



2023:DHC:7707



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

% **Reserved on: 1st August, 2023**
Pronounced on: 20th October, 2023

+ **W.P.(C) 1146/2020 and CM APPL. No. 3790/2020**

H K DABAS

..... Petitioner

Through: **Mr.Prakhar Bhatnagar, Advocate**
(through VC)

Versus

**WAREHOUSING DEVELOPMENT AND REGULATORY
AUTHORITY**

..... Respondent

Through: **Ms.Bhanrani Gupta and**
Mr.Snigdha Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

The present Writ Petition has been filed under Article 226 of the Constitution of India challenging the order dated 2nd January, 2020, passed by the respondent no. 1 whereby, the seniority of the petitioner was erroneously fixed by the respondent no. 1.

FACTUAL MATRIX

1. The petitioner is a Central Government Employee and joined the National Horticulture Board ('NHB' hereinafter) in 1990 as a Technical Assistant and was subsequently promoted at various levels and was last working as Assistant Director in the pay scale of 15600-39100 Grade Pay Rs. 5400 in his parent Department, i.e. the NHB.



2. In 2011, the petitioner joined the respondent ('respondent Authority' hereinafter) as Under Secretary on deputation basis and therefore, was relieved from his parent organization *vide* order dated 9th June, 2011. The respondent Authority is a body set up under the Department of Food and Public distribution, Ministry of Consumer Affairs, Government of India.

3. The employees in the respondent Authority are governed by the rules and regulations laid down by it and the guidelines formulated by the Department of Personnel & Training ('DoPT' hereinafter). The officers of the respondent Authority are governed by Warehousing and Regulatory Authority (Conditions of Service of the Officers and other Employees) Regulations, 2016 ('the Regulations' hereinafter).

4. In the year 2016, upon request, the petitioner was permanently absorbed in the respondent Authority *vide* order dated 15th September, 2016, against the post of Under Secretary (Technical) in the Pay Band-3 Rs. 15,600-39,100 + Grade Pay Rs. 6600.

5. In 2019, the respondent Authority notified vacancy for the post of Director (Technical) and invited applications from the eligible candidates *vide* advertisement dated 8th February, 2019. In light of the said notification, the petitioner submitted his representation to the Chairman of the respondent Authority requesting him for promotion to the said post. In the said letter, the petitioner conveyed that he meets the eligibility criteria, and therefore, he should be promoted to the said position, however, the petitioner did not receive any response to the said letter.

6. Thereafter, the petitioner sent several representations to which the respondent Authority informed the petitioner about the non-availability of



the Chairman, and assured that a decision will be taken once the new Chairman gets appointed in the respondent Authority. The said reply is as under:

“This is in reference to your letter dated 20.09.2019 on the subject cited above and to inform that as instructed by Director (A&F), as of now there is no Chairman/Chairman I/C in WDRA, the same may be put up after the appointment of Chairman.”

7. In 2020, the respondent Authority decided the representation and fixed the petitioner's seniority whereby the petitioner was intimated about his ineligibility for the said post since he did not meet the minimum service requirement i.e. 8 years. The order dated 2nd January, 2020, is reproduced herein:

“Consequent to the absorption of Shri H.K.Dabas to the post of Under Secretary (Technical) in WDRA on 01.09.2016 in the Pay Scale Rs. 15600 - 39100 GP 6600/- (Sixth CPC) [now Level-11 Rs. 67700 - 208700 of 7th CPC], with the approval of the Competent Authority, the seniority date of Shri H.K.Dabas in the grade of Under Secretary (Technical) is fixed from the date of his absorption i.e. 01.09.2016 for all purposes in, terms of DoP&T Office Memorandum No. 20011/1/2000-Estt D dated 27th March, 2001. This issues with the approval of the competent authority.”

8. Aggrieved by the decision of the respondent Authority, the petitioner has preferred the instant petition seeking the following reliefs:

"A. Quash impugned order dated 02.01.2020, whereby the Respondent has erroneously fixed the seniority of Petitioner in derogation to the provisions of Warehousing Development & Regulatory Authority (Conditions Of Service Of The Officers And Other Employees) Regulations, 2016
B. Quash impugned letter dated 02.01.2020 whereby the



*Respondent has wrongly held that the Petitioner does not fulfill the eligibility condition of minimum eight year of regular service in the grade of Under Secretary (Technical).
C. Direct the Respondent to fix the seniority of the Petitioner in accordance to the provisions of Warehousing Development & Regulatory Authority (Conditions of Service of the Officers and Other Employees) Regulations, 2016.
D. Direct the Respondent to consider the Petitioner-'s case for grant promotion to the post of Director (Technical).
E. Direct the Respondent to not to fill up the post of Director (Technical) during the pendency of the present petition
F. Any other order which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may also be passed in favor of the Petitioner and against the Respondent."*

SUBMISSIONS

(on behalf of the petitioner)

9. The learned counsel appearing on behalf of the petitioner submitted that the petitioner is a *bonafide* appointee to the respondent Authority and is entitled to pay and promotion in accordance with the Regulations governing the respondent Authority i.e. Warehousing Development and Regulatory Authority Act, 2007 ('the Act' hereinafter).

10. It is submitted that Section 33(1) and 51(1)(g) of the Act empowers the respondent to notify regulations governing the service conditions of their employees and the said regulations have to be notified with prior approval from the Central Government and in consultation with the Warehousing Advisory Committee. The said regulations are as follows:

"33. (1) The Authority may appoint officers and such other employees as it considers necessary for the efficient discharge of its function under this Act."

(2) The terms and conditions of service of officers and other



employees of the Authority appointed under sub-section (1) shall be governed by the regulations made under this Act.

51. (1) The Authority may, with the previous approval of the Central Government, and in consultation with the Warehousing Advisory Committee, by notification, make regulations consistent with this Act and the rules made there-under to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:

(g) the terms and conditions of service of officers and other employees of the Authority under sub- section (2) of section 33.”

11. It is submitted that the respondent Authority constituted the Officers Cadre in 2016, and notified the said regulations in the Official Gazette. It is submitted that the post of Under Secretary (Technical) and Director (Technical) were duly included in the said cadre.

12. It is submitted that the respondent Authority overlooked the relevant regulations governing the employees, whereby, Regulation 5 & 6 clearly lays down that the services rendered by the petitioner before his permanent absorption in the respondent Authority, shall constitute as regular services and the same shall be taken into account while considering his eligibility.

13. It is submitted that the Regulation 7 provides for promotion of the employees if they fulfill the requirements specified in Schedule II and therefore, can be recommended for promotion by the Selection Committee constituted for the said purpose. Therefore, the petitioner belonging to the officers, mentioned in the said schedule is eligible for



the promotion. The said Regulation reads as follows:

"7. Method of Recruitment- (1) After initial formation of the Officers cadre if any vacancy arises in any of the grades specified in Schedule-I of sub-regulation (3) of regulation 5 or if a new post is created in any of the grades, the same shall be filled up in the manner specified in Schedule-II."

14. It is submitted that if the seniority of the petitioner is correctly fixed from the date of his joining the respondent Authority, i.e. 10th June, 2011, he fulfills the requirement of minimum employment of 8 years, as enshrined in Schedule II of the 2016 Regulations and the advertisement notified by the respondent Authority.

15. It is submitted that the provisions governing the employees of the respondent Authority are beneficial to the petitioner, however, the respondent Authority has ignored its own regulations and has placed reliance on the DoPT Office Memorandum (Administrative instructions/Executive Orders). It is also submitted that in case of conflict between the executive orders and statutory regulations, the statutory regulations shall prevail.

16. It is submitted that the Regulation 5(1)(a) provides for inclusion of officers who were holding any post of an officer either on a deputation or on an *ad-hoc* appointment basis immediately before the constitution of officer cadre.

17. It is submitted that Regulation 5(2) provides for inclusion of officers in the Officer Cadre in the appropriate grade applicable to them from the date of their initial appointment with the authority, and therefore, the petitioner's seniority should be considered from the date of



his initial appointment in the respondent Authority, i.e. 10th June, 2011.

18. It is submitted that the audit report dated 23rd November, 2021, given by the Indian Audit and Accounts Department fortifies the case of the petitioner as the department has held that the petitioner's case is fit for promotion and denial of the said promotion by the respondent Authority can be termed as non-adherence to the regulations.

19. It is submitted that the petitioner filed an RTI Application, and the respondent Authority had replied to the said RTI *vide* letter bearing No. H-11021/1/2017/A8F/123 whereby, the respondent Authority admitted that the petitioner had completed 8 years of regular service in the respondent Authority. The relevant extracts of the said letter are reproduced herein:

"Sh. Dabas has been completed 8 years of regular service in the grade of Under Secretary (Technical). As per above, Schedide -III (C/p.l30) a DPC comprising of one member nominated by Chairman Incharge, WDRA .Additional Secretary and Director (A&F) shall examine the promotion eligibility to the post of Director (Technical) and submit the recommendation for consideration of the Chairperson. The Chairperson/Chairperson Incharge will take the final decision in this regard".

20. It is also submitted that the Additional Secretary of the respondent Authority had also made recommendations in favor of the petitioner and had clarified that the petitioner fulfills the minimum criteria of 8 years of service, a condition essential for promotion to the post of Director (Technical).

21. It is further submitted that the Audit report dated 23rd November, 2021, clearly establishes the case in favor of the petitioner whereby it was



rightly noted that the respondent had failed to comply with its own regulation while deciding the seniority of the petitioner.

22. Therefore, in light of the foregoing submissions, it is prayed that the present petition may be allowed and relief may be granted, as prayed.

(on behalf of the respondent)

23. The learned counsel appearing for the respondent vehemently opposed the present petition submitting to the effect that the respondent Authority correctly fixed the seniority of the petitioner on the basis of Rules and Regulations as well as the guidelines laid down by the DoPT.

24. It is submitted that the petitioner was earlier working in his parent Department as an Assistant Director and was subsequently selected for the post of Under Secretary (Technical) on deputation basis in the respondent Authority in 2011. It is submitted that the petitioner was permanently absorbed in the respondent Authority *vide* order dated 15th September, 2016, and his seniority was accordingly fixed from the said date.

25. It is submitted that even though Schedule I of the regulations include the post of Under Secretary, the services of the petitioner at the time of publication of the said regulations i.e. 14th July, 2016, were not regularized and the same got regularized only in the month of September, 2016.

26. It is submitted that the petitioner was granted Modified Assured Career Progression Scheme ('MACP' hereinafter) under the grade pay of Rs. 6,600 since 2012 by his parent Department and not by the respondent. It is also submitted that the order granting MACP specifically specified



that the said benefit granted to the petitioner would not be relevant to decide his seniority.

27. It is submitted that the Clause 34(1) of the Warehousing Development and Regulatory Authority (Conditions of service of Officers and other Employees) Regulations, 2016 provides “***Residuary Provision(s)- (1) The guidelines or instructions issued by the Department of Personnel and Training from time to time on matters in these regulations shall be followed.***”

28. It is therefore submitted that the respondent Authority is bound by the rules & regulations framed by the DoPT and the Office Memorandum bearing No. 20011/1/2000-Estt (D) dated 27th March, 2001, provides for seniority of an official to be calculated from the date of absorption.

29. It is also submitted that the petitioner has not completed 8 years as Under Secretary after his permanent absorption and therefore, does not fall within the prescribed criteria for appointment to the said post.

30. It is further submitted that the petitioner did not hold the requisite post and grade pay on regular basis to become eligible for promotion to the post of Director (Technical) as the petitioner was working in the respondent Authority on deputation and grant of MACP the parent Department was merely a financial benefit to the petitioner.

31. Hence, in view of the forgoing discussion, it is submitted on behalf of the respondent that the petition is liable to be dismissed.

FINDINGS AND ANALYSIS

32. Heard the learned Counsel appearing for the parties and perused the records. This Court has given its thoughtful consideration to the



submissions made by the parties.

33. It is pertinent to mention that the petitioner joined the respondent Authority on deputation in 2011 is not in dispute, and the only contention made by the petitioner is regarding his eligibility for promotion to the post of Director (Technical) in the respondent Authority and has supplemented the relevant rules prescribing for his eligibility for the said promotion.

34. Therefore, this Court has adjudicated the present writ petition on the issue related to the re-fixing of the petitioner's seniority in light of the regulations formulated on the basis of the statutory provisions governing the officers of the respondent Authority.

35. The question of validity of the regulations issued by the Government Department has been raised before the Hon'ble Supreme Court and various High Courts several times and the ratio laid down by the Hon'ble Supreme Court prevail as the settled principle of law. It is no doubt that the Office Memorandums ('OM' hereinafter) issued by the various Ministries are being followed as the standard norms, however, the validity of the said OMs have been challenged by the affected parties from time to time.

36. It is true that the statutory rules framed for regulation and promotion of the employees are the ones prescribed to be followed by the concerned department, however, in absence of the said rules, the OMs issued by the Department can be used to fill the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

37. It is a settled legal principle that the authority conferred with the competence under the statute prevails over the commands granted by the



superior person sitting on the higher position, and if that happens, it can be termed illegal.

38. In *Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation*, (2011) 5 SCC 435, the Hon'ble Supreme Court dealt with the issue of legality of orders issued by the Civil Aviation to keep the Civil Aviation Requirements (CAR) in abeyance and termed the said order illegal. The relevant paragraphs are reproduced herein:

"14. The appellants have raised the issue as to whether the Order dated 29-5-2008, keeping CAR 2007 in abeyance could be passed without following the procedure prescribed in CAR dated 13-10-2006. CAR dated 13-10-2006 provides for a detailed procedure for the promulgation of CAR. Clause 3.3 provides that whenever a change is effected to a CAR, it shall be termed as a revision and effective date of the revision of CAR shall be indicated therein. According to Clause 4 thereof, if a new CAR or a revision to the existing CAR is proposed to be issued, the draft of the proposed CAR/revision shall be posted on DGCA's website or circulated to all the persons likely to be affected thereby inviting their objections/suggestions. The objections so received shall be analysed, considered and incorporated in case the same are found to be acceptable, before the promulgation of CAR.

15. In State of A.P. v. Civil Supplies Services' Assn. [(2000) 9 SCC 299 : 2001 SCC (L&S) 71] the Government had issued a notification that provided, inter alia, that certain rules which had earlier been framed by the Government would be kept in abeyance. The Administrative Tribunal quashed the same directing the Government to frame the rules in a particular manner and to give partial effect to the rules kept in abeyance. However, on appeal, this Court set aside the order of the Tribunal and held that the Tribunal could neither have given directions to the Government to frame rules in any particular manner, nor to give partial effect to the rules kept in abeyance, as the order had



exclusively been legislative in character.

16. *Thus, in exceptional circumstances, it may be permissible for the statutory authority to put subordinate legislation in abeyance. However, such an order being legislative in character, is not warranted to be interfered with by the Court/Tribunal.*

17. *CAR 2007 is neither a statute nor a subordinate legislation. The provisions contained in Sections 4-A, 5 and 5-A of the 1934 Act and Rules 42-A and 133-A of the 1937 Rules make it evident that the same are merely executive instructions which can be termed as “special directions”. The executive instruction can supplement a statute or cover areas to which the statute does not extend, but it cannot run contrary to the statutory provisions or whittle down their effect. (Vide State of M.P. v. G.S. Dall & Flour Mills [1992 Supp (1) SCC 150] .)*

18. *In Khet Singh v. Union of India [(2002) 4 SCC 380 : 2002 SCC (Cri) 806 : AIR 2002 SC 1450] this Court considered the scope and binding force of the executive instructions issued by the Narcotic Bureau, New Delhi and came to the conclusion that such instructions are binding and have to be followed by the investigating officer, coming within the purview of the Narcotic Drugs and Psychotropic Substances Act, 1985, even though such instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by them during the investigation of the crime.*

19. *A Constitution Bench of this Court in Sant Ram Sharma v. State of Rajasthan [AIR 1967 SC 1910] held as under : (AIR p. 1914, para 7)*

“7. ... It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

20. *Thus, an executive order is to be issued keeping in view the rules and executive business, though the executive order*



may not have the force of law but it is issued to provide guidelines to all concerned, who are bound by it.

21. In Union of India v. Amrik Singh [(1994) 1 SCC 269 : 1994 SCC (L&S) 517 : (1994) 26 ATC 589 : AIR 1994 SC 2316] this Court examined the scope of executive instructions issued by the Comptroller and Auditor General for making the appointments under the provisions of the Indian Audit and Accounts Department (Administrative Officers, Accounts Officers and Audit Officers) Recruitment Rules, 1964, and came to the conclusion that the Comptroller and Auditor General of India had necessary competence to issue departmental instructions on matters of conditions of service of persons serving in the Department, being the Head of the Department, in spite of the statutory rules existing in this regard. The Court came to the conclusion that an enabling provision is there and in view thereof, the Comptroller and Auditor General had exercised his powers and issued the instructions which are not inconsistent with the statutory rules, the same are binding for the reason that the provision in executive instructions has been made with the required competence by the Comptroller and Auditor General.

22. Thus, it is evident from the above that executive instructions which are issued for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time. The law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable thereunder.”

39. The question of validity of the OMs has been revisited by the Hon’ble Supreme Court in the case of **Union of India v. Ashok Kumar Aggarwal, (2013) 16 SCC 147**, and the said question was decided in the following manner:

“57. It is a settled legal proposition that jurisdiction under Article 136 of the Constitution is basically one of



conscience. The jurisdiction is plenary and residuary. Therefore, even if the matter has been admitted, there is no requirement of law that court must decide it on each and every issue. The court can revoke the leave as such jurisdiction is required to be exercised only in suitable cases and very sparingly. The law is to be tempered with equity and the court can pass any equitable order considering the facts of a case. In such a situation, conduct of a party is the most relevant factor and in a given case, the court may even refuse to exercise its discretion under Article 136 of the Constitution for the reason that it is not necessary to exercise such jurisdiction just because it is lawful to do so. (Vide *Pritam Singh v. State* [1950 SCC 189 : AIR 1950 SC 169 : (1950) 51 Cri LJ 1270] , *Taherakhattoon v. Salambin Mohammad* [(1999) 2 SCC 635 : AIR 1999 SC 1104] and *KaramKapahi v. Lal Chand Public Charitable Trust* [(2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262 : AIR 2010 SC 2077] .)

58. A Constitution Bench of this Court while dealing with a similar issue in respect of executive instructions in *Sant Ram Sharma v. State of Rajasthan* [AIR 1967 SC 1910] , held : (AIR p. 1914, para 7)

“7. ... It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.”

59. The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide *Union of India v. MajjiJangamayya* [(1977) 1 SCC 606 : 1977 SCC (L&S) 191] , *P.D. Aggarwal v. State of U.P.* [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 272] , *PaluruRamkrishnaiah v. Union of India* [(1989) 2 SCC 541 : 1989 SCC (L&S) 375 : (1989) 10 ATC 378 : AIR 1990 SC



166] , *C. Rangaswamaiah v. Karnataka Lokayukta* [(1998) 6 SCC 66 : 1998 SCC (L&S) 1448] and *Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation* [(2011) 5 SCC 435 : AIR 2011 SC 2220] .)

60. Similarly, a Constitution Bench of this Court, in *Naga People's Movement of Human Rights v. Union of India* [(1998) 2 SCC 109 : 1998 SCC (Cri) 514 : AIR 1998 SC 431] , held that the executive instructions have binding force provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.

61. In *Nagaraj Shivarao Karjagi v. Syndicate Bank* [(1991) 3 SCC 219 : 1991 SCC (L&S) 965 : (1992) 19 ATC 639 : AIR 1991 SC 1507] this Court has explained the scope of circulars issued by the Ministry observing that it is binding on the officers of the department, particularly the recommendations made by CVC.

62. In *State of U.P. v. Dharmander Prasad Singh* [(1989) 2 SCC 505 : AIR 1989 SC 997] this Court held that the order must be passed by the authority after due application of mind uninfluenced by and without surrendering to the dictates of an extraneous body or an authority.”

40. In *ESI Corpn. v. Union of India*, (2022) 11 SCC 392, the Hon’ble Supreme Court adjudicated the question of validity of OMs when the said OMs are in contravention to the statutory rules governing the aspects related to services of the employees of a particular department and held that the said OMs cannot be termed legal if the same are in violation to the statutory rules. The relevant paragraphs are reproduced herein:

“**17.** In *P.D. Aggarwal v. State of U.P.* [*P.D. Aggarwal v. State of U.P.*, (1987) 3 SCC 622 : 1987 SCC (L&S) 310] a two-Judge Bench of this Court declined to grant primacy to an office memorandum issued by the Government of Uttar Pradesh which purportedly amended the method of recruitment of Assistant Civil Engineers in the U.P. Public



Service Commission without amending the relevant regulations. The Court held : (SCC p. 640, para 20)

“20. The office memorandum dated 7-12-1961 which purports to amend the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 in our opinion cannot override, amend or supersede statutory rules. This memorandum is nothing but an administrative order or instruction and as such it cannot amend or supersede the statutory rules by adding something therein as has been observed by this Court in Sant Ram Sharma v. State of Rajasthan [Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910 : (1968) 1 SCR 111] . Moreover the benefits that have been conferred on the temporary Assistant Engineers who have become members of the service after being selected by the Public Service Commission in accordance with the service rules are entitled to have their seniority reckoned in accordance with the provisions of Rule 23 as it was then, from the date of their becoming member of the service, and this cannot be taken away by giving retrospective effect to the Rules of 1969 and 1971 as it is arbitrary, irrational and not reasonable.”

18. The contesting respondents have referred to certain letters and to an internal communication of the appellant to urge that the DACP scheme was to be implemented for promotions at the appellant. However, these letters, similar to the Office Memorandum dated 29-10-2008 implementing the DACP scheme, would not have the force of law until they were enforced through an amendment to the Recruitment Regulations. In considering a similar factual situation, a three-Judge Bench of this Court in Union of India v. MajjiJangamayya [Union of India v. MajjiJangamayya, (1977) 1 SCC 606 : 1977 SCC (L&S) 191] held that : (SCC pp. 618-19, paras 31, 34 & 36)

“31. The second question is whether the requirement of 10 years' experience was a statutory rule. The High Court held that the requirement of 10 years' experience is not a statutory rule. Counsel for the respondents contended that the requirement of 10 years' experience is statutory because



the letter dated 16-1-1950 is by the Government of India and the Government of India has authority to frame rules and one of the letters dated 21-7-1950 referred to it as a formal rule. The contention is erroneous because there is a distinction between statutory orders and administrative instructions of the Government. This Court has held that in the absence of statutory rules, executive orders or administrative instructions may be made. (See CIT v. A. Raman & Co. [CIT v. A. Raman & Co., (1968) 1 SCR 10 : AIR 1968 SC 49 : (1968) 67 ITR 11])

34. The counsel on behalf of the respondents contended that the requirement of 10 years' experience laid down in the letter dated 16-1-1950 had the force of law because of Article 313. Article 313 does not change the legal character of a document. Article 313 refers to laws in force which mean statutory laws. An administrative instruction or order is not a statutory rule. The administrative instructions can be changed by the Government by reason of Article 73(1)(a) itself.

36. The expression "ordinarily" in the requirement of 10 years' experience shows that there can be a deviation from the requirement and such deviation can be justified by reasons. Administrative instructions if not carried into effect for good reasons cannot confer a right. (See P.C. Sethi v. Union of India [P.C. Sethi v. Union of India, (1975) 4 SCC 67 : 1975 SCC (L&S) 203] .)"

19. On the dates when the contesting respondents joined the service of the appellant, 7-2-2014 till 26-6-2016, their promotions were governed by the ESIC Recruitment Regulations, 2008 which came into effect on 2-5-2009 and mandated four years of qualifying service for promotion from Assistant Professor to Associate Professor. When the contesting respondents had completed two years of service, they were governed by the ESIC Recruitment Regulations, 2015 which came into effect on 5-7-2015 and mandated five



years of qualifying service for promotion from Assistant Professor to Associate Professor. Thus, the DACP scheme facilitating promotion on the completion of two years of service is not applicable to the contesting respondents, when the regulations have a statutory effect that overrides the Office Memorandum dated 29-10-2008 which implemented the DACP scheme.

20. The advertisements issued by the appellant mentioned that the DACP scheme would be applicable for its recruits. However, it is a settled principle of service jurisprudence that in the event of a conflict between a statement in an advertisement and service regulations, the latter shall prevail. In *Malik Mazhar Sultan v. U.P. Public Service Commission* [*Malik Mazhar Sultan v. U.P. Public Service Commission*, (2006) 9 SCC 507 : 2006 SCC (L&S) 1870] (“*Malik Mazhar Sultan*”) a two-Judge Bench of this Court clarified that an erroneous advertisement would not create a right in favour of applicants who act on such representation. The Court considered the eligibility criteria for the post of Civil Judge (Junior Division) under the U.P. Judicial Service Rules, 2001 against an erroneous advertisement issued by the U.P. Public Service Commission and held : (SCC p. 512, para 21)

“21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1-7-2001 and 1-7-2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules.”



41. On perusal of the aforesaid judicial *dicta*, it is made out that the statutory rules of the concerned Department prevail over the executive orders i.e. the OMs. It is also clear that the object of the issuance of OM is to supplement the rules to fill the gap in the said rules, and they can never override the explicit rules. Therefore, the OMs issued by the concerned department can be binding in nature only if the rules are silent on the said aspect.

42. The perusal of the aforesaid paragraphs also makes it amply clear that even though the executive is empowered to issue the orders, the said orders can only be issued to either provide clarification to the rules or prevail as a rule in absence of such rules in the concerned Department. Therefore, in a conflict between an executive order and the statutory rules, the latter prevails.

43. Having dealt with the first sub-question, the only consideration left before this Court is whether the rules of the respondent Authority are clear and sufficient to establish the criteria for appointment to the post of Director (Technical) or not and if the petitioner's seniority needs to be re-fixed due to non-conformation with the prescribed rules.

44. The Regulations were notified by the respondent Authority in 2016 prescribing for the criteria to be fulfilled for the promotion within the Department. It is also placed on record that the said regulations were amended by the respondent Authority in 2018. For disposal of the instant petition, the relevant rules regarding the calculation of services of an employee are relevant. Therefore, it is apposite to look into the said rules, i.e. Regulation 6, which is reproduced herein:



"6. Initial Constitution of the Officers cadre- All persons appointed on regular basis and holding the post as specified in Schedule-I on the date of commencement of the Warehousing Development and Regulatory Authority (Conditions of Service of the Officers and Other Employees) Regulations, 2016 shall be deemed to have been appointed under these regulations and the services rendered by him in the said post before the said commencement shall be taken into account as regular service for deciding the eligibility for promotion and the like to the next higher grade"

45. On perusal of the aforesaid, it is evident that the officers holding the posts prescribed in Schedule I of the Regulations shall be part of the initial Officers Cadre constituted in 2016. Another regulation prescribing for constitution of the Officers cadre is Regulation 5, which reads as follows:

"5. Constitution of Officers cadre - (I) The Officers cadre shall consists of
(a) any person who immediately before the constitution of this cadre was holding any post of an officer as listed in Schedule-I, on deputation or on adhoc appointment basis, and is regularised.
(b) any person appointed to a post under regulations 7.
(2) Any person appointed under clause (a) of sub-regulation (1) shall on such appointment be deemed to be a Member of the cadre in the appropriate grade applicable to him from the date of his initial appointment with the Authority"

46. On perusal of the above provisions, it is clear that the employees working on deputation or on *ad hoc* basis at the position listed in Schedule I at the time of constitution of the said Cadre shall also be part of the Officers cadre. In the counter affidavit, the respondent Authority has argued that the petitioner does not fall within the ambit of Regulation



6, and therefore, his seniority can only be calculated on the basis of his permanent absorption, which is after the notification of the said regulations. The relevant parts of the counter are reproduced herein:

“a) That the Schedule 11 of the Warehousing Development and Regulatory Authority [Conditions of service of the Officers and other Employees] Regulations, 2016, which have already been filed alongwith the above captioned Writ Petition as Annexure P/6, in context to the post of Director [Technical] states that the mode of Recruitment to be either by Absorption or Promotion or Deputation or Direct recruitment. Further it states that "For Promotion: Appointment by promotion shall be made from the grade of Under Secretary (Technical) with minimum eight year of regular service in this grade".

b) That it is most respectfully stated that the Petitioner herein does not fall within the aforesaid clause as the Petitioner has not completed the requisite eight years of regular service. The Petitioner was working in his parent office i.e. National Horticulture Board [hereinafter referred to as 'NHB'] as Assistant Director in the pay scale of Rs. 15,600-39,100 [Grade Pay of Rs. 5,400]. He was subsequently selected to the post of Under Secretary [Technical] in the pay scale of Rs. 15,600 - 39,100 [Grade Pay of Rs. 6,600] on Deputation basis in Respondent's Organisationw.e.f 10.06.2011 [FN]. The Petitioner Shri H K Dabas had given his request dated 22/07/2016 for permanent absorption to the post of Under Secretary [Technical], and based on No Objection Certificate[NOC] from his parent Organization, NHB he was absorbed by the Respondent's organisationw.e.f. 01.09.2016 vide Office Order No. WDRA/2016/19-4/A&F/1392 dated 15.09.2016. His seniority in the grade of Under Secretary [Technical] has been fixed by the Respondent's Organisationw.e.f. 01.09.2016 vide Office Order No. F. No. A-32012/1/2019-NIC/09 dated 02.01.2020 as per provisions of DoP&T OM No. F. No. 20011/1/2000-Estt[D] dated 27.03.2001 [Annexed as Annexure 2) for absorption of candidates working on



deputation, and his regular services started from the date of his permanent absorption.

c) That the Petitioner is now wrongfully counting the years rendered by him on deputation basis in the Respondent Organisation claiming that he is eligible for the promotion of Director [Technical] in the Respondent s Organisation in terms of the aforesaid Regulations.

d) That Clause 5 [l][a] of Chapter 11 of the Warehousing and Regulatory Authority [Conditions of service of the Officers and other Employees] Regulations , 2016 provides that- "The Officers cadre shall consist of [a] any person who immediately before the constitution of this cadre was holding any post of an officer as listed in Schedule - I, on deputation or on ad-hoc appointment basis, and is regularised".

It is pertinent to mention herein that Schedule 1 as mentioned above does include the post being held by the Petitioner. However, the services of the petitioner on the date of the publication of the aforesaid Regulations i.e. 14.07.2016 were not regularised. His services were regularized after being absorbed w.e.f. 01.09.2016 to the post of Under Secretary [Technical], that is, after the date of publication of the said Regulation in the Gazette Notification.

[e) The Petitioner's claim that he was in the Pay Scale of Rs. 15,600 - 39,100 [Grade pay of Rs. 6,600] since 17.10.2011 due to grant of MACPS is not correct. The Petitioner was granted a mere benefit of Modified Assured Career Progression Scheme [MACPS] vide Office Order dated 17.10.2012 by his Parent Department [NHB] in the pay scale of Rs. 15600- Rs. 39100 Grade pay of Rs. 6,600/- explicitly speciying at condition Nos. 2 &3 of the said Office Order that "the MACP Scheme contemplates merely placement on personal basis in the higher pay band/Grade Pay/grant of financial benefits only and shall not amount to actual/functional promotion and employees would continue to perform the duties as highterto". "Financial up-gradation under the MACP shall be purely personal to the employee and shall have no relevance to his seniority position". The



Petitioner has thus misinterpreted the aforesaid clause of the Regulations. The NHB Office Order dated 17.10.2011 is being attached herewith and is marked as Annexure - 2.

[f] That it is also imperative to state that Clause 34[1] of the Warehousing Development and Regulatory Authority (Conditions of service of the Officers and other Employees} Regulations, 2016 which provides - "Residuary Provision(s)

-
(1) The guidelines of instructions issued by the Department of Personnel and Training from time to time on matters in these regulations shall be followed."

[g] Thus, the Respondent's Organisation is bound by the rules and regulations framed by DOP&T from time to time. The DoP&T's Office Memorandum bearing F. No. 20011/I/2000-Estt[D] dated 27.03.2001 provides "that in the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "transfer on deputation/transfer") his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from - the date he has been holding the post on deputation, or - the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department, whichever is earlier'

[h] That it is most respectfully stated before this Hon'ble Court that prior to the Petitioner joining the Respondent, he was working as Assistant Director in his parent office i.e, NIIID in Pay scale PB-3 of Rs. 15600-39100 in the grade pay of Rs. 5400/-on regular basis. He was selected to the post of Under Secretary [Technical] in the Respondent's organisation in the pay scale of Rs. 15,600-39,100 [Grade Pay Rs. 6600/-) on deputation basis w.e.f. 10.06.2011. Upon being selected to the post of Under Secretary [Technical] on deputation basis and having joined the Respondent's



organisation, he was granted MACP by his parent department i.e, NHB in the grade pay of Rs. 6600/-w.e.f. 17.10.2011.”

47. In the rejoinder affidavit, the petitioner has replied to the above quoted counter in the following manner:

“2(d) The contents of paragraph 2(d) of the Preliminary Submissions are not denied insofar they are the reproduction of the Regulation 5(1) (a) of Chapter-II of Warehousing Development and Regulatory Authority (Conditions of service of the Officers and other Employees) Regulations, 2016 and that Schedule-I of the aforesaid regulation does include the post being held by the Petitioner. The remaining contents of the paragraph 2(d) are vehemently denied. The reason cited by the Respondent in the present paragraph to show that the Petitioner is not eligible to be promoted to the post of Director (Technical) is that he was permanently absorbed by Respondent Authority on 01.09.2016 and that the Warehousing Development and Regulatory Authority (Conditions of service of the Officers and other Employees) Regulations, 2016 came into force on 14.07.2016. As per Respondent, since Petitioner was not regularized before 14.07.2016, he should not be considered for promotion. The aforesaid contention has no legs to stand by virtue of Regulation 5(2) of Warehousing Development and Regulatory Authority (Conditions of service of the Officers and other Employees) Regulations, 2016. The same is reproduced below for the ready reference of this Hon'ble Court:

*"5. Constitution of Officers cadre - (I) The Officers cadre shall consists of
(a) any person who immediately before the constitution of this cadre was holding any post of an officer as listed in Schedule-I, on deputation or on adhoc appointment basis,*



and is regularised.

(b) any person appointed to a post under regulations 7.

(2) Any person appointed under clause (a) of sub-regulation (1) shall on such appointment be deemed to be a Member of the cadre in the appropriate grade applicable to him from the date of his initial appointment with the Authority

The conjoint reading of Regulation 5 and Regulation 6 would show that the service of the Petitioner automatically got regularized as from the date of his deputation to the Respondent department i.e. 10.06.2011. So it becomes clearly evident that the order dated 02.01.2020 of the Respondent is arbitrary and illegal.

It is abundantly clear by the above regulations that the Petitioner is deemed to be a member of the officer's cadre from the date of his initial appointment with the authority. The language regulation 5(1) (a) does not state that it shall exclude those officers who are not regularized by the date of commencement of Regulations i.e. 14.07.2016. Regulation 6 of the Warehousing Development and Regulatory Authority (Conditions of service of the Officers and other Employees) Regulations, 2016 would further unequivocally render the Petitioner eligible for the post of Director (Technical). ”

48. Therefore, it has been established that the respondent Authority had failed to interpret its own rules correctly, rather it read one of the Regulations independently which led to the belief that the period of deputation shall not be calculated for determining the seniority.

49. The conjoint reading of both the relevant provisions i.e. Regulation 5 and 6 reveals that the deputed officers appointed to the post as per Schedule I shall also be considered as part of the cadre notified in the year 2016. Furthermore, the seniority of the petitioner shall be governed by the relevant rules and not as per the OM issued by the DoPT as the settled principle regarding the said question prescribes for preference to



be given to the statutory rules and not the executive orders.

50. It is clear that clause 2 of the Regulation 5 provides for inclusion of the employees holding a position of an officer mentioned in Schedule I, either on *ad hoc* or on *deputation* shall be part of the Officers cadre as constituted in 2016. Therefore, the rules and regulations of the respondent Authority do provide for officers on deputation to be included in the cadres constituted and notified in 2016.

51. The procedure regarding appointment to the post of the Director (Technical) is clear where 8 years of minimum experience *inter alia* is a condition necessary to be fulfilled by the interested candidates. The foregoing discussion clarifies that even though the regulations of the respondent Authority were notified in the year 2016, the officers serving on deputation at the post mentioned in Schedule I of the cadre shall also be part of the said cadre.

52. As per material on record, it is not in dispute that the petitioner was serving in the respondent Authority on deputation since 2011 and got permanently absorbed in 2016. The application of the provisions of the respondent Authority clearly establishes that the rules provide for inclusion of the officers even though said officers are serving on deputation in posts mentioned in the Schedule I of the Regulations.

53. In any case, the evidence placed on record by the petitioner also suggests that the respondent had agreed to the petitioner's seniority to be calculated from the time he joined the respondent Authority on deputation, i.e. in the year 2011. Some of the relevant communications between the petitioner and the respondent Authority, as placed on the record by the petitioner in the rejoinder, which is as follows:



"3. At the outset, kind attention of this Hon'ble Court is brought to Respondent's letter F. No. H-11021/1/2017/A8F/123 dated 30.01.2020, the aforesaid letter is a response to Petitioner's RTI Application dated 10.01.2020. In one of the file noting dated 25.06.2016, Mr. Rakesh Kumar Yadav, Section Officer (A/F) has clearly held that Petitioner has completed eight years of regular service. It is unfortunate that the Respondent is now submitting a contrary statement before this Hon'ble Court just to frustrate the Petitioner's interests. The relevant extracts of the letter F. No. H-11021/1/2017/A8F/123 dated 30.01.2020 are being reproduced below for the ready reference of this Hon'ble Court:

"Sh. Dabas has been completed 8 years of regular service in the grade of Under Secretary (Technical). As per above, Schedule -III (C/p.130) a DPC comprising of one member nominated by Chairman Incharge, WDRA .Additional Secretary and Director (A&F) shall examine the promotion eligibility to the post of Director (Technical) and submit the recommendation for consideration of the Chairperson. The Chairperson/Chairperson Incharge will take the final decision in this regard".

A copy of Respondent's letter F. No. H-11021/1/2017/A8F/123 dated 30.01.2020 along with its true typed copy is annexed hereto and marked as ANNEXURE R/1 (colly)

Mr. Rakesh Kumar Yadav, Section Officer (A/F)'s file noting dated 25.06.2019 received with letter F. No. H-11021/1/2017/A8F/123 dated 30.01.2020 along with its true typed copy is annexed hereto and marked as ANNEXURE (Collv)

4. It is submitted that the Additional Secretary of the Respondent Authority has also made recommendations in favor of the Petitioner vide his file noting. In the abovementioned file noting, the Additional Secretary of the Respondent Authority goes to the extent of holding that the Petitioner is fulfilling the minimum criteria of eight years



service to be promoted to the post of Director (Technical). The relevant extracts of Respondent's Additional Secretary's file noting are being reproduced below for the ready reference of this Hon'ble Court:

"Above notes on 110/N & 111/N may refer please. It is with respect to the request of Shri HK.Dabas for promotion as Director (Technical) WDRA. At present post is vacant and also advertised to be filled on deputation.

As per notes at 'A' 'B' 'C' 'D' marked on 110/N & 111/N. SluH.K.Dabas who is at present US(Tech.) as regular service in WDRA, is fulfilling the criteria of minimum service of 08 years. However his suitability for promotion shall be assessed by DPC.

In view of this , file is put up to take a view on this for consideration of his candidature for promotion to Dir(Tech) to be assessed and recommended by DPC as defined in Regulations of WDRA staff, or go ahead with deputation process. Submitted please". It is quite clear that it does lie in the mouth of the Respondent Authority to now alter its stance to defeat the rights of the Petitioner. Respondent's Additional Secretary's file noting dated 25.06.2019 received with letter F. No. H- 11021/1/2017/A8F/123 dated 30.01.2020 along with its true typed copy is annexed hereto and marked as ANNEXURE R/3 colly)."

54. On perusal of the aforesaid letters as annexed by the petitioner, it is clear that the regulations prescribe for calculation of the services from the time of deputation, which continues till now and the same was agreed by the competent Authority as well. Therefore, the petitioner is deemed to have completed 8 years of minimum services prescribed under the said advertisement released for the appointment of the Director (Technical) in the respondent Authority.

55. It is also to be noted that the RTI filed by the petitioner also makes the same conclusion where the concerned officer of the respondent



Authority had provided the necessary details regarding the years of services completed by the petitioner. Hence, proving the fulfillment of the condition of minimum experience, however the respondent Authority has vehemently argued for the reading of both the DoPT and the rules co-jointly. Therefore, it is pertinent for this Court to determine whether the said OM needs to be interpreted along with the regulations of the respondent Authority or not. The OM No. 200111/2000-Estt[D] dated 27th March, 2001, is reproduced herein:

“Sub: Seniority of persons absorbed after being on deputation.

The undersigned is directed to say that according to our O.M. NO. 20020/7/80-Estt.D dated May 29, 1986 (copy enclosed) in the case of a person who is initially taken on deputation and absorbed later (i.e., where the relevant recruitment rules provide for "transfer on deputation/transfer", his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from

- the date he has been holding the post on deputation,*
 - or*
 - the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent department,*
- whichever is later.*

*2. The Supreme Court has in its judgment dated December 14, 1999 in the case of **Shri. S.I. Rooplal & Others Vs. Lt. Governor through Chief Secretary, Delhi, JT 1999 (9)SC 597** has held that the words "whichever is later" occurring in the Office Memorandum dated May 29, 1986 and mentioned above are violative of Articles 14 and 16 of the*



Constitution and, hence, those words have been quashed from that Memorandum. The implications of the above ruling of the Supreme Court have been examined and it has been decided to substitute the term "whichever is later" occurring in the Office Memorandum dated May 29, 1986 by the term "whichever is earlier".

3. It is also clarified that for the purpose of determining the equivalent grade in the parent department mentioned in the Office Memorandum dated May 29, 1986, the criteria contained in this Department Office Memorandum No. 14017/27/75-Estt.D(Pt.) dated March 7, 1984 (copy enclosed), which lays down the criteria for determining analogous posts, may be followed.

4. These instructions shall take effect from the December 14, 1999 which is the date of the judgment of the Supreme Court referred to above.

5. In so far as personnel serving in Indian Audit and Accounts Departments are concerned, these instructions are issued in consultation with the Comptroller and Auditor General of India. However, these orders (in keeping with paragraph 4 of the Office Memorandum dated May 29, 1986 as referred to above) will not be applicable to transfers within the Indian Audit and Accounts Department which are governed by orders issued by the C&AG from time to time.

6. The above instructions may be brought to the notice of all concerned for information, guidance and necessary action."

56. Upon perusal of the aforesaid OM it is the evident that it suggests for calculation of the seniority of the petitioner from the time he was permanently absorbed in the respondent Authority, however, there were other factors which were required to be considered while solely relying upon the said OM for calculation of the seniority. *Firstly*, the respondent Authority failed to realize that the OM relied upon by them was issued by the DoPT in 2001 which still prevails as it is and could have been termed



as the rule for calculation of the seniority in absence of any prescribed regulations, however, the notification of rules in 2007 and then subsequent formulation of the regulations in 2016 prevail over the said OM. *Secondly*, the conjoint reading of the regulation 5 and 6 makes it clear that the deputation period served by an officer mentioned in Schedule I of the Cadre can be calculated to determine the seniority and the same is applicable to the petitioner in the instant case.

57. The rejoinder affidavit filed by the petitioner also suggests that the officers concerned for deciding the seniority had already answered the question of fulfillment of criteria of minimum service by the petitioner in his favor, however, the said fact was not mentioned in the counter affidavit filed by the respondent Authority, whereby the OM issued by the DoPT has been taken as a shield to justify the calculation of seniority from the date of permanent absorption of the petitioner, i.e. 2016.

58. At last, it is imperative to refer to the Audit Report placed by the petitioner, whereby the petitioner was deemed eligible to be appointed for the position of the Director (Technical) as notified in the advertisement released by the respondent Authority. The relevant parts of the said report are reproduced herein:

“As per Section 33(1) read with Section 51(g) of the WDRA Act 2007, the WDRA has the power to notify regulations governing the service conditions of their officers and other employees with the prior approval of the Central Government and in consultation with Warehousing Advisory Committee.

Sections 33 and 51(1)(2)(g) of W(D&R) Act, 20017

"33. (1) The Authority may appoint officers and such other



employees as it considers necessary for the efficient discharge of its function under this Act.

(2) The terms and conditions of service of officers and other employees of the Authority appointed under sub-section (1) shall be governed by regulations made under this Act.

51. (1) The Authority may, with the previous approval of the Central Government, and in consultation with the Warehousing Advisory Committee, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this act

(2) In particular, and without prejudice to the generally of the foregoing power, such regulations may provide for all or any of the following matters, namely:

(g) the terms and conditions of service of officers and other employees of the Authority under sub-section (2) of section 33,"

Further, under Sections 33 and 51 of WD&R)A Act 2007, on July 14, 2016. WDRA published in the Official Gazette, the WDRA (Conditions of Service of Officers & Other Employees) Regulations, 2016.

Scrutiny of Personal files of Shri HK Dhus, it has been noticed that he was appointed on deputation on 10.6.2011 in the grade of Under Secretary (Technical)(GP 6600) and was absorbed on 1.2.2016, WDRA. Invited application for the post of Director (Technical) in February 2019 on deputation basis. Shri Dabas has applied for the same and he was not considered for Director Technical) as per the WDRA service regulations in Schedule II of Note II that "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 appointment by promotion" Further, it has been noticed that Shri Dabas made representation in June 2019 for granting him promotion to the post of Director (Technical) after completion of eligibility criteria since he is working in WDRA from eight years.

Audit observed the followings:

1) As per Regulation 5 (1)(a) of the Regulations, an Officers cadre of the WDRA was constituted beginning from July 14, 2016 when the Regulations were notified in the Official Gazette.

(2) The post of Under Secretary (Technical) and Director (Technical) were included in the aforesaid Officers Cadre as per Regulations 5(1)(a) and 5(3) read with Schedule 1.

(3) As per Regulation 2 of the Regulations, Shri Dabas is whole-time officer of the WDRA on the rank of Under Secretary (Technical) ever since his deputation to WDRA on 10-06-2011 from his parent organization, viz. the National Board of Horticulture (NHB).

(4) The Regulation 5(1)(a) of WDRA becomes applicable from the date of initial appointment and covers the case of an officer who is on deputation, and is subsequently regularized, and as such the Regulations cover the case of Shri Dabas, who was initially appointed on deputation, and subsequently absorbed on permanent basis in WDRA on 01-09-2016 vide WDRA letter dated 15-09-2015.

(5) As per Regulation 5(2), Shri H K Dabas became a member of the Officers Cadre on the date of his initial appointment on 10-06-2011.

(6) As per Regulation 6, the services rendered by him



constitute regular service and the same shall be taken into account in considering his eligibility for promotion to the next higher grade.

(7) The provisions of Regulation 7 and 11 he is eligible for promotion as he fulfil the requirements specified in Schedule II and can be recommended for promotion by the Selection Committee constituted for the purpose.

(8) The provisions of Schedule II lay down the requirements for promotion to the post of Director (Technical) from the post of Under Secretary (Technical). It is stipulated that the applicant should have minimum regular service of 8 years in the grade of Under Secretary (Technical).

(9) As per provisions of Regulations 6 and 5(1a), services rendered prior to commencement of the Regulations from the date of initial appointment by deputation in Officers Cadre are to be computed (as such Shri HK Dabas services are deemed to be regular). As the date of initial appointment by deputation to WDRA, was 10-06-2011, he completed 8 years of regular service as on 10-06-2019. Till today he completed more than 10 years in the grade of Under Secretary (Technical) and in the circumstances, he is eligible for promotion to the post of Director (Technical).

It has also been observed that Shri HK. Dabas has also requested for promotion to the post of Director (Technical) in September 2019. In this reference WDRA has informed that as of now there is no Chairman/Chairman In-charge in WDRA, the same may be put up after appointment of Chairman but in January 2020 the Seniority date of Shri Dabas is fixed from the date of his absorption i.e. 01.09.2016 for all purposes in terms of DoP&T office memorandum No 20011/1/2000-Est D dated 27th March 2001. However, as per the provisions of Schedule II of the regulations which lays down the qualifications for promotion



to the post of Director (Technical) from the post of Under Secretary (Technical), it is provided that, "Appointment by promotion shall be made from the grade of Under Secretary (Technical) with minimum eight year of regular service in this grade". That if the seniority of Shri HK Dabas is correctly fixed from 10.06.2011 ie. the date when he was initially appointed as Under Secretary in the WDRA, his mandatory service of eight years for promotion to the post of Director (Technical) stands on 10.06.2019.

In view of the above, it has been observed that Shri HK Dabas has a right to get promotion to the Post of Director (Technical) in Warehousing Development and Regulatory Authority as he is working at the same post for last more than ten years and eligible for promotion as per WDRA Regulations.

The above fact and figures may be confirmed and file relating to recruitment of Director (Technical) may also be provided to Audit urgently."

59. On perusal of the aforesaid report, it is crystal clear that the report reiterated the contention that the petitioner has already completed 8 years of service in the respondent Authority and therefore, should be considered for promotion to the post advertised by the respondent Authority.

60. Furthermore, the excerpts of the report also suggest that the rules laid down by the respondent Authority shall be solely relied upon for determining his seniority, therefore, making him eligible for the promotion to the post of Director (Technical).

61. The compliance with the statutory rules is not an empty formality rather a mandatory requirement as enshrined and expounded by the



Hon'ble Supreme Court in a catena of judgments. The foregoing discussion makes it abundantly clear that the conflict between the executive orders and the statutory rules is no more a *res integra* rather a settled position of law. Therefore, the statutory rules are the rule of law which needs to be adhered by the respondent Authority.

CONCLUSION

62. The present case is a textbook example of how the Authorities do not confine themselves to their own rules rather justify the inaction by supplementing the executive orders which clearly do not have any binding value in case of conflict between the statutory rules and the said orders.

63. On interpretation of the relevant rules i.e. Regulation 5 and 6 of the Regulations, the contention of the petitioner that the services rendered by the petitioner during deputation period shall be included for calculation of his seniority, stands correct.

64. Since the order dated 2nd January, 2020, does not conform to the prescribed rules of the respondent Authority, it is termed illegal as the respondents have turned blind eye to its own rules and regulations which prescribes for inclusion of the officers on deputation in the 2016 Cadre.

65. This Court does not find any force in the arguments of the respondent Authority that the seniority of the petitioner should be decided on the basis of the OM issued by the DoPT in 2001 as the rules of the respondent Authority are clear with regards to the calculation of the seniority of an officer appointed on deputation and therefore, there is no need to supplement the said rules with the OM issued by the DoPT.



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66. In view of the aforesaid observation as well as the law settled by the Hon'ble Supreme Court, the petitioner's service during the period of the deputation shall be calculated for determining his seniority.

67. Accordingly, the writ petition is allowed with direction to the respondent Authority to re-fix the petitioner's seniority by taking into account, the period served during the deputation. Furthermore, the respondent Authority is also directed to consider the petitioner's eligibility for the promotion to the said post.

68. Pending applications, if any, also stands disposed of.

69. The judgment to be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

OCTOBER 20, 2023
SV/AV