

Shamkant Narayan Deshpande

Vs

Maharashtra Industrial Development Corporation and Another

Spl. Leave Petn. (C) No. 4748 of 1991

(P. B. Sawant, G. N. Ray JJ)

21.10.1992

JUDGEMENT

SAWANT, J.:-

1. The petitioner is a diploma-holder in Engineering and holds the post of Executive Engineer in the respondent-Corporation. Till 1974, the promotional post of the Superintending Engineer was available both for diploma-holders and degree-holders according to merit-cum-seniority. This was so according to the practice followed by the Corporation without making any rules or regulations in that behalf. In 1974, the Corporation made regulations by passing a resolution and continued the same practice. Admittedly, the regulations were not made under Section 64 of the Maharashtra Industrial Development Act, 1961 (hereinafter referred to as 'the Act') under which the respondent-Corporation was created. Thereafter in 1988, the Corporation passed a resolution, for the first time, making 75 per cent of the posts of Superintending Engineers available to the Executive Engineers holding degrees and 25 per cent to the Executive Engineers who were diploma-holders. This resolution was also admittedly not a regulation made under the said Section 64. But for this resolution, the petitioner who was senior to respondent No. 2 would have been promoted to the post of Superintending Engineer on 31st October, 1990. However, since respondent No. 2 was a degree-holder, he got the benefit of the said resolution and was promoted to the said post on that date. It is this promotion which was challenged by the petitioner by a writ, petition in the High Court. The High Court by the impugned judgment dismissed the said petition.

2. Two contentions were raised before us :

(i) that no classification could be made among the Executive Engineers on the basis of their educational qualifications for the purpose of promotion to the post of Superintending Engineer, since they belong to the same cadre of Executive Engineers and do the same work. There was also a common seniority list of the Executive Engineers maintained. Hence the classification was discriminatory in nature and violative of Arts. 14 and 16 of the Constitution.

(ii) that if at all such a discrimination was permissible, it could be made only by a statutory rule or regulation framed under Section 64 of the said Act. A mere resolution or an executive instruction could not effect such discrimination.

3. We find no merit in either of the two contentions. It is now well settled that for the purposes of

promotion, a valid classification can be made among the members holding the same post on the basis of their qualifications. In *State of Jammu and Kashmir v. Triloki Nath Khosa*, (1974) 1 SCR 771 : (AIR 1974 SC 1), a Constitution Bench of this Court has clearly held that such a classification is permissible and does not violate Arts. 14 and 16 of the Constitution. The Court has observed there that in *State of Mysore v. P. Narasing Rao*, (1968) 1 SCR 407 : (AIR 1968 SC 349) and *Union of India v. Dr. (Mrs.) S. B. Kohli*, AIR 1973 SC 811, it was already held that classification on the basis of educational qualifications was permissible. The Court then referred to *Roshan Lal Tandon v. Union of India*, (1968) 1 SCR 185 : (AIR 1967 SC 1889) and distinguished it on the facts by pointing out that it was a case of the direct recruits and promotees integrated into one cadre. Once they were integrated they lost their birth-marks, viz., the different sources from which they were recruited. (Emphasis supplied). The Court pointed out that *Roshan Lal's* case (supra) was thus no authority for the proposition that if direct recruits and promotees are integrated into one class, they cannot be classified for purposes of promotion on a basis other than that they were drawn from different sources. The Court pointed out that in the case before them the classification rested fairly and squarely on the consideration of educational qualifications which was not a discrimination in relation to the source of recruitment. The Court also pointed out that the very Bench which decided *Roshan Lal's* case (supra) held about a fortnight later in *Narsingh Rao's* case (supra) that higher educational qualifications were a relevant consideration for fixing a higher pay-scale and, therefore, matriculate Tracers could be given a higher scale than non-matriculate Tracers though their duties were identical. The Court, further, on the same reasoning distinguished *Mervyn Coutindo v. Collector of Customs, Bombay*, (1966) 3 SCR 600 : (AIR 1967 SC 52) and *S. M. Pandit v. State of Gujarat*, AIR 1972 SC 252 by pointing out that both the cases related to the classification made on the basis of the sources of recruitment and not on the basis of educational qualifications. The Court then concluded (Para 55 of AIR 1974 SC 1) :

"We are therefore of the opinion that though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. The rule providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders does not violate Arts. 14 and 16 of the Constitution and must be upheld."

The reliance placed by Shri Shetye appearing for the petitioner on a later decision of a Bench of two learned judges of this Court in *H.C. Sharma v. Municipal Corporation of Delhi*, (1983) 3 SCR 372 : (AIR 1983 SC 881) is, we are afraid, not justified. It was a case where no separate quota for promotion to the post of Assistant Engineer was kept for degree-holder Junior Engineers and diploma-holder Junior Engineers. The degree-holder Junior Engineers had sought a relief that such a quota be kept. It is while dealing with this relief claimed, that this Court had observed that it could not be done except by carving out two classes in the same category of Junior Engineers. It may be observed that it was not a case where the classification was already made which was challenged before the Court. It was a case where the writ petitioners wanted such a classification to be made. It is for the authorities if they so desire, taking into consideration the nature of work, the requisite qualification for the work and the necessity for making such a classification that quotas could be prescribed on the basis of educational qualifications. It is true that the following observations made in that case while dealing with the relief claimed, do support the petitioner (Para 56 of AIR) :

".....Prayer No. 4 is to declare the petitioners Graduate Engineers as a separate category amongst Junior Engineers and give them equal quota like the Diploma holder Junior Engineers out of the 50% quota for promotion as Assistant Engineers.

This cannot be done except by carving out two classes in the same category of Junior Engineers on the basis merely of their qualification which is not permissible in law though the creation of selection grade in the same category on the basis of merit and or seniority is well known and permissible. The Junior Engineers do the same kind of work and bear the same responsibilities whatever their qualification, whether they are Degree-holders or Diploma holders"

However, these observations have been made without noticing the decision in Khosa's case (AIR 1974 SC 1) (supra). Hence, the observations are per incuriam.

As regards the next contention, admittedly either the practice followed till 1988, nor the resolution passed by the respondent Corporation in 1988 was a regulation passed in accordance with Section 64 of the Act. It is well settled that in the absence of a rule or regulation, the authority can prescribe service conditions by executive instructions and this is what was done till the year 1988 and is also sought to be done since 1988 by the impugned resolution.

The proposition that in the absence of the rules and regulations, the authority can act by executive instructions finds direct support in *Mysore State Road Transport Corporation v. Gopinath Gundachar Char*, (1968) 1 SCR 767 : (AIR 1968 SC 464) and *V. Balasubramaniam v. Tamil Nadu Housing Board*, (1987) 4 SCC 738 : (AIR 1988 SC 6). In view of the above, the petition stands dismissed. Petition dismissed.

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