

Manoj Kumar Vs Union of India

Court: Delhi High Court

Date of Decision: Aug. 29, 2014

Acts Referred: Constitution of India, 1950 " Article 226

Hon'ble Judges: Vipin Sanghi, J; S. Ravindra Bhat, J

Bench: Division Bench

Advocate: Kailash Vasdev, Sr. Advocate, Tarun Gupta, Shreyans Singhvi, Umrao Singh Rawat, Ekta Mehta and Joann Pudussery, Advocate for the Appellant; Ruchir Mishra, Sanjiv K. Saxena, Padma Kumar S., Naresh Kaushik, Aditi Gupta, Amita Kalkal Chaudhary, Prasant Sivarajan for Ankur Chhibber, Advocate for the Respondent

Final Decision: Dismissed

Judgement

S. Ravindra Bhat, J.

In these two proceedings under Article 226 of the Constitution, a common order of the Central Administrative

Tribunal (CAT) dated 26.09.2013 in O.A. No. 2898/2012 and O.A. No.3000/2012 have been challenged. In both these proceedings, the

petitioner's non-inclusion for promotion to the post of Additional Director General in the Central Engineering Service for the vacancy years 2011-

12 and 2012-13 have been challenged. Additionally, the petitioner had challenged the Central Engineering Service (Roads) Group A Rules, 2003

(hereafter called "the 2003 Rules") as inconsistent and arbitrary.

2. The petitioner was appointed as Assistant Executive Engineer (Roads Wings), after he qualified in the Central Engineering Service (CES)

entrance examination 1980, on 31.05.1982. The CES was governed by the rules which were replaced in 1995 and subsequently amended on

31.03.1997. The petitioner was promoted as Superintending Engineer on 11.06.1997; the contesting respondent, Sh. S.N. Das was promoted to

the grade of Superintending Engineer in the Mechanical Wing on 16.08.2002. It is not in dispute that, subsequently, on 06.10.2008, Sh. S.N. Das

was promoted as Chief Engineer; the petitioner was promoted as Chief Engineer, on the other hand, on 15.07.2009.

3. The 2003 Rules provided inter alia that the maintenance of the service (Chief Engineers) was to be in accordance with the manner indicated by

its provisions. Rule 5(1) and 5(2) prescribed that vacancies in the grades of Assistant Executive Engineer (Civil) and Assistant Executive Engineer

(Mechanical) were to be filled up by direct recruitment on the basis of the results in the Central Engineering Services Examinations. Rule 5(3)

provided as follows:

Appointments in the Service to the posts of Chief Engineer, Superintending Engineer and Executive Engineer shall be made by promotion from

amongst the officers of the respective discipline (Civil or Mechanical) in the next lower grade with minimum qualifying service as specified in

Schedule II. Appointment to the posts of Additional Director General and Director General (Roads Development) and Special Secretary shall be

made by promotion from amongst the officers in the next lower grade(s) with minimum qualifying service as specified in Schedule II.

4. The relevant portion of Schedule-II, which is relevant for determining the eligibility conditions for promotion to the post of Additional Director

General and Director General respectively provided as follows:

Schedule-II

[See Rule 5(3)]

Method of recruitment, field of promotion and minimum qualifying service in the next lower grade for appointment of officers on promotion to duty

posts included in various grades of Central Engineering Service (Roads) Group "A" of the Ministry of Road Transport and Highways:

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5. As noticed earlier, the petitioner was promoted to the post of Chief Engineer on 15.07.2009 whereas one of the private respondents, Sh. S.N.

Das was likewise appointed on 06.10.2008; whereas the petitioner was promoted as Chief Engineer (Civil), the said Sh. S.N. Das was promoted

as Chief Engineer (Mechanical). The report of the Sixth Pay Commission recommended uniformity in the eligibility criteria across various Group-A

services for promotions. In the wake of its report, the Department of Personnel and Training (DOPT), Central Government on 15.12.2009 issued an

Office Memorandum which inter alia provided as follows:

2. The 6th CPC has also recommended for bringing uniformity in eligibility criteria across various organized Group "A" Services for promotions.

The issue has been examined and in the light of these it has been decided that the following steps to amend the existing Service Rules shall be

undertaken on priority basis:

(i) For promotion to SAG level, the eligibility requirement shall be "Officers in the JAG with 8 years" regular service in the grade including NFSG

OR Officers with 17 years regular service in Group "A" posts in the service out of which at least 4 years regular service should be in the JAG

(including service rendered in the NFSG of the JAG.

(ii) For promotion to HAG level, the eligibility requirement shall be ""Officers in the SAG with 3 years" regular service in the grade OR Officers with

25 years" regular service in Group "A" posts in the service out of which at least 1 year" regular service should be in the SAG.

3. The cadre controlling authorities of the various Organized Group A Services may initiate action for appropriate amendments in the Service

Rules.

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6. The petitioner approached the CAT firstly through O.A. No. 2898/2012, claiming that Sh. S.N. Das was wrongly included in the list for

promotion to the post of Additional Director General, which according to him was arbitrary. Likewise, in O.A. No. 3000/2012, a similar grievance

with respect to inclusion of the name of Sh. Nandan Singh and Sh. S.N. Das for the other panel year was impugned. In both the applications,

common grounds were urged. It was firstly stated that the petitioner was senior to the private respondent and ought to have been considered and

his claims for promotion could not be ignored. It was next urged that the recruitment rules did not permit promotion of officers from the Mechanical

Wing to the post of Additional Director General and Director General, which had to be filled from amongst eligible officers of the Civil Wing only.

The petitioner relied upon the seniority list maintained by the official respondents in the various cadres up to Superintending Engineer, to urge that

he was clearly senior to those considered for promotion and, therefore, his claims could not be ignored.

7. The official respondents (hereafter collectively referred to as ""the Central Government """) in its reply stated that with the advent of the 2003

Rules, the post of Director General (RD) and Additional Director General were classified in Schedule-I with reference to the name, number and

scale of pay of different posts included in the various grades of Central Engineering Services. It had nothing to do with the method of recruitment,

promotion and qualifying service in the next lower grade for appointment and on promotion to those posts. The mere mention of ""Additional

Director General "" and ""Director General "" under the heads ""Civil Engineering "" in the First Schedule, according to the Central Government, did not

mean that those were to be filled-up from amongst officers of civil engineering branch. The Central Government stated that field of ""promotion"", of

minimum qualification"" for next lower grade for appointment of officers was defined in Schedule-II of the recruitment rules and that consequently

there was no inconsistency. The Central Government also relied upon the Office Memorandum dated 15.12.2009, which allowed consideration of

officers with 25 years" regular service in Group A posts out of which at least one year"s regular service should have been in the Senior

Administrative Grade (SAG) as against the existing requirement of three years" regular service, in the rules. The Central Government went on to

explain that for 2011-12, only one clear vacancy in the post of Additional Director General arose due to the superannuation of an incumbent

officer on 31.05.2011. When the names were processed, it was found that only one officer $\hat{\sim}\hat{\sim}\hat{\sim}\hat{\sim}$ Sh. A.K. Sharma, Chief Engineer fulfilled the

eligibility criteria of possessing the service in the SAG as on 01.01.2011. Further, he was assessed and found unfit for vacancies for the years

2011 and 2012 due to his below-benchmark gradings for the two years. In the Central Government"s opinion, since it was almost certain that the

said Sh. A.K. Sharma would be rendered unfit for the vacancy in 2011-12, which potentially led to a situation where no one could have been

considered under the rules, the DOPT"s approval by way of relaxation was sought to fill-up the vacancies in accordance with the Office

Memorandum dated 15.12.2009. It was submitted that six officers were found eligible on the basis of their having rendered 20 years of regular

service in the Group A posts, with at least one year"s regular service in the SAG, who were eligible $\hat{\sim}\hat{\sim}\hat{\sim}\hat{\sim}$ Sh. A.K. Sharma, Sh. S.K. Marwah, Sh.

V.L. Patankar, Sh. Chaman Lal, Sh. S.N. Das and Sh. Manoj Kumar. It was submitted further that the Central Government followed the DOPT

guidelines dated 11.11.2010, which inter alia stated as follows:

where promotion to a grade/post are made from more than one grade and no quota has been fixed for various feeder grades owing to a smaller

number of posts in the promotion grade, in such cases it would be required to prepare a combined eligibility list of the candidates from various

feeder grades with due regard to inter-se seniority of the candidates of various feeder grades for preparation of combined eligibility list of the

candidates from various feeder grades/broad parameter is date of completion of qualifying service prescribed in the relevant recruitment rules, in

the feeder grade for promotion and if the aforesaid date is same then date of completion of the qualifying service in the feeder to feeder grade.

8. The Central Government further submitted that following the existing criteria of considering five names for a single vacancy, the names of the

senior-most five, i.e. Sh. A.K. Sharma, Sh. S.K. Marwah, Sh. V.L. Patankar, Sh. Chaman Lal and Sh. S.N. Das were taken up for consideration.

Since the petitioner was the sixth officer and fell outside the zone of consideration. Of the five, Sh. A.K. Sharma was found unfit whereas Sh. S.K.

Marwah and Sh. V.L. Patankar were assessed and found fit for promotion. However, since Sh. S.K. Marwah was due to retire on 30.11.2011,

Sh. V.L. Patankar's name was recommended. The names of the other two, i.e. Sh. Chaman Lal and Sh. S.N. Das could not be considered.

9. For the next vacancy year, it was contended that the petitioner did not fulfil the eligibility criteria of possessing the qualifying service in the grade

of Chief Engineer as on 01.01.2012 whereas Sh. S.N. Das fulfilled that criteria. For this period, the Central Government did not seek any

relaxation in terms of the Office Memorandum dated 15.12.2009 as three Chief Engineers were eligible for promotion to the post of Additional

Director General in terms of the recruitment rules.

10. The CAT was of the opinion that the reliance on the Office Memorandum dated 15.12.2009 for the basis of considering the eligibility was not

sound. It was of the opinion that once the recruitment rules existed, there is no question of applying any criteria which are different from the

conditions prescribed in the rules, since the executive instructions cannot supersede the rules which have force of law. As regards the other

contention made by the petitioner that he was senior to Sh. S.N. Das and, therefore, he is to be considered, the CAT was of the opinion that firstly

there was no force in the submission with regard to the post of Additional Director General having to be filled-up only from amongst the officers of

Civil Wing and that eligible Chief Engineers from both the Civil and Mechanical Wing were to be considered on the basis of a combined eligibility

list. Taking note of the fact that Sh. S.N. Das was promoted as Chief Engineer on 06.10.2008 and had completed the three years" qualifying

service on 05.10.2011, whereas the petitioner was promoted as Chief Engineer on 15.07.2009 and would have completed the qualifying service

on 15.07.2012, the CAT held that there was no infirmity and that the Central Government acted in accordance with law in promoting Sh. S.N.

Das. The CAT further went on to hold that there was no justification for the Central Government to invoke the provisions of the Office

Memorandum dated 15.12.2009 given that the recruitment rules were clear and unequivocal with regard to the qualifications, experience and

eligibility conditions etc. for promotion to the post concerned.

11. The petitioner argues that the impugned order has fallen into error in as much as it upholds the application of the Office Memorandum dated

15.12.2009 for one vacancy year, i.e. 2011-12 whereas for the next year, it is held inapplicable. It is next contended that if the Central

Government's position in recommending the relaxation of the recruitment rules of 2003 on account of absence of eligible officers were to be

considered, the denial of promotion to the petitioner was arbitrary. Expanding on this submission, Sh. Kailash Vasdev, learned senior counsel

contended that the petitioner joined the service in Group A post in Central Engineering Service on 05.04.1982, whereas the seventh respondent

joined as Assistant Executive Engineer on 17.03.1989. Clearly, therefore, Sh. S.N. Das was ineligible, on a textual application of the Office

Memorandum dated 15.12.2009, which required 25 years" service in Group A post. It was further submitted that the petitioner was an Executive

Engineer even as Sh. S.N. Das continued as Assistant Executive Engineer and that even in the cadre of Superintending Engineer, the petitioner was

senior, whereas the seventh respondent was junior to him. Learned counsel thirdly submitted that there was an inherent contradiction in the 2003

rules in as much, as, Schedule-I indicated that promotional avenues for Civil Engineering stream was up to the post of Director General whereas

for the Mechanical Engineering stream, it was only up to the post of Chief Engineer. This was a pointer to the Central Government"s thinking that

the officers in the Mechanical Engineering stream were ineligible and not equipped to man the highest echelons of the service, i.e. Additional

Director General and the Director General. On the other hand, Schedule-II, which prescribed the qualifications for promotions to the post of

Additional Director General, erroneously made the Chief Engineer (Mechanical) eligible. This rendered the rules arbitrary; the reasonable way to

apply it was to ensure that the Chief Engineers of the Mechanical Wing were not promoted as Additional Director General/Director General.

12. It was next argued that the relevant cut-off date, i.e. 01.01.2012 for the second vacancy period in respect of which the Departmental

Promotion Committee (DPC) was held on 05.09.2012, the petitioner had to be considered along with Sh. S.N. Das since he had completed more

than 2 ½ years" service in the grade of Chief Engineer. For this purpose, learned counsel relied upon the following note of Schedule - II:

Note:- Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors would also be

considered provided they are not short of the requisite qualifying/eligibility service by more than half of such qualifying/eligibility service, or two

years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who

have already completed such qualifying/eligibility service.

13. In the present case, it was urged by learned senior counsel that since Sh. S.N. Das was clearly junior to the petitioner, the latter had a right to

be considered for promotion since he had already completed more than two years of regular service in the lower grade, i.e. Chief Engineer.

14. Learned counsel for the respondents argued that the CAT"s findings are not in error. Learned counsel for the Central Government has

produced the files pertaining to the DPC and urged that for the vacancy year 2011-12, only one vacancy arose with anticipated retirements on

31.05.2000 and in 2011. There were two other vacancies which arose subsequently on 26.12.2011 and 30.12.2011. They were unanticipated

vacancies. The Central Government sought relaxation from the DOPT on 06.04.2011 in view of the fact that the only candidate, who could

possibly be considered - Sh. A.K. Sharma - would have been unfit in view of the past record. Therefore, a reference was made to the DOPT

seeking approval by way of relaxation for application of the Office Memorandum dated 15.12.2009. On 06.04.2011, the DOPT noted that similar

proposals have been processed and permitted, and accordingly approved the relaxation of the eligibility conditions for the vacancy which would

arise upon superannuation of an officer on 31.05.2011. This meant that six candidates would be considered, including the petitioner; however,

since the zone of consideration was confined to five only, the petitioner's name was left-out. Ultimately, Sh. V.L. Patankar was found fit and was

recommended. Even though the name of Sh. S.N. Das was included for consideration, he was not selected. Arguing that in neither petition was Sh.

V.L. Patankar impleaded as a party, the Central Government urged that the petitioner cannot challenge his promotion, especially since Sh. S.N.

Das was not promoted, though considered. It was underlined that for the vacancies which arose on 31.05.2011 (in respect of DPC held on

01.08.2011), the petitioner had no cause of action because the only individual impleaded, Sh. S.N. Das was, like the petitioner not promoted, and

the officer selected and promoted - Sh. V.L. Patankar - had not been impleaded. It was next contended by the respondents that as far as the

subsequent DPC was concerned, i.e. one held on 15.09.2012, the eligibility was to be reckoned as on 01.01.2012. On that day, the petitioner

had not fulfilled the eligibility condition of possessing three years' service in the lower grade; on the other hand, two other officers, including Sh.

S.N. Das had fulfilled that condition. For this year, there was no necessity to seek any relaxation, or apply the Office Memorandum dated

15.12.2009 because the eligible officers were available and consequently were assessed. Learned counsel submitted that there was no question of

applicability of a note relied upon by the petitioner because that was operative only when a junior in the grade was considered for promotion.

Learned counsel stressed that since the petitioner was promoted as Chief Engineer only on 15.07.2009, whereas Sh. S.N. Das was promoted to

the post of Chief Engineer on 06.10.2008, the note could not apply. As far as the allegation that Sh. S.N. Das was appointed in 1989 is

findings of the CAT that officers of both the civil and mechanical wing from the cadre of Chief Engineer can be considered for promotion as

Additional Director General/Director General.

17. As previous discussion reveals, barring one Sh. A.K. Sharma - who alone fulfilled the condition of three years" regular service in the grade of

Chief Engineer as of April-May 2011, no other candidate could have been considered at that stage. The Central Government took note of the fact

that Sh. A.K. Sharma's record was poor and, therefore, approached the DOPT for a relaxation. The 2003 rules prescribe the power to relax.

The relaxation sought by the Central Government was, therefore, a proposal mooted to the DOPT; it alluded to the Office Memorandum dated

15.12.2009 which stated that officers with 25 years" service in Group A posts could be considered for promotion to the HAG (post of ADG is a

HAG post). The DOPT granted the approval on 06.04.2011. The Central Government"s explanation for not including the petitioner"s name in that

instance - when the DPC considered all eligible officers, is that the zone of consideration $\tilde{\hat{\Delta}}\hat{\Delta}\hat{\Delta}\frac{1}{2}$ given that only one vacancy existed $\tilde{\hat{\Delta}}\hat{\Delta}\hat{\Delta}\frac{1}{2}$ extended to

five officers. Since the petitioner, according to the Central Government, was the sixth officer, his name was not sent-up. Ultimately, of the two

officers who were found eligible, only Sh. V.L. Patankar was selected and appointed. Concededly, this officer was senior to the petitioner; in

neither of the application was he impleaded, nor is he a party in the present proceedings. On account of this fact alone, the petitioner"s grievance

regard his non consideration has to be rejected. Moreover, even though Sh. S.N. Das was considered for DPC, his name was not recommended

for promotion. Therefore, the petitioner"s grievance with respect to his non-selection for the year 2011-2012 (in respect of vacancies which

occurred on 31.05.2011, for which the DPC met on 01.08.2011) is unfounded.

18. This Court notices that the CAT, in its impugned order, was of the opinion that the Central Government could not have fallen back upon the

Office Memorandum dated 15.12.2009 because of an express eligibility condition contained in the rules. Since the concerned individual, Sh. V.L.

Patankar, who was promoted, was not an aggrieved party, and as against him the petitioner could not claim to be senior, the CAT"s findings in this

regard were not called for. That apart, there is no discussion in the impugned order with regard to the power of the Central Government to relax

any condition and the implications arising out of it, having regard to the facts of this case.

19. As a result of the above discussion, it is held that the petitioner"s submission that he was wrongly overlooked for the vacancies which arose on

31.05.2011 and later in 2011 is meritless.

20. For the above reasons, this Court further holds that the Central Government"s opinion that the lone eligible candidate $\tilde{\hat{\Delta}}\hat{\Delta}\hat{\Delta}\frac{1}{2}$ Sh. A.K. Sharma"s

track record was poor and that on this count, the exigencies of service warranted some relaxation could not have been overlooked. The official

files reveal that the process for seeking approval of DOPT began sometime in October, 2010 when it became clear, given the below benchmark

ACR gradings of the lone eligible candidate, Sh. A.K. Sharma, that he would be found not likely to be fit for promotion. There was no need to fill

the anticipated vacancy on 31.05.2011. It was in these circumstances that the relaxation to apply the terms of the Office Memorandum dated

15.12.2009 on a one-time basis was sought. This relaxation was, therefore, on the basis of some logic and principle and not in order to favour an

officer or a group of individuals. If one were to have regard to the fact that in the CES, there were only two posts of ADGs under the 2003 rules,

there was a great need to fill it. The Office Memorandum dated 15.12.2009 not only stated that the candidates with 25 years" regular service

could be considered but also that, of those 25 years, at least one years" regular service should have been in the SAG. The records show that Sh.

V.L. Patankar had fulfilled the 25 years" criteria on 24.07.2009 and was promoted to a post and the date of his entry in the SAG was

25.07.2008. Clearly, therefore, he was senior to the petitioner in the SAG grade as well as Sh. S.N. Das. As a result, this Court holds that there

was no infirmity in the Central Government"s action by applying the Office Memorandum dated 15.12.2009 by way of relaxation.

Issue No.3

21. The petitioner"s grievance with regard to the promotion of Sh. S.N. Das ~Å½ one of the vacancies for which DPC was held on 05.09.2012 is

two-fold. The first appears to be that the CAT upheld the application of the Office Memorandum dated 15.12.2009 for one year whereas for the

later year, it did not. This contention is groundless. The CAT undoubtedly records the findings that the Office Memorandum dated 15.12.2009

could not have been applied in the teeth of the provisions of the 2003 rules. As discussed previously, this finding is faultless. However, the

petitioner"s argument that the impugned order upholds the application of that Office Memorandum for one year and does not do so for the next

year, is without substance for the reason that the mere consideration of Sh. S.N. Das along with other eligible candidates on 01.08.2011, by itself,

could not have resulted in an actionable grievance. Sh. S.N. Das was not appointed; he was not even selected. The candidate found eligible and

who was subsequently appointed ~Å½ Sh. V.L. Patankar was not impleaded. Therefore, the petitioner"s grievance with regard to the application of

the Office Memorandum for one year is academic.

22. The next grievance, i.e. that the petitioner was wrongly overlooked despite his being senior to Sh. S.N. Das, now requires to be examined.

This submission is based upon the assumption that the promotion of Sh. S.N. Das pursuant to the DPC proceedings of 05.09.2012 was, like in

respect of the previous year, based upon the application of the Office Memorandum dated 15.12.2009. As recorded by the CAT, the Central

Government's submission on this aspect is that there were officers who fulfilled the eligibility criteria, Sh. S.N. Das being one of them. The

petitioner, however, did not fulfil the eligibility criteria spelt-out in the rules, i.e. 3 years' qualifying service in the lower grade of Chief Engineer on

01.01.2012, which was a crucial date for consideration of the qualifying service for determining the eligibility of officers for promotion. The Central

Government in this regard had relied upon the DOPT guidelines in the Office Memorandum dated 19.07.1989 and the Office Memorandum

22011/3/98 dated 17.09.1998.

23. During the proceedings, some arguments were sought to be made that even on an application of the Office Memorandum dated 15.12.2009,

Sh. S.N. Das was ineligible. However, this Court notices that there was no pleading urged in the grounds in the original applications filed before the

CAT, nor was any contention urged in that regard before the CAT. The submission was, however, countered on behalf of the Central Government

- which stated that in respect of unanticipated vacancies, i.e. such as the ones which arose subsequently in 2011 on account of voluntary retirement

and death, the Office Memorandum of 09.04.1996 (No.2201/8/87-Est.(B)) applied and, consequently, the eligibility with respect to such

vacancies was to be considered as on 01.01.2012. Whatever be the position, the fact remains that when the DPC met to consider the eligible

candidates on 05.09.2012, the record of the officer as on 01.01.2012 was available and apparently taken into consideration. As on that date, the

petitioner had not fulfilled the eligibility conditions. His submission that a junior, Sh. S.N. Das was considered as a result of which he too had to be

considered, is unsound. The note relied upon by the petitioner in this regard applies only when the consideration is of a junior in the cadre, and not

a junior in the entire service. In other words, the entire period of service of an officer is not relevant; what is material and what the note speaks of is

where the junior in the immediately preceding grade $\tilde{A}-\tilde{A}_2\tilde{A}_{\frac{1}{2}}$ in the present case, the Chief Engineer, is considered senior, acquires the right to be

considered. In the present instance, Sh. S.N. Das cannot be considered as the petitioner's junior in the grade of Chief Engineer because he was

promoted to that post on 06.10.2008, while the petitioner was promoted as the Chief Engineer on 15.07.2009.

24. A week after arguments were concluded, and judgment reserved, the petitioner's counsel circulated written submissions. These sought to

highlight that the vacancies which arose after 31.05.2011 could not be called "unanticipated vacancies" since one was due to the promotion of an

officer; the other submission was that the relevant date for determining eligibility for these vacancies was 01.01.2011 and not 01.01.2012 (though

the DPC was held in September 2012). A circular dated 09.04.1996 was relied upon in support of the submission.

25. This Court is of the opinion that these questions cannot be gone into because there is nothing in the pleadings before the CAT or its order,

suggestive of these being put in issue or raised, or argued. The averments in the Writ Petitions too are bereft of any pleadings on the point.

Furthermore, there cannot be any dispute about the fact that when the subsequent DPC did consider the cases of officers for promotion, there

were several eligible under the Rules; the Petitioner had not fulfilled the qualifying service as on the cut off date considered by the DPC, i.e.

01.01.2012. These aspects, therefore, cannot be urged for the first time in written submissions.

26. For the above reasons, the third point too is to be answered against the petitioner; his contentions are, therefore, rejected.

27. As a consequence, it is held that these petitions lack merit and are to fail. They are accordingly dismissed with no order as to costs.