SHRI GOVIND PRASAD

v.

SH. R.G. PRASAD AND ORS.

NOVEMBER 2, 1993

[KULDIP SINGH AND S.P. BHARUCHA, JJ.]

Service law : United Provinces Service of Engineers (Buildings and Roads Branch) Class-II Rules, 1936 :

Executive instructions issued by way of Memorandum dated 7.1.1980 amending the eligibility criteria—Promotion of Junior Engineers as Assistant Engineers—Minimum eligibility service reduced from 10 years to 7 years—Applicability of the Memorandum to Jr. Engineers/Assistant Engineers in Electrical and Mechanical branches—Service conditions for all the three Branches of Public Works Department, viz. Buildings and Roads, Mechanical and Electrical—Laying down of—in clear and certain terms—Suggestion made to State Government. Executive Order of government cannot be made operative with retrospective effect.

In the U.P. State Public Works Department there were no statutory service rules regulating the recruitment and conditions of service of persons appointed to the Electrical and Mechanical Branches. However, the Building and Roads Branch was governed by the rules called the United Provinces Service of Engineers (Building and Roads Branch) Class II, Rules, 1936 framed under the Government of India Act, 1935. The 1936 rules, though not applicable in terms to Electrical and Mechanical branches, had always been applied *Mutatis mutandis* to these branches as well. The 1936 rules laid down three eligibility conditions for a Junior Engineer to be considered for promotion to the post of Assistant Engineer, viz., confirmation as Junior Engineer, A.M.I.E./B.E. qualification or passing the qualifying examination prescribed by the Government and 10 years experience as Junior Engineer.

The Government Order dated December 3, 1964 further prescribed rules for the qualifying examination in respect of Electrical/Mechanical subordinates for promotion to the post of Assistant Engineer in the

A Electrical and Mechanical branches of the Public Works Department.

The State Government issued office memorandum dated January 7, 1980, amending the formula laid down, making Junior Engineers with 7 years experience, eligible for being considered for promotion as Assistant
B Engineer.

In 1981 the State Government intimated to the Public Service commission that the vacancies for the years 1968-69 to 1979-80, in the cadre of Assistant Engineers pertaining to the Mechanical and Electrical wings of the Public Works Department, were to be filled by promotion. Only those
C Junior Engineers who had put in a minimum of 10 years service as Junior Engineer were to be considered. While the interviews were being conducted by the Selection Committee, some of the Junior Engineers, who had not been included in the eligibility list, as they had not completed 10 years as Jr. Engineers, challenged the process of selection before the High Court
D on the ground that they were wrongly excluded from the eligibility list. The High Court by an interim order permitted more than 100 candidates, who were not in the eligibility list, to be interviewed by the Selection Committee subject to the final result of the writ petitions. The list of selected candidates was notified by the Government on November 7, 1983. Thereafter
E large number of Junior Engineers who were officiating as Assistant Engineers on ad-hoc basis were ordered to be reverted to accommodate the Junior Engineers who were selected. The reversion orders were challenged before the High Court by way of several writ petitions. The High Court stayed the reversion and further stayed appointments from the select list. Thereafter, the High Court permitted ad-hoc promotions to be made on
F the basis of seniority subject to rejection of the unfit.

Before the High Court the Writ Petitioners contended that there being no statutory service rules applicable to the Electrical and Mechanical branches of the Public Works Department the memorandum which laid
G down seven years services as an eligibility condition for promotion to the post of Assistant Engineer, was to be followed and as such the writ petitioners were entitled to be included in the eligibility list.

The High Court set aside the selection solely on the ground that
H the Junior Engineers with seven years service to their credit, having not

been included in the eligibility list the selection was illegal. It accepted the contention that the memorandum superseded all earlier executive instructions /precedents in the matter of promotions from Junior Engineers to Assistant Engineers and as such had reduced the eligibility criterion of ten years service to that of seven years service with effect from July 1, 1978.

The present appeals and petitions relate to the said judgment of the High Court.

Disposing of the matters, this Court.,

HELD : 1.1 Neither the memorandum dated 7.1.1980 nor any other Government order has specifically modified or amended the Government order dated December 3, 1964. Even otherwise, a bare look at the contents of the memorandum shows that it contained a policy decision of the Government which was to be implemented in the future. The memorandum did not state that it was applicable to the Electrical and Mechanical branches. Para 5 therein stated that "provision shall be made in accordance with the above said decision in the service rules". Admittedly, there were no service rules regarding Electrical and Mechanical branches. It can, therefore, be legitimately inferred that the memorandum was meant only for the Building and Roads branch which was governed by the 1936 rules. Even if it is assumed that the memorandum was meant for all the three branches, it could not operate in respect of Building and Roads Branch till the time the 1936 rules were amended and since the Government was uniformly applying the 1936 rules to all the three branches, the memorandum could not be read to be applicable to the Electrical and Mechanical branches. [563-H, 564-A-D]

1.2 Para 3 of the memorandum gives deeming effect - from July 1, 1978 - to the provisions in paras 1 and 2 of the memorandum. An executive order of the Government cannot be made operative with retrospective effect. Thus the memorandum contained various proposals which were to be incorporated in the statutory rules. [564-D-E]

1.3 The scheme of the memorandum clearly show that it did not lay down conditions of service for any of the branches of the Public Works Department. The contents of the said memorandum were the various

A **policy decisions taken by the Government from time to time which were to be implemented in future by making necessary provisions in the relevant rules or by amending the existing executive instructions. The memorandum does not talk of electrical or mechanical branches in any manner. [564-G-H]**

B *Gopal Krishna Goel* **v.** *State of Uttar Pradesh* **Civil Misc. Writ No. 2001 of 1983 decided on March 20, 1984; approved.**

(During the pendency of these matters the operation of the judgment of the High Court under challenge and also all reversions were stayed by C this Court. 12 posts were permitted to be filled by the State Government and the State Government was allowed to make ad-hoc appointments by following the rule of seniority subject to unfitness. In view of its decision, this Court gave certain directions to the State of U.P. as regards selection, seniority and regularisation of the Asstt. Engineers. It also suggested that D the State of U.P. may at its discretion, lay down in clear and certain terms the conditions of service in respect of the three branches of Public Works Department, viz., Buildings and Roads, Mechanical and Electrical, either by executive instructions or statutory rules.)

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3868 of 1984.

From the Judgment and order dated 3.8.1984 of the Allahabad High Court in W.P. No. 37 of 1984.

F With

W.P.(C) No. 56/89, C.A. No. 4985/84, S.L.P. (C) No.1416/85, C.A. Nos. 1602/85, 250/85, 251/85, 485/85 and I.A. Nos. 8 & 9/90, Con. Pet. No. 226/90 in C.A. No. 3868/84.

G P.P. Rao, M.R. Sharma, R.K. Jain, D.V. Sehgal, Ms. Lalit Mohini Bhat, Ms. Kiran Jathanand, S.R. Bhat, N.R. Nath, Anil Kumar Gupta, Pankaj Kalra, A.K. Srivastava, D.K. Garg, Dileep Tandon, J.M. Khanna, R.K. Khanna, Raju Ramachandran, R.B. Mishra, Manoj Swarup, Ms. Lalitha Kohli, K.R. Nagaraja, S.A. Syed, A.K. Sanghi and Setia for the H appearing parties.

The Judgment of the Court was delivered by A

KULDIP SINGH, J. Junior Engineers and Assistant Engineers working in the Electrical and Mechanical wings of the Public Works Department in the State of Uttar Pradesh, are involved in this litigation. The State Government held selection for promotions to the cadre of Assistant Engineers from amongst the Junior Engineers. The selection was challenged by way of several writ petitions before the Lucknow Bench of the Allahabad High Court. A Division Bench of the High Court allowed the bunch-petitions by its judgment dated August 3, 1984 and quashed the select list notified by the office memorandum dated November 5, 1983. These appeals and the connected matters are directed against the judgment of the High Court. B C

We may briefly notice the facts necessary to resolve the controversy. Building and Roads, Electrical, and Mechanical are the three branches of the Public Works Department to which the Junior Engineers and the Assistant Engineers are appointed. There are no statutory service rules regulating the recruitment and conditions of service of persons appointed to the Electrical and Mechanical branches. However, the Building and Roads branch governed by the rules called The United Provinces Service of Engineers (building and roads branch) Class II rules, 1936 (the 1936 rules) framed under the Government of India Act, 1935. It is not disputed that the 1936 rules, though not applicable in terms to Electrical and Mechanical branches, have always been applied *mutatis mutandis* to these branches as well. The 1936 rules lay down three eligibility - conditions for a Junior Engineer to be considered for promotion to the post of Assistant Engineer. These are: the candidate should (1) be confirmed Junior Engineer; (2) be A.M.I.E./B.E. or have passed the qualifying examination prescribed by the Government and (3) have 10 years experience of service on the post of Junior Engineer. D E F

The Government Order dated December 3, 1964 further prescribes rules for the qualifying examination in respect of Electrical/Mechanical subordinates for promotion to the post of Assistant Engineer (Electrical/Mechanical). These rules, as amended from time to time, provide that the examination shall be held every alternate year to enable the members of the subordinate electrical engineering (Electrical overseers) service and G H

A the subordinate mechanical engineering (Mechanical overseers) service to qualify for promotion to the post of Assistant Engineer (Electrical and Mechanical). The rules also provide the list of subjects in which the candidates are to be examined and the marks to be obtained for qualifying the examination. The rules further provide that all permanent members of
B the respective subordinate services, who have completed a total of not less than 10 years, including temporary or officiating service, are eligible to appear in the examination. Although the Government Order dated December 3, 1964 states "that the Governor is pleased to make the enclosed rules for the qualifying examination of the members ....." but since these
C rules have not been framed under Article 309 of the Constitution of India they are only executive instructions laying down the procedure and eligibility for the qualifying examination in respect of the two subordinate services in the Electrical and Mechanical branches of the Public Works Department. These executive instructions, however, clearly show that the Government was uniformly applying the eligibility criteria of 10 years
D service as Junior Engineer, for promotion to the post of Assistant Engineer, in respect of all the three branches of the Public Work Department.

The State Government issued office memorandum dated January 7, 1980, (the memorandum) which is the bone of contention between the
E parties. The said memorandum as reproduced in the impugned judgment of the High Court reads as under :

> "The following conditions of eligibility have hither to been required for promotion from the post of Junior Engineer to the post of Assistant Engineer ;
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> F
>
> (1) The candidate should be confirmed (Permanent) on the post of Junior Engineer.
>
> (2) The candidate should be *A.M.I.E./B.E. or have passed the qualifying examination* laid down by the Government.
>
> G
>
> (3) The *candidate should have ten years* experience of service on the post of Junior Engineer.
>
> The Government after consulting other Engineering Departments
> H and the Public Service Commission decided on 13.4.1978 after

promotion to amend the above formula. The amended formula is as follows : A

"(1) Against the 25% posts reserved for promotion, half of them would be filled by promoting those Junior Engineers who are A.M.I.E./B.E. or have passed the prescribed qualifying examination. While the remaining half, as well as those vacancies which cannot be filled from among A.M.I.E./B.E. or qualifying examination passed Junior Engineers for want of such candidates being available, shall be filled by other Junior Engineers who are neither A.M.I.E./B.E., nor have passed qualifying examination. B C

(2) *These Candidates who are not A.M.I.E/B.E. nor have passed qualifying examination or should have seven years' experience on the post of Junior Engineer. This condition of seven years' experience will not be* required for those Junior Engineers who are A.M.I.E./B.E. or have passed qualifying examination. D

(3) The above provision shall be *deemed to be effective from 1.7.1978.*

(4) The question of revising the promotion quota was also considered and after due consideration, vide G.O. No. 10335/23/4/94-N.G./72 dated 7.12.79 "the Government had announced its decision that out of the available vacancies on the posts of Assistant Engineers 25% would be filled promotion of non-graduate Junior Engineers, while 5% would be filled by promoting A.M.I.E./B.E. Junior Engineers. If, however A.M.I.E./B.E. Junior Engineers are not available in sufficient numbers, then the vacancies allotted to them shall also be filled by promoting non-graduate Junior Engineers. *This provision shall be effective in respect of vacancies of the year 1970-80 and subsequent years.* E F G

(5) *Provision shall be made in accordance with the above said decision in the service rules.*

(6) The Government Orders issued from time to time in respect of reservation shall be strictly followed, *and the basis of adhoc* H

promotions shall be seniority subject to rejection of the unfit."

We have set-out the full text of the memorandum in order to appreciate the nature of the document. The memorandum was relied upon before the High Court in support of the contention that the eligibility condition of 10 years service, in respect of Junior Engineers of Electrical and Mechanical branches, was reduced to 7 years with effect form July 1, 1978.

Regular promotions from amongst the Junior Engineers in the Electrical and Mechanical branches had not been made since 1968- 69. It was in 1981 that the State Government intimated to the Public Service Commission (Commission) that the vacancies for the years 1968-69 to 1979-80, in the cadre of Assistant Engineers pertaining to the Mechanical and Electrical wings of the Public Works Department, were to be filled by promotion. Only those Junior Engineers were considered eligible who had put in a minimum of ten years services as Junior Engineer. While the interviews were being conducted by the Selection Committee, some of the Junior Engineers, who had not been included in the eligibility list, challenged the process of selection before the High Court on the ground that they were wrongly excluded from the eligibility list. According to them all those Junior Engineers who had completed seven years of service, as laid-down in the memorandum, were eligible to be considered for selection to the post of Assistant Engineer. The High Court by an interim order permitted more than 100 candidates, who were not in the eligibility list, to be interviewed by the Selection Committee subject to the final result of the writ petitions. The list of selected candidates was notified by the government on November 7, 1983. Thereafter large number of Junior Engineers who were officiating as Assistant Engineers on ad-hoc basis were ordered to be reverted to accommodate the Junior Engineers who were selected. The reversion orders were challenged before the High Court by way of several writ petitions,. The High Court stayed the reversions and further stayed appointments from the select list. On February 28, 1984 the High Court permitted ad-hoc promotions to be made on the basis of seniority subject to rejection of the unfit.

The contention of the writ petitioners before the High Court was that there being no statutory service rules applicable to the Electrical and Mechanical branches of the Public Works Department the memorandum,

which laid down seven years service as an eligibility condition for promotion to the post of Assistant Engineer, was to be followed and as such the writ petitioners were entitled to be included in the eligibility list. The contention was accepted by the High Court. A

The High court also referred to the U.P. Promotion By Selection In Consultation With Service Commissions (Procedure) Rules, 1970 and came to the conclusion that the Government in consultation with the Commission was justified in adopting the criterion of strict selection on merit for promotion to the post of Assistant Engineer. B

We have heard learned counsel for the parties. The High Court has set aside the selection solely on the ground that the Junior Engineers with seven years service to their credit, having not been included in the eligibility list the selection was illegal. The High Court accepted the contention that the memorandum superseded all earlier executive instructions/precedents in the matter of promotions from Junior Engineers to Assistant Engineers and as such had reduced the eligibility criterion of ten years service to that of seven years service with effect from July 1, 1978. It was on that basis that the selection was set aside by the High Court. C D

We have given our thoughtful consideration to the arguments of the learned counsel for the parties. We are not inclined to agree with the reasoning and the conclusions reached by the High Court. The history of service in the Public Works Department of the State of Uttar Pradesh clearly shows that the State Government from the very beginning has been regulating the three branches of the Public Works Department with uniform conditions of service. It is no doubt correct that the 1936 rules only relate to the Building and Roads branch but the same rules were being made applicable to the other two branches. There is no material whatsoever on the record to show that at any time prior to the issue of the memorandum, the State Government intended to provide separate conditions of service for the Electrical and Mechanical branches. As stated in earlier part of this judgment the rules circulated by the Government order dated December 3, 1964 regarding qualifying examination in respect of subordinate services of Electrical and Mechanical branches clearly stated that the eligibility for promotion to the post of Assistant Engineer was ten years service as Junior Engineer. Neither the memorandum nor any other E F G H

A Government order has specifically modified or amended the Government order dated December 3, 1964. Even otherwise a bare look at the contents of the memorandum shows that it contained a policy decision of the Government which was to be implemented in the future. The memorandum did not state that it was applicable to the Electrical and Mechanical B branches. Para 5 therein stated that "provisions shall be made in accordance with the above said decision in the service rules". Admittedly, there were no service rules regarding Electrical and Mechanical branches. It can, therefore, be legitimately inferred that the memorandum was meant only for the Building and Roads branch which was governed by the 1936 rules. Even if it is assumed that the memorandum was meant for all the three C branches, it could not operate in respect of Building and Roads branch till that time the 1936 rules were amended and since the Government was uniformly applying the 1936 rules to all the three branches, the memorandum could not be read to be applicable to the Electrical and Mechanical branches.

D

Para 3 of the memorandum gives deeming effect - from July 1, 1978 - to the provisions in paras 1 and 2 of the memorandum. It is settled law that an executive order of the Government cannot be made operative with retrospective effect. It is, thus, clear that the memorandum contained E various proposals which were to be incorporated in the statutory rules.

We may examine the memorandum from another angle. The first part of the memorandum shows the existing eligibility conditions for promotion to the post of Assistant Engineer. Paras 1 and 2 contain the decision which was taken by the Government on April 13, 1978. Para 4 F gives the decision of the Government which was taken on December 7, 1979. It was finally stated in para 5 that the decisions in paras 1 to 4 "shall be incorporated in the services rules". The scheme of the memorandum clearly show that it did not lay down conditions of service for any of the branches of the Public Works Department. The contents of the said G memorandum were the various policy decisions taken by the Government from time to time which were to be implemented in future by making necessary provisions in the relevant rules or by amending the existing executive instructions. The memorandum does not talk of electrical or mechanical branches in any manner. The High Court fell into patent error H in treating the memorandum to be laying down the conditions of service of

the Electrical and Mechanical branches of the Public Works Department. It would be useful to refer to a Division Bench judgment of the Allahabad High Court in *Gopal Krishna Goel* v. *State of Uttar Pradesh,* Civil Misc. Writ No. 2001 of 1983 decided on March 20, 1984 wherein the Bench interpreted the memorandum as under :

> "In order to appreciate the rival contentions, it will be necessary to have a closer look at the Office Memorandum dated January 7, 1980 with a view to ascertaining its true nature and import..... A bare reading of the aforesaid Office Memorandum leaves no room for doubt that in truth and substance it is exactly what it purports to be namely, a mere memorandum regarding the various policy decisions, which have been taken by the Government in 1978 and 1979 and stating that provisions should be made for bringing the service rules in accord with the said policy decisions taken by the Government with regard to filling up of the quota reserved for promotees from amongst the Junior Engineers. The memorandum has not been expressed in the name of the Governor nor does it even state that it has been issued by an order of the Government. Indeed it expressly asks the concerned, instrumentalities and authorities of the Government to make provision for amending the service rules so as to bring them in line with the policy decisions of the Government."

We agree with the above quoted reasoning of the High Court in *Gopal Krishna Goel's* case.

This Court during the pendency of these matters stayed the operation of the impugned judgment of the High Court, and also stayed all reversions. 12 posts were permitted to be filled by the State Government and the State Government was allowed to make ad hoc appointments by following the rule of seniority subject to unfitness.

As a result of the above discussion we allow the appeals and set aside the impugned judgment of the High Court. We order as under :

1. The selection made by the State Government in the year 1983 was in accordance with law and as such is upheld. The select list notified in the

memorandum dated November 5, 1983 is declared valid and operative.

2. All the selected candidates listed in the office memorandum dated November 5, 1983 shall be deemed to have been appointed, if not already appointed, to the posts of Assistant Engineers with effect from the respective dates when they were to be appointed, in the ordinary course, on the basis of the said selection.

3. The memorandum did not lay down conditions of service in respect of Electrical and Mechanical branches. The memorandum was a document showing the policy decisions of the Government to be implemented in future.

4. The Junior Engineers who are holding the posts of Assistant Engineers on ad hoc basis shall be treated to having been appointed as ad hoc Assistant Engineers from the dates when they would have completed ten years of service as Junior Engineers and this shall be the relevant date for the purposes of paras 5 and 6 hereafter.

5. The Junior Engineers who are holding the posts of Assistant Engineers on ad hoc basis shall be considered for regularisation in terms of the Uttar Pradesh Regularisation of Ad-hoc Promotions (on posts within the purview of the Public Service Commission) Rules, 1988 (Regularisation Rules).

6. The ad hoc promotees, who do not come within the purview of the Regularisation Rules, shall be considered for regular appointment through the process of selection to be held by the State Government in accordance with the rules and the executive instructions governing the conditions of service of the two branches of the Public Works Department. Those selected shall be appointed on regular basis from the dates they were appointed on ad hoc basis. We further direct that the process of selection be completed within four months of the receipt of this judgment and *status quo* shall continue till then.

7. The conditions of service of the three branches of the Public Works Department have not been laid down with clarity either in the 1936 rules or in any of the executive instructions issued by the Government from time to time. We commend the State of Uttar Pradesh to lay down the

conditions of service of the three branches of the Public Works Department in clear and certain terms either by executive instructions or by statutory rules at its discretion. A

These matters are disposed of in the above terms. No costs.

N.P.V. Matters disposed of.