



**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 6553 of 1991**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**

**and  
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

G G SHAIKH & ORS.  
Versus  
STATE OF GUJARAT & ORS.

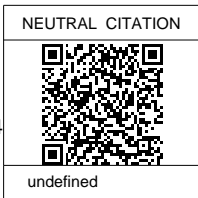
Appearance:

MR BHASKAR TANNA, SR. ADV. with MR HARDEEP MAHIDA, ADVOCATE for TANNA ASSOCIATES(1410) for the Petitioner(s) No. 1,2,3,4,5  
MS HETAL PATEL, ASST.GOVERNMENT PLEADER for the Respondent(s) No. 1,2,3

**CORAM: HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL  
and  
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE**

**Date : 17/05/2024**

**CAV JUDGMENT  
(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)**



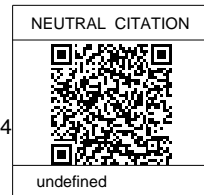
1. By means of the instant petition, filed in the year 1991, the petitioners who were appointed on the post of Deputy Engineer (Civil) Class-II, in the year 1980 and 1982, seek the following reliefs:-

“ B. Be pleased to issue an appropriate writ under Article 226 of the Constitution of India, declaring the proviso to Rule-3 and provisions of Rule 12 of Deputy Engineers (Civil) Gujarat Services of Engineers Class II Recruitment Rules, 1979 as arbitrary, illegal ultra vires the constitution of India, invalid and inoperative.

C. Be pleased to issue an appropriate writ under Article 226 of the Constitution of India, declaring the proviso to Rule 2 and provisions of Rule 13 of the Executive Engineers (Civil) Gujarat Services of Engineers Class I Recruitment Rules, 1979 as ultra vires the Constitution of India, arbitrary, illegal, invalid and inoperative.

D. Be pleased to issue a writ of mandamus on a writ in the nature of mandamus or any other appropriate writ order, or direction under Article 226 of the Constitution of India, directing the respondent Nos. 1 and 2 to consider the petitioner as directly recruited on the vacancies of the Executive Engineers (Civil) Class-I in the respective year of their passing the combined competitive examination held by the Gujarat Public Service Commission, by applying the “Carry forward” rule to the vacancies of Executive Engineer (Civil) Class-I in the quota of direct recruits, remaining vacant from 1960 onwards and by distributing the said carried forward vacancies of direct recruits in the year of their recruitment and further directing the respondent No.1 and 2 to give all consequential benefits to the petitioners, and to make the necessary changes in all the records maintained by it wherever necessary.

E. Be pleased to issue a writ of mandamus on a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, directing the respondent Nos. 1 and 2 to prepare the seniority list of Deputy Executive Engineers Class II by placing the

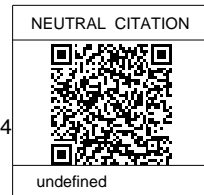


names of petitioners and other directly recruited Deputy Executive Engineers above the promotee Deputy Executive Engineers who have been fitted in the vacancies for the direct recruit of Deputy Executive Engineers between 1960 to 1980 they being invalid appointees on account of their promotion on the said posts in excess of their quota, by implementing the principles laid down in resolution dated 04.12.1986 and by applying the “push down” formula laid down by their Lordships of Supreme Court in N.K. Chauhan’s case and further directing the respondent Nos. 1 and 2 to give the promotion to the petitioner on the post of Executive Engineer (Civil) Class-I on the strength of their placement in the said seniority list with effect from due date, and to accord the petitioners the difference in salary, seniority in the cadre of Executive Engineers and all other consequential benefits.

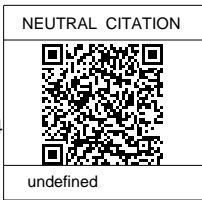
F. Be pleased to grant interim relief directing the respondents No.1 and 2 to assess the vacancies of the Executive Engineer (Civil) Class-I of direct recruits during the period 1968 onwards and to distribute the same amongst the petitioners and other candidates who were selected on the post of Deputy Executive Engineers (Civil) for want of the post of Executive Engineers (Civil) in the relevant year of their passing competitive examination held by the Gujarat Public Service Commission for both the cadres.

G. Be pleased to grant the interim relief pending the hearing and final disposal of their petition, directing the respondent No.1 and 2 to make the assessment of “carry forward” vacancies in the post of Deputy Executive Engineer (Civil ) Class-II for the period between 1960 to 1978 and to distribute the said vacancies in the relevant years amongst the petitioners and others directly recruited as Deputy Executive Engineers and give them proper placement in the seniority list of the Deputy Executive Engineers (Civil) by pushing down the invalid appointees holding the post of Executive Engineers (Civil) by virtue of their promotion in excess of their quota.”

2. Out of the five petitioners herein, as stated in the writ petition, the petitioner No.1 had completed B.E.(Civil) Examination in the year 1978. The petitioner No.2 passed B.E. (Civil) Examination in the

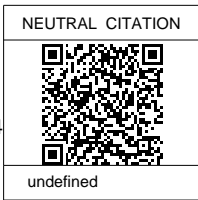


year 1979. Petitioners No.3 and 4 in the year 1978 and the year of passing of B.E. (Civil) Examination of the petitioner No.5 has not been disclosed in the writ petition. It is stated therein that after passing the B.E. (Civil) examination, being eligible for consideration for the vacancies of Executive Engineer (Civil) in the quota of direct recruitment, the petitioners were entitled to undertake the selection process, however, no competitive examination was conducted by the Gujarat Public Service Commission (in short as “the GPSC). It is stated that as the State Government did not hold any competitive examination for direct recruitment to the post in Gujarat Service of Engineers (Class-I and Class-II) from 1968 to 1980 and at the time of selection in the year 1980 after a long time, the direct recruitment vacancies for the posts of Executive Engineer (Civil) Class-I and Deputy Engineer (Civil) Class-II, were computed only for the year 1980. In absence of any competitive examination for direct recruitment from 1968 to 1980, the promotions in excess of the promotion quota were made in both the cadres. The contention, thus, is that there was a requirement to compute the vacancies of direct recruitment quota even prior to the year 1980, which were filled up by the promotees, so as to make more direct recruitment. The competitive



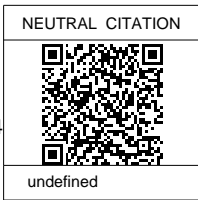
examinations in two batches were held in the year 1980 for filling up only 22 posts of Executive Engineer and 104 posts of Deputy Engineer. The petitioners No.1 to 5 participated in the examination and upon being declared qualified, they got selection to the posts of Deputy Engineer. The contention further is that on account of less number of vacancies notified of the post of Executive Engineer (Class-I), wrongly computed by the Department, the petitioners did not get chance for consideration against the direct recruitment quota vacancies of Executive Engineer (Class-I), in the combined competitive examination, wherein the petitioners had qualified.

3. From the statement made in the writ petition, it may be noted that the petitioners No.1 joined as Deputy Engineer on 04.12.1980; petitioner No.2 joined on 14.12.1982; petitioner No.4 joined on 08.12.1981 and petitioner No.5 joined on 16.12.1982. In so far as the petitioner No.3 is concerned, he had appeared in the combined examination held in February, 1982 for filling up 12 posts of Executive Engineer (Class-I) and 65 posts of Deputy Engineer. Petitioner No.3 was selected and appointed as Deputy Engineer on 06.12.1983.
4. It is stated that initially, the ratio of 3:1 direct recruitees and promotees under the Bombay Service of Engineers Class-I and

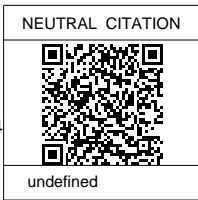


Class-II was changed to 1:3 by the Recruitment Rules framed by the State in exercise of powers under Article 309 of the Constitution of India notified on 29.03.1979. It was further provided therein that if in any year direct recruitment by direct selection is not made according to the prescribed ratio, the shortfall of direct recruits shall lapse, and shall not be carried forward in subsequent year. Recruitment Rules were further amended vide Notification dated 21.05.1982, wherein appointment by direct selection and promotion has been made in the ratio of 1:4. Thus, from May 1982, the ratio of appointment by direct selection and promotion came to be 1:4, in place of 1:3 prescribed in the Recruitment Rules, 1979.

5. It is contended by the petitioners that right from the bifurcation of the State of Gujarat, the respondent authorities have not maintained the ratio between the direct recruitees and promotees while filling up the vacancies for the posts of Executive Engineer (Civil) Class-I and Deputy Engineer (Civil) Class-II, and they did not make appointments on Class-I and Class-II posts as per the ratio prescribed by the Recruitment Rules relevant from time to time. The result is that there occurred a huge shortfall of direct recruitees in both Class-I and Class-II cadres.



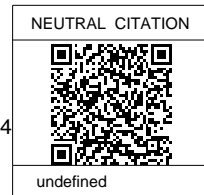
6. It is contended that though upto the year 1968, the respondent No.1 State had held the combined competitive examination for direct recruitment in Class-I and Class-II cadres and 181 promotions from lower cadre were also made to the post of Deputy Executive Engineer, Class-II at the cost of the direct recruitees, but, for no recruitment examinations being made, all the vacancies created in both the cadres were filled only by promotions showing shortfall of the direct recruits in both the cadres, namely Executive Engineer (Civil) and Deputy Engineer (Civil). There had been excess promotions beyond the vacancies of promotion quota.
7. This issue had already been taken care of by the Apex Court in the case of *N.K. Chauhan and others vs. State of Gujarat and others*, (1977) 1 SCC 308, wherein the Apex Court had propounded “push down” theory. It was ruled by the Apex Court therein that where recruitment to a cadre is made by promotion and direct recruitment in a prescribed ratio, the seniority of the officers in the cadre must follow the quota. For proper implementation of the said decision, the Government Resolution dated 04.12.1986 was also issued, wherein it was decided that the shortfall in the particular recruitment quota (direct or promotion) shall be carried forward in the subsequent year as “labelled vacancies” earmarked for direct



recruits or promotees only, as the case may be. It was notified that the vacancies arising in the relevant subsequent year should be allocated between the direct recruits and promotees in accordance with the prescribed ratio and the carried forward “labelled vacancies”. Preceding year should be added to the vacancies allocated to the direct recruitment quota or the promotion quota as the case may be. Further if the appointments made in the year are in excess of the number of vacancies allocable to direct promotion quota, the direct recruits or promotees as the case may be should be “pushed down” to the next year and adjusted against the vacancies allocable to the respective direct or promotion quota. There were certain queries for implementation of the Apex Court’s decision which have been answered by the Government Resolution dated 04.12.1986.

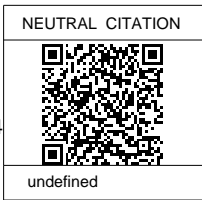
8. By the Government Resolution dated 29.03.1988, the provisional seniority list of Class-I and Class-II officers of Common Accounts cadre as on 31.03.1987 was published by applying the “push down” theory, propounded by the Apex Court, implemented through the Government Resolution dated 04.12.1986. It was further stated that four seniority lists of Deputy Engineer (Class-II) showing positions from 01.07.1967 to 30.06.1976 vide Circular



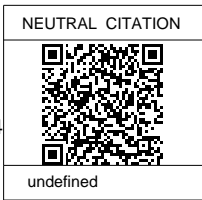


dated 26.08.1988; from 1.7.1976 to 30.06.1977 vide Circular dated 29.11.1988; from 01.07.1977 to 0.06.1978 vide Circular dated 2404.1989; from 01.07.1978 to 31.03.1979 vide Circular dated 24.04.1989, had been published, however, the names of the petitioners were not included in the aforesaid seniority lists even though the State was under obligation to publish the seniority list as per the Government Resolution dated 04.12.1986 by applying “push down” theory.

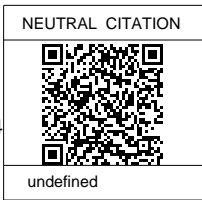
9. Dealing with the said contention, at this stage, it may be noted that the said contention of the petitioners is misconceived, inasmuch as, all five petitioners herein were appointed after the year 1980 onwards. There was no question of inclusion of their names in the seniority lists showing the seniority positions up till 31.03.1979.
10. In the entire writ petition, the main ground of challenge is to apply “push down” theory and promote the petitioners to the post of Executive Engineer (Civil) Class-I on the strength of their placement in the seniority list, by applying the ‘ push down’ theory. The contention is that on account of short fall of vacancies of direct recruits to the post of Deputy Executive Engineer, Class-II and Executive Engineer Class-I between 1960 to 1980, the petitioner did not get chance for selection to the posts of Executive Engineer



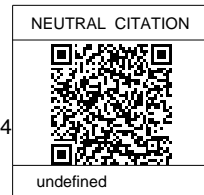
(Civil) Class-I, through competitive examinations which were held in and after the year 1980. This submission of the petitioners is also found misconceived for the simple reason that for the first time, the petitioners have approached this Court in the year 1991, after a period of approximately 11 to 12 years of their selection to the post of Deputy Executive Engineer, Class-II in the combined recruitment examinations held for both the posts, namely the Executive Engineer, Class-I and Deputy Executive Engineer, Class-II. The petitioners, who had completed their B.E. examinations only in the years 1978 and 1979 cannot claim selection for the post of Executive Engineer (Civil) Class-I prior to they having attained the minimum eligibility qualification and further having participated in the B.E. examination, within a year or two of attaining minimum eligibility qualification. Admittedly the competitive examination for selection to both the above noted posts were conducted in the year 1980 in two batches. No prejudice, therefore, can be said to have been caused to the petitioners by the fact that no competitive examinations for direct recruitment were held prior to the year 1980, inasmuch as, the petitioners (five in number) had attained the minimum eligibility qualification only in the year 1978 and 1979.



11. We may further record that a fresh seniority list was published by the State Government (Narmada Water Resources, Water Supply and Kalpsar Department) dated 15.11.2008 by applying the “push down” theory propounded by the Apex Court in the case of *N.K. Chauhan and others* (supra) implemented vide Government Resolution dated 04.12.1986. It is admitted by the petitioners in the affidavit-in-rejoinder to the Additional Affidavit filed on behalf of the respondents that with the provisional seniority list published on 15.11.2008, the “push down” theory as envisaged by the Apex Court in the case of *N.K. Chauhan and others* (supra) and implemented in the form of Government Resolution dated 04.12.1986, has been applied.
12. It is however contended that the respondents had not applied the “push down” theory in its entirety and while preparing the seniority list dated 15.11.2008, the respondents have derived a cut-off date as 01.04.1979, prior to which date the respondents have not gone into the issue of allocable vacancies for applying the “push down” theory. The result is that the vacancies for the period prior to 01.04.1979 have not been considered by the respondents while applying “push down” theory. The contention is that there is no justification for introducing the cut-off date, which is 01.04.1979.

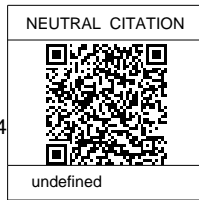


13. It is further contended that various departments of the State have revised their seniority list by complying with the Government Resolution dated 04.12.1986 in accordance with the “push down” theory, wherein the starting period of the seniority list was taken from the year 1960.
14. In reply thereto, an affidavit has been filed by the Under Secretary, Narmada Water Resources, Water Supply and Kalpsar Department as affidavit-in-Sur-rejoinder, wherein it is stated that the appointment by direct selection and promotion were to be made in the ratio of 1:3 for the period from 01.04.1979 to 20.05.1982 and, thereafter, from 21.05.1982 onwards, for the vacancy of Deputy Executive Engineer (Civil) as per the revised recruitment rules, the ratio became 1:4. The Recruitment Rules of the Deputy Executive Engineer (Civil) framed under the Government Notification dated 29.03.1979 came into force on 01.04.1979. For this reason, the department has considered the cut-off date as 01.04.1979, which is also the date when the current department, namely Narmada Water Resources, Water Supply and Kalpsar Department came into existence. As regards the seniority list of the cadre of Accounts Officer Class-I and Class-II, it is submitted that the said list was prepared on the basis of “Rota-Quota” theory instead of “push



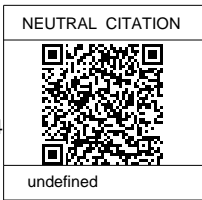
down” theory. It is further stated that six persons working as Deputy Executive Engineer in the Department have been given deemed date from the year 1969 instead of their actual date of appointment in the year 1972 as direct recruits for those appointments which were given in the year 1972. However, the case of the petitioners is not similar to those employees, inasmuch as, the petitioners did not possess requisite qualification for the appointment to the post of Deputy Executive Engineer Class-II or Executive Engineer, Class-I prior to the year 1978 and 1979, when they qualified for B.E. examination from the respective Universities. It is further stated that with effect from 01.04.1979, two departments came into existence, (1) Roads and Building Department and (2) Irrigation Department, which has been renamed as Narmada Water Resources, Water Supply and Kalpsar Department.

15. The reason for prescribing the cut-off date i.e. 01.04.1979 for applying the “push down” theory and publishing seniority list on 15.11.2008 has, thus, been given that the Department, wherein the petitioners have been appointed, came into existence only with effect from 01.04.1979. On this date, 121 promotees, Deputy Executive Engineers, who were excess in ratio, were all pushed

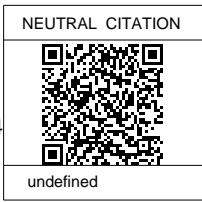


down in the year 1979-80 giving them re-adjusted date of their appointments. The petitioners (five in number), however, are the direct recruits appointed under the Direct Recruitment Rules dated 29.03.1979 and their appointment date being on or after 05.12.1980, cannot be given benefit of inclusion in the seniority list by applying the “push down” theory.

16. From the above noted facts, it is clear that there is no error in the decision of the department in prescribing the cut-off date which is 01.04.1979 for application of “push down” theory, to prepare the seniority list by bringing down all those Deputy Executive Engineers, who were promoted in excess of their quota, prior to the said date.
17. However, since the petitioners were not born in the cadre of the Deputy Executive Engineer (Class-II) as they were appointed only after the year 1980 under the Recruitment Rules notified on 29.03.1979, they cannot be given the benefit of inclusion in the seniority list by pushing down those persons, who brought into the cadre prior to 01.04.1979. The petitioners cannot be said to suffer from prescribing the cut-off date, i.e 01.04.1979 for application of “push down” theory, in preparation of the seniority list dated 15.11.2008.



18. Further in view of the categorical assertion in the affidavit of the respondent that 121 promotees Deputy Executive Engineers, who were in excess of promotion quota as on 01.04.1979, the date when the department namely Narmada Water Resources, Water Supply and Kalpsar Department came into existence, were all pushed down in the year 1979-80 by re-adjusting the date of their appointment, the petitioners are left with no grievances at all. For the simple reason that the petitioners herein were appointed in the Department only after 01.04.1979, they cannot be said to have any legitimate right to claim appointment prior to 01.04.1979, more so when they were not even qualified to participate in the competitive examination to the post of Deputy Executive Engineer Class-II or Executive Engineer Class-I.
19. At the cost of repetition, it is reiterated here that as per the own statement of the petitioners, they have passed the B.E. (Civil) examination only in the year 1978 or 1979. The contention of the petitioners that they were deprived of getting appointment to the post of Deputy Executive Engineer Class-II or Executive Engineer, Class-I prior to the year 1980, as no competitive examination was held by the State respondents, therefore, is liable to be turned down as misconceived.



20. Coming to the vires of the proviso to Rule 3 and Rule 12 of the Deputy Engineers (Civil) Gujarat Services Engineers Class-II, Recruitment Rules, 1979, which came into effect vide Notification dated 29.03.1979, suffice it to note that these Rules are in the Statute book since the year 1979 and they were applicable in the recruitment/selection of the petitioners herein. The challenge to the validity of the Recruitment Rules which have done away the “carry forward” rule of the vacancies of one source of recruitment to the subsequent year, cannot be entertained after a period of more than 10 years, that too at the instance of the writ petitioners who came into service on the strength of the said rules. It is settled that it is for the recruiting agency to prescribe the rules of recruitment to a particular post. The Recruitment Rules, which have done away with the “carry forward” of the vacancies of any one of the quota to the subsequent years, cannot be said to have caused any prejudice to the petitioners who have been born into the cadre only after 04.12.1980, i.e. the dates of appointment of all the five petitioners to the posts of Deputy Executive Engineer, Class-II being on or after 04.12.1980.
21. For the above discussion, none of the prayers made in the writ petition can be granted. The writ petition is dismissed, accordingly.

**(SUNITA AGARWAL, CJ )**

**(ANIRUDDHA P. MAYEE, J.)**

SUDHIR