

“concession”, Rule (3) cannot be applied. Therefore, the question of applicability of Rule 3 was pending before the High Courts, which came to be concluded by the judgment of the Hon’ble Supreme Court in **Arun Kumar’s** case (*supra*). The issue raised was subject to interpretation by the Courts. Therefore, it cannot be said that the petitioners cannot be visited with the consequences of the amendment from the retrospective date.

(17) Thus, we do not find any merit in the present petition. Hence, the present writ petition is dismissed.

R.N.R.

Before M.M. Kumar & Jitendra Chauhan, JJ.

ANIL SAGAR,—Petitioner

versus

STATE OF HARYANA AND OTHERS,—Respondents

C.W.P. No. 13811 of 2007

19th August, 2008

Constitution of India, 1950—Art. 226—Haryana Public Works Department (Buildings and Roads Branch) Research Laboratory (Group B) Service Rules, 1996—R1.7—Promotion of respondent No. 4 to post of Assistant Director (Lab.)—Respondent not possessing essential qualifications as required under R1.7—Requirement of fulfilling qualification is mandatory and not merely directory—Under Rule 17 relaxation could be granted in case of ‘necessity’ or ‘expediency’—Petitioner possessing adequate qualification and experience—Neither any ‘necessity’ in existence nor it would be expedient to relax qualification because educational qualification is required to be possessed by candidate as a condition of eligibility for promotion to higher post—Petition allowed.

Held, that the language of Rule 7 starts with the expression that no person shall be appointed unless he is in possession of qualification and experience. It shows that the requirement of fulfilling the qualification

is mandatory and not merely directory. Respondent No. 4 does not possess essential qualifications either of M.Sc or Bachelor of Engineer or Bachelor of Technology. He is simply B.Sc whereas the petitioner has acquired degree of A.M.I.E. which is recognized and equivalent degree for promotion to the post of Assistant Director (Lab.). The requirement of Rule 7 is mandatory and under Rule 17 of the Rules relaxation could be granted in case of 'necessity' or 'expediency'. There is neither any necessity in existence because the petitioner with adequate qualification and experience is available nor it would be expedient to relax the qualification because educational qualification is required to be possessed by the candidate as a condition of eligibility for promotion to the higher posts.

(Paras 12 & 13)

S. K. Sud Advocate *for the petitioner.*

Harish Rathee, Sr. DAG Haryana.

R.S. Mamli, Advocate *for respondent No. 4.*

Ms. Minakshi, Advocate *for respondent No. 5.*

M. M. KUMAR, J.

(1) This petition filed under Article 226 of the Constitution prays for quashing promotion of Jaibir Singh, respondent No. 4 on the post of Assistant Director from the post of Research Assistant in the office of Director-cum-Superintending Engineer, Research Laboratory, P.W.D. B&R Branch, Hissar. The principal ground urged in support of the petition is that respondent No. 4 has been given promotion despite the fact that he was not qualified in accordance with Rule 7 of the Haryana Public works Department (Buildings and roads Branch) Research Laboratory (Group B) Service Rules, 1996 (for brevity 'the Rules') and that power of relaxation postulated by Rule 17 of the Rules could not be exercised once the person like the petitioner who is fully qualified is available.

(2) Brief facts of the case are that the petitioner has been working on the post of Research Assistance since 20th June, 1987. His

4. Qualifications : (i) B.Sc. with Physics, Chemistry and Mathematics
5. Place of posting : Assistant Director, Research Lab. Bhiwani
6. Experience : 31-3-1979 to 31-12-1986 (WC) +1-1-1987 to onwards on regular basis.

Smt. Urmila Garg is M.Sc in Mathematics. Her name is also being sent for your kind decision.

It is further stated that as per service Rules Research Lab. Group B. Oct. 1, 1996 :

Academic qualifications and experience, if any, for direct recruitment :

1. Ist Class M.Sc. in Physics or Chemistry

OR

Ist Class Bachelor of Engg., Bachelor of Technology
Master of Technology.

Academic qualifications and Experience, if any for appointment by promotion :

Master of Science/Bachelor of Engg./Bachelor of Technology or equivalent with 5 years experience as Research Assistant.

A photo stat copy of service rules is also attached for ready reference. Photo stat attested copies of certificates of both Research Assistants stand submitted to your office,—*vide* this office No. 293, dated 31st October, 2005.”

(5) The Director—respondent No. 3 did not recommend the name of any other person although they were senior to the petitioner because they did not fulfill the qualifications. The petitioner also sent various representations dated 24th August, 2005, 5th May, 2006,

6th November, 2006, 24th April, 2007 and 28th June, 2007 (Annexures P. 5 to P. 9) requesting the respondents to consider his case for promotion for the post of Assistant Director (Lab.). The petitioner has also asserted that on 28th July, 1990 when the vacancy had fallen vacant then Shri Jagdev Singh was promoted as Assistant Director, who alone fulfilled the qualifications and was eligible for promotion as his senior Shri P.C. Mittal who was not qualified, was ignored. However, this time, the petitioner who is fully qualified has been ignored by giving promotion to Jaibir Singh respondent no. 4 by granting him relaxation under Rule 17 of the rules as is evident from the perusal of order dated 31st July, 2007 (Annexure P. 10). The petitioner has claimed that power of relaxation could not be exercised in the facts and circumstances of the case especially when it is not in respect of a class or category of persons.

(6) The stand of the official respondents in the written statement filed by them is that respondent No. 4 is qualified with B.Sc. Degree and has been a seniormost Assistant. It has been pointed out that he has experience of 29 years as Research Assistant. The fact that petitioner is working since 1st April, 1993 on regular basis and possess the qualification of AMIE is conceded. It is further asserted that Departmental Promotion Committee in its meeting held on 20th April, 2007 considered the name of Jaibir Singh, respondent No. 4 for promotion to the post of Assistant Director (Lab) by keeping in view the fact that seniormost candidate has retired and other candidates did not possess the required qualification i.e. M.Sc. for promotion to the post of Assistant Director. Respondent No. 4 being the seniormost was considered suitable for promotion because ignoring eight persons senior to the petitioner was not considered to be conducive to the working of the department as the petitioner was at serial No. 11 in the seniority list although he possess the qualification of AMIE. Therefore, the Departmental Promotion Committee recommended that the government might consider relaxation of the qualification in the case of Jaibir Singh- respondent No. 4 under the provisions of Rule 17 of the rules. Accordingly the recommendation of the Committee have been accepted and the educational qualification in his case has been relaxed. It is in these circumstances that promotion of respondent No. 4 has been ordered.

(7) In his separate written statement filed by respondent No. 4 relaxation has been justified and a totally different stand has been taken that a separate cadre was created for testing the road sample. It is stated in para 2 of the reply that petitioner is not eligible for promotion of Assistant Director because the cadre of the petitioner is different than that of respondent No. 4 as respondent No. 4 was directly recruited for special work in the Laboratory and is thus having a separate cadre whereas the petitioner was initially recruited on the basis of work charge and thereafter regularised. Respondent No. 4 is having experience of special kind in the laboratory and therefore relaxation has been given in his case being the special cadre.

(8) After hearing learned counsel for the parties, we are of the considered view that appointment of respondent No. 4 has been made in flagrant violation of the Rules. For facility of reference Rule 7 of the Rules alongwith Appendix is reproduced hereunder :

“7. No person shall be appointed to any post in the service, unless he is in possession of qualifications and experience specified in column 2 of appendix B to these Rules in the case of direct recruitment and those in column 3 in the aforesaid Appendix in the case of appointment other than by direct recruitment :

Provided that in the case of appointment by direct recruitment, the qualifications regarding experience shall be relaxable to the extent of 50% of the discretion of the Commission or any other recruiting authority in case sufficient number of candidates belonging to Scheduled castes, Backward Class, Ex-Servicemen and physically handicapped categories, possessing the requisite experience are not available to fill up the vacancies reserved for them after recording reasons for so doing in writing.”

Appendix ‘B’ is reproduced below :

Designation of post	Academic qualifications and experience if any for direct recruitment.	Academic qualifications and experience if any for appointment other than by direct recruitment.
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Assistant Director	Ist Class M.Sc. In Physics or Chemistry or Ist Class a Bachelor of Engineering, Bachelor of Technology, Master of Technology	(i) for appointment by promotion Master of Science/Bachelor of Engineering/Bachelor of Technology or equivalent with five years experience as Research Assistant. (ii) for appointment by transfer Master of Science/ Bachelor of Engineering/ Bachelor of Technology or equivalent with five years experience in Research Laboratory.
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(9) A perusal of the afore-mentioned Rule makes it evident that for appointment by promotion on the post of Assistant Director (Lab.) a candidate must have M.Sc. or B.E. or B. Tech. or an equivalent qualification with five years experience as Research Assistant. The language of the Rule is mandatory as it incorporate prohibition to appoint any person to the post unless such a person is in possession of qualification and experience mentioned in Appendix "B". It is conceded position that respondent No. 4 does not possess the degree of M.Sc. However power of relaxation as contemplated by Rule 17 of the Rules has been exercised by passing order dated 31st July, 2007 by the Government.

(10) The short question which arises for consideration is whether power of relaxation as contemplated by Rule 17 of the Rules could be exercised in favour of respondent No. 4 by giving him appointment on the post of Assistant Director (Lab.) especially when Rule 7 is couched in a mandatory language requiring the possession of degree in M.Sc., Bachelor of Engineering or Bachelor of Technology. It is well settled that experience could not be a substitute for educational qualification prescribed in statutory rules. In that regard reliance may be placed on

para 32 of the judgement in the case of **State of Madhya Pradesh versus Dharambir (1)**, which reads thus :

“32. “Experience” gained by the respondent on account of his working on the post in question for over a decade cannot be equated with educational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government.”

(11) It is equally well settled that a person in order to be considered for promotion to a higher post must possess essential qualifications. In the absence of essential qualification he cannot be considered for promotion. In that regard reliance may be placed on the judgement of Hon’ble the Supreme Court in the case of **Dr. Bhanu Prasad Panda versus Chancellor, Sambalpur University and others (2)**. We are further of the view that once a person with requisite qualification is available fulfilling the mandatory qualifications for appointment to the promotional post then resorting to the power of relaxation in case of an individual would be impermissible. In the case of **Principal, King George’s Medical College versus Virendra Kumar (3)** the Hon’ble Supreme Court has held that the relaxation could be granted if the rule is directory and that too must be governed by defined and objective guidelines. The afore-mentioned observations have been made in para 16 of the judgment which reads thus :

“16. Whether the rules contained in the Ordinance governing admission to the post-graduate course of studies are mandatory or directory is a matter which the University shall have to consider after taking all relevant factors into

(1) (1998) 6 S.C.C. 165

(2) (2001) 8 S.C.C. 532

(3) AIR 1984 S.C. 221

account like the nature of the requirement, its purpose and the consequences of its relaxation on educational excellence. We have not gone into that question because no contention in that behalf was made either before us or in the High Court. One thing, however, must be made clear that if the University considers that any provision is not mandatory, its relaxation in particular cases has to be governed by objective considerations. No public authority least of all a University which is entrusted with the future of the students community, can pick and choose persons for receiving the benefit of relaxation of the rules. In the first place the rigor of a rule can be relaxed provided such relaxation is permissible under the rules or if the rule is directory and not mandatory. Secondly, even if it is permissible to relax a rule, such relaxation, as stated above, must be governed by defined guidelines.”

(12) The language of Rule 7 in the present case starts with the expression that ‘no person shall be appointed-unless he is in possession of qualification and experience’. It shows that the requirement of fulfilling the qualification is mandatory and not merely directory. In **Dr. Virendra Kumar’s case** (*supra*) the question had arisen for admission to M.D. course and the language of the rule required a candidate to possess the degree of MBBS and other experience. The language of the rule is similar to the language of Rule 7 of the Rules holding that a candidate who did not obtain degree of MBBS on the date of application for admission would not be eligible. The Supreme Court in para 10 held as under :—

10. Ordinance 1 begins with the words : “No candidate shall be eligible appear at the examination for the degree of Doctor of Medicine or Master of Surgery, unless (emphasis supplied). The respondent derives sustenance to his contention from the words which we have underlined. It is argued on his behalf that Ordinance 1 prescribes conditions of eligibility for appearing at the examination and not for making an application for admission to the M.D. course of studies. Therefore, the material date for determining whether

the conditions of eligibility are fulfilled is the date of examination and not the date of application. This contention is difficult to accept. Clauses (a) to (e) of Ordinance 1 are parts of an integrated scheme and therefore it will be wrong to apply different criteria to the interpretation of those clauses. Clause (a) of the Ordinance requires that the candidate "has obtained" the degree of M.B.B.S. It is inarguable that a candidate who has not yet obtained the M.B.B.S. degree can apply for admission to the M.D. course of studies in anticipation of or on the supposition that he will pass that examination before the M.D. examination is held. He must hold the M.B.B.S. degree on the date on which he applies for admission to the course of studies leading to the M.D. examination. Clause (b) requires that the candidate "has completed" one year's compulsory rotating housemanship after passing the M.B.B.S. examination. As in 'the case of clause (a), this qualification must also be possessed by the candidate on the date on which he applies for admission to the M.D. course of studies. It is not enough that the candidate has completed one year's compulsory rotating housemanship after making the application and before the date of the examination. The language of clause (c) is in material respects, identical with the language of clauses (a) and (b). Leaving aside for a moment the equivalence prescribed by paragraph (i) of the second proviso to clause (c) of the Ordinance, the substantive provision of clause (c) requires that the candidate "has, after full registration, done one year's housemanship or equivalent job". There is no justification for applying to the interpretation of this clause a different test than the one which has to be applied to the interpretation of clauses (a) and (b). Neither the language of Clause (c) nor the requirement of justice and fairplay warrants such a course. Therefore, the condition prescribed by Cl. (c) must also be shown to have been fulfilled by the candidate on the date on which he applies for admission to the M.D. course of studies and not

latter. Clause (d) of the Ordinance points in the same direction. It requires that subsequent to obtaining the qualification prescribed by clause 1 (c), the candidate “has put in two years’ work in the subject in the department concerned in the college”. The verbs used in clauses (a) to (d) are: “has obtained”, “has completed”, “has done” and “has put in” respectively. Giving to those words their natural meaning, we are of the view that the requirement of everyone of these clauses has to be fulfilled by the candidate on the date on which he applies for admission to the M.D. or M.S. course of studies. It is not sufficient that he fulfils the requirements of these clauses on the date of the examination.” (emphasis added)

(13) When the facts of the present case are examined in the light of the aforementioned principles of law laid down by their Lordships then it becomes evident that respondent No. 4 Jaibir Singh does not possess essential qualifications either of M.Sc. or Bachelor of Engineer or Bachelor of Technology. He is simply B.Sc. whereas the petitioner has acquired degree of A.M.I.E. which is recognised and equivalent degree for promotion to the post of Assistant Director (Lab.). The requirement of Rule 7 is mandatory and under Rule 17 of the Rules relaxation could be granted in case of necessity or ‘expediency’. There is neither any necessity in existence because the petitioner with adequate qualification and experience is available nor it would be expedient to relax the qualification because educational qualification is required to be possessed by the candidate as a condition of eligibility for promotion to the higher post.

(14) The argument of the counsel for respondent No. 4 that a separate cadre has been created has not been supported by the official respondents who have placed reliance on Rule 7 Appendix “B” which shows that the post of Assistant Director is a cadre post and has to be filled up 50% by promotion and 50% by direct recruitment. Therefore, we find no substance in the aforementioned stand of respondent No. 4. Respondent No. 5, added, respondent has also claimed to be eligible.

(15) For the reasons afore-mentioned this petition succeeds. Appointment of respondent No. 4 on the post of Assistant Director (Lab.) is set aside. Respondent Nos. 1 to 3 are directed to reconsider the whole matter by considering the case of the petitioner alongwith other eligible candidates in accordance with the provisions of Rule 7 of the rules by ignoring the relaxation given to respondent No. 4. The needful shall be done within a period of three months from the date of receipt of certified copy of this order. If the petitioner or the added respondent No. 5 or any other candidate with requisite qualifications are found suitable then they shall be given promotion with effect from the date promotion was given to respondent No. 4 on the post of Assistant Director (Lab.). Such a selected candidate on promotion would be entitled to ante dated appointment by giving him the same date which was given to respondent No. 4 alongwith all other consequential benefits except arrears of pay.

R.N.R.

Before M.M. Kumar and Jitendra Chauhan, JJ.

RAMBATI,—Petitioner

versus

STATE OF HARYANA AND OTHERS,—Respondents

C.W.P. No. 19006 of 2007

5th August, 2008

Constitution of India, 1950—Art. 226—Haryana Compassionate Assistance to the Dependents of the Deceased Government Employees Rules, 2003—Haryana Compassionate Assistance to the Dependents of the Deceased Government Employees Rules, 2006—Husband of petitioner died in harness—Son of petitioner after attaining majority applying for ex-gratia appointment—Which of policies for compassionate appointment apply to petitioner—2003 Rules in operation at time of death—Whether such rules applicable in deciding case for compassionate appointment—Held, yes.