

M. B. Joshi and Others

Vs

Satish Kumar Pandey and Others

Ram Sharan Gupta and Others

Vs

State of M. P. and Others

N. N. Asthana and Another

Vs

Harish Kumar Ahuja and Others

Civil Appeal Nos. 4255, 4256 and 4257 of 1992

(Kuldip Singh, N. M. Kasliwal JJ)

15.10.1992

JUDGMENT

KASLIWAL, J. –

1. Special leave granted in all the above cases.

2. All the above appeals are disposed of by a common order, as identical questions of law are involved in these cases. For the purpose of understanding the controversy raised in all these cases, we are stating the facts of appeal arising out of Special Leave Petition No. 2507 of 1992. The appellants and the private respondents were Sub-Engineers in Public Health Engineering Department of Government of Madhya Pradesh. They are governed by Madhya Pradesh Public Health Engineering (Gazetted) Service Rules, 1980 (hereinafter referred to as 'the Rules'). Under Schedule IV of the Rules, the next higher post for promotion from the post of Sub-Engineers in Civil or Mechanical is the post of Assistant Engineers. The minimum period for a Sub-Engineer to qualify for promotion to the post of Assistant Engineer is 12 years for diploma-holders and 8 years for such Sub-Engineers who obtain degree of graduation in the course of service. Earlier 60 per cent quota for the posts of Assistant Engineers was fixed by direct recruitment and 40 per cent by promotion from the Sub-Engineers, Draftsman and Head Draftsman. By an executive order dated February 7, 1989, quota of direct recruitment was reduced to 50 per cent and the quota by promotion increased to 50 per cent. This 50 per cent quota by promotion with which we are concerned in the above cases has been sub-divided in the following manner :

#(i) Diploma holder Sub-Engineers 35 per cent completing 12 years of service(ii) Draftsman & Head Draftsman 5 per cent completing 12 years of service(iii) Graduate Sub-Engineers completing 10 per cent 8 years of service##

3. In the above cases we are now concerned with the third category of cases which deal with the promotion of Graduate Sub-Engineers completing 8 years of service.

4. The State Government had been applying the principle of counting the seniority of Graduate Sub-Engineers from the date of their continuous officiation irrespective of the date on which such diploma-holder Sub-Engineer acquired degree of graduation in engineering. On this basis, the Departmental Promotion Committee took into consideration 30 Graduate Sub-Engineers for promotion to the post of Assistant Engineers. The D.P.C. by order dated December 4, 1989 prepared a panel of 18 Graduate Sub-Engineers found suitable for promotion to the post of Assistant Engineer. The Government by order dated December 6, 1989 promoted M. B. Joshi and six others as Assistant Engineer who are appellants in appeal arising out of Special Leave Petition No. 2507 of 1992. The private respondents in this appeal filed application No. 140 of 1990 in Madhya Pradesh Administrative Tribunal, Jabalpur challenging the aforesaid orders dated December 4, 1989 and December 6, 1989. The contention of these persons before the Tribunal was that the seniority for the purpose of promotion to the post of Assistant Engineers in 10 per cent quota of Graduate Sub-Engineers completing 8 years of service ought to have been considered from the date of attaining the Graduate degree of engineering and not from the date of appointment as Sub-Engineer. The Tribunal placing reliance on its earlier decision in T.A. No. 771 of 1988 Sanaula Sunzani v. State of M.P. held that the seniority of diploma-holder Sub-Engineers acquiring the degrees of graduation in engineering for inclusion in the gradation list of Sub-Engineers should be counted from the dates of acquisition of graduation in engineering or of any other equivalent degree and not from the dates of their initial entries as Sub-Engineers. Applying the aforesaid principle laid down in Sanaula case, the Tribunal held that the applicants (private respondents in the appeal) having secured the degrees in engineering prior to respondents 3 to 9 (the appellants in the appeal) will rank higher in the gradation list of Graduate Sub-Engineers. The Tribunal as such allowed the petition filed before them and directed the State Government and Engineer-in-Chief, Public Health Engineering Department to convene a special D.P.C. to consider the applicants for promotion to the post of Assistant Engineers as on December 4, 1989 and if found suitable for promotion, promote them and give them seniority over respondents 3 to 9 within 4 months of the date of receipt of the order.

5. The short controversy arising in these cases relates to the determination of seniority amongst the diploma-holder Sub-Engineers who acquired the degree of graduation in engineering during the period of service qualifying them for promotion in 8 years to the post of Assistant Engineer. It is an admitted position that there is no specific rule governing such situation. Relevant extracts of Schedule IV of the Rules as published in the Madhya Pradesh Gazette dated February 27, 1981 issued in Hindi read as under :

(Matter is typed in Hindi Version.)

6. Mr. S. S. Ray, learned senior counsel appearing on behalf of the appellants contended that so far as the post of Sub-Engineers is concerned, the minimum qualification prescribed is diploma-holder. Initially, in the Public Health Engineering Department till 1980, fresh degree-holders used to get appointed directly as Assistant Engineers and the diploma-holders used to be appointed as Sub-Engineers. Thereafter on account of unemployment, the degree-holders also started seeking appointments as Sub-Engineers. However, so far as the post of Sub-Engineer was concerned, the seniority was determined on the basis of the date of appointment on the post of Sub-Engineer irrespective of the fact that the person joining such post was a degree-holder or a diploma-holder. The scale of pay was similar and the diploma-holder and degree-holder Sub-Engineers stood on the same footing and their gradation list was prepared on the basis of length of service in the cadre of

Sub-Engineers. The next higher post for promotion from the post of Sub-Engineer is the post of Assistant Engineer. Every diploma-holder Sub-Engineer became eligible for promotion to the post of Assistant Engineer after having completed 12 years of service. The Government however, considered it proper to reduce this period of 12 years to 8 years in case of such diploma-holder Sub-Engineers who obtained a degree of engineering during the continuance of their service as Sub-Engineer as a sort of incentive to improve qualification while continuing in service. It was thus, submitted by Mr. Ray that it is a well-settled principle of service jurisprudence that where the rules are silent, the seniority is always determined on the basis of length of service amongst the employees appointed on a similar post in the same cadre. It was thus, submitted that obtaining a degree during the continuation of service as Sub-Engineer simply accelerated the entitlement to promotion for the post of Assistant Engineer from 12 years to 8 years but it did not in any manner disturb the seniority which was already settled on the basis of length of service on the post of Sub-Engineer. It was submitted that the D.P.C. rightly prepared the panel of selection and the Government took a correct decision in issuing the order dated December 6, 1989.

7. Mr. Ashoke Sen, learned senior counsel appearing on behalf of the respondents contended that it was necessary to obtain the degree of engineering for being qualified for promotion to the post of Assistant Engineer within a period of 8 years instead of 12 years. It was further argued that the period of 8 years can only be counted from the date when the diploma-holder Sub-Engineer acquired the degree of engineering and not prior to the said date. Mr. Sen further placed reliance on N. Suresh Nathan v. Union of India (1922 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928) and submitted that this case clinches the issue raised in these cases and is no longer open for consideration.

8. We have given our careful consideration to the arguments advanced on behalf of learned counsel for the parties. We may first deal with N. Suresh Nathan case (1922 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928) on which strong reliance is placed by Mr. Ashoke Sen. In this case, the Recruitment Rules for the post of Assistant Engineer in the Public Works Department, Pondicherry, prescribing the educational and other qualifications for appointment by direct recruitment and promotion came for consideration. For direct recruits, the qualification prescribed was a Degree in Civil Engineering of a recognised University or Diploma in Civil Engineering from a recognised institution with three years' professional experience. For appointment by promotion of Section Officers now called Junior Engineers, the qualification prescribed was as under :

"1. Section Officers possessing a recognised Degree in Civil Engineering or equivalent with three years' service in the grade failing which Section Officers holding Diploma in Civil Engineering with six years' service in the grade - 50 per cent.

2. Section Officers possessing a recognised Diploma in Civil Engineering with six years' service in the grade - 50 per cent."

9. The dispute in the above case whether a diploma-holder Junior Engineer who obtains a degree while in service becomes eligible for appointment as Assistant Engineer by promotion on completion of three years' service including therein the period of service prior to obtaining the degree or the three years' service as a degree-holder for this purpose is to be reckoned from the date he obtains the degree. The Central Administrative Tribunal held that the applicants diploma-holder were entitled to be considered for promotion to the post of Assistant Engineer on par with the other degree-holder Junior Engineers taking due note of their total length of service rendered in the grade

of Junior Engineer. Such a consideration should be alongside other Junior Engineers who might have acquired the necessary degree qualification earlier than the applicants, while holding the post of Junior Engineer. This Court allowed the appeal and set aside the above order of the Tribunal. While allowing the appeal, this Court held as under : (SCC p. 586, para 4)

"In our opinion this appeal has to be allowed. There is sufficient material including the admission of respondents diploma-holders that the practice followed in the department for a long time was that in the case of diploma-holder Junior Engineers who obtained the degree during service, the period of three years' service in the grade for eligibility for promotion as degree-holder commenced from the date of obtaining the degree and the earlier period of service as diploma-holder was not counted for this purpose. This earlier practice was clearly admitted by the respondents diploma-holder in para 5 of their application made to the Tribunal at page 115 of the paper book. This also appears to be the view of the Union Public Service Commission contained in their letter dated December 6, 1968 extracted at pages 99-100 of the paper book in the counter-affidavit of respondents 1 to 3. The real question, therefore, is whether the construction made of this provision in the rules on which the past practice extending over a long period is based is untenable to require upsetting it. If the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined."

10. This Court then considered the Recruitment Rules applicable in the said case and then held that the entire scheme did indicate that the period of three years' service in the grade required for degree-holders according to Rule 11 as the qualification for promotion in that category must mean three years' service in the grade as a degree-holder, and therefore, that period of three years can commence only from the date of obtaining the degree and not earlier. It was further held that the service in the grade as a diploma-holder prior to obtaining the degree cannot be counted as service in the grade with a degree for the purpose of three years' service as a degree-holder. This Court then observed : (SCC p. 587, para 5)

"In our opinion, the contention of the appellants degree-holder that the rules must be construed to mean that the three years' service in the grade of a degree-holder for the purpose of Rule 11 is three years from the date of obtaining the degree is quite tenable and commends to us being in conformity with the past practice followed consistently. It has also been so understood by all concerned till the raising of the present controversy recently by the respondents. The tribunal was, therefore, not justified in taking the contrary view and unsettling the settled practice in the department."

11. A perusal of the above observations made by this Court clearly show that the respondents diploma-holders in that case has admitted the practice followed in that department for a long time and the case was mainly decided on the basis of past practice followed in that department for a long time. It was clearly laid down in the above case that if the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It was clearly said "it is in this perspective that the question raised has to be determined". It was also observed as already quoted above that the Tribunal was not justified in taking the contrary view and unsettling the settled practice in the department. That apart the scheme of the rules in N. Suresh Nathan case (1922 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19

ATC 928) was entirely different from the scheme of the Rules before us. The rule in that case prescribed for appointment by promotion of Section Officers/Junior Engineers provided that 50 per cent quota shall be from Section Officers possessing a recognised degree in Civil Engineering or equivalent with three years' service in the grade failing which Section Officers holding Diploma in Civil Engineering with six years' service in the grade. The aforesaid rule itself provided in explicit terms that Section Officers possessing a recognised Degree in Civil Engineering was made equivalent with three years' service in the grade. Thus, in the scheme of such rules the period of three years' service was rightly counted from the date of obtaining such degree. In the cases in hand before us, the scheme of the rules is entirely different.

12. In the cases before us 50 per cent of the posts of Assistant Engineers have to be filled by direct recruitment of persons having degree of graduation in engineering. The remaining 50 per cent of the vacant posts are to be filled by promotion from the lower cadre of Sub-Engineer and Draftsman. Out of this 50 per cent, 35 per cent quota is fixed for diploma-holders who have completed 12 years of service on the post of Sub-Engineer, 5 per cent quota for Draftsman who have completed 12 years of service and the remaining 10 per cent with which we are concerned has been kept for such Sub-Engineers who during the continuation of their service obtained a degree of graduation or equivalent in engineering and in that case the period of service is reduced from 12 years to 8 years. The Rules in our case do not contemplate any equivalence of any period of service with the qualification of acquiring degree of graduation in engineering as was provided in express terms in N. Suresh Nathan case (1922 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928) making three years service in the grade equivalent to degree in engineering. In our opinion, the Rules applicable in the cases before us clearly provide that the diploma-holders having obtained a degree of engineering while continuing in service as Sub-Engineers shall be eligible for promotion to the post of Assistant Engineer in 8 years of service and quota of 10 per cent posts has been earmarked for such category of persons.

13. If we accept the contention of Mr. Ashoke Sen, it would defeat the very scheme and the purpose of giving incentive of adding educational qualification by diploma-holders while continuing in service in case the period of 8 years' is counted from the date of obtaining graduate degree in engineering. It may be noted that no such argument was raised even from the side of the respondents before the Tribunal. If such interpretation as now sought to be advanced by Mr. Ashoke Sen, learned senior counsel is accepted, no relief could have been granted to the respondent Satish Kumar Pandey. We would illustrate the above position on admitted facts that Shri Satish Kumar Pandey had joined as Sub-Engineer on August 23, 1980, but had acquired the degree of engineering in May 1987. In that situation, Mr. Satish Kumar becomes eligible only in May 1975 and he could not be considered as eligible in December 1989 when these Sub-Engineers were considered for promotion as Assistant Engineers. Even otherwise, if this period of 8 years is counted from the date of acquiring degree then this incentive of adding the qualification during the continuation of service and getting the advantage of acceleration in promotion in 8 years would for all practical purposes become nugatory and of no benefit.

14. It is further important to note that in the cases before us, the Government itself has been adopting the practice and making promotion as contended by the appellants and we are upholding such practice. In N. Suresh Nathan case (1922 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) 19 ATC 928) also this Court had upheld the practice followed by the Government. It is also a well-settled principle of service jurisprudence that in the absence of any specific rule, the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of service and not on any other fortuitous circumstance.

15. Though, in the cases of special leave petitions filed by Shri Ram Sharan Gupta v. State of M.P. and N. N. Asthana v. Harish Kumar Ahuja the parties belonged to the Irrigation Department of the State of Madhya Pradesh and were governed by different set of rules, by the controversy arising in these cases is amply covered with the view taken by us and determined in the manner indicated above.

16. In these circumstances mentioned above, we are clearly of the view that the Tribunal was wrong in determining the seniority from the date of acquiring degree of engineering and it ought to have been determined on the basis of length of service on the post of Sub-Engineer and the State Government was right in doing so and there was no infirmity in the orders passed by the Government. In the result, we allow these appeals, set aside the orders of the Tribunal dated October 15, 1991, November 28, 1991 and September 17, 1991 and uphold the orders passed by the Government in all these cases. In the facts and circumstances of the case, no order as to costs.

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