

K.K. Tiwari and Others Vs. Union of India and Others

K.K. Tiwari and Others Vs. Union of India and Others

SooperKanoon Citation : sooperkanoon.com/478913

Court : Allahabad

Decided On : Aug-09-2001

Reported in : 2001(3)AWC2377; [2001(91)FLR693]; (2001)3UPLBEC2105

Judge : G.P. Mathur and ;U.S. Tripathi, JJ.

Acts : Indian Defence Service of Engineers (Recruitment and Conditions of Service) Rules, 1991 - Rules 2, 3 to 7; Military Engineering Service (Army Personnel) Recruitment, 1989; [Constitution of India](#) - Articles 309 and 335; Military Engineer Services (Army Personnel) Regulations, 1989

Appeal No. : C.M.W.P. Nos. 10242 and 18114 of 2000

Appellant : K.K. Tiwari and Others

Respondent : Union of India and Others

Advocate for Def. : Atul Mehra, ;S.C. Budhwar, ;Satish Chaturvedi, Advs. and ;S.C.

Advocate for Pet/Ap. : Rakesh Pandey and ;T.P. Singh, Advs.

Disposition : Petition dismissed

Judgement :

G.P. Mathur, J.

1. Both the writ petitions have been filed challenging the same order dated 8.2.2000 of Central Administrative Tribunal, Allahabad Bench, Allahabad (C.A.T.) and, therefore, they are being disposed of by a common order. Civil Misc. Writ Petition No. 10242 of 2000 shall be treated as the leading case.

2. The post of Executive Engineer in the Indian Defence Service of Engineers, Ministry of Defence, has to be filled by promotion from amongst Assistant Executive Engineers and Assistant Engineers. The Assistant Executive Engineers are appointed by direct recruitment on the basis of selection made by the Union Public Service Commission. For making appointment on the post of Executive Engineer for the recruitment year 1997-98, an order was issued whereby it was directed that all the 58 vacancies shall be filled in by promotion of Assistant Engineers only. This order was challenged by Assistant Executive Engineers (respondent Nos. 4 to 8) by filing Original Application No. 465 of 2000 before the C.A.T. The C.A.T. by its judgment and order dated 8.2.2000 partly allowed the Original Application and directed respondent Nos. 1 to 3, namely, Union of India through Secretary Ministry of Defence, Engineer-in-Chief, Army Head Quarter and Union Public Service Commission to fill up the vacancies in proportion of 2/3rd from Assistant Executive Engineers and 1/3rd from Assistant Engineers in accordance with the provisions of S.R.O. 4-E. Feeling aggrieved, Writ Petition No. 10242 of 2000 has been filed by 7 Assistant Engineers who were respondents in the original application before the C.A.T. and Writ Petition No. 18114 of 2000 has been filed by Engineer-in-Chief, Army Head Quarter.

3. In exercise of powers conferred by proviso to Article 309 of the Constitution, the President of India made the Indian Defence Service of Engineers (Recruitment and Conditions of Service) Rules, 1991 (hereinafter referred to as the Rules). The definitions are given in Rule 2 and sub-rule (a) thereof provides that unless the context otherwise requires, 'Commission' means the Union Public Service Commission and sub-rule (d) provides that 'Departmental Promotion Committee' means a Committee specified against each post in Schedule IV to consider promotion or confirmation on the said post. Rules 3 to 7 which are relevant for the controversy in hand read as under :

'Rule 3. [Constitution of India](#) Defence Service of Engineers.--There shall be constituted a service to be known as the Indian Defence Service of Engineers consisting of posts specified In Schedule I.

Rule 4. Grade, authorised strength and its review.--(1) The duty posts included in various grades of the service, their names, numbers and scales of pay shall be as specified in Schedule I.

(2) The Government may make temporary additions to or reductions from the strength of the duly posts in various grades as it may deem necessary from time to time.

(3) The Government may. In consultation with the commission, include in or exclude from the service such posts as may be deemed to be equivalent to the posts included in the service, in status, grade, scale of pay and professional content, other than those included in Schedule I.

(4) The Government may, in consultation with the commission, appoint an officer whose post is included in the service under sub-rule (3) to the appropriate grade of the service in a temporary capacity or in a substantive capacity, as it may deem fit and fix his seniority in that grade in accordance with the general orders or Instructions issued by the Government from time to time in this regard.

Rule 5. Members of the services.--The following persons shall be members of the service, namely :

(a) Persons deemed to have been appointed to the service under Rule 6 ; and

(b) Persons appointed to the service under Rule 7.

Rule 6. Initial Constitution,--All the existing officers in the Military Engineer Services (Engineer cadre) holding Group 'A' posts on regular basis on the date of commencement of these rules shall be deemed to have been appointed to the corresponding posts and grades in the service in the substantive or officiating capacity, as the case may be at the initial constitution stage.

Rule 7. Future maintenance of the service.--After the commencement of these rules, the vacancies, excluding the vacancies reserved for Army Offices under the Military Engineer Services (Army Personnel) Regulations, 1989, shall be filled in the manner as provided in Schedule II, III and IV.'

4. Schedule I of the rules gives the total number of posts and number of posts which are to be held by civilian officers in each cadre, i.e., from Assistant Executive Engineer to that of Chief Engineer and Additional Director General. The total number of sanctioned posts of Executive Engineers is 890 and the number of posts to be held by civilian officers is 445. We are concerned here with the posts to be held by civilian officers. Schedule II lays down the minimum technical qualification and age limit for direct recruits to the post of Assistant Executive Engineer Group 'A' which is to be filled on the basis of examination conducted by the Union Public Service Commission. The relevant part of Schedule III is being reproduced below :

'Schedule III [See Rule 7]

Method of recruitment, field of promotion and minimum qualifying service in the next lower grade or feeder grade for promotion to duty posts in the various grades of the Indian Defence Service of Engineers (Group 'A')

Sl. No.

Name of post and scale of pay

Method of recruitment

Whether Selection Departmental Promotion Non-selection

Field of selection and minimum qualifying service for promotion

(1)

(2)

(3)

(4)

(5)

1.

Additional Director General(Works) (Rs. 7.300-7.600)

By Promotion

Selection

Chief Engineer (Civil)with 3 years regular service in the scale of Rs. 5.900-6,700

2.

-

-

-

—

3.

—

-

-

—

4.

-

-

-

-

5.

-

-

-

-

6.

Executive Engineer (Rs. 3.000-4,500)

By Promotion

(i) 66-2/3% post to be filled on non selection basis from the grade of Assistant Executive Engineer.

Assistant Executive Engineer with 4 years' regular service in the grade with degree in Civil, Mechanical or Electrical Engineering or equivalent from a Institution

(ii) 33-1/3% posts to be filled on selection basis from the grade of Assistant Engineers

Assistant Engineer with the grade and possessing degree in Civil, Mechanical or Electrical Engineering or recognised University/ Institution

Note .- Persons holding the post of Assistant Engineer on regular basis on the date of Indian Defence Service of Engineers Rules and possessing diploma in Civil, Mechanical or Electrical Engineering from a recognised University/ Institution will continue to be eligible for promotion to the grade of Executive Engineer.

7.

Assistant Executive Engineer (Rs. 2,200-4,000)

By direct recruitment

The vacancies shall be filled by direct recruitment on the basis of Examination.

5. The Engineer-in-Chief by his order dated 29.7.1997 issued a D.P.C. demand for the post of Executive Engineers. It was stated therein that the number of posts of Executive Engineers was 445 out of which 297 had to be manned by those who had been promoted from the post of Assistant Executive Engineers while 148 had to be manned by those who had been promoted from the post of Assistant Engineers. As on 1.4.1997, only 432 posts had been filled up out of which 354 were manned by those who had been promoted from the post of Assistant Executive Engineers while 76 posts were manned by those who had been promoted from amongst Assistant Engineers. It was further stated that the total demand in the year 1997-98 was 58 and these vacancies had to be filled up by promotion of only Assistant Engineers. This was presumably done in order to maintain the ratio of 2/3rd and 1/3rd of the Assistant Executive Engineers and Assistant Engineers on the post of Executive Engineers. This was challenged by the Assistant Executive Engineers by filing the original application before the C.A.T. which partly allowed the same and issued a direction that the vacancies be filled in proportion of 2/3rd from the Assistant Executive Engineers and 1/3rd from Assistant Engineers in accordance with Rules.

6. Sri Rakesh Pandey, who has appeared for the petitioners (Assistant Engineers) in Writ Petition No. 10242 of 2000 has submitted that recruitment to the post of Executive Engineers has to be made by promotion and 66-2/3 per cent posts have to be filled in from the grade of Assistant Executive Engineers and 33-1/3 per cent posts have to be filled in on selection basis from the grade of Assistant Engineers and, therefore, this ratio of 2/3 and 1/3 should be consistently maintained in the cadre of Executive Engineers. He has urged that as the Assistant Engineers are promoted at a very late stage, such persons who become Executive Engineers by promotion from the cadre of Assistant Engineers retire early and over a period of time, the number of such persons who had been promoted from the grade of Assistant Engineers to that of Executive Engineer had been considerably reduced.

Therefore, in order to maintain the ratio of $\frac{2}{3}$ and $\frac{1}{3}$, the Engineer-in-Chief had issued the order on 29.7.2000 directing that 58 vacancies for the recruitment year 1997-98 shall be filled in by promoting only the Assistant Engineers. In support of his submission, learned counsel has placed reliance on *R. K. Sabharwal and others v. State of Punjab*, (1995) 2 SCC 745. Sri Pandey has further submitted that the promotion should be made in a manner that the quota of the two feeder channels as provided in the rules, namely, $\frac{2}{3}$ rd and $\frac{1}{3}$ rd is strictly maintained. Learned counsel has also urged that if there is any ambiguity in the rules, it should be interpreted in a manner so as to save them from absurdity and any construction which leads to absurdity should be rejected as laid down in *Sham Rao v. Parolekar*, AIR 1952 SC 324 and *O. P. Singhla v. Union of India*, AIR 1984 SC 1595. Learned counsel has further submitted that vacancies should be filled in, in a manner, that the quota for the Assistant Engineers in the whole cadre of Executive Engineers is maintained. Sri Satish Chaturdevi who has appeared for the petitioner (Engineer-in-Chief) in Writ Petition No. 18114 of 2000 has supported the contention of learned counsel for the petitioners in Writ Petition No. 10242 of 2000 and has submitted that in view of Schedule III of the Rules, the strength of the cadre of Executive Engineers has to be maintained in the ratio of $\frac{2}{3}$ rd and $\frac{1}{3}$ rd and when the vacancies were filled in the earlier years in the said ratio, an anomaly has resulted on account of early retirement of those who had been promoted from the post of Assistant Engineers. In order to remove the anomaly the Office Memorandum has been issued whereunder it was provided that all the 58 vacancies shall be filled up by promotion of only Assistant Engineers. Learned counsel has submitted that C.A.T. has erred in issuing the impugned direction for filling up the vacancies in the proportion of $\frac{2}{3}$ rd from Assistant Executive Engineers and $\frac{1}{3}$ rd from Assistant Engineers.

7. Sri S. C. Budhwar, learned counsel for the contesting respondents (Assistant Executive Engineers) has submitted that rules do not specifically provide anywhere that there will be a quota of $\frac{1}{3}$ rd in the total number of posts of Executive Engineers of such officers who had been promoted from the cadre of Assistant Engineers. Schedule III only provides that $66\frac{2}{3}$ per cent posts have to be filled from the cadre of Assistant Executive Engineers and $33\frac{1}{3}$ per cent posts have to be filled in from the grade of Assistant Engineers and in view of the

clear language used this quota has to be observed whenever a selection is made on the post of Assistant Executive Engineers. Learned counsel has further submitted that the language of the rule is absolutely plain and clear and It admits of no ambiguity and, consequently, the ratio 2/3rd and 1/3rd has to be maintained every time whenever a selection is made,

8. Rule 5 provides that persons deemed to have been appointed to the service under Rule 6 and persons appointed to the service under Rule 7 shall be members of the Indian Defence Service of Engineers. Rule 6 deals with the existing officers who shall be deemed to have been appointed to the corresponding posts and grades in the service. The relevant rule is Rule 7 which lays down that after the commencement of the rules, the vacancies, excluding the vacancies reserved for Army Officers under the Military Engineering Service (Army Personnel) Recruitment, 1989, shall be filled in, in a manner as provided in Schedules II, III and IV. This rule indicates that after the commencement of the rules, which came into force on 9th July, 1991, the vacancies had to be filled in the manner provided in Schedules II, III and IV. The title of Rule 7 is 'Future Maintenance of the Service' and it is noteworthy that it makes no reference to Schedule I which provides that the number of posts held by civilian officers in the cadre of Executive Engineers would be 445. The rules nowhere provide that the total strength of the cadre of Executive Engineers of 445 has to be consistently maintained in a manner that 2/3rd cadre is manned by those who are promoted from the post of Assistant Executive Engineers and 1/3rd cadre is to be manned by those who have been promoted from the post of Assistant Engineers. The entire basis for issuing the order dated 29.7.2000 is that in the cadre of Executive Engineers, the ratio of such officers who had been promoted from the post of Assistant Engineers had been depleted and after calculation, the deficiency has been found to be 58 and, therefore, these vacancies should be filled in from amongst Assistant Engineers. In our opinion, such a direction cannot be supported by the provisions of the rules as Rule 7 neither refers to Schedule I which gives the total strength of the cadre nor it provides anywhere that future recruitment shall be made in a manner so as to maintain the ratio of 2/3rd and 1/3rd in the entire cadre.

9. The language of Rule 7 is very clear and it provides that after the commencement of the rules, the vacancies shall be filled in a manner provided in Schedule III. Schedule III only says that the posts of Executive Engineers shall be filled by promotion and the rider is that $66\frac{2}{3}$ per cent posts are to be filled from the grade of Assistant Executive Engineers and $33\frac{1}{3}$ per cent posts have to be filled from the grade of Assistant Engineers. The expression used in the rule is 'posts to be filled'. It clearly means that whenever any selection is made for the post of Executive Engineer, $66\frac{2}{3}$ per cent of the posts which have to be filled in shall be from the grade of Assistant Executive Engineers and the remaining $33\frac{1}{3}$ per cent posts shall be from the grade of Assistant Engineers. This ratio of $66\frac{2}{3}$ and $33\frac{1}{3}$ per cent has to be maintained every time whenever selection is made for filling the post of Executive Engineer. By way of illustration, if 9 posts of Executive Engineers have to be filled in, then 6 have to come from the grade of Assistant Executive Engineer and 3 from the grade of Assistant Engineer. The language of the rule being absolutely plain and unambiguous, it is not possible to interpret it in any other manner.

10. The reliance on certain observations made in *K. K. Sabharwal v. State of Punjab*, 1995 (2) SCC 745, placed by the learned counsel for the petitioners is wholly misconceived as the question for consideration in the said case related to reservation for Scheduled Castes and Scheduled Tribes. The import of the said decision has been explained in *All India Federation of Central Excise v. Union of India*, JT 1999 (1) SC 622, where in Para 13 of the reports, it has been observed as follows :

'13. Reliance by the petitioners is placed upon *R. K. Subharwal's case*, JT 1995 (2) SC 351. That case deals with the principle that the posts vacated by an officer recruited from SC/ST category must be filled in only by the same reserved category. This is because of the special provision in Article 335 of the [Constitution of India](#) relating to adequate representation of the SC/STs in the services. The birth marks there remain even on promotion inasmuch as a particular number of posts in the promotional category are reserved to be filled in only from among SC/STs. On the other hand, so far as a normal quota rule between two feeder channels for recruitment or promotion is concerned, be it between direct recruits

and promotees or promotion by a quota between different feeder groups (as in the case before us), the relevant precedents, are *Paramjit Singh and others v. Ram Rakha and others*. 1982 (3) SCC 191 and *State of Punjab and others v. Dr. R. N. Bhatnagar and another*, 1998 (6) SCALE 642. In *Paramjit Singh's* case which related to recruitment from among promotees and direct recruits, D. A. Desai, J., pointed out that if a quota rule between direct recruits and promotees were treated as a rule of reservation, then because of the frequent retirements of the promotees who were generally closer to retirement, most vacancies in the promotional posts would repeatedly go to the aged promotees leaving little scope for direct recruitment. At page 196, the learned Judge clarified as follows :

'What this Court meant while saying that when a quota rule is prescribed for recruitment to a cadre, it meant that quota should be co-related to the vacancies which are to be filled in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule'. The learned Judge further pointed out :

'Promotees who come to the service at an advanced age may retire early and direct recruits who enter the service at a comparatively young age may continue for a long time. If, therefore, in a given year larger number of promotees retire and every time the vacancy is filled in by referring to the source from which the retiring person was recruited, it would substantially disturb the quota rule itself. Therefore, while making recruitment quota rule is required to be strictly adhered to'. In Para 15 of the aforesaid case, it was observed that once the recruitment was made from two channels, the birth marks got erased and the following passage from *State of Punjab v. Dr. R. N. Bhatnagar*, 1998 (6) SCALE 642, was quoted with approval : The quota of percentage of departmental promotees and direct recruits has to be worked out on the basis of the roster points taking into consideration vacancies that fall due at a given point of time. As stated earlier, as the roster for 3 promotees and one direct recruit moves forward, there is no question of filling up the vacancy created by the recruitment of a direct recruit by a direct recruit or the vacancy created by a promotee by a promotee, (sic) Irrespective of the identity of the person retiring, the post is to be filled by the onward motion of 3 promotees and one direct recruit.'

11. In view of this authoritative pronouncement, it is not legally permissible to find out how many have come from the grade of Assistant Executive Engineers and how many have come from the grade Assistant Engineers and then to try and maintain their respective quota in the whole cadre of Executive Engineers. Similarly, the origin of the person retiring from the post of Executive Engineer is wholly irrelevant in order to determine as to how the said post should be filled in.

12. The order of the Engineer-in-Chief dated 29.7.2000 can at best be treated to be an executive instruction. If the rules are silent on any point, the Government can fill up the gaps and supplement the rules and issue instructions consistent with the rules already framed. But they cannot run contrary to statutory provisions or whittle down their effect. The office memorandum dated 29.7.1997 clearly runs contrary to the provisions of the rules and, as such, it is illegal. The order passed by the C.A.T. directing respondent Nos. 1 to 3 to fill up the vacancies in proportion of 2/3 of Assistant Executive Engineers and 1/3 from Assistant Engineers is, therefore, perfectly legal and calls for no interference.

13. In view of the discussion made above, both the writ petitions lack merit and are hereby dismissed.