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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI,
ACTING CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESEVALU

W.P.No.9628 of 2020

G.R.Radhakrishna

..Petitioner

vs

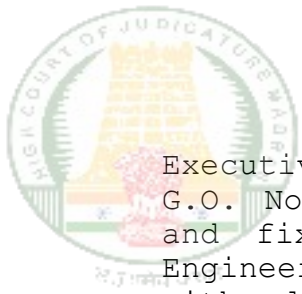
1. The Government of Tamil Nadu,
Rep. by its Secretary,
P & AR Department,
Secretariat,
Chennai - 600 009.

2. The Government of Tamil Nadu,
Rep. by its Secretary,
Public Works Department,
Secretariat,
Chennai - 600 009.

3. The Engineer-in-Chief (WRO) & Chief Engineer (General),
Public Works Department,
Chepauk,
Chennai - 600 005.

..Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for a Writ of Declaration declaring the provisions of Tamil Nadu Government Servants (Conditions of Service) Act, 2016, especially the provisions under section 7(1) of the Act including the second and fourth provisos thereunder and the promotions of Assistant Executive Engineers as Executive Engineers ordered in G.O. (2D) No. 45, Public Works (A1) Department dated 19.02.2019 and G.O.(2D) Public Works (A1) Department dated 27.11.2019 as illegal, unconstitutional and void ab initio and consequently direct the respondents to revise the promotions of Assistant Executive Engineers as Executive Engineers ordered in the said Government orders dated 19.02.2019 and 27.11.2019 based on merit and ability as stipulated under Special Rules to Tamil Nadu Engineering Service and consequently to consider the petitioner for promotion as Executive Engineer notionally from the date on which the first ranked Assistant



Executive Engineer promoted as Executive Engineer in the said G.O. No. 45 dated 19.02.2019 joined duty as Executive Engineer and fix the Petitioner's pay in the category of Executive Engineer accordingly with effect from the said notional date with all consequential service and monetary benefits including the arrears of pay therefor from that notional date of actual promotion.

For the Petitioner : Mr. N.Subramaniyan
For the Respondents : Mr. P.Muthukumar,
Government Pleader

ORDER

(Order of the Court was made by
the Hon'ble Acting Chief Justice)

By this writ petition, the constitutional validity of Section 7(1) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 has been challenged.

2.The writ petition was earlier dismissed by this Court vide the order dated 15.09.2020. The review application was also dismissed by order dated 21.01.2021 and aggrieved by the order passed in the writ petition as well as the order passed in the review application, the petitioner had preferred special leave petition before the Apex Court. By the judgment dated 08.11.2021 in S.L.P. (C) Nos. 6590-6591 of 2021, the Apex Court had set aside the order of this Court remanding the case for a fresh hearing. It was with a direction to the State to file their counter-affidavit within three weeks and rejoinder affidavit, if any, within two weeks thereafter. The respondents/State chose not to file counter-affidavit within the time stipulated by the Apex Court, i.e., three weeks, from the date of judgment or even when the matter was restored by this Court for a fresh hearing and, accordingly, we take it that the State is contesting the writ petition without counter-affidavit. In the aforesaid circumstances, we have heard the learned counsel for the petitioner to appreciate the legal arguments for challenging the constitutional validity of Section 7(1) of the Act of 2016. For ready reference, Section 7(1) of the Act of 2016 is quoted hereunder:

"7. (1) All first appointments to any class or category or grade in any State Service or Subordinate Service, whether by direct recruitment or by recruitment by transfer or by promotion, shall be made by the appointing authority from a list of approved candidates. All appointments made by transfer, from



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one class to another class and from one category to another category, in the same service carrying identical scale of pay shall be made by the appointing authority from a list of approved candidates. Such list shall be prepared in the manner as specified in Schedule-XI by the appointing authority or any other authority empowered in the special rules in that behalf and shall be displayed in the notice board in the office of the appointing authority. The list shall also be communicated to all persons concerned by registered post whose names are found in the list as well as to persons senior to the junior most person included in the list whose names have not been included in the list. Where the candidates in such list are arranged in their order of preference, appointments to the service shall be made in such order:

Provided that the list of approved candidates for appointment by promotion and by recruitment by transfer to all the categories of posts in the State and Subordinate Services shall be prepared annually against the estimated number of vacancies expected to arise during the course of a year. The estimate of vacancies shall be prepared taking into account the total number of permanent post in a category; the number of temporary posts in existence; the anticipated sanction of new posts in the next year; the recruitment post of leave reserves; the anticipated vacancies due to retirement and promotion, etc., in the course of the year and the number of candidates already in position in that category. The list of approved candidates, so prepared, shall be in force for a period of one year only and shall lapse at the end of the year. The candidates whose names were included in the previous list, but were not appointed, shall be considered, if eligible for inclusion in the list of next year along with their seniors, if any, whose names were not included in the previous list either because they were found not suitable or because they were not technically qualified when the previous list was drawn up:

Provided further that, for preparing such lists to fill up vacancies, the names of the qualified candidates in the seniority list in a class, category or service shall be considered in the following proportions (rounding off fractions to the next whole number) :-



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Number of vacancies	Number of qualified candidates to be considered
1-20	200% of the actual number of estimated vacancies;
21-80	175% of the actual number of estimated vacancies, subject to a minimum of 40;
81 and above	150% of the actual number of estimated vacancies, subject to a minimum of 140:

Provided also that if the qualified candidates, after consideration of their claims, are found not suitable for the post, the names of the next qualified candidates, to the extent necessary, shall be considered:

Provided also that in respect of each reserved vacancy to be filled up by the candidate belonging to the Backward Class, Backward Class Muslims or the Most Backward Class and Denotified Community or the Scheduled Caste or the Scheduled Tribe, the names of the first two qualified candidates belonging to the Backward Classes, Backward Class Muslims or Most Backward Classes and Denotified Communities or the Scheduled Castes and Scheduled Tribes, as the case may be, shall be considered, subject to their availability and if the first two qualified candidates belonging to the Backward Classes, Backward Class Muslims or Most Backward Classes and Denotified Communities or the Scheduled Castes and Scheduled Tribes, as the case may be, are found not suitable for the post, the claims of the next two qualified candidates belonging to that reserved category shall be considered. No reserved vacancy shall be left unfilled, except when no qualified candidates in the seniority list in a class, category or service belonging to that reserved category are available for consideration. In respect of a vacancy to be filled up by General Turn, the names of the qualified candidates including those belonging to the Backward Classes, Backward Class Muslims, the Most Backward Classes and Denotified Communities, the Scheduled Castes and the Scheduled Tribes in the seniority in a class, category or service shall also be considered:

Provided also that in respect of filling up vacancies in the post of Head of Department, the number of names

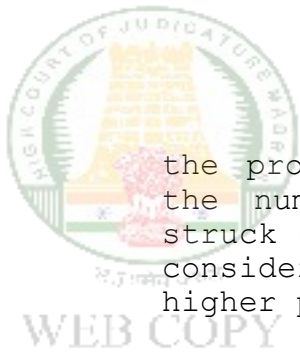


of qualified candidates to be considered shall be fixed as twice the number of vacancies plus three in the seniority list in a class, category or service."

3. Learned counsel for the petitioner submits that Section 7(1) provides for display of list of approved candidates on the notice board of the office of the appointing authority and the same should be communicated to all persons concerned by registered post whose names are found in the list as well as to the persons senior to the junior most persons included in the list whose names have not been included in the list. The display of the list on the notice board of the office and the communication to all persons concerned by registered post is illegal and offends the constitutional provision. Thus, Section 7(1) of the Act of 2016 deserves to be struck down to that extent. It should be with a direction to the respondents to make publication of the list on the official website and in the gazette.

4. The other challenge is to second proviso to Section 7(1) of the Act of 2016. Learned counsel for the petitioner submits that for promotion, the names of the qualified candidates in the order of seniority is to be arranged for consideration of candidature, but in doing so, the provision has restricted the number of candidates for consideration for promotion. It is ignoring the fact that the consideration of the candidature should be allowed for all candidates for promotion without any restriction. The restriction of number of candidates for consideration offends Article 16 of the Constitution of India. To support his argument, reference to the judgment of the Apex Court in Ashok Kumar and others v. Chairman, Banking Service Recruitment Board and others, reported at (1996) 1 SCC 283 has been given. It is to show a direction by the Apex Court to consider the candidature of all the eligible candidates for appointment to a post in the spirit of Article 16 of the Constitution of India. Ignoring the direction aforesaid and the mandate of Article 16 of the Constitution of India, the respondents restrict consideration of the candidates to the size given in the second proviso to Section 7(1) of the Act of 2016. The second proviso to Section 7(1) of the Act of 2016 is also unconstitutional thus be struck down and the respondents may be directed to consider the candidature of the petitioner for promotion to the higher post.

5. Learned counsel for the petitioner has even made a reference to the Tamil Nadu Engineering Service Special Rules to show that promotion of Chief Engineers, Superintending Engineers, Executive Engineers and Assistant Engineers is provided based on merit and ability, seniority being considered only when merit and ability are approximately equal. Keeping in mind the rules, providing promotion based on merit and ability,



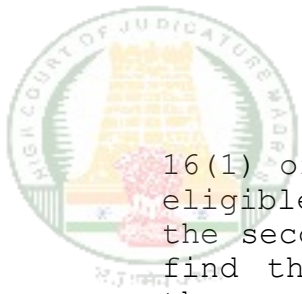
the provisions of Section 7(1) of the Act of 2016 restricting the number of candidates based on seniority deserves to be struck down and, accordingly, the respondents may be directed to consider the candidature of the petitioner for promotion to the higher post.

6. We have considered the submissions of the learned counsel for the petitioner and perused the records.

7. Section 7(1) of the Act of 2016 has been quoted by us for consideration of the challenge to the provision aforesaid. The first part of challenge is to the display of the list of approved candidates on the notice board of the office and communicating the same to the concerned candidate by registered post whose name appears in the list. The challenge to the aforesaid has been made without referring to any provisions of the Constitution of India being offended. It is, however, with a prayer that the list should be hosted in the official website, ignoring the fact that the provisions of Section 7(1) of the Act of 2016 mandates not only the display of the list on the notice board of the office, but the communication of the said list to all persons concerned by registered post whose names are found in the list as well as to the persons senior to the junior most person included in the list whose names have not been included in the list.

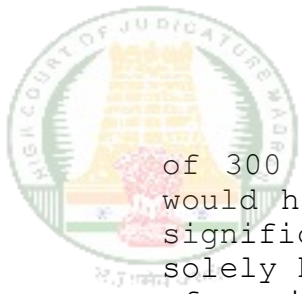
8. We do not find that Section 7(1) of the Act of 2016 offends any of the provisions of the Constitution of India, when the publication of the list is made on the notice board of the office, it remains under common knowledge of all persons concerned and furthermore, the provision envisages circulation of the list to the concerned candidates, apart from the candidates senior to them, if not included in the list. The proper mechanism of circulation of the list to the knowledge of the candidate concerned has been made and otherwise for others, it would remain available on the notice board of the office. Thus, a transparent mechanism has been used by the respondents for circulation of the list. Learned counsel for the petitioner could not refer to any provision which mandates the hosting of the list on the website or of any other arrangement. Thus, the prayer, not supported by provision of law or the Constitution of India, cannot be accepted to be a ground for challenge to the constitutional validity of Section 7(1) of the Act of 2016. Accordingly, the first part of the challenge to Section 7(1) of the Act of 2016 cannot be sustained.

9. The other part of challenge is to the second proviso to Section 7(1) of the Act of 2016. The said provision has been challenged in reference to Article 16 of the Constitution of India. Learned counsel for the petitioner submits that Article



16(1) of the Constitution of India mandates consideration of all eligible candidates for promotion, which has been offended by the second proviso to Section 7(1) of the Act of 2016. We do not find that Article 16(1) of the Constitution of India mandates the consideration of the candidature of all candidates for promotion, rather it mandates equality in public employment. We find no unconstitutionality in the provision in providing 'zone of consideration' for promotion. The promotion to the higher post may be based on different criteria, which may be merit cum seniority or seniority cum merit or lastly, merit alone. To apply any of the criteria aforesaid, what is required to be seen is the seniority of the candidate for consideration to avoid method of pick and choose amongst the candidates eligible for promotion. The consideration of the candidate for promotion is kept limited and thereby, the 'zone of consideration' is provided. It remains for consideration of 3 to 5 candidates against one post while 5 to 7 candidates against two posts and so on which may be to the extent twice the number of the posts also. The method of 'zone of consideration' is provided under the service rules in the matter of promotion and, accordingly, the respondents while providing second proviso to Section 7(1) of the Act of 2016 created the 'zone of consideration' which for the first 1 to 20 posts is 200% to the actual number of the estimated vacancies. The proviso under the aforesaid Section makes it clear that if the qualified candidates are not found suitable for the post, the names of the next qualified candidates, to the extent necessary, shall be considered. The proviso aforesaid provides an arrangement for consideration of the candidature of the eligible candidates for promotion to the extent of vacancy if the qualified candidates are not found suitable for the promotion. For illustration, if there are 20 posts, the consideration of the candidature for promotion would be of 40 candidates in the order of seniority. If none of them or half of them are found suitable for promotion and thereby, would fill up only 10 posts out of 20 posts then consideration for the next 10 posts would be from and amongst the next qualified candidates and it would go to the extent necessary making a room for other candidates for consideration of their candidature for promotion to fill up the vacant posts. In view of the said proviso, the challenge to the second proviso on the ground that consideration of all eligible candidates would not be made for promotion is not met out.

10. In the service rules, the phrase 'zone of consideration' is well known in the matter of promotion. It was brought to limit the consideration of eligible candidates for promotion to the size of vacancies. In the absence of it, a chaos may be created and we could illustrate the aforesaid. In a given case, if there are 20 posts for promotion and if the consideration is to be made of all the candidates, then in case of availability



of 300 eligible candidates, the consideration of 300 candidates would have to be made. Though invariably in promotion, there is significance of seniority and otherwise, if promotion is given solely based on merit, consideration will always be in the order of seniority of the candidates. Though seniority may not have significance for promotion, but only for consideration of the merit of the candidature. If seniority for the aforesaid is ignored, then it will create a situation where the administration may evolve a method of 'pick and choose' to consider the candidature of the eligible candidate. To apply the aforesaid, a well known method of 'zone of consideration' has been evolved for promotion unlike in the matter of direct recruitment where even against 100 posts there may be 1,000 or 5,000 applications and candidature of all such candidates would have to be considered. It is for the reason that in the absence of seniority list of the candidate for direct recruitment, every eligible candidate has to be considered unlike in the case of promotion. The aforesaid difference has not been marked by the petitioner to challenge to the proviso under the Act. The method of 'zone of consideration' has been evolved for the object sought to be achieved and to keep consideration of eligible candidates to the extent that it may not create chaos and to make the process of promotion meaningful.

11. At this stage, we are referring to the rule for promotion given under the Tamil Nadu Engineering Service Special Rules. Rule 2(b) of the said Rules is quoted hereunder for ready reference:

"2. Application:-

...

(b) Promotion as Chief Engineers, Superintending Engineers, Executive Engineers and Assistant Executive Engineers shall be made on grounds of merit and ability seniority being considered only where merit and ability are approximately equal."

The provisions of the said Rule also show that promotion shall be made based on merit and ability, seniority being considered only where merit and ability are approximately equal. The element of seniority has a role to play therein also and goes after consideration of merit and ability. For the consideration of merit and ability, the candidature is to be arranged in the order of seniority and not on the whims and fancies of the respondents. It is even for declaration of the list of the eligible candidates for promotion. It is to avoid 'pick and choose' method by the respondents, thus, seniority has its role to play even as per the rules referred to above.

12. The issue of 'zone of consideration' was considered by the Apex Court in V.J. Thomas v. Union of India, 1985 Supp SCC 7



: 1985 SCC (L&S) 516. In the said decision, the Apex Court held that where vacancies are few and candidates are disproportionately large in number, department can make classification amongst eligible candidates on the basis of length of experience, so as to restrict the examination only for those having longer service leaving others to appear in the next examination. The relevant portion of the said judgment is reproduced herein under:

"13. It is a known principle of service jurisprudence that even though minimum eligibility criterion is fixed enabling one to take the examination yet the examination can be confined on a rational basis to recruits up to a certain number of years. That constitutes recognition of long experience and not permitting some irate junior to score a march. If by 1982, nearly 4000 Junior Engineers of pre-1973 batches had become eligible for taking competitive examination, the department would be perfectly justified in keeping the examination open only to persons who have put in such long service and leaving others to wait for the next examination. If for taking examination this aspect introduces classification, it is based on rational and intelligible differentia which has a nexus to the object sought to be achieved. By the note, for a period of two years only pre-1973 Junior Engineers who had cleared qualifying examination were given a chance to take competitive examination. If this introduces a classification, it is valid. It caters to a well-known situation in service jurisprudence that there must be some ratio of candidates to vacancies. And it is based on long experience as a rational basis for classification. Viewed from this angle, we find nothing in the policy underlying the Note to clause (4) as being either discriminatory or arbitrary or denying equality of opportunity in the matter of promotion. It had the desired effect of not having a glut of Junior Engineers taking examination compared to fewer number of vacancies. Length and experience were given recognition by the note. The promotion can be thus by stages exposing the promotional avenue gradually to persons having longer experience. This seems to be the policy underlying the note and we see nothing improper or unconstitutional in it."

[emphasis supplied]

13. In S.B. Mathur v. Chief Justice of Delhi High Court, 1989 Supp (1) SCC 34, the Apex Court considered the fact that the



zone of consideration was limited to a multiple of 3 to 5 times of the number of vacancies. This criterion was upheld. The test laid down was that criterion adopted should be reasonable, based on rational & intelligible differentia which has nexus to the object sought to be achieved. It was further held that so long as the zone of consideration is limited by the competent authority in a manner not inconsistent with the rules or in a manner which is not arbitrary or capricious or mala fide, the validity of the decision to limit the zone of consideration cannot be successfully called in question on the ground that the manner in which the zone of consideration was limited was not uniform. The relevant paragraphs of the said judgment are reproduced here under:

"20. In the case before us, zone has been restricted by prescribing that out of the total number of candidates who satisfy the eligibility requirement, the zone of consideration will be limited to a multiple of 3 to 5 times of the number of vacancies and the persons to be considered will be determined on the basis of their seniority in the combined seniority list. It appears to us that there is nothing unreasonable in this restriction. It was open to the Delhi High Court to restrict the zone of consideration in any reasonable manner and limiting the zone of consideration to a multiple of the number of vacancies and basing it on seniority according to the combined seniority list, in our view, cannot be regarded as arbitrary or capricious or mala fide. Nor can it be said that such restriction violates the principle of selection on merit because even experience in service is a relevant consideration in assessing merit. We may also refer, in this connection, to the decision of this Court in V.J. Thomas v. Union of India [1985 Supp SCC 7 : 1985 SCC (L&S) 516] where it has been pointed out that even though minimum eligibility criterion is fixed for enabling one to take the examination, yet the examination can be confined on a rational basis to recruits up to a certain number of years. In adopting such a policy which underlay the Note to clause (4) of Appendix I to the new Rules in question, there is nothing which is arbitrary or amounting to denial of equal opportunity in the matter of promotion. It had the desired effect of not having a glut of Junior Engineers taking examination compared to fewer number of vacancies. Length and experience were given recognition by the Note. The promotion can be thus by stages exposing the promotional avenue gradually to persons having longer experience. This



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seems to be the policy underlying the Note and there was nothing arbitrary or unconstitutional in it. Such a limitation caters to a well known situation in service jurisprudence that there must be some ratio of candidates to vacancies. If for taking an examination this aspect of classification is introduced, it is based on rational and intelligible differentia which has a nexus to the object sought to be achieved (see SCC p. 13 para 13). In view of what we have pointed out above, the submission of Mr Thakur in this connection must also be rejected.

.....

23. Finally, it was pointed out by learned counsel for the petitioners that no uniform policy has been followed in the past regarding the limitation of zone of consideration as far as the selection to the post of Assistant Registrars is concerned. This may be so. But we are afraid, by itself that circumstance cannot lead to a conclusion that promotions are made arbitrarily because the failure to follow one uniform policy in respect of limiting the zone of consideration would not, by itself, necessarily render the limitation, of the zone of consideration invalid on the ground of arbitrariness. So long as the zone of consideration is limited by the competent authority in a manner not inconsistent with the Rules or in a manner which is not arbitrary or capricious or mala fide, the validity of the decision to limit the zone of consideration cannot be successfully called in question on the ground that the manner in which the zone of consideration was limited was not uniform. The zone might have, been limited on each occasion keeping in view the relevant circumstances including the number of posts vacant and on a basis having a nexus to the purpose of selection."

[emphasis supplied]

14. In Arjit Singh v. State of Punjab, AIR 1999 SC 3471, the Apex Court held that only if a person satisfies the eligibility and falls within the zone of consideration, but has been not considered for promotion, then there will be an infraction of his rights. The following observation is of relevance:

"22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1)



[emphasis supplied]

"22. The promotion has to be effected in terms of statutory rules and in absence thereof, as per the executive instructions. The policy provides equal opportunities to the officers falling within the zone of consideration and subsequent promotion. Such policy is not discriminatory in terms of Article 14 or denies lack of equal opportunity in terms of Article 16. The promotion to the post of



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Air Vice Marshal is governed by the policy of Air Force which is applicable to all officers falling in the zone of consideration. Therefore, the Promotion Policy cannot be said to be illegal, arbitrary and irrational warranting interference in exercise of power of judicial review."

17. We are unable to find any reason for the petitioner to challenge the validity of Section 7(1) of the Act of 2016, when the second proviso makes it clear that in case the suitable candidates are not found available, the next qualified candidates would be considered to the extent necessary that is to fill up all the posts by way of promotion. It makes it clear that consideration of the candidature for promotion to the post would go to the extent of filling all the posts irrespective of the limit of the 'zone of consideration' under the second proviso. We do not find that Article 16 of the Constitution of India is offended by that proviso.

18. The judgment of the Apex Court in the case of Ashok Kumar supra does not provide any assistance on the issue. The said decision pertains to the fundamental right of every citizen to claim consideration for appointment to a post by direct recruitment under the State, and is clearly distinguishable on facts of the present case which deals with right of a candidate to be considered for promotion. The eligible candidates are entitled for consideration of their candidature for promotion, but keeping in mind the seniority, thus, the method of 'zone of consideration' has been evolved under the service rules or under the Act. It is more so, when challenge is unnecessary in view of Section 68 of the Act of 2016, which is quoted hereunder:

"68. If any provision of this Act is inconsistent with any provision of the special rules applicable to any particular service, the special rules shall, in respect of that service, prevail over the provisions of this Act."

The provision aforesaid makes it clear that if any of the provisions of the Act of 2016 is found inconsistent with any special rule applicable to a particular service, then the special rule would prevail. In the aforesaid circumstances, even for the sake of argument, if we assume that Rule 29(b) of the Tamil Nadu Engineering Services Special Rules is offended by Section 7(1) of the Act of 2016, the third proviso to Section 7(1) of the Act of 2016 is to be ignored as per Section 68 of the Act of 2016. Ignoring the aforesaid provisions, the constitutional validity of Section 7(1) of the Act of 2016 has been challenged by the petitioner. However, we find Section 7(1) of the Act to be reasonable and not offending any of the



provisions of the Constitution of India, thus, there is no reason to declare it to be ultra vires.

In the result, the Writ Petition fails and the same is dismissed. W.M.P. Nos. 11756 and 11784 of 2020 are closed. There will be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vjt

To:

1. The Secretary to Government of Tamil Nadu,
P & AR Department,
Secretariat,
Chennai - 600 009.
2. The Secretary to Government of Tamil Nadu,
Rep. by its Secretary,
Public Works Department,
Secretariat,
Chennai - 600 009.
3. The Engineer-in-Chief (WRO) & Chief Engineer (General),
Public Works Department,
Chepauk,
Chennai - 600 005.

W.P.No.9628 of 2020

SR-II (CO)
RGA (24/01/2022)