T.A/C66F

IN THE CENTRAL ADMINISTRATILVE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI.

Regn.No.OA 1311/1989 Date of decision:29.01.1993.

with MP No.3271/92

Shri S.K. Jain ...Applicant

Vs.

Union of India & Others ....Respondents

For the Applicant ...Shri Shyam Moorjani, Counsel

For the Respondents ..Mrs. Raj Kumari Chopra, Counsel

CORAM:

The Hon'ble Mr. P.K. Kartha, Vice Chairman(J)

The Hon'ble Mr. B.N. Dhoundiyal, Administrative Member

1. Whether Reporters of local papers may be allowed to see the Judgment? Yes

2. To be referred to the Reporters or not? Yes

JUDGMENT

(of the Bench delivered by Hon'ble Shri P.K. Kartha, Vice Chairman(J))

In a batch of eleven cases, including the instant case, questions of seniority and promotion of officers of the Military Engineering Service (MES for short) have been raised. The applicants in these applications are direct recruits belonging to two categories - those who qualified in the Competitive Engineering Services Examination and those who qualified in the interview by Union Public Service Commission (UPSC for short) through relaxation of the rules. They were initially appointed as Assistant Executive Engineers(AEE for short). Some of them had been promoted to the grade of Executive Engineer(EE for short)) after holding regular DPCs and some had been promoted on ad hoc basis but these promotions had been made subject to the final outcome of the litigation which was pending in the Courts. MP 1180/1987 filed by the Union of India praying for transfer to the Principal Bench from the Jodhpur, Calcutta and Hyderabad Benches, applications filed by the officers of the MES was allowed by the Hon'ble Chairman vide order dated 9.5.1989 so as to avoid conflict of decisions and that is how these cases have come up before us for consideration and disposal.

2. We have heard the learned counsel for both parties at length and have gone through the voluminous records carefully. The respondents have made available the relevant minutes of the meetings of the Departmental Promotion Committee (DPC for short) which have been perused by us. We have duly considered the catena of

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decisions relied upon by both sides*. There are three major groups of officers of Engineering Cadre of MES, namely, the promotee group, the direct recruit (interview) group and the Direct Recruit (Examination) group. The interests of these groups are not similar. Nevertheless, some of the issues are common and it would be convenient to discuss them at the outset before considering the facts of each case.

3. Broadly speaking, the issues raised arise out of the decision of the Supreme Court in A. Janardhana Vs. Union of India, 1983 SCC (L&S) 467. The applicants are contending that Janardhana's case has not been properly understood and implemented. The respondents are contending that they have implemented it in letter and spirit.

*Case law relied upon by the applicants:

AIR 1973 SC 1088; AIR 1964 SC 423; 1976(1) SLR 806; AIR 1987 SC 1889; AIR 1968 SC 1113; 1989(9) ATC 799; 1986 (4) SLJ 564; 1988(3) SLJ 208; 1988(3) SLJ 241; AIR 1988 SC 2255; 1989(1) SLJ (CAT) 430; 1968 SLR 333; 1976(1) SLR 805; 1991(2) SLJ (CAT) 100; 1989(1) SLJ (CAT) 257; 1992(2) JT(SC) 264; 1989(9) ATC 396; AIR 1990 SC 311.

*Case law relied upon by the respondents:

1989(4) SLJ (CAT) 927; ATR 1987(2) CAT 637; ATR 1987(2) CAT 60; 1991(1) SLJ(CAT) 530; 1984(4) SLJ 564; 1987(1) SLJ(CAT) 462; 1989(3) SLJ(CAT) 219; 1989(4) SLJ(CAT) 723; 1990(2) SLJ(CAT) 268; 1987(1) SLJ(CAT) 592; 1989(2) SCALE 205; AIR 1992 SC 1806; 1992(3) SLJ 73; JT 1992(5) SC 667; JT 1992(5) SC 565; JT 1992(5) SC 525; 1990(14) ATC 379; AIR 1969 SC 1249; 1974(1) SLR 595; AIR 1955 SC 233; 1987 Supp.SCC 15; 1988(3(SLJ 204; 1988(3) SLJ(CAT) 241; 1988(3) SLJ(SC) 61; 1991(1) SLJ (CAT) 4; AIR 1987 SC 1748; AIR 1985 SC 1378; 1989(9) ATC 799; 1990(1) ATJ 440; 1971(1) SCC 583; 1974(4) SCC 308; 1968(1) SCR 111; JT 1992(5) SC 92; 1991(18) ATC 65; AIR 1992 SC 435; 1991(2)) SLJ 100; 1991(2) SLJ 14; 1974(1) SLR 594; AIR 1985 SC 227; AIR 1967 SC 1467; AIR 1967 SC 1910; AIR 1969 Delhi 15; AIR 1985 SC 1558; AIR 1970 SC 1748; AIR 1985 SC 1457; 1992(3)SLJ 272; 1987 SCC(L&S) 272; 1989(2)ATC 499; AIR 1974 SC 87; AIR 1968 SC 507; AIR 1971 SC 1318; AIR 1987 SC 1889.

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4. Shri Janardhana was an Assistant Executive Engineer belonging to the promotee category. He had filed a Writ Petition in the Karnataka High Court in 1979 questioning the validity and legality of the seniority list dated June 14, 1974 and the panel of promotion dated January 13, 1975 in respect of 102 officers prepared on the basis of the impugned seniority list. Prior to the publication of the impugned seniority list, a seniority list of AEE was drawn up in 1963 and another list drawn up in 1967/68. In the operative part of the judgment in Janardhana's case, the Supreme Court has directed as follows:-

"Let a writ of certiorari be issued quashing and setting aside the seniority list dated June 14, 1974. It is further hereby declared that the seniority lists of 1963 and 1967/68 were valid and hold the field till 1969 and their revision can be made in respect of members who joined service after 1969 and the period subsequent to 1969. The panel for promotion in respect of 102 officers included in E-in-C's Proceedings No.65020/EE/74/EIR dated January 13, 1975 is quashed and set aside. All the promotions given subsequent to the filing of the petition in the High Court

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are subject to this decision and must be readjusted by drawing up a fresh panel for promotion keeping in view the 1963 and 1967/68 seniority lists of AEE in the light of the observations contained in this judgment".

5. The seniority list of 1974 was prepared consistent with the quota rule. Before the said seniority list was prepared, one Bachan Singh and another, two promotees to the post of Assistant Executive Engineer in the years 1958 and 1959 respectively had filed a Writ Petition in the Delhi High Court challenging the appointment of several direct recruits of MES on the ground that their appointment was contrary to and in violation of the rules of recruitment and they were not validly appointed and, therefore, could not become members of the Service. The Writ Petition was dismissed by the Delhi High Court and the matter was carried in appeal to the Supreme Court. The Supreme Court in Janardhana's case observed that in Bachan Singh's case, the court "upheld the appointment of those direct recruits who were appointed after interview by the UPSC by holding that that was done in relaxation of the rules both as to competitive examination and the promotions were given after relaxing the quota rule. The court held that direct recruits who were appointed by interview fall within the class of direct recruits".

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6. In Janardhana's case, it was observed that since recruitment contrary to the recognised mode of recruitment under the relevant rules was held valid in Bachan Singh's case, "it must follow as a corollary that the same emergency compelled the Government to recruit by promotion engineers to the post of AEE Class-I in excess of the quota by exercising the power of relaxation and such recruitment ipso facto would be valid. The promotees being validly promoted as the quota rule was relaxed, would become members of the Service. Whether the vacancies were in the permanent strength or in the temporary cadre is irrelevant because none of them is reverted on the ground that no more vacancy is available". The appellant and those similarly situated were recruited by promotion during these years in excess of the quota as provided in the rules. The recruitment having been done for meeting the exigencies of service by relaxing the rules, including the quota rule, the promotion in excess of quota would be valid. Once the recruitment was legal and valid, there was no difference between the holders of permanent posts and temporary posts in so far as it related to all the members of the service. Persons recruited to temporary posts would be members of the Service.

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7. In Janardhana's case, the Supreme Court took note of the fact that the quota rule was wholly relaxed between 1959 and 1969 to suit the requirements of service and observed that no effect can be given to the seniority rule which wholly interlinked with the quota rule and cannot exist apart from it on its own strength. This was implicit in the seniority lists prepared in 1963 and 1967-68 in respect of Assistant Executive Engineers which were drawn up in accordance with the principle that continuous officiation determines the inter se seniority. It was observed that the aforesaid two seniority lists were legal and valid and drawn up on the basis of the principle which satisfied the test of Article 16 and that they must hold the field. The Supreme Court further observed that the 1974 seniority list was liable to be quashed on the following grounds:-

"The criteria on which 1974 seniority list is founded are clearly illegal and invalid and this stems from a misunderstanding and misinterpretation of the decision of this Court in Bachan Singh's case. It also overlooks the character of the appointments made during the period 1959 to 1969. It treats valid appointments as of doubtful validity. It pushes down persons validly appointed below those who were

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never in service and for reasons which we cannot appreciate, it is being made effective from 1951. In our opinion, there was no justification for redrawing the seniority list affecting persons recruited or promoted prior to 1969 when the rules acquired statutory character".

8. With regard to the prayer of the appellant for a direction to quash the panel for promotion dated January 13, 1975 of 102 officers on the ground that it was drawn up on the basis of the impugned seniority list in which the appellant and several similarly situated Assistant Executive Engineers promoted way back in 1962 onwards did not find their place and were, therefore, not treated as being within the zone of promotion, the Supreme Court observed in Janardhana's case that this relief must follow as a necessary corollary. The Supreme Court observed that a fresh panel for promotion will have to be drawn up consistent with the seniority list of 1963 and 1967 "because it was not disputed that promotion from the cadre of AEE to Executive Engineer is on the principle of seniority-cum-merit". The appellant had sought interim relief by way of injunction restraining the respondents not to promote any one on the basis of the panel. The Supreme Court declined to grant such relief "because exigencies of service do demand that the vacancies have to be filled". In order to protect the interest of the appellant and those similarly situated, it was made clear that "any

promotion given subsequent to the date of the filing of the petition in the High Court must be temporary and must abide by the decision in this appeal. Therefore, consequent upon the relief being given in this appeal, the promotions will have to be readjusted and the case of the appellant and those similarly situated will have to be examined for being brought on the panel for promotion".

9. Some direct recruits through examination filed review petitions in the Supreme Court which were dismissed (CMP Nos. 8727-31 of 1983 - Madanlal and Others Vs. U.O.I. and CMP Nos. 9856-61 of 1983 - O.P. Kalsian & Others Vs. Union of India). Contempt petition filed in Janardhana's case was also dismissed(CMP No.25406 of 1984). Thus the judgment of the Supreme Court in Janardhana's case is final and binding.

10. An important issue raised in the litigation before us is whether promotion from the cadre of Assistant Executive Engineer to Executive Engineer is on the principle of seniority-cum-merit or on the principle of merit-cum-seniority.

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11. Broadly speaking, there are two methods for promotion known to service jurisprudence - selection method and non-selection method. The relative importance of seniority and merit would depend on the method specified in the Recruitment Rules. The relevant decisions of the Supreme Court on the subject may be summed up as follows:-

(i) In Sant Ram Sharma Vs. State of Rajasthan, AIR 1967 SC 1910, the Supreme Court observed that it is a well established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority and that when the claim of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available.

(ii) In State of Mysore Vs. Syed Mehmood, 1968 SLR 333 at 335, the relevant rules provided for promotions to be made by selection on the basis of seniority-cum-merit. The Supreme Court observed that selection will be on the basis of seniority subject to fitness of the candidate to discharge the duties of the post from among persons eligible for promotion. It was further observed that "where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted".

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(iii) In Janki Prasad Parimoo Vs. State of J&K, 1973(1) SCC 420 at 431, it was observed that "selection means that the man selected for promotion must be of merit. Where promotion is by seniority, merit takes the second place but when it is a selection, merit takes the first place and it is implicit in such selection that the man must not be just average".

(iv) In Union of India Vs. M.L., Capoor, 1974 SCC(L&S 5 at 24-25, the Supreme Court has considered the meaning of the service rule which stipulated that the selection for inclusion in the select list shall be based on merit and suitability in all respects with due regard to seniority. It was observed that "what it means is that for inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or, if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale".

(v) In State of Kerala Vs. N.M. Thomas, 1976 SCC(L&S) 227 at 252, the Supreme Court observed that "with regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority".

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(vi) In D.K. Mitra Vs. Union of India, 1985 SCC(L&S) 879, the Supreme Court upheld the validity of promotions made on the basis of merit to the grade of Divisional Medical Officers. The rules were amended to provide promotion by non-selection method (i.e. seniority-cum-suitability). It was held that promotions and appointments made under the new rules cannot affect promotions and appointments already made under the unamended rules.

(vii) In R.S. Dass Vs. Union of India, 1987(2) SLJ (SC) 55 at 63, the Supreme Court observed that "where selection is made on merit alone for promotion to a higher service, selection of an officer although junior in service in preference to his senior does not strictly amount to supersession. Where promotion is made on the basis of seniority the senior has preferential right to promotion against his juniors but where promotion is made on merit alone, senior officer has no legal right to promotion and if juniors to him are selected for promotion on merit the senior officer is not legally superseded. When merit is the criteria for the selection amongst the members of the service no officer has legal right to be selected for promotion, except that he has only right to be considered along with others".

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(viii) In State Bank of India Vs. Mohd. Mynuddin, 1987 SCC(L&S) 464, it was observed that "whenever promotion to a higher post is to be made on the basis of merit no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone with effect from the date on which his juniors are promoted".

(ix) In S.B. Mathur Vs. Chief Justice of Delhi High Court, 1989 SCC(L&S) 183, it was observed that where selection is to be based on merit, seniority can be taken as a relevant factor for limiting the zone of consideration provided that this is not done so rigidly as to exclude a proper selection on merit being made. The minimum eligibility qualifications has to be kept distinct from the zone of consideration and even if there are a large number of candidates who satisfy the minimum eligibility requirement it is not always required that they should be included in the zone of consideration.

(x) The distinction between the method of promotion by selection and of promotion on the basis of seniority-cum-merit has been noticed in the case of R.S. Raghunath Vs. State of Karnataka, 1991(2) SCALE 808.

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12. According to the relevant Recruitment Rules notified in January, 1970, the post of Executive Engineer is a "selection post". The applicants in some of these applications have referred to other organised Engineering Services where the corresponding post in the senior Class I scale is non-selection post. Even in the Surveyor cadre of MES, the post of Surveyor of Works which corresponds to that of Executive Engineer is treated and described as "non-selection post". Thus according to them, the description of the post of Executive Engineer as "selection post" in MES was an erroneous departure from the normal pattern of promotion in corresponding post of other equivalent organised services. The respondents have argued that any reference to other organised services as well as Surveyor Cadre of MES either in matter of duties or in matter of promotion to the post of Executive Engineer has no bearing on the case as promotions to the grade of Executive Engineer in MES are made on the basis of the statutory recruitment rules which classify the post as a "selection post".

13. The applicants have relied upon the submissions made by the Department itself before the Estimates Committee of Parliament to the effect that one of their chief aims is to bring some parity in promotional prospects in the MES with

those prevailing in other Engineering Departments like Railways and the CPWD(Vide 25th Report of the Estimates Committee, 1981-82). The Department had submitted a Cadre Review proposal to the Government in 1980-81 in which it was stated that the post of Assistant Executive Engineer was functionally a training post. According to the applicants, this indicated that promotion to the next higher grade i.e. to the post of Executive Engineer was to be made on the basis of seniority-cum-fitness.

14. As against the above, the respondents have contended that no decision had been taken by the Government at that point of time to make the post of Executive Engineer a non-selection post to be filled on the basis of seniority only. They have also denied that the post of Assistant Executive Engineer has been accepted to be a training post.

15. Another point urged by the applicants is that the Third Pay Commission had stated in Para 6 of Chapter XIV of its report that the junior grade in organised Engineering Services serves as a training and preparatory period before promotion to senior scale after five to six years. According to them, the above recommendation has been accepted by the Government. In this context, they have relied upon the judgment of the Supreme Court in Purshottam Lal Vs. Union of India, AIR 1987 SC 1088.

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16. As against the above, the respondents have stated that the report of the Third Pay Commission does not contain any recommendation for making the post of Executive Engineer a non-selection post to be filled by seniority-cum-fitness and, therefore, the question of its acceptance does not arise. According to them,Purushottam Lal's case is not applicable to the facts and circumstances of the case.

17. The ruling in Janardhana's case principally related to the breakdown of the quota-rota rule and the enunciation of the principle that continuous officiation determines inter se seniority of direct recruits and promotees. Accordingly, the Supreme Court set aside and quashed the seniority list dated 14.6.1974 and upheld the validity of the seniority lists of 1963 and 1967/68. The Supreme Court further set aside and quashed the panel for promotion in respect of 102 officers on the basis of the seniority list of 1974. As regards promotions made subsequent to the filing of the petition in the High Court, it was directed that the same would be subject to the decision in Janardhan's case and must be readjusted by drawing up a fresh panel for promotion keeping in view the 1963 and 1967/68 seniority lists of Assistant Executive Engineers in the light of the observations contained in the judgment. The Supreme Court did not specifically consider

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the question as to whether the promotion from Asstt. Executive Engineer to Executive Engineer is to be on the basis of selection method or non-selection method, though it has made an observation in para 37 of the judgment that "it was not disputed that promotion from the cadre of AEE to Executive Engineer is on the principle of seniority -cum-merit". Apparently, the above observation was made without regard to the the relevant recruitment rules of 1970 dealing with the selection method to be followed for promotion from Assistant Executive Engineer to Executive Engineer.

18. The respondents have mentioned in some of the counter-affidavits filed by them that the method followed by them for promotion to the post of Executive Engineer is seniority-cum-merit in some paras and merit-cum-seniority in some other paras. This is hardly relevant as the matter is to be governed by the relevant recruitment rules. The relevant recruitment rules of 1970 classified the post of Executive Engineer as "Selection Post". In view of this, we are of the opinion that promotion made by adopting the selection method cannot be faulted on legal or constitutional grounds. During the hearing of these matters, our attention was drawn to the recruitment rules for the post of Executive Engineer notified on 13.6.86 which again classify the post as "Selection Post". The recruitment rules of 1986 were,

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however, superseded by rules notified on 9.7.91 entitled the Indian Defence Service of Engineers(Recruitment and Conditions of Service)) Rules, 1991, according to which the post of Executive Engineer is to be filled upto the extent of sixty six 2/3 percent by promotion from the grade of Assistant Executive Engineers on non-selection basis and of thirty three 1/3 percent from the grade of Assistant Engineer on selection basis. The amended rules of 1991 shall come into force on the date of their publication in the official Gazettee which is 9.7.1991. In other words, the amended rules are only prospective and not retrospective in operation and would not govern the filling up of the vacancies prior to 9.7.1991. That being so, the amendment of the rules have no relevance to these applications before us.

19. As observed above, in terms of Para 37 and 39 of the judgment of the Supreme Court in Janardhana's case, any promotion given subsequent to the date of filing of the petition in the High Court in 1979 will have to be readjusted and the case of Shri Janardhana and those similarly situated will have to be examined for being brought on the panel for promotion. A fresh panel for promotion will have to be drawn up consistent with the seniority list of 1963 and 1967 in view of the fact that the Supreme Court had quashed the panel for promotion dated 13.1.1975 of 102 officers on the ground that the same was drawn up on the basis of the impugned seniority list of 1974 which had also been quashed.

20. We are, therefore, of the opjnion that the action of the respondents in reviewing the promotions made upto the filing of the petition in the Karnataka High Court and in preparing fresh panels of promotions after such review and subsequent periods was truly in implementation of the directions of the Supreme Court in Janardhan's case. Promotions made on the basis of the impugned seniority list of 1974 had been quashed by the Supreme Court in Janardhan's case. Promotions made after the filing of the petitions in the Karnataka High Court have been held to be subject to the outcome in Janardhana's case. Therefore, the readjustment of promotions, referred to in Janardhana's case,does not necessarily mean that those who have already been promoted should not be disturbed in their existing positions in the panel of promotion regardless of the merit as adjudged by the DPC on the basis of the seniority lists of 1967/68. The purport of the judgment in Janardhana's case is that the entire exercise of making promotions to the post of Executive Engineers should be undertaken afresh on the basis of the 1967/68 seniority list in the light of the observations contained in the judgment. Whether or not it would be fair and just to revert those who had already been duly promoted as Executive Engineers, after the lapse of a few years, while drawing up fresh panels for promotion pursuant to the directions of the Supreme Court in Janardhana's case is an entirely different matter, which will be considered later in the course of this judgment.

21. The DPCs for 1976, 1977 and 1978 were held on the basis of the seniority list issued in June, 1974 which had been set aside and quashed in Janardhana's case. Accordingly, Review DPCs for the original DPCs held in 1974, 1976, 1977 and 1978 were held from 28th May to 31st May, 1984 and 30th July to 6th August, 1984 in which those persons who were eligible as on the date of the meeting of original DPC were considered. All the persons who were eligible at that point of time as per the seniority list upheld by the Supreme Court were considered. As a result thereof, revised panels for promotion to the Grade of Executive Engineer in replacement of the panels recommended by the original DPCs held in the years 1974, 1976, 1977 and 1978 were issued. These panels were recommended by the review DPCs on the basis of the 1967/68 seniority list which was held to be valid by the Supreme Court.

22. DPC for filling up of the vacancies of 1979 and 1980 was held in June, 1985 on the basis of the seniority list of 1967/68 circulated on 19.11.1984 after deletion of such persons as had been promoted on the recommendation of Review DPC. The respondents have stated that there was no need to make any additions to the seniority list of 1967/68 at that stage because the zones of consideration for the number of vacancies of 1979 and 1980 were fully covered by that list.

23. DPC for filling up the vacancies of 1981 to 1984 was held from 19th May to 22nd May, 1986 as a result of which panel of 216 officers was published on 13th June, 1986. The DPC had before it the seniority list circulated in 1985 containing additions to the seniority of 1967/68 in respect of such officers as had joined service from 1969 onwards and those left over from the said seniority list after filling up the vacancies of 1979 and 1980 by the persons recommended by the DPC held in June, 1985.

24. The Tribunal would not ordinarily interfere with the proceedings of the DPC which is chaired by a Member of the UPSC, unless there is evidence on record to indicate that they were vitiated by unfairness or arbitrariness. There is no such evidence on record in these applications before us.

25. Some of the applicants have argued that according to the recruitment rules of 1970, promotion to the grade of Executive Engineer is to be by a Group 'A' DPC consisting of (a) Chairman/Member of the UPSC (b) Joint Secretary (P&W), Ministry of Defence and (c) Engineer-in-Chief. In the instant case, the Joint Secretary (P&W) did not attend. Engineer-in-Chief also did not attend the meeting and in his place one Maj. General J.P. Sharma attended the meeting.

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Thus, the very constitution of the DPC was wholly illegal and unsustainable. Apart from this, the DPC did not sit for more than 4 days . It purported to have scrutinised a large number of confidential reports in such a short period, leading to the inference that the scrutiny was made in a mechanical manner.

26. The respondents have denied the aforesaid contentions and allegations. According to them, Joint Secretary(P&W) did not attend the meeting of the DPC but it was because of his other urgent preoccupation. Major General J.P. Sharma who was officiating Engineer-in-Chief and who belonged to the MES attended the meeting. The DPC was presided over by a member of the UPSC and being experts in the job, there was nothing strange in doing the job in 4 days.

27. In Union of India Vs. Somasundaram, AIR 1988 SC 2255, the Supreme Court has upheld the validity of the Office Memorandum No.22011/6/76-Estt.D dated 30.12.76 issued by the Department of Personnel according to which "the proceedings of the Departmental Promotion Committee shall be legally valid and can be operated upon notwithstanding the absence of any of its members other than the Chairman provided that the member was duly invited but he absented himself for one reason or the other and there was no deliberate attempt to exclude him from the deliberation of the DPC and provided further that the majority of the members constituting the Departmental Promotion Committee are present in the meeting".

28. From the relevant file of the respondents, we have seen that though they had initially informed the UPSC that the Joint Secretary (P&W) and Lt. Gen. R.K. Dhawan, Engineer-in-Chief would attend the meeting of the DPC to be held from 19.5.1986 to 22.5.1986, the Jt. Secretary informed on 19.5.86 that he was not attending the meeting due to preoccupation. As regards Lt. Gen. Dhawan, the Engineer-in-Chief's Branch informed the Ministry of Defence on 16.5.1986 that he was required to proceed to Jaipur for some urgent operational requirements and that Maj. General J.P. Sharma, Officiating Engineer-in-Chief would attend the DPC.

29. In view of the above, the absence of the Joint Secretary(P&W) at the meetings of the DPC would not vitiate the proceedings. Major General Sharma who was officiating Engineer-in-Chief and who belonged to the MES was not incompetent to participate in the deliberations of the DPC. As the majority of the Members were present, we are of the opinion that the proceedings of the DPCs cannot be said to be invalid or unconstitutional.

30. Some of the applicants have argued that relative assessment was not on the basis of equality. While some have been adjudged on their performance in the post of Assistant Executive Engineer, some others like the applicants have been

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also adjudged in the higher post of Executive Engineer. In this context, they have relied upon the judgment of the Full Bench of this Tribunal dated 29.10.1991 in OA 306/1990 and connected matters - S.S. Sambus and Others Vs. Union of India and Others. In our opinion, the aforesaid decision of the Full Bench and other decisions cited before us are distinguishable. In our opinion, where promotions are to be made by selection method, as in the instant case, it is entirely left to the DPC to make its own classification of the officers being considered by them for promotion, irrespective of the grading that may be shown in the confidential reports. It is for the DPC to consider the confidential reports as a whole in this regard.

31. The applicants have stated that no supersession took place in the selection made in 1985 but there was large scale supersessions in the selection made in 1986. The respondents have stated that selections in 1985 and 1986 were made on the basis of the same selection method and that it was a matter of chance that there were no supersessions in the selection made in 1985. In our opinion, the proceedings of the DPCs chaired by Member of the UPSC cannot be invalidated on the ground alleged by the applicants.

32. There is, however, another aspect of the matter.

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Some of the applicants had been duly promoted to the grade of Executive Engineer on the basis of the seniority which existed at the relevant time and before the Supreme Court delivered its judgment in Janardhana's case. These seniority lists have been redrawn or updated in the light of the judgment of the Supreme Court in Janardhana's case. In our considered opinion, justice and equity require that those who have already been promoted shall not be reverted and they shall be accommodated in the grade of Executive Engineer so as to protect the pay and allowances and the increments drawn by them in the said grade. Their pay and allowances, should be fixed accordingly. They would also be entitled to increments in the grade of Executive Engineer from the respective dates of their initial appointment in the grade of Executive Engineer. Their further promotions shall, however, be made on the basis of the seniority lists prepared by the respondents pursuant to the judgment of the Supreme Court in Janardhana's case and in accordance with the relevant recruitment rules.

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33. In the above background, we may consider OA 1311/1989 filed by Shri S.K. Jain while working as Assistant Executive Engineers in the Military Engineering Service (MES) under the Ministry of Defence. The applicant has prayed for the following reliefs:-

It is, therefore, most respectfully prayed that this Hon'ble Tribunal may be graciously pleased to:

(a) allow this application under Section 19 of the Administrative Tribunal ACt, 1985 with cost.

(b) issue appropriate order/or orders, direction or directions.

(i) declaring the promotion of the applicant to the post of Executive Engineer as made in the year 1979 as regular and the said promotion is entitled to continue as such and further entitled to all benefits like promotion, seniority and further promotion.

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(ii) further declaring that the post held by the applicant was not liable to be reconsidered by another subsequent DPC.

(iii) to declare that the review DPCs held in the year 1984 as illegal and arbitrary.

(iv). directing the respondents to review panels prepared by the review DPCs for the year 1975 to 1984 after excluding the officers working in the post of Surveyor or Works.

(v) directing the respondents to reassess the vacancies of Executive Engineers from years 1969 onward for adjustment/promotions to the post of Executive Engineer.

(vi) directing the respondents to readjust/promote the applicant in the first available vacancy and to assign seniority from that data.

(vii) to declare that the vacancies of Executive Engineer can only be filled as per para 6, appendix V of 1949 Rules.

(viii) to declare that ad hoc appointments/promotions made in various years from 1975 onward were in regular vacancies and appointments made were regular and should count for seniority and future promotions.

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(ix) to declare that the charge-sheet issued in June 1985 cannot deny promotions due to applicant in any post prior to that date or even after.

(x) to declare that promotions due to applicant and denied by allowing the vacancy to be occupied by Army Officers as illegal. And to further declare that applicant be adjusted in the vacancy so occupied with all consequential benefits.

(xi) to declare that the treatment given to the applicant is unjust, unfair, illegal and against natural justice.

(xii) pass such other and further orders as this Hon'ble Tribunal deem fit and proper to pass in the circumstances of the case to meet the ends of justice.

34. The applicant joined the MES as Assistant Executive Engineer on his selection in the Combined Engineering Services Examination held by the UPSC in 1966. He was promoted to the grade of Executive Engineer by a DPC held in 1978 in the UPSC on the basis of the 1974 seniority list of Assistant Executive Engineers. He joined the post of

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Executive Engineer on 15.1.1979. The 1974 seniority list was quashed by the Supreme Court in Janardhana's case and the promotions made on the basis of the said seniority were also quashed. Thereafter, the respondents held review DPC in 1984 and DPCs in 1985 and 1986. The respondents have stated that he was considered for promotion as Executive Engineer by the DPC held in 1985 against the vacancies of 1979 and 1980 but could not be selected because of his low seniority in the grade of Assistant Executive Engineer and the grading awarded to him by the DPC. He was again considered for promotion to the grade of Executive Engineer by the DPC held in 1986 for the vacancies of 1981, 1982, 1983 and 1984 but could not be empanelled because of the fact that he was involved in disciplinary cases. He was again considered for promotion to the grade of Executive Engineer by the DPCs held in 1987, 1988 and 1989 but could not be regularised in the grade of Executive Engineer because of his being involved in three disciplinary cases.

35. The applicant has prayed in this application for a declaration that the charge-sheet issued to him in June, 1985 cannot deny to him promotions due in any post prior to that date or even after. The particulars of the charge-sheet have not been mentioned in the application or its annexures.

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36. Apart from the above prayer, the other reliefs prayed for in the application are substantially similar to those contained in OA 54 of 1988. The applicant was promoted to the grade of Executive Engineer in 1979 pursuant to the DPC held in 1978 on the basis of the 1974 seniority list which was quashed by the Supreme Court in Janardhana's case. Thereafter, he has been continued in the grade of Executive Engineer, though on ad hoc basis. In our opinion, the drawing up of fresh seniority lists and fresh panels for promotions by the DPCs were in conformity with the directions contained in the judgment of the Supreme Court in Janardhana's case. There is nothing on record to indicate that the DPCs chaired by Member of the UPSC proceeded in the matter unfairly or arbitrarily. The applicant is, therefore, not entitled to the reliefs sought by him, except to the extent indicated in para 32 above.

37. After the hearing was concluded the applicant filed MP No.3271/1992 stating that he had come to know that the respondents were contemplating to revert him from the post of Executive Engineer to that of Assistant Executive Engineer and in view of this he prayed for an interim direction to the respondents restraining them from doing so. On 22.10.1992, the Tribunal passed an interim order directing that the applicant be not reverted from the post of Executive Engineer.

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38. The respondents have filed their reply to the aforesaid MP. They have stated that they are not planning to revert him, that he is holding the post of Assistant Executive Engineer on regular basis, that he was promoted in 1978 on the basis of invalid and illegal seniority list of 1974 as Executive Engineer and that the said seniority list and promotions based thereon were set aside and quashed by the Supreme Court in Janardhana's case. In view of this, his previous service was considered as ad hoc and he was allowed to continue as such under the sanctions issued from time to time. The last sanction lapsed on 30.11.1991. They have further stated that he is involved in three disciplinary cases at present, including one pertaining to CBI investigation and that in one of these cases, he has been awarded a penalty of "withholding of one increment of his pay for a period of one year without cumulative effect" vide Presidential order dated 28.11.1991 because of his involvement in a disciplinary case. Accordingly, they have contended that he ceased to be ad hoc Executive Engineer w.e.f. 28.11.1991, i.e. the date of the award of penalty and accordingly he will function as an Assistant Executive Engineer. In this context, they have relied upon OM dated 12.1.1988 issued by the Department of Personnel & Training.

39. There is nothing on the record to indicate that when the applicant was promoted to the grade of Executive Engineer on the basis of the recommendations of the DPC in

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1978, any charge-sheet was issued to him. Issue of charge-sheet on subsequent dates would not, in our opinion, affect the promotion given to him. However, in view of the penalty imposed on him by order dated 28.11.1991, he would not be entitled to increment of his pay from 28.11.1991 to 28.11.1992. Subject to this, we hold that the applicant be treated to have continued in the grade of Executive Engineer for the purpose of protection of his pay and allowances and the increments drawn by him and he shall not be reverted from the said grade. His pay and allowances should be fixed on that basis. We order and direct accordingly. OA 1311/1989 and MP 3271/1992 filed thereunder are disposed of accordingly.

(B.N. DHOUNDIYAL)
MEMBER(A)
29.01.1993

(P.K. KARTHA)
VICE CHAIRMAN(J)
29.01.1993

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