

PETITIONER:

J. N. GOEL & ORS.G.L. GUPTA Y ORS.

Vs.

RESPONDENT:

UNION OF INDIA & ORS.

DATE OF JUDGMENT: 14/01/1997

BENCH:

S.C. AGRAWAL, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

WITH
CIVIL APPEAL NO. 5364 OF 1990
J U D G M E N T

S.C. AGRAWAL, J. :-

There appeals, by special leave, are directed against the judgment of the Central Administrative Tribunal, Principal bench, New Delhi (hereinafter referred to as 'the Tribunal') in O.A. No. 704 of 1988 and O.A. No. 910 of 1989. The appeals relate to promotion of Assistant Engineers to the post of Executive Engineer in the Central Public Works Department (for short 'the C.P.W.D.'), of the Government of India.

In the C.P.W.D. Assistant Engineers are appointed by direct recruitment as well as by promotion from the cadre of Junior Engineers. The cadre of Assistant Engineers consists of graduates holding a degree in Engineering as well as holders of diploma in Engineering. Recruitment to the post of Executive Engineer was earlier governed by the Central Engineering Service Group 'A' Recruitment Rules, 1954 (hereinafter referred to as 'the 1954 Rules'). Under the 1954 Rules appointment to the post of Executive Engineer was being made by promotion of Assistant Executive Engineers and Assistant Engineers. The promotion of Assistant Engineers as Executive Engineers was governed by Rule 21(3) of the 1954 Rules which provided as follows :-

"Rules 21(3). No Assistant Engineer shall be eligible for promotion to the service, unless he :-

(a) would, but for age, be qualified for admission to the competitive examination under Part-III of these rules.

(b) has rendered at least three years service in a permanent or temporary capacity as an Assistant Engineer and subordinate under the Central Government, and

(c) satisfied the commission that he is in every respect suitable for appointment to the service."

In view of sub-clause (a) of Rule 21(3) only graduate Assistant Engineers were eligible for promotion to the post of Executive Engineer because the qualification prescribed for recruitment by Competitive Examination under Rule 11 (falling in Part-III of the 1954 Rules) was "degree in Engineering from a University incorporated by an Act of the Central or State Legislature in India, or any other educational institution established by an Act of Parliament or declared to be deemed as Universities under Section 3 of the University Grants Commission Act, 1956, or a foreign University approved by the Government from time to time, or a qualification which has been recognised by the Government for the purposes of admission to the competitive examination". Executive instructions were, however, issued in 1956 for promotion of diploma holder Assistant Engineers as Executive Engineers on ad hoc basis. This practice of promoting diploma holder Assistant Engineers on ad hoc basis continued for a considerable time. A Writ Petition (C.W.P. 818 of 1972) was filed by one C.P. Gupta, a degree holder Assistant Engineer, in the Delhi High Court wherein the action of the Government in promoting diploma holder Assistant Engineers on ad hoc basis was challenged. The said Writ Petition, which was subsequently transferred to the Tribunal and registered as T-52 of 1985, was decided by the Tribunal, by judgment dated December 19, 1986, whereby it was held that administrative instructions could not override the statutory provisions of the 1954 Rules and that promotions made on the basis of administrative instructions, being contrary to the statutory rules, were invalid. During the pendency of the said petition, the following proviso was inserted in sub-rule (3) of Rule 21 of the 1954 Rules by Notification dated October 31, 1972 :-

"Provided that Government in consultation with the Commission may promote an Assistant Engineer of outstanding ability and record, to Group A service in relaxation of the educational qualifications provided in clause (a)."

After the insertion of the said proviso promotions of diploma holder Assistant Engineers were being made on the post of Executive Engineer on ad hoc basis under the said proviso. Feeling aggrieved by such promotion the graduate Assistant Engineers filed an application (O.A. No. 704 of 1988) before the Tribunal wherein it was submitted that in view of the proviso inserted in sub-rule (3) of Rule 21 of the 1954 Rules only those diploma holder Assistant Engineers could be promoted to the post of Executive Engineers who had 'outstanding ability and record' and that diploma holder Assistant Engineers who did not possess 'outstanding ability and record' were not eligible for promotion as Executive Engineer either on regular or on ad hoc basis and that promotion of diploma holder Assistant Engineers could not be made simply on the basis of seniority-cum-fitness by taking them at par with graduate Assistant Engineers. Another application (O.A. No. 910 of 1989) was filed before the Tribunal by the diploma holder Assistant Engineers who submitted that the proviso to Rule 21(3) of the 1954 Rules, in so far as it prescribed the requirement of 'outstanding ability and record' for the purpose of promotion of diploma holder Assistant Engineers to the post of Executive Engineer, was discriminatory and violative of Articles 14 and 16 of the Constitution. On behalf of the Union Government it was submitted that the proviso inserted in Rule 21(3) of the 1954 Rules is fair and just and cannot be

termed as discriminatory and that the assessment of 'outstanding ability and record' of the diploma holder Assistant Engineers is done by the Departmental Promotion Committee (for short 'DPC') which is chaired by a member of the Union Public Service Commission and that the assessment of merit is based on the total record of service. Both these applications have been disposed of by the Tribunal by the impugned judgment dated April 30, 1990.

After referring to the proviso introduced in Rule 21(3) of the 1954 Rules, the Tribunal has observed that the eligibility conferred thereby in relaxation of the educational qualification is conditioned by the higher quality of performance and a longer work experience, assessed as 'outstanding ability and record' and that this could be judged from the annual confidential reports (ACRs). According to the Tribunal, ACR is a vehicle for assessment of comparative and competitive merit of the officers equally placed for the purpose of promotion and that such an assessment cannot quantify the compensatory element for the diploma holders Assistant Engineers which is required to place them at the same pedestal as graduate Assistant Engineers who admittedly have higher mental equipment because the DPC that makes assessment for the purpose of promotion to the higher grade applies uniform norms for assessing the performance of the officers placed equally in the feeder grade. The Tribunal has also observed that according to Rule 21(3) the Department is required to screen the diploma holder Assistant Engineers based on their total record of service to identify those persons who have 'outstanding ability and record' and the diploma holder Assistant Engineers so identified should thereafter be placed at par with the graduate Assistant Engineers and assessed for promotion to the grade of Executive Engineer in accordance with the procedure prescribed by the DPC and this has never been followed. Since both the assessments, namely, screening of diploma holder Assistant Engineers first for identifying those who have 'outstanding ability and record' in accordance with Rule 21 (3) and thereafter assessing them along with the graduate Assistant Engineers by the DPC in accordance with the procedure followed by it for such selection, are made on the basis of job performance, the work content of which is the same, for the diploma holders as well as graduates, Rule 21(3) contains an element of arbitrariness and discrimination. The Tribunal has taken note of the fact that for the last three decades diploma holder Assistant Engineers have been promoted on ad hoc basis along with the graduate Assistant Engineers based on the appraisal of their confidential record and that in the last three DPCs held in 1965, 1968 and 1971, the select lists were prepared applying the selection norms uniformly to all the Assistant Engineers irrespective of their being diploma holders or degree holders by treating them (graduates and non-graduates) as one category and the selection was made without first determining the eligibility of diploma holder Assistant Engineers for the next promotion. According to the Tribunal, the procedure so far has not been in conformity with Rule 21(3). The Tribunal has, therefore, held that the proviso inserted in Rule 21(3) is arbitrary and discriminatory and it requires to be substituted by a rational and just criterion, e.g., holding of a qualifying test for diploma holder Assistant Engineers, annually or as may be necessary, to obviate the element of arbitrariness and make the rule reasonable and those who qualify in such a departmental test, they should be considered along with graduate Assistant Engineers for

promotion to the next higher grade by the DPC by following the normal procedure. The Tribunal has directed the Government to further amend the 1954 Rules suitably and has also directed that until the Rules are so amended, no regular promotion of diploma holder Assistant Engineers shall be made and that ad hoc promotions already made shall be regularised in accordance with the amended Rules.

Both the sides, namely, the graduate Assistant Engineers as well as diploma holder Assistant Engineers, have felt aggrieved by the judgment of the Tribunal. The graduate Assistant Engineers have filed Civil Appeal No. 5363 of 1990, while the diploma holder Assistant Engineers have filed Civil Appeal No. 5364 of 1990.

During the pendency of these appeals, the Government of India has made the Ministry of Urban Affairs and Employment (Department of Urban Development), Central Engineering (Civil) Group 'A' Service, Rules, 1996 and the Ministry of Urban Affairs and Employment (Department of Urban Development) Central Engineering (Electrical and Mechanical) Group 'A' Service Rules, 1996 (hereinafter referred to as 'the 1996 Rules'). The 1996 Rules have been published in the Gazette of India dated October 29, 1996 vide notifications dated October 28, 1996. The 1996 Rules have superseded the 1954 Rules and prescribe a quota system for promotion to the post of Executive Engineers from three sources :-

- (i) Assistant Executive Engineer with four years regular service in the grade. 33/1/3%
- (ii) Degree holder Assistant Engineers with eight years regular service in the grade. 33/1/3%
- (iii) Diploma holder Assistant Engineers with ten years regular service in the grade. 33/1/3%

The 1996 Rules have come into force with effect from October 29, 1996. Since the 1996 Rules are prospective in operation, the promotions made prior to the making of the 1996 Rules would be governed by the 1954 Rules and, therefore, the question regarding the validity of the proviso to Rule 21(3) of the 1954 Rules has to be considered.

Before we come to the question regarding the validity of the proviso to Rule 21(3), we would deal with the submission of Shri G.K. Aggarwal, the learned counsel appearing for the appellants in Civil Appeal No. 5364 of 1990 filed by the diploma holder Assistant Engineers, assailing the validity of Rule 21(3). Shri Aggarwal has submitted that Rule 21(3) of the 1954 Rules, in so far as it restricts eligibility for promotion to the cadre of Executive Engineer to graduate Assistant Engineers only, is violative of Articles 14 and 16 of the Constitution. The submission is that promotion to the cadre of Assistant Engineers is made from amongst Junior Engineers who are degree holders as well as diploma holders on the basis of a limited departmental examination and that diploma holder Junior Engineers who become Assistant Engineers after such selection discharge the same duties and responsibilities as graduate Assistant Engineers and that there is no basis for denying diploma holder Assistant Engineers promotion to the higher grade of Executive Engineers. Shri Aggarwal has also urged that since 1956 diploma holder Assistant Engineers were being promoted as Executive Engineers and there is nothing to show that their performance as Executive Engineers was found wanting.

We are unable to accept this contention of Shri

Aggarwal. The decisions of this Court have laid down that educational qualifications can justifiably be made the basis for classification for the purpose of promotion to the higher post. In *State of Jammu & Kashmir v. Triloki Nath Khosa & Ors.*, 1974 (1) SCR 771, there was a similar provision in the Jammu & Kashmir Engineering (Gazetted Service) Recruitment Rules, 1970, whereunder only graduate Assistant Engineers were eligible for promotion to the post of Assistant Executive Engineers. The validity of the said rule was challenged by diploma holder Assistant Engineers on the ground of violation of Articles 14 and 16 of the Constitution and the provision was struck down by Jammu & Kashmir High Court, but, on appeal, the rule was upheld as valid by this Court. It was held :-

"Formal education may not always produce excellence but a classification founded on variant educational qualifications is, for purposes of promotion to the post of an Executive Engineer, to say the least, not unjust on the fact of it".

[p. 780]

In that case also an argument was advanced that diploma holders could comfortably fill higher posts for over three decades and no reason was shown why they shall be rendered wholly ineligible even for being considered for promotion to the post of Executive Engineer. The Court has, however, held :-

"Efficiency which comes in the trail of a higher mental equipment can reasonably be attempted to be achieved by restricting promotional opportunities to those possessing higher educational qualifications."

[p. 784]

In restricting promotion to the cadre of Executive Engineer from amongst graduate Assistant Engineers only Rule 21(3) of the 1954 Rules, as it stood prior to the amendment of 1972, was not different from the rule which has been upheld as valid by this Court in *State of Jammu & Kashmir v. Triloki Nath Khosa & Ors.* (supra). The insertion of the proviso in Rule 21(3) in 1972 removes the bar against eligibility of diploma holder Assistant Engineers being promoted as Executive Engineers and permits relaxation in educational qualification in respect of non-graduate Assistant Engineers of outstanding ability and record. Keeping in view the paramount requirement of efficiency in the higher echelons of the service, the proviso seeks to strike a balance between the aspirations in the matter of promotion of Assistant Engineers having higher educational qualifications and Assistant Engineers, though lesser qualified educationally, having outstanding ability and record.

Shri Aggarwal has placed strong reliance on the decision of this Court in *N. Abdul Basheer and Ors. v. K.K. Karunakaran and Ors.*, 1989 Supp. (2) SCC 344, which related to promotion from the post of Excise Preventive Officer to that of Second Grade Excise Inspectors. In that case the provision fixing a quota for promotion between graduates and non-graduates was held to be violative of Articles 14 and 16 of the Constitution on the view that the conditions of employment and the incidents of service recognise no distinction between graduate and non-graduate officers and that for all material purposes they are effectively treated

as equivalent. The decision in State of Jammu & Kashmir v. Triloki Nath Khosa & Ors. (supra) was noticed and it was observed that in that case having regard to the object of achieving the administrative efficiency in the Engineering Service it was a just qualification to maintain a distinction between Assistant Engineers who were degree holders and those who were merely diploma holders. The decision in N. Abdul Basheer & Ors. v. K.K. Karunakaran & Ors. (supra) does not, therefore, lend support to the submission of Shri Aggarwal that Rule 21(3) of the 1954 Rules was invalid. Reference in this context may be made to the recent decision in T.R. Kothandaraman & Ors. v. Tamil Nadu Water Supply & Drainage Board & Ors., 1994 (6) SCC 282, wherein this Court has upheld that validity of the proviso to Regulation 19(2) (b) of the Tamil Nadu Supply and Drainage Board Service Regulations, 1972, which permitted diploma Assistant Engineers to be eligible for promotion to the post of Executive Engineer only if they were to have "exceptional merit" in work, otherwise such diploma holders were not eligible for promotion. The challenge to the said provision on the basis of Article 16 of the Constitution was negatived on the basis of the judgment in Triloki Nath Khosa & Ors. (supra).

We may now come to the proviso to Rule 21(3) which was inserted in 1972. As noticed earlier, the proviso permits relaxation in the matter of educational qualifications for promotion of Assistant Engineers to the cadre of Executive Engineers and an Assistant Engineer though not a graduate could be promoted provided he had 'outstanding ability and record'. The said criterion of 'outstanding ability and record' prescribed by the proviso cannot be regarded as vague or arbitrary. In service jurisprudence 'outstanding merit' is a well recognised concept for promotion to a selection post on the basis of merit. Such assessment of outstanding merit is made by the DPC on the basis of the record of performance of the employee. It cannot, therefore, be said that the proviso to Rule 21(3) which enabled a diploma holder Assistant Engineer to be promoted as Executive Engineer if he had 'outstanding ability and record' suffers from the vice of arbitrariness. The only reason given by the Tribunal for striking down the said proviso as invalid is that in the matter of promotions which have been made on the post of Executive Engineer, the DPCs have not correctly applied the said criterion and have made selections by applying selection norms uniformly irrespective of their being diploma holder Assistant Engineers or degree holder Assistant Engineers. The failure on the part of the DPCs, in the past, to correctly apply the norms laid down in the proviso and to make an assessment about the eligibility of the diploma holder Assistant Engineers on the basis of their 'outstanding ability and record' would not mean that the proviso which enables diploma holder Assistant Engineers having 'outstanding ability and record' being promoted as Executive Engineers is violative of Articles 14 and 16 of the Constitution on the ground of arbitrariness. The failure to implement the said proviso properly could only mean that the promotion which was made without properly applying the criterion laid down in the proviso would be open to challenge. But it does not mean that the proviso itself is bad as being arbitrary. We are, therefore, unable to hold that the proviso to Rule 21(3) of the 1954 Rules was violative of Articles 14 and 16 of the Constitution. This would mean that the promotions from the cadre of Assistant Engineers (graduates as well as diploma holders) to the cadre of Executive Engineers prior

to the coming into force of 1996 Rules would be governed by Rule 21(3) of the 1954 Rules, as amended in 1972 to include the proviso.

In O.A. No. 704 of 1988 which filed by the graduate Assistant Engineers, the relief sought was confined to future promotions of diploma holder Assistant Engineers to the cadre of Executive Engineers on regular as well as ad hoc basis. The scope of Civil Appeal No. 5363 of 1990 filed by the graduate Assistant Engineers is, therefore, confined to promotions made to the cadre of Executive Engineers from amongst diploma holder Assistant Engineers after the date of filing of D.A. No. 704 of 1988 in the Tribunal. It has been pointed out that subsequent to the filing of O.A. No. 704 of 1988 before the Tribunal some orders were passed in 1994 whereby regular appointments have been made to the cadre of Executive Engineers from amongst Assistant Engineers, degree holders as well as diploma holders. It has also been stated that most of the diploma holder Assistant engineers who were regularly appointed as Executive Engineers under these orders have already retired from service. The grievance of the graduate Assistant Engineers is mainly confined to diploma holder Assistant Engineers who have been working as Executive Engineers on ad hoc basis. Since the 1954 Rules were in operation prior to the promulgation of the 1996 Rules, regular promotion on the post of Executive Engineers against vacancies which occurred prior to the promulgation of the 1996 Rules will be governed by the 1954 Rules. If any of the appellants in Civil Appeal No. 5363 of 1990 feels aggrieved by the regular promotion of any of the diploma holder Assistant Engineers to the cadre of Executive Engineer after the filing of O.A. No. 704 of 1988 and prior to the coming into force of the 1996 Rules, he may agitate the said grievance in the competent forum. The promotion of diploma holder Assistant Engineers who have been promoted on the post of Executive Engineer on ad hoc basis, will have to be reviewed by the authorities and regular promotions against vacancies which occurred prior to the promulgation of the 1996 Rules will have to be made in accordance with the 1954 Rules. Regularisation of diploma holder Assistant Engineers who are working as Executive Engineers on ad hoc basis against vacancies which occurred after the promulgation of the 1996 Rules will have to be made in accordance with the provisions of the 1996 Rules.

The appeals are disposed of accordingly and the impugned judgment of the Tribunal will stand modified in these terms. No order as to costs.