

WRIT PETITION NO.306 OF 1998

Shri J.S.R. Parabrahman,
major, married,
Surveyor of Works,
(Executive Engineer),
Office of S.S.W./Goa Tilari
Irrigation Development Corporation,
Junta House, 3rd Floor,
Panaji, Goa.

..... Petitioner.

V/s.

1. State of Goa through
its Chief Secretary having office,
at Secretariat, Panaji, Goa.

2. Chief Engineer,
Irrigation Department,
Panaji, Goa.

3. Chairman,
Goa Public Service Commission,
Panaji, Goa.

4. Shri S.T. Nadkarni,
Superintending Engineer,
Circle I, Junta House,
Panaji, Goa.

5. Shri V.V.P. Gaitonde,
Superintending Engineer,
CADA Circle,
Irrigation Department,
Gogol, Madgaon, Goa.

6. Shri P.J. Bhobe,
Superintending Engineer,
Central Planning Organization,
Irrigation Department,
Junta House, (Annexe)
First Floor, Panaji, Goa.

7. Shri Paramsivam,
Superintending Engineer,
Goa Tillari Irrigation Develop-
ment Corporation,
P.O. Tivim Industrial Estate,
Caraswada,, Colwale.

..... Respondents.

Shri D.P. Bhise, Advocate for the petitioner.

Shri A.N.S. Nadkarni, Advocate General with Mr. H.R. Bharne, Government Advocate for the respondents No.1 and 2.

Mr. A.N.S. Nadkarni, Advocate General with Mr. H.L. Naik, Advocate for the respondent No.3.

Mr. M.S. Sonak, with Mr. D. Pangam, Advocates for respondent No.4.

CORAM : A.M. KHANWILKAR &
P.V. HARDAS, JJ.

DATE OF RESERVING THE
JUDGMENT : NOVEMBER 5, 2003.

DATE OF PRONOUNCING THE
JUDGMENT : DECEMBER 30, 2003.

J U D G M E N T : (Per KHANWILKAR, J.)

By this writ petition under Article 226 of the Constitution of India, the petitioner prays that the process of selection of promotion, promoting respondents No.4 and 5, undertaken by the DPC held on 7.7.1998 be quashed and set aside being bad in law and consequently the order of promotion dated 20.7.1998 be also quashed and set aside. It is further prayed that a writ of mandamus be issued directing the respondent No.1 to fill up the post of Superintending Engineer on ad hoc basis from amongst the eligible Executive Engineers as per Office Memorandum No.2/8/74-PER (Vol. III) dated 14.4.1983.

2. The grounds of challenge in this petition are that the private respondents were promoted to the

post of Executive Engineer vide order dated 25.9.1997 on probation and they had not even completed the probation period, much less the essential eligibility period of 5 years' of regular service in the post which is a feeder grade post for promotion. It is the grievance of the petitioner that the ad hoc service rendered by the private respondents was computed as regular service and on that basis promotion has been granted, which cannot be sustained. It is now contended that to extend the zone of consideration and consider ineligible Executive Engineers, certain steps were taken including of relaxing minimum experience period for considering the eligibility. It is stated that even if the authorities had to fill up the post of Superintending Engineer, on urgent basis, that could have been done on ad hoc basis from amongst the eligible engineers as in the case of filling up promotional post of Additional Chief Engineer in terms of Memorandum dated 14.4.1983. According to the petitioner, he has put in 17 years as Executive Engineer and over 10 years of regular service on that post and was the only eligible candidate for being appointed to the post of Superintending Engineer. It is then asserted that there is no objectivity in the individual assessment which is done by the interested persons and they would never project fair and honest determination. It is next asserted that the action of the respondents in relaxing the minimum regular service

period provided by the Recruitment Rules suggests an open favouritism by disregarding the Rules, so as to favour the private respondents. In other words, the promotion of the private respondents to the post of Superintending Engineer in the Irrigation Department has been questioned by the Petitioner being not in conformity with the relevant Rules.

3. In response, the respondents No.1 and 2 have filed affidavit sworn by Satish M. Nadkarni, Chief Engineer, Irrigation Department and Ex-Officio Additional Secretary to the Government of Goa dated August 7, 1998. It is stated on affidavit that right from the year 1993, as and when the vacancy arose, the petitioner was duly considered, but not recommended for promotion as Superintending Engineer. In para 4 break-up of the yearwise vacancies has been furnished along with the names of the candidates recommended by the Goa Public Service Commission (GPSC), upon selection by the GPSC on 11.3.1997. It is stated that the Departmental Promotion Committee (DPC) again met on 8.8.1997 as there were three vacancies for promotion and three candidates were available, including the petitioner. It is stated that the GPSC/DPC recommended two of them for promotion. As regards one Executive Engineer, the recommendations were kept in a sealed cover. In para 5 of the affidavit, it is stated that

the minimum five years' regular service in grade and possessing Degree in the Civil Engineering from recognized University or equivalent, is essential for the promotion to the post of Superintending Engineer. It is further stated that Rule 5 of the Goa, Daman and Diu Irrigation Department Group 'A' and 'B' Gazetted Post Recruitment Rules, 1986 empowered the Government to relax such a condition. In paragraph 6, it is stated that the vacancies of the Superintending Engineer could not be filled up and it was very much necessary and in 'public interest' relaxation was made in the qualifying service to include ad hoc service put in by the prospective candidates and period of their probation for the purposes of reckoning the qualifying service. It is stated that in consultation with the GPSC, the DPC was convened on 7.7.1998, which recommended the names of the private respondents 4 and 5 for promotion. In para 7, it is stated that there was one vacancy in the year 1996 which was reserved for Scheduled Caste (SC) candidate and one vacancy in the year 1998, reserved for Scheduled Tribe (ST) candidate. However, as no SC/ST candidate was available, the said vacancies were deserved and the names have been recorded by the DPC as against the said vacancies. The petitioner was also considered along with others in that process. In para 9 it is stated that the respondent No.4 was appointed on ad hoc basis as Executive Engineer by order dated 18.1.1993 and he

continued to be on ad hoc basis till he was regularised by order dated 25.9.1997. It is stated that he had about 5 years 5 months' service as on the date of DPC as ad hoc and regular Executive Engineer. In para 10 it is stated that the respondent No.5 was appointed on ad hoc basis as Executive Engineer by order dated 28.1.1988 and he continued on ad hoc basis till he was regularised on 25.9.1997. Thus, he had in all about 10 years 5 months' service as Executive Engineer on the date of DPC. In para 11, it is reiterated that the petitioner was duly considered for promotion to the post of Superintending Engineer for the vacancies which arose right from the year 1993 (six times), but the DPC did not recommend him till the last DPC held on 7.7.1998.

4. Respondent No.3 GPSC has resisted this petition by filing the affidavit of Shri D.M. Borkar, Under Secretary to the GPSC, sworn on 7.8.1998. The affidavit states that the post of Superintending Engineer is a Group 'A' Gazetted Post. It reiterates the position that the Recruitment Rules provide for five years' service in the grade and possessing necessary qualifications. In para 3 break-up of five vacancies on yearwise basis has been furnished to indicate that in 1996 one vacancy which was reserved for SC; in 1997 one General and in 1998 three out of which one reserved for ST. In para 4 of the affidavit, it is stated that it

was reported to the Commission that there were no officers belonging to SC/ST community in the grade of Executive Engineer were available, for which reason the reserved vacancies of 1996 and 1998 were to be dereserved and filled up by general candidates in current year 1998 after it was actually dereserved by the Government. In para 5 of this affidavit, it is stated that to fill up 5 yearwise vacancies, 13 candidates came in the zone of consideration, however, there were only three eligible officers in the seniority list of Executive Engineer. The seniority list was finalised by the Department in December, 1996. The names of those three officers have been stated. The petitioner is at sr. No.2 of that list. It is the stated that due to inadequate number of eligible officers in the grade of Executive Engineer on regular basis for promotion to the post of Superintending Engineer, it was decided by the Government in consultation with the Commission to relax the requirement of five years' regular service in respect of those Executive Engineers who come in the zone of consideration for promotion on the ground that they had held the post of Executive Engineer on ad hoc basis for about 5 years. As per Rule 5 of the Recruitment Rules, it is stated that the Government was empowered to relax any provision of the said Rules to any class or category of persons, in consultation of the GPSC. It is further

stated that the Government had also dispensed with their probation period in the post of Executive Engineer to consider them for promotion to the post of Superintending Engineer. Names of 19 candidates have been enlisted, out of which 13 Executive Engineers were to be considered for promotion. It is also stated that since the seniority list of the Executive Engineer from sr. No.4 was not drawn so far by the Government, their names were arranged in the order of selection to the post of Executive Engineer. It is further stated that the candidates listed at sr. Nos. 12 and 13, though did not have ad hoc service, they were considered for promotion as they stand senior in the select list in the grade of Executive Engineers. In para 7, it is stated that the DPC met on 7.7.1998, but considered the officers against yearwise vacancies as mentioned in the paragraphs 8 and 9 of the affidavit. It is averred in paras 8 and 9 of the affidavit that for one vacancy of 1997, five officers came in the zone of consideration and the petitioner was considered along with other four officers where his performance was assessed as "Average" by the DPC and was not recommended against the vacancy. The DPC recommended Shri N.B.Das, but sealed cover procedure was observed in his case. It is further stated that in respect of four vacancies of 1998, including the one of 1996 which is carried forward to 1998, 12 officers were coming in the zone of

consideration and the petitioner along with other 11 officers was considered for promotion. The performance of the petitioner was assessed by the DPC as "Average" and consequently did not get placing in the select list. It is stated that as per guidelines contained in the Office Memorandum No.12/14/89-PER dated 26.09.1990, as amended on 14.12.1995, the bench mark grade prescribed for promotion to the post under consideration is 'Very Good'. The petitioner did not possess this bench mark ('V. Good') and consequently was not selected and was superseded by respondents No.4 and 5 on recommendation of the duly constituted DPC. Further affidavit was filed on behalf of respondents No.1 and 2 sworn in on 9.3.2001. This affidavit broadly reiterates the position stated in the earlier affidavit. Suffice it to observe that it is asserted that for the vacancies right from 1993 till 1998, the petitioner was considered by GPSC/DPC, but was not recommended for promotion. It further stated in para 7 of this affidavit that the respondents were duly considered and as regards newly added respondents No.6 and 7, the promotion was directed to be given after NOC from the Social Welfare Department for dereserving the reserved vacancies obtained. After deservation, the appointment order was issued to the said respondents. In para 10, it is clearly averred that since number of candidates were not available, relaxation was done which can be found in the Minutes of

the DPC. It is further asserted in para 12 that although the petitioner has made vague allegations of favouritism, has not disclosed nor he has named any person, who according to him, was writing his Annual Confidential Reports. Accordingly, those allegations are devoid, being unfounded. It is further stated that all promotions have been granted on merit cum seniority basis. It is stated that the petitioner cannot claim, as a matter of right, for any ad hoc promotion and, even for giving ad hoc promotion, it has to be based on merit-cum-seniority. In paras 15 and 19 of the affidavit, justification for relaxation has been given. Respondents No. 1 and 2 filed further affidavit sworn by Shri S.D. Sayanak, Chief Engineer, Water Resources Department (previously known as Irrigation Department) dated 13.3.2003 mentioning additional events of convening of GPSC meeting for recommending the candidates for promotion to the post of Superintending Engineer on 30.8.2002. Regarding earlier period, the details which are stated in the earlier affidavits have been reiterated. In para 11 it is stated that the vacancy arose to the post of Superintending Engineer as a result of retirement of Shri J.S. Khanuja under the Voluntary Retirement Scheme w.e.f. 4.4.2001. In the circumstances, after completing necessary formalities, the Government decided to fill up the said vacancy to the post of Superintending Engineer by promotion on ad

hoc basis and considering the merit cum seniority of the respective candidates. Shri A.S. Salelkar was promoted as Superintending Engineer on ad hoc basis with effect from 1.6.2001. This was only a stop-gap arrangement till the GPSC convened meeting for recommending the candidates for promotion to the post of Superintending Engineer. Accordingly, meeting was held on 30.8.2002 and GPSC recommended Shri A.S. Salelkar for promotion to the post of Superintending Engineer, which was accepted by the Government and order dated 9.10.2002 was issued in that behalf. Respondents No.1 and 2 filed further affidavit sworn in by Shri S.D. Sayanak, Chief Engineer dated 17.10.2003, placing on record the response of the Government with regard to the observations made by the Court at the time of hearing. By this Affidavit, it is stated that it was not possible for the Government to consider the petitioner for promotion, as records disclose that his performance was not satisfactory to hold the post of Superintending Engineer and as he does not satisfy the bench mark and the post is a selection post.

5. During the course of arguments, Mr. Bhise for the petitioner mainly argued that the action of the Government of relaxing the minimum service period in feeder grade was arbitrary and with a view to favour the private respondents, for which reason it cannot be

sustained. According to him, the relaxation has not preceded the satisfaction and the decision of the Government which was required to be in consultation with the GPSC. It is argued that even though this assertion has been specifically made in the writ petition, there is no response in the reply filed by the respondents, nor any justification is forthcoming. According to him, the petitioner has put in 17 years' of service as Executive Engineer and in any case, 10 years on regular post. Learned Counsel, therefore, submits that in such a case, the petitioner's claim cannot be ignored and the juniors who had not even completed the required period of service, cannot be preferred. He has placed reliance on the decision of the Apex Court in (1996)2 SCC 363, in U.P. Jal Nigam and ors. vs. Prabhat Chandra Jain and ors. to contend that granting gradation which is lower than the bench mark is an adverse remark, which ought to have been communicated to the petitioner. It is submitted that failure to do so has vitiated the decision making process. Learned Counsel submits that instead of exercising powers under Rule 5 and relaxing the minimum service period, the Government ought to have appointed the candidates who were eligible for promotion on ad hoc basis. It is further contended that in fact situation of the present case, it would be appropriate to direct the Government to create supernumerary post so as to accommodate the petitioner.

6. On the other hand, learned Advocate General contends that the reply-affidavit filed on behalf of the respondents No.1 and 2 clearly spells out the piquant situation in which the Government was required to take decision of relaxation in exercise of powers under Rule 5, so as to do away with the requirement of five years' service in the feeder grade. Learned Advocate General further submits that in the petition as filed, there is not even a remote suggestion that the petitioner satisfies the bench mark required for being eligible for being considered for promotion; and the post being selection post required benchmark "Very Good", was indispensable. It is contended that if the argument of the petitioner was to be accepted that he should have been appointed merely because of the length of his service, that would result in the situation which has been deprecated by this Court in an unreported decision in Writ Petition No.15/1998 in the case of Laxman G. Phadte vs. State of Goa and ors., decided on 30/9/1998, in particular the dictum in paras 25 and 28 thereof. It is further submitted that in so far as allegation of favouritism is concerned, the same is vague and cannot be gone into because the person responsible has not been named in the petition and, therefore, inquiry into that allegation was impermissible. It is further contended that prayer in the writ petition as couched, particularly clause (b), is in fact a prayer to appoint

the petitioner on ad hoc basis, which is obviously untenable as no such mandamus can be issued by the High Court in exercise of writ jurisdiction. It is further argued that the decision relied upon in the case of U.P. Jal Nigam and others (supra) by the Counsel for the petitioner is wholly inapplicable to the present case. Inasmuch as, the dictum in that case is in the context of adverse remarks in the Confidential Reports and extreme variation in gradation such as 'outstanding' gradation in one year followed by 'satisfactory' in the succeeding year. On the other hand, in the present case, the gradation is on the basis of the assessment made by the DPC and there is no requirement in law of communicating assessment made by the DPC. Moreover, there is no extreme variation on gradation by the DPC in the case of the petitioner, as even in the past the DPC has assessed his performance as "Average". It is further argued that even in the Confidential Report, the assessment of the petitioner has been consistently noted as "Average". There is no extreme variation which would result in down grading of entry, requiring communication thereof to the petitioner.

7. Mr. Sonak, learned Counsel appearing for the respondent No.4 has adopted the arguments of the learned Advocate General and submits that the petition is devoid of merit.

8. Having considered the rival submissions, we have no hesitation in observing that the petition is devoid of merits. The first ground that was pressed into service during the arguments, canvassed before us, is one of inappropriate exercise of powers by the Government under Rule 5 of the Recruitment Rules, relaxing minimum service period in the feeder post. We find no substance in that argument. Before we examine this argument any further, it will be apposite to advert to Rule 5, which reads as under :

" Power to relax. - Where the Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing and in consultation with the Union Public Service Commission, relax any of the provisions of these rules with respect to any class or category of persons."

Rule 5 clearly empowers the Government to relax any of the provisions of the Rules with respect to any class or category of persons. It is stated on affidavit by respondents No.1 and 2 that, in view of the piquant situation, it was imperative for the Government to take decision to relax the requirement of five years' of regular service in the feeder grade. That decision was taken by the Government in consultation with the GPSC, in public interest. The minutes of the DPC clearly records this fact. Even the record produced before us supports the position stated on affidavit by the

authorities. In so far as grievance that there is no compliance of Rule 5, we are of the view that such a grievance cannot be countenanced because there is no foundation laid down in the memo of writ petition as to the nature of non-compliance. The rule enables the Government to relax any of the provisions of the Rules with respect to any class or category of persons. In the present case, such a fact has been clearly stated on affidavit before us and is also supported by the record. The decision has been taken in consultation with the GPSC. In that sense there is no reason to accept the grievance of the petitioner. In this view of the matter, we see no substance in the grievance made before us that there has been either non-compliance of requirement of Rule 5 or inappropriate exercise of powers under Rule 5. It is not necessary for us to elaborate on the ground as set out in the petition, one of favouritism. As rightly contended on behalf of the respondents, no details in that behalf are furnished in the petition. Moreover, the person against whom such an allegation is made or intended is not named in the petition. If that is so, no further inquiry into that allegation can be allowed.

9. It was next contended on behalf of the petitioner that the petitioner has been given gradation of "Average" which amounts to adverse remarks and ought

to have been communicated to the petitioner in terms of the decision in U.P. Jal Nigam and ors. (Supra). We find no substance even in this submission. As rightly argued on behalf of the respondents, in that case the observations have been made with regard to the remarks appearing in the Confidential Report. Beside the observations are in the context of extreme illustration of variation in gradation such as outstanding gradation in one year and, followed by satisfactory in the succeeding year. In the present case, we are concerned with assessment made by the DPC. It is not an adverse remark in the Confidential Report as such. Moreover, there is no extreme variation in the gradation because even in the previous years the performance of the petitioner has been assessed by the DPC as "Average". Although it is not necessary for us to look into the remarks in the Confidential Report, as rightly pointed out by learned Advocate General, even the Confidential Report mentions the assessment of the petitioner as "Average" consistently. Accordingly, this decision pressed into service on behalf of the petitioner is of no avail.

10. As rightly contended on behalf of the respondents, there is no averment in the petition that the petitioner possessed the minimum bench mark "Very Good". Unless the petitioner was to assert that he possessed the bench mark "Very Good", he will have no

right to challenge the promotions given to the private respondents. Moreover, as we have already observed, there is no infirmity in the action of the respondents invoking Rule 5 or the manner of exercise of that power. It necessarily follows that, in law, the private respondents were qualified and eligible for being considered for promotion. As they were eligible for consideration and having been assessed by the DPC as 'suitable', it is not open for the petitioner to question their selection, especially when he did not possess the bench mark "Very Good".

11. It was next argued that if there was urgency to fill up any post of the Superintending Engineer, the Government ought to have appointed eligible candidates on ad hoc basis in exercise of power under Rule 5. It is not open for this Court to question justness of the decision taken by the Government of invoking powers under Rule 5, having recorded the satisfaction about the expediency and necessity of such a decision. Understood thus, it will not be open for this Court to sit over the decision so arrived at by the Government, which was in consultation with the GPSC and upon complying with the necessary requirement. In such a situation, there is no question of doubting the decision of the Government of relaxing the service. Moreover, whether the Government was interested in

filling up the vacancy on regular basis or on ad hoc basis, was the prerogative of the Government. Merely because other option was available to the Government, cannot be the basis to question the decision of the Government of relaxing the requirement in exercise of Rule 5 of the Recruitment Rules.

12. It was also suggested on behalf of the petitioner that the Government be directed to create supernumerary post to accommodate the petitioner. We find no basis to accept this contention as we have already held that the petitioner has not achieved the bench mark and as such, the question of the petitioner being considered for promotion, does not arise. In such a situation there can be no basis for even suggesting to create supernumerary post, so as to accommodate the petitioner

13. During the course of arguments only the above contentions were pressed into service. Accordingly, we have confined this Judgment with regard to the arguments as canvassed by Mr. Bhise.

14. In the circumstances, this petition is devoid of any merits and the same is dismissed with costs.

A.M. KHANWILKAR, J.

P.V. HARDAS, J.

ssm.