damodar Singh Yadav (S.No.46), Dhananjay Ram Dewangan (S.No.113), Sunil Kumar Sharma (S.No.118), Ashish Kumar Sahu (S.No.162), Jitendra Meshram (S.No.227), Ramgopal Jangde (S.No.80) and Anil Kumar Rathore (S.No.104), in all 7 persons, who have been retrospectively promoted without submission of immovable property details of last 5 years by them.

16. Per contra, Shri Shashank Thakur, learned Govt. Advocate, appearing for the State would justify the non consideration of petitioner's case for promotion by referring to the GAD communication dated 17-7-2012 and the notification dated 26-10-2015 amending the Rules, 2003 to deny promotion to such candidates who have not submitted details of their immovable property of preceding 5 years. He would also refer to para 4 of the return to contend that the Principal Secretary to the Government of Chhattisgarh, Panchayat & Rural Development Department had issued the instructions dated 18-10-2011 with respect to furnishing all details of movable and immovable assets of the gazetted officers. In respect of the candidates who were promoted even without submission of details of immovable property for the preceding 5 years, it is argued that by order dated 27-5-2017 their names have been deleted by the PSC from the list of candidates found fit for promotion and consequently, 8 candidates have been reverted back to the post of Sub Engineer.

17. Learned State counsel would refer to another order of even dated whereby promotion of 9 candidates to the post of Assistant Engineer has been cancelled and they have been reverted back with retrospective post. All these candidates (8+9) were promoted in the DPC dated 17-9-2013 and cancellation of their promotion was recommended by the PSC in its review DPC dated 14-2-2017. It is apt to mention here that, admittedly, the above order of cancellation of promotion has been stayed by this Court in writ petitions filed by the affected Engineers.
18. Shri Ashish Shrivastava, learned counsel appearing for the PSC would also refer to the GAD communication dated 17-7-2012 and the amendment incorporated in the Rules, 2003 to argue that the DPC conducted by the PSC is bound to consider the candidature of candidates in accordance with the instructions issued by the State Government whether the same is issued by the GAD or by the concerned Department or under the statutory rules. The petitioner having not submitted the details of immovable property of preceding 5 years he was not found fit to be considered for promotion, therefore, non consideration of the candidature of the petitioner is not hit by the provisions of Article 14 or 16 of the Constitution of India.
19. In view of the documents and submissions, as referred above, this Court is required to dwell on the issue *firstly*, as to whether denial or deferment of promotion for non submission of yearly return of immovable properties on the basis of GAD instructions dated

17-7-2012 is legally permissible ? If yes, the second or further issue may arise as to when the petitioner had submitted details of his immovable property on 7-12-2011 or subsequently on 1-10-2015, as stated in para 8.24 of the petition, non consideration of his name for want of vacant post is legal and proper.

20. I wish to deal with the first issue, which is purely legal, because if that issue is answered in favour of the petitioner, it may not be necessary to answer the second issue.
21. Non consideration of petitioner's case for promotion is on account of non submission of yearly return of immovable property for the preceding 5 years. In the communications Annexures – R/1 & R/2 dated 18-10-2011 & 18-11-2011, respectively, issued by the Panchayat & Rural Development Department and the office of the Development Commissioner, Chhattisgarh, addressed to the Chief Executive Officers of Janpad Panchayats, Superintending Engineers & Executive Engineers, Rural Engineering Services and Chhattisgarh Rural Road Development Agency drawing their attention to Rule 19 (1) of the Chhattisgarh Civil Services (Conduct) Rules, 1965 (for short 'the Conduct Rules') mentioning that as required under the said Rule the yearly return of immovable property is not sent, therefore, such return should be submitted for the period ending December, 2010, failing which the concerned officers shall be treated to have committed misconduct under sub-rule (3A) of Rule 19 of the Conduct Rules and disciplinary action shall be taken.

22. Similar recital is made in the subsequent communication Annexure – R/3, however, by GAD's administrative instruction dated 17-7-2012 (Annexure – R/4) it was mentioned, for the first time, that such Government servants who have not submitted yearly return by 31<sup>st</sup> January of the next following year, his case shall not be considered by the DPC. This administrative instruction is not issued by order and in the name of the Governor of Chhattisgarh albeit it says that the decision has been taken by the State Government. Similar instruction was issued by the office of the Development Commissioner on 24-7-2012, which is part of Annexure – R/6. The petitioner, thereafter, submitted the return on 5-1-2012 (Annexure – R/8) showing the details of his immovable property as on 31-12-2010.
23. The State Government subsequently issued the notification on 26-10-2015 in exercise powers under Article 16, 335 and 309 of the Constitution of India, amending the Chhattisgarh Public Service (Promotion) Rules, 2003 to insert sub-rule (6-a) and (7-a) after the existing sub-rule (6) and (7) of Rules 6 and 7 of the Rules, 2003 providing that such Government servants whose yearly return of preceding 5 years has not been received, his case shall be kept for consideration in circulation and as soon as the return of 5 years is available, the DPC shall consider his case for promotion by circulation. This amendment was issued by order and in the name of the Governor of Chhattisgarh.

24. The question which arises for consideration is - whether in absence of any statutory bar or prohibition for consideration of Government servant's case for promotion in absence of the yearly return of immovable property as required under Section 19 (1) of the Conduct Rules, promotion can be denied or his case is required to be deferred to be considered later on ?
25. Rules 19 (1), (3A), (3B) and (4) of the Conduct Rules are reproduced for ready reference :

**19. Movable, immovable and valuable property.-** (1) Every Government servant shall on his appointment to any service or post and thereafter at such intervals as may be specified by the Government, submit a return of his assets and liabilities, in such form as may be prescribed by the Government, giving the full particulars regarding :-

- a) the immovable property inherited by him, or owned or acquired by him or held by him on lease or mortgage, either in his own name or in the name of any member of his family or in the name of any other person;
- b) shares, debentures and cash including bank deposits inherited by him or similarly owned, acquired or held by him;
- c) other movable property inherited by him or similarly owned, acquired or held by him; and
- d) debts and other liabilities incurred by him directly or indirectly.

Note- Sub-rule (1) shall not ordinarily apply to Class IV servants but the Government may direct that it shall apply to any such Government servant or class of such Government Servants.

In all returns, the value of items of movable property worth less than Rs.1,000.00 may be added and shown as a lump sum. The value of articles of daily use such as clothes, utensils, crockery, books, etc., need not be included in such return.

Every Government servant who is in service on the date of commencement of these rules shall submit a return under this sub-rule on or before such date as may be specified by the Government after such commencement.

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(3A) If a Government servant either fails to file a return prescribed in sub-rule (1) or files a return for any year which does not fully disclose all the property that is required to be indicated or otherwise conceals any such property it would amount to misconduct;

(3B) In a disciplinary proceeding on account of misconduct under sub-rule (3A) it shall be presumed that the property not included in the return or the value of which is incorrectly shown was acquired through means in contravention of these rules. In such proceedings the burden of proof of establishing that the property was acquired legitimately shall lie on the Government servant.

(4) (i) The Government or the prescribed authority may, at any time, by general or special order, require a Government servant to furnish, within a period of specified in the order, a full and complete statement of such movable or immovable property held or acquired by him or on his behalf or by any member of his family as may be specified in the order. Such statement shall, if so required by the Government or by the prescribed authority, include the details of the means by which, or the source from which such property was required.

(ii) If the movable and immovable property is, or at any time was found to be beyond his known sources of income, it shall be presumed, unless the contrary is proved by the Government servant, that the acquisition was from a corrupt source.

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26. A plain reading of the above quoted rules would discern that non submission of yearly return would amount to misconduct, however, for proving the misconduct there has to be a regular enquiry as contemplated under the Chhattisgarh Civil Services (Classification, Control and Appeal) Rules, 1966. As long as a departmental enquiry is not constituted, non submission of return by itself may not be treated to be conclusive proof of misconduct for the purpose of attracting a disqualification for consideration of Government servant's case for promotion. If the Government has not initiated any departmental enquiry for the misconduct as defined in Rule 3A of the Conduct Rules, an officer or employee cannot be punished, if he is otherwise qualified and eligible for consideration of his case for promotion. It is precisely for this reason, the State Government notified the amendment under the Rules, 2003 on 26-10-2015.
27. It has not been brought to the notice of this Court as to whether there was any prior statutory provision in form of any Act of legislature or Rules framed under Article 309 of the Constitution of India disqualifying a person for consideration of his case for promotion merely because he has not submitted the yearly return of immovable property as required under the Conduct Rules. The previous communication or administrative instruction issued by the GAD or by the Panchayat and Rural Development Department have not

been issued by order and in the name of the Governor of Chhattisgarh.

28. When a decision is purported to be taken by the State Government, but the order is not issued by order and in the name of Governor of Chhattisgarh, the validity of the order is to be seen in the light as to the compliance of requirement of Article 166 of the Constitution of India.
29. In **Bachhittar Singh v. State of Punjab**<sup>1</sup>, the Constitution Bench of the Supreme Court held that the constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of PEPSU provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. The Supreme Court held that we may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor or Rajpramukh, is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State.

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1 AIR 1963 SC 395

30. In view of the above settled proposition, it is not difficult to hold that the instructions issued by the GAD on 17-7-2012 is in the nature of guidelines or executive instructions, therefore, it cannot override the service rules, which govern the promotion or the general rules for promotion framed in the year 2003. An officer who is otherwise qualified and eligible for consideration of his name for promotion cannot be denied such consideration for violation of any provision of the Conduct Rules which may or may not amount to misconduct, if the officer is sent for departmental enquiry which, in the present case, has not been constituted against the petitioner. If the State Government itself has deferred submission of yearly return by issuing circulars at different point of time, such deferment would make the rules and the instructions directory, therefore, non submission of return is not fatal for an employee or officer in respect of consideration of his case for promotion.
31. By denying promotion on the basis of executive instructions issued by the GAD on 17-7-2012 the respondents have, in fact, tried to supplant or add a new provision, which was not available in the rules as on the date of consideration for promotion in the year 2012.
32. I may now refer to the legal position as to when an executive instruction can be allowed to supplement the rules on any aspect for which the rules are silent. It is also to be deliberated whether an executive instruction can override any provision of the rule in the garb of supplementing or filling the gap in the rule.

33. The Supreme Court in **Paluru Ramkrishnaiah and Others v. Union of India and Another**<sup>2</sup> held that an executive instruction could not override any provision of the Rule. In the said case, the Supreme Court held that the procedure for making promotion as laid down in Rule 8 of the concerned Rules has to be followed. Likewise, in the case at hand, if the petitioner was duly eligible and qualified under the relevant service rules and the Rules, 2003, he could not have been denied consideration only on the basis of an executive instruction.
34. The Supreme Court in **State of Maharashtra v. Jagannath Achyut Karandikar**<sup>3</sup> held (in para 7) thus.....'the circular is an executive instruction whereas the 1955 Rules are statutory since framed under the proviso to Article 309 of the Constitution. The Government could not have restricted the operation of the statutory rules by issuing the executive instruction. The executive instruction may supplement but not supplant the statutory rules. The High Court was in error in ignoring this well accepted principle.'
35. In **T.R. Kapur and Others v. State of Haryana and Others**<sup>4</sup> the Supreme Court held that the rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say,

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<sup>2</sup> (1989) 2 SCC 541

<sup>3</sup> 1989 Supp (1) SCC 393

<sup>4</sup> AIR 1987 SC 415

there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules, cannot be reverted and their promotions cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the tests of Arts. 14 and 16(1) of the Constitution.

36. In the case at hand also, there was no statutory rule putting embargo for consideration of the case for promotion of an Engineer who has failed to submit the return of immovable property for the preceding five years. The right of promotion accrued in favour of the petitioner in December, 2012 when the DPC was convened. At that point of time there was no amendment in the Rules, 2003 introducing sub-rule (6-a) and sub-rule (7-a) after the existing sub-rules (6) & (7) of Rules 6 & 7. which came into effective pursuant to the notification dated 26-10-2015 expressly providing that such Government servants whose yearly return of preceding 5 years has not been received, his case shall be kept for consideration in circulation and as soon as the return of 5 years is available, the DPC shall consider his case for promotion by circulation. This amendment was issued by order and in the name of the Governor of Chhattisgarh. Thus, petitioner's fundamental right to be considered for promotion was taken away without there being any statutory backing, merely on the basis of an

executive instruction, which cannot be held to be permissible by any rule of construction.

37. The Supreme Court in **Bindeshwari Ram v. State of Bihar and Others**<sup>5</sup> held that it is only in the absence of statutory rules that executive instructions have relevance.
38. It may be argued that there being absence of statutory rules for the subject under consideration it was lawful for the Government to issue executive instructions, however, considering the fact that it involves fundamental right of consideration for promotion, it is not a case of absence of statutory rule, but it is a case of taking away the right by issuance of a circular, which was not issued by order and in the name of the Governor of Chhattisgarh.
39. In view of the above, the second issue is not discussed. Since the petitioner has wrongly been denied promotion on the basis of executive instruction, which is not expressed to have been issued by order and in the name of the Governor of Chhattisgarh, the respondents are directed to consider the case of the petitioner for promotion by holding review DPC of the DPC dated 29-9-2012. If the petitioner is found fit for promotion, he is entitled for the seniority and backwages from the date persons junior to him were promoted pursuant to the said DPC dated 29-9-2012.

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5 (1989) 4 SCC 465

40. In so far as the contempt petition is concerned, the contemnors have taken the shelter of GAD instruction dated 17-7-2012, therefore, it cannot be said that they were acting *mala fide* only with a view to defeat the just claim of the petitioner and, as such, in the considered opinion of this Court, the rule issued against the contemnors deserve to be and is hereby discharged.
41. As an upshot, the contempt petition is disposed of and the writ petition is allowed to the extent indicated above.
42. There shall be no order as to costs.

Sd/-

Judge  
Prashant Kumar Mishra

Gowri