

Shailendra Dania & Others vs S.P. Dubey & Others on 17 April, 2007

Equivalent citations: 2007 AIR SCW 3553, 2007 (5) SCC 535, AIR 2007 SC (SUPP) 208, (2007) 5 SCALE 781, (2007) 3 SCT 1

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Bench: B.N. Agrawal, P.P. Naolekar, Lokeshwar Singh Panta

CASE NO.:

Appeal (civil) 2219-2222 of 2002

PETITIONER:

SHAIENDRA DANIA & OTHERS

RESPONDENT:

S.P. DUBEY & OTHERS

DATE OF JUDGMENT: 17/04/2007

BENCH:

B.N. AGRAWAL, P.P. NAOLEKAR & LOKESHWAR SINGH PANTA

JUDGMENT:

JUDGMENT [with Civil Appeal No. 4104 of 2002, Transferred Cases (Civil) Nos. 83 & 84 of 2005, Transferred Cases (Civil) Nos. 2, 3, 46, 47, 48, 49 & 50 of 2006 and Civil Appeal No. of 2007 (arising out of SLP(C) No. 9239 of 2002)] P.P. NAOLEKAR, J.

Leave granted in S.L.P.(C) No. 9239 of 2002.

The appellants and the respondents herein are employees of the Slum Wing Department (hereinafter referred as "SWD"). SWD was part of the Municipal Corporation of Delhi (hereinafter referred as "MCD") before 1974. SWD was transferred from MCD to Delhi Development Authority (hereinafter referred as "DDA") in 1974 with the stipulation that its employees alone would be considered for confirmation and promotions against the posts in it. In 1978, SWD was retransferred to MCD, but once again in May 1980 it was transferred back to DDA with the stipulation that it would remain as a separate entity and its employees would not be merged with DDA. For recruitment of various staff members in DDA, vide its Resolution No.574 dated 13.11.1963, DDA adopted Recruitment Rules of CPWD qua the posts of Junior Engineer, Assistant Engineer and Executive Engineer. In the hierarchy of Engineering Cadre, the initial post is of Junior Engineer (Section Officer or S.O.). The post is meant for 100% direct recruitment and the qualification prescribed was "Diploma-holders in Civil Engineering with two years' experience". However, there was no bar for persons possessing higher qualification, viz., Degree in Engineering, for applying to

the post of Junior Engineer and such persons were not required to have any prior experience for appointment to the cadre of Junior Engineer in DDA. The next higher post is that of Assistant Engineer. The rule provided filling up of 50% vacancies on the post of Assistant Engineer by those who acquired a Graduate Degree in Engineering by means of direct recruitment or by deputation. The remaining 50% vacancies were to be filled up on promotional basis from the pool of Junior Engineers. Out of 50% of the promotional feeder cadre of Junior Engineers, one-half of such posts would be filled up by promotion of diploma-holders with eight years' qualifying service and remaining 50% quota would be filled up from the Junior Engineers who were Graduate Engineering Degree-holders with three years' qualifying service. Thus, the diploma-holders having eight years of qualifying service and Graduate Engineering Degree-holders with three years' qualifying service would be considered for promotion to the post of Assistant Engineer within their quota of 25% each. Further promotion in the Engineering Branch is from the post of Assistant Engineer to the post of Executive Engineer. The minimum qualifying experience for promotion to the post of Executive Engineer for graduate Engineers is eight years' experience in the grade of Assistant Engineer, whereas for diploma-holders it is ten years' service in the grade of Assistant Engineer.

The appellants were graduates with Engineering Degree and joined the Department as Junior Engineers as direct recruits. On 7.6.1985 and 24.6.1985, some diploma-holder Junior Engineers were promoted on ad hoc basis as Assistant Engineers.

First phase of litigation In the year 1984, the Junior Engineers and the Assistant Engineers, who were diploma-holders, assailed constitutional validity of the rules in the matter of requirement of differential service experience between the graduates and the diploma-holders for promotion to the higher cadres, viz., Assistant Engineers and Executive Engineers respectively before Delhi High Court. In W.P. No.2132 of 1984 (Kimti Lal Kathuria and Others v. DDA), the challenge was to the rule prescribing three years' and eight years' service experience for graduates and diploma-holders respectively to the posts of Assistant Engineers and a discrimination thus brought about between them. W.P. No.2082 of 1984 (Niranjan Goel and Others v. DDA) pertained to the constitutional validity of the analogous provisions in the rules adopted by Resolution No.105 dated 16.6.1971. The distinction made for promotion of degree- holder promotees and diploma-holder promotees was struck down by Delhi High Court. It was held that the diploma-holders should be governed by the same eligibility promotional qualifications that were applicable to degree-holders. In W.P. No.2082 of 1984, the Delhi High Court struck down Resolution No.105 dated 16.6.1971 which allowed DDA to distinguish between diploma-holder and degree- holder Assistant Engineers in the matter of experience and promotion as Executive Engineers. By a common judgment dated 2.9.1987 reported as Kimti Lal Kathuria and Others v. Delhi Development Authority and Others, 1988 Labour Industrial Cases 434 (Del) = 1988 (1) SLR 293, the Court held that the prescription of differential standards - based even on the differences in technical, educational qualifications - is violative of Articles 14 and 16 of the Constitution. However, in Roop Chand Adlakha and Others v. Delhi Development Authority and Others, 1989 Supp.(1) SCC 116, a two-Judge Bench of this Court reversed the above-mentioned judgment of the Delhi High Court.

Second phase of litigation In 1971, the Departmental Promotion Committee (hereinafter referred as "DPC"), appended a Note relaxing the rules in favour of diploma-holders, who while in service

acquired degree qualification, so that they could be considered for promotion to the post of Assistant Engineer on the following basis :-

1. The period of three years should comprise of at least two years after graduation plus 3/8 of the service rendered in DDA or other government organization or local body as S.O. subject to a maximum of one year benefit.
2. If a S.O., who has done graduation, completes eight years' service as S.O. on the date earlier than the date on which the period of two years after graduation expires, he should be given promotion from such earlier date notwithstanding the fact that he has not completed two years' service after graduation.

On 24.2.1989, S.P. Dubey, one of the respondents herein, filed a writ petition (W.P. No.591 of 1989) before the High Court of Delhi and challenged the validity of the above-mentioned Note, which was adopted by the DPC in 1971. It was contended that once a diploma- holder acquired a degree qualification, the entire experience gained by him prior to obtaining the degree qualification should be counted for considering the eligibility to the post of Assistant Engineer in degree quota.

One Naresh Kumar Gera, on 15.5.1989, filed another writ petition (W.P. No.1427 of 1989) before the High Court of Delhi against DDA and challenged the above-mentioned Note adopted by the DPC in 1971 as arbitrary on the ground that it was not proportionate to the length of service rendered as Junior Engineer holding Diploma in Electrical Engineering and accordingly sought quashing of the rules.

In January 1990, Slum Wing Graduate Engineers' Association filed a writ petition (W.P. No.250 of 1990) before the High Court of Delhi and sought direction against DDA to fill up posts of Assistant Engineers belonging to degree-holders' quota and claimed that diploma-holders were much in excess of their quota. The petitioners therein alleged that the intention and the spirit behind the Recruitment Rules was that there should be parity between the degree-holders and diploma-holders in the matter of promotion to the post of Assistant Engineer.

On 5.3.1991, a Division Bench of the High Court of Delhi granted an interim order in W.P. No.250 of 1990 and directed DDA to convene a DPC for each of the three years, i.e., January-1988, 1989 and 1990 in order that promotion be made and a parity of 1:1 is maintained between the promotees. The relevant observations of the High Court in that regard are as follows:-

"We are informed that after January, 1987 till today no DPC has been held. DPCs are required to be held at least once a year. This being so, we direct the DDA to hold a DPC for each of the succeeding years, namely, 1988, 1989 and 1990 and make regular promotions of eligible candidates in such a way that as far as possible parity between the Degree-holders and the Diploma- holders is attained. The regular promotions so made shall, however, be subject to any direct recruitment, which may be made in accordance with the rules against the quota meant for direct recruits. If as a result of such direct recruitment, any of the promotees have to be reverted then the reversion

should be done in such a way that the remaining Assistant Engineers who are promotees should maintain the parity, namely 50% should be from Degree-holders and 50% from Diploma-holders. For the purpose of seniority at least, if not for other benefits, about which we make no observations, the promotions or regularization should be made with effect from the date when the vacancies were available and the candidates became eligible for promotion. The DPC should be convened within a period of six weeks from today."

In the meanwhile, on 20.9.1990, a Memorandum was issued by DDA which stipulated that a diploma-holder who had subsequently acquired a Degree in Engineering would be treated as a degree-holder for the purposes of promotion, irrespective of the date of acquiring graduate qualification. It also stipulated that the Recruitment Rules recognize only a 'Degree' or a 'Diploma' for purposes of promotions and did not stipulate any minimum experience after acquisition of 'Degree'. It was further stated therein that even if an officer had acquired his degree just before the meeting of DPC, he would be considered as a degree-holder for that and any subsequent DPCs and the benefit of the past service would not be available for reckoning seniority.

On 1.5.1991, a DPC was held in which the appellants were considered on the basis of their seniority. However, on 5.7.1991, by giving effect to the Memorandum dated 20.9.1990, a fresh DPC was convened which changed the seniority list in favour of the respondents as a diploma-holder who had subsequently acquired a Degree in Engineering would be treated as degree-holder for the purposes of promotion, irrespective of the date of acquiring graduate qualification.

The aforementioned Memorandum was challenged by way of a writ petition (W.P. No. 3336 of 1990 - R.K. Mittal & Another v. Union of India & Others) before a Single Judge of the Delhi High Court. By its judgment dated 19.8.1991 which was reported as 45 (1991) DLT 589, the High Court quashed the decision dated 20.9.1990 of DDA and allowed the writ on a limited ground that prior to issuance of the said circular, principles of natural justice were not complied with. The relevant observations are as follows :-

" , I am of the view that the impugned decision has been taken, in violation of the principles of natural justice, as admittedly, no opportunity of being heard was given to the Degree-holders, as well as, the Diploma- holders. The result is that in my opinion, the case should be remanded back to the DDA, for taking the decision afresh, after inviting objections, or comments, both from the Degree-holders and Diploma-holders Junior Engineers. The representatives of both these categories be also given opportunity of being heard. After this, it is for the DDA to interpret or clarify the rules."

" The impugned decision dated September 20, 1990, is quashed and set aside. I remand the matter back to the DDA, with direction to decide the matter afresh, within a period of six months, after inviting objections / comments from all concerned and after giving an opportunity of being heard, to the representatives of Degree-holder and Diploma Holder Junior Engineers."

The diploma-holders by way of a Letters Patent Appeal (L.P.A. No. 43 of 1991) challenged the decision of the Single Judge dated 19.8.1991. On 5.2.1991, an Establishment Order was issued to promote diploma-holders on current duty charge basis. The same was questioned by filing a writ petition (W.P. No. 2382 of 1991 - Slum Wing Delhi Development Authority Graduate Engineers' Association (Regd.) & Others v. D.D.A. & Others). By its decision dated 12.2.1992 reported as 46 (1992) DLT 486 (DB) = 1992 (22) DRJ 548, the Delhi High Court's Division Bench dismissed the LPA and allowed the writ petition holding that three years' experience required for degree-holders' eligibility quota had to be considered after acquiring the degree. The High Court summarized the issues as follows :-

"Herein, the main controversy is whether a Diploma holder Junior Engineer, who obtains degree while in service becomes eligible for promotion as Assistant Engineer on rendering three years' service would include therein the period of service rendered by him prior to the obtaining of the Degree or he has to render three years' service after obtaining the Degree to become eligible for promotion to the post of Assistant Engineer Here the only point for our consideration is whether three years service as Junior Engineer has to be after obtaining degree or the earlier service of the Junior Engineer while holding diploma only can also be considered"

The Division Bench of the High Court relied upon the observations of this Court as propounded in N. Suresh Nathan and Another v. Union of India and Others, 1992 Supp.(1) SCC 584 wherein the Court has observed that Rule 7 lays down the qualifications for direct recruitment from the two sources, namely, degree-holders and diploma-holders with three years' professional experience. In other words, a degree is equated to diploma with three years' professional experience. Rule 11 provides for recruitment by promotion from the grade of Section Officers (now called Junior Engineers) which provides two categories of Junior Engineers, i.e., degree-holder Junior Engineers with three years' service in the grade and the diploma-holder Junior Engineers with six years' service in the grade and promotional quota of 50% from each category which matches with Rule 7 wherein a degree is equated with diploma with three years' professional experience. The entire scheme, therefore, does 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 and this interpretation of Rule 11 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. On 25.2.1992, one of the respondents herein S.P. Dubey and others challenged the abovementioned judgment of the Delhi High Court dated 12.2.1992 before this Court by way of Special Leave Petition (Civil) Nos. 7737-39 of 1992. The DDA also filed Special Leave Petitions (Civil) Nos. 7114-16 of 1992 against the aforesaid judgement. This Court dismissed these petitions vide order dated 20.8.1992 in limine.

Pursuant to the directions contained in the judgment dated 12.2.1992 of the Division Bench of the Delhi High Court, DDA by a circular dated 30.10.1992 issued tentative seniority list of the Engineers and indicated their placement as per their eligibility for promotion as Assistant Engineer upto

15.10.1992. On 19.3.1993, the final seniority list of graduate Junior Engineers (Civil) indicating their placement as per eligibility for promotion as Assistant Engineer (Civil) was circulated. On 22.3.1993, the appellants were promoted as Assistant Engineers (Civil) on the recommendations of DPC against the vacancies arising during calendar year spanning from 1.1.1988 to 1992 as per the seniority list prepared by the Department in accordance with the judgment dated 12.2.1992 of the High Court. The seniority list so drawn was based on two principles, namely,

1. The date on which the selection panel of Degree- holders was approved for appointment as Junior Engineers, and

2. The date of acquisition of degree by a Diploma-

holder Junior Engineer working in the Department, Provided that the persons in (1) above would maintain their inter se seniority by the selection panel;

Provided further that if there are more than one Diploma-holder Junior Engineer acquiring degree as in (2) above, then they will be assigned inter se seniority according to the order in which their names figure in 1987 list.

On 22.3.1993, the Department issued a corrigendum with regard to the seniority position.

SWD was transferred to MCD on 1.9.1992 and hence the appellants moved an application before the High Court. The High Court passed an order on 21.9.1992 that in view of the transfer, the decision of the High Court dated 12.2.1992 would be implemented by MCD within three months from 21.9.1992.

One of the respondents herein S.P. Dubey - through writ petition before the High Court of Delhi (W.P. No. 1664 of 1993), prayed for quashing the above-mentioned seniority list and sought for a direction that promotions to the post of Assistant Engineers be made on the basis of the seniority list issued by the authority in 1984 and 1987. Several other writ petitions were filed before the High Court of Delhi, which questioned the above-mentioned seniority list. S.P. Dubey and others through another writ petition before the High Court of Delhi (W.P. No.1923 of 1993) prayed for quashing the promotions to the post of Assistant Engineers made by MCD vide orders dated 22.3.1993.

On 12.3.2001, a Division Bench of the Delhi High Court vide its order referred Civil Writ Petition Nos. 591 of 1989, 1427 of 1989, 1664 of 1993 and 1923 of 1993 along with some other petitions for decision by a Bench of three Judges of the High Court in view of the fact that it felt that the earlier decision of the High Court dated 12.2.1992 in *Slum Wing Delhi Development Authority Graduate Engineers Association (Regd.) & Others v. D.D.A. & Others* (supra), which followed the decision of this Court in *N. Suresh Nathan and Another v. Union of India and Others* (supra), required to be considered as *N. Suresh Nathan's Case* had not been subsequently followed by this Court in other cases like *M.B. Joshi and Others v. Satish Kumar Pandey and Others*, 1993 Supp. (2) SCC 419; *D. Stephen Joseph v. Union of India and Others*, (1997) 4 SCC 753; *Anil Kumar Gupta and Others v. Municipal Corporation of Delhi and Others*, (2000) 1 SCC 128; and *A.K. Raghumani Singh and*

Others v. Gopal Chandra Nath and Others, (2000) 4 SCC 30 as regards the applicability of eligibility criteria in the Recruitment Rules for promotion to the post of the Assistant Engineer.

Accordingly, the matter was placed before the Full Bench of the Delhi High Court. The present appeals by special leave have been filed before this Court against the interim and common order dated 25.1.2002 passed by the Full Bench of the Delhi High Court. The Full Bench of the Delhi High Court after consideration of the relevant decisions, the rule in question and the facts found from the record has recorded the findings that (i) it cannot be said that the DDA followed a consistent practice to the effect that experience for the purpose of promotion to the post of Assistant Engineer would be counted only after a candidate acquires a degree; and (ii) the Note which was issued by DPC in 1971 was in violation of the statutory rules dated 13.11.1963. It was observed that DPC had no requisite jurisdiction therefor, the same had not been approved by the DDA and such Note was ultra vires. Consequently, the appropriate practice which was followed pursuant to the Note of 1971 till 6.12.1982 was held to be wholly illegal and without jurisdiction and thus in the eye of law to be non est. The issue of res judicata was decided in the light of the aforementioned findings. With reference to the Note issued by the DPC in 1971, it was observed that in a case where the fundamental right of a person, by reason of a wrong interpretation of statute would be taken away, which would render a decision nullity, cannot operate as res judicata. It was further said that a candidate in terms of Article 16 of the Constitution of India does not have a right to promotion, but he has the fundamental right to be considered therefor. Right to be considered in terms of Article 16 would embrace within its fold consideration in accordance with law and in a fair, just and equitable manner. If a candidate is deprived of his right to be considered for promotion on misinterpretation and misconstruction of a statutory provision, the same in the aforementioned situation would attract the wrath of Article 16 and on that ground an earlier decision would not attract the principle of res judicata. An unreasoned order at the threshold does not constitute a binding precedent nor would such an order operate as res judicata. As for the interpretation of the rule regarding the past service of the diploma-holders, the Court held that the diploma-holders and the degree-holders were at par. The educational qualification was to be considered for the purpose of eligibility alone. Once it is held that both the degree-holders and the diploma-holders had been performing the same type of functions, there cannot be any doubt whatsoever that their experience would be counted for the purpose of their promotion irrespective of their educational qualification. As and when diploma-holders acquire qualification, only then they become eligible for consideration in the degree-holders' quota. It was observed that it was idle to contend that any anomaly existed and the answer to the question referred to the Full Bench was in the following terms:

1. Principle of res judicata in the instant case has no application; and,
2. The experience gained by diploma-holders as Junior Engineer has to be counted for promotion to the post of Assistant Engineer, in the event they are duly qualified as degree-holders;

and the matter was remitted back to the Division Bench for consideration of the cases in the light of the findings arrived at by the Full Bench.

In the present case, we are concerned with the rule relating to promotion from the post of Junior Engineer to the post of Assistant Engineer.

It is urged by Shri Jawahar Lal Gupta and Dr. Rajeev Dhavan, the learned senior counsel for the appellants, that under the promotion rule promotion to the post of Assistant Engineer two separate channels are provided for diploma-holders and degree-holders within their respective quota and there would be no violation of rules if requisite experiences required on the post of Junior Engineer as diploma-holder and degree-holder are treated differently and it would be open for the Government to lay down and treat different period of experience as qualitatively different for two classes for further promotion to the post of Assistant Engineer.

On the other hand, it is urged by Shri G.D. Gupta, the learned senior counsel for the respondents, that 50% of the promotion quota for degree-holders Junior Engineers is provided under the rules irrespective of the fact whether a person has joined the post of Junior Engineer as a degree-holder or a diploma-holder and, therefore, on correct interpretation of the rule the period of three years' experience required is inclusive of the period of service on the post prior to the acquisition of the degree qualification. The plain meaning of the words in the rule suggests only one interpretation that two qualifications, namely, Degree in Engineering and three years' service are disjunctive. Therefore, a Junior Engineer who obtains degree while in service, is required to satisfy only two requirements to become eligible for promotion to the post of Assistant Engineer, i.e., a Junior Engineer should have Degree in Engineering or its equivalent qualification in addition to three years' service experience as Junior Engineer. The rule refers to three years' service experience on the post of Junior Engineer and not the experience as qualified degree-holder Junior Engineer. It is further urged that even otherwise for appointment to the post of Assistant Engineer by direct recruitment, the qualification required is Degree in Engineering without there being any requirement of experience, which shows that the degree-holder with no prior experience is considered competent to perform the duties attached to the post of Assistant Engineer. There can be no justification that for promotion to the post of Assistant Engineer, a Junior Engineer must possess three years' service experience as Junior Engineer after obtaining Degree in Engineering. While construing the relevant rule, the Court has to take into consideration the fact situation in the service and on due consideration of the facts the experience required for promotion could only mean the experience on the post of Junior Engineer and not after obtaining the degree for the purpose of promotion in the quota of degree-holders.

Large number of authorities are cited by learned counsel appearing for both sides raising various issues, viz., whether a diploma-holder after obtaining a degree would be compulsorily shifted to the group of graduate Engineers giving a go-by to their claim for promotion to diploma-holders quota or they have a choice to select and continue with either of them. What should be the seniority position of the diploma-holders after they have qualified as graduates, etc. We have refrained ourselves from expressing any opinion on these points and have confined ourselves to the specific issue raised before us and answered by the High Court in the impugned judgment.

In the matter of N. Suresh Nathan and Another v.

Union of India and Others, 1992 Supp. (1) SCC 584, a three- Judge Bench was called upon to decide a similar question as involved in the present case, namely, whether the three years' service experience for promotion for graduate Engineers would mean three years' service prior to obtaining the degree or three years' service after obtaining the degree. The relevant Rule 11 provided for recruitment by promotion from the grade of Junior Engineers. Two categories were provided therein, viz., one of degree-holder Junior Engineers with three years' service in the grade and the other of diploma-holder Junior Engineers with six years' service in the grade, the provision being for 50% from each category. While interpreting the rule, this Court said that the entire scheme did indicate that the period of 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. 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. The Court observed as follows:

"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-holders commenced from the date of obtaining the degree and the earlier period of service as diploma-holders was not counted for this purpose. This earlier practice was clearly admitted by the respondents diploma-holders 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."

From a reading of the aforesaid judgment, it is apparent that after construing the relevant rule the Court has found that the past practice followed in the Department is consistent with the interpretation provided to the relevant rule by the Court.

The same question once again came before another two- Judge Bench of this Court in M.B. Joshi and Others v. Satish Kumar Pandey and Others, 1993 Supp. (2) SCC 419. This time an interpretation was required with reference to a quota of 10% for the graduate Sub-Engineers completing eight years of service. The relevant rule provided for Sub-Engineers to qualify for promotion to the post of Assistant Engineer and qualifying service provided was twelve years for diploma-holders and eight years for such Sub-Engineers who had obtained Degree of Graduation in the course of service. By an Executive Order, 50% of the quota was provided for direct recruits and the balance 50% quota by promotion was sub-divided prescribing 35% for diploma-holders completing twelve years of service, 5% for Draftsmen and Head Draftsmen completing twelve years of service and 10% for graduate

Engineers completing eight years of service. The Court was called upon to consider whether the period of eight years can only be counted from the date when the diploma-holder Sub-Engineers acquired the Degree of Engineering and not prior to the said date. The controversy arose between the parties is summarized in paragraph 5 of the judgment as under :-

"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. "

From the aforesaid, it is clear that the Court was considering the experience/qualifying service of eight years and twelve years amongst the diploma-holder Sub-Engineers and not vis-à-vis the degree-holder Sub-Engineers. The reduction of the qualifying service from twelve years to eight years simply accelerated the entitlement to promotion for the post of Assistant Engineer by Sub-Engineers from twelve years to eight years. The qualifying service which was required to be considered under the rule was that of diploma-holder Sub-Engineers. The qualifying service has no relation with the Degree of Engineering and it is said by the judgment in N. Suresh Nathan's case (supra) that the rule does not contemplate any equivalence of any period of service with the qualification of acquiring Degree of Graduation in Engineering. In paragraph 11 of the judgment, the Court discussed the ratio and held :-

"A perusal of the above observations made by this Court clearly show that the respondents diploma-holders in that case had 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 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 recognized degree in Civil Engineering or equivalent with three years' service in the grade failing which Sections 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 recognized 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".

In the above decision (i.e. M.B. Joshi's case), the matter of N. Suresh Nathan (supra) was distinguished mainly on the basis of past practice and the Court further held that the rule under

consideration in N. Suresh Nathan (supra) was entirely different from the scheme of the rule which the Court was considering in M.B. Joshi (supra). We have carefully considered the case of N. Suresh Nathan and it is not correct to say that the decision rendered in that matter was based on past practice. The Court, in fact, has considered and interpreted the relevant service rules and then found that such an interpretation is fortified by the practice followed in that department.

Similar issue once again came before a two-Judge Bench of this Court in D. Stephen Joseph v. Union of India and Others, (1997) 4 SCC 753. The exact question was as follows :-

" ..whether for promotion to the post of Assistant Engineer in the 50% promotion quota reserved for the person possessing degree in Electrical Engineering from a recognized University or an equivalent with three years' regular service in the grade of Junior Engineers in the Electricity Department, Government of Pondicherry, three years' experience as Junior Engineer in the grade is to be counted from the date of acquisition of the degree in Electrical Engineering or the length of service in the grade of Junior Engineers is to be reckoned if the incumbent at the time of promotion to the 50% quota also possesses degree in Electrical Engineering."

The ambit of N. Suresh Nathan's case (supra) is explained in D. Stephen Joseph (supra), wherein it is said in paragraph 5 that the State Government is labouring under a wrong impression as to the applicability of the past practice as indicated in N. Suresh Nathan's case. This Court, in the said decision, has only indicated that the past practice should not be upset if such practice conforms to the rule for promotion and consistently followed for some time past. The rule has been interpreted in a particular manner and N. Suresh Nathan's case only indicates that past practice must be referable to the applicability of the rule as interpreted by the Court's order in a particular manner consistently for some time and would lend support to the interpretation of the rule. The Court emphasized that any past practice de hors the rule cannot be taken into consideration as past practice consistently followed for long by interpreting the rule and N. Suresh Nathan's case was distinguished in the facts of that case and the language of the rule which came up for consideration. D. Stephen Joseph (supra) provides for promotion to 50% quota from Junior Engineers possessing Degree in Electrical Engineering from a recognized university with three years' regular service in the grade of Junior Engineers. On the plain language of the rule, this Court has held that the requirement of the rule is three years' experience as Junior Engineer in the grade and not the acquisition of Degree in Electrical Engineering. Thus, it cannot be said that in M.B. Joshi and D. Stephen Joseph (supra) the Court has taken a different view than what was taken by a 3-Judge Bench in N. Suresh Nathan's case. In N. Suresh Nathan's case, the Court has interpreted the rule which provides for a particular length of service in the feeder post as qualifying service completed with educational qualification to enable the candidates to be considered for promotion and, thus the experience so obtained in the service would necessarily mean the experience obtained after the requisite qualification was acquired. Thus, the decision turns on the language of the rule and has distinguished N. Suresh Nathan's case on that basis.

In Anil Kumar Gupta and Others v. Municipal Corporation of Delhi and Others, (2000) 1 SCC 128, the relevant rules which came up for consideration provided for essential qualification for

appointment, viz., (a) Degree in Civil Engineering ; and (b) two years' professional experience. The age was not to exceed 30 years (relaxable for government servants and MCD employees). The applications were received for appointment to the post of Assistant Engineer (Civil) in the Engineering Department of MCD. The applications were received from the departmental candidates as well as others. The Selection Board of MCD had prescribed the norms for awarding marks. So far as the experience part was concerned, break-up was : Upto two years experience - 'no marks'; 3 to 12 years' and above experience at the rate of = mark, i.e., for 10 years - 5 marks; and Viva-voce - 15 marks. The question for consideration was whether the pre-degree experience of the candidates can be taken into consideration for awarding the marks or whether the candidate's experience gained after obtaining the degree is to be taken into consideration for awarding the marks. In paragraph 20 of the judgment, the Court has said that the provision regarding experience speaks only of professional experience of two years and does not, in any manner, connect it with the degree qualification. Further, the Court has considered N. Suresh Nathan's case (supra) and said in para 22 that N. Suresh Nathan's case was based initially on the practice followed in the department over a long number of years when the rules were understood as full service of three years after obtaining the degree and on that basis it was held that the service was not to include the service while holding a diploma. In paragraph 23, the Court cautioned that any practice which is de hors the rules can be no justification for the department to rely upon. Such past practice must relate to the interpretation of the rule in a particular manner and while interpreting the language of the notification, the Court held that two years' professional experience need not entirely be the experience obtained after obtaining the degree. Requirement is only degree and two years' professional experience and not the experience as degree-holder. We are afraid that the observation of the Court that N. Suresh Nathan's case was decided mainly on the past practice followed in the department, would not be a correct reading of N. Suresh Nathan's case. This case was essentially decided on the interpretation of the rule and the court found support to that interpretation from the past practice followed in the Department. Thus, it appears from this judgment that essentially N. Suresh Nathan's case was not followed on the interpretation of the rule, which came in question for consideration before the Court and it was held that the professional experience required cannot be read to have any connection with the Degree in Civil Engineering and, therefore, the professional experience in service irrespective of a Degree in Civil Engineering would be considered for allotting marks by the Selection Board.

A two-Judge Bench of this Court gave its considered opinion on the subject by means of interpretation of the word 'with' that appeared before the stated requirement of given period of experience in A.K. Raghumani Singh and Others v. Gopal Chandra Nath and Others., (2000) 4 SCC 30. The Court considered the rules called "The Manipur PWD/Irrigation and Food Control/Public Health Engineering (Superintending Engineer (C)/Superintending Surveyor of Works) Recruitment Rules" wherein it is provided that the post of Superintending Engineer shall be filled up by promotion from Executive Engineer and Surveyor of Works possessing Degree in Civil/Mechanical Engineering or its equivalent from a recognised institution with six years' regular service in the grade. The contention was that six years' regular service in the grade as eligibility criteria should be after the educational qualification was obtained. The Court interpreted the rules and said that the rule prescribed the eligibility criteria to be a prescribed educational qualification and six years' experience as well. Giving a plain meaning to the phrase, it would not be justified in reading 'a

qualification' into a conjunctive word and imply the word 'subsequent' after the word 'with'. The Court was of the view that six years' regular service in the grade would not mean the service subsequent to obtaining the prescribed educational qualification. Para 9 of the judgment gives the Court's reasoning as follows :-

"Even on a point of principle it would be unreasonable to distinguish between the nature of the regular service required, as if the service in the grade subsequent to the obtaining of the necessary educational qualification were qualitatively different from the service in the grade prior thereto. In fact no such case has been made out."

The decision rendered by the Court is based on interpretation of the rule.

In *Indian Airlines Ltd. and Others v. S. Gopalakrishnan*, (2001) 2 SCC 362, a Division Bench of this Court had an occasion to consider the relevant Service Rules in the fact situation where the Indian Airlines Ltd. had invited applications for the post of Junior Operator. The respondent, who made an application for the said post, possessed an ITI certificate since 1994 and a Diploma in Mechanical Engineering. Under the relevant rule, the qualification prescribed was 'SSC or its equivalent with three years' Government-recognized diploma in Mechanical/Electrical/Automobile Engineering and having two years' experience in equipment operations or driving and possessing current heavy vehicle driving license' or 'SSC with ITI certificate or equivalent in associated trades of mechanical/electrical/automobile courses and having five years' experience in equipment operating or driving and possessing current heavy vehicle driving license'. The Court said that when in addition to qualification, experience is prescribed, it would only mean acquiring experience after obtaining the necessary qualification and not before obtaining such qualification. In the case of the respondent, he obtained the ITI certificate in 1994 and, therefore, did not possess five years of experience as required under the relevant rule. The experience required to be gained by a candidate of five years was held to be after obtaining the requisite qualification.

From a reading of the decisions rendered by this Court, one thing is clear to us that the decisions in *N. Suresh Nathan*, *M.B. Joshi*, *D. Stephen Joseph*, *Anil Kumar Gupta*, *A.K. Raghumani Singh* and *Indian Airlines Ltd.* (supra), are based on the interpretation of the respective rules called in question, giving meaning to the words used in the context of the entire scheme governing service conditions and the facts involved in each case and it cannot be said that the decisions rendered by this Court after the decision of *N. Suresh Nathan*'s case, have taken a different view than what has been decided in *N. Suresh Nathan*'s case. Thus, we are required to decide the matter on the basis of the entire scheme of the rules, the facts and circumstances at the relevant time and the rules called in question before us, independently giving meaning to the words, the principle involved and the past practice, if any, which is in consonance with the interpretation given by us to the rule. If we find that two views are possible after interpreting the rule, then the rule would be interpreted keeping with the practice followed in the Department for a long time and thus the practice practically acquired status of rule in the Department.

The only question involved in these appeals and transferred cases can be stated thus : Whether a diploma-holder Junior Engineer, who obtains a degree while in service, becomes eligible for

promotion to the post of Assistant Engineer on completion of three years of service after he obtained the Engineering Degree or on completion of three years of service prior to obtaining the Degree in Engineering.

The following table shows the effect and intent of the rules adopted under Resolution Nos.574 and 105 dated 13.11.1963 and 16.6.1971 respectively. It also shows the manner of initial recruitment to the cadre of Junior Engineers:

Executive Engineers (By promotion) |

|
Assistant Engineers
(Degree) + 8 years'
service

Assistant Engineers
(Diploma) + 10 years'
service

|
Assistant Engineers
Graduates and Diploma
Holders
|

|
50 per cent by
promotion
|

50 per cent by direct recruitment

|
25 per cent
Junior Engineers
(Degree) + 3
years' service

25 per cent
Junior Engineers
(Diploma) + 8
years' service

(Section Officers)

|
Junior Engineers
Direct recruitment
|

|
Graduates in Engg.
(No prior experience

Diploma
(with 2 years'

prescribed)

experience)

From a perusal of the rules regarding recruitment to the post of Junior Engineers and, thereafter, their promotion to the post of Assistant Engineers and subsequently to the post of Executive Engineers in the service, it is clear that entry point in the service to the posts of Junior Engineers is by 100% direct recruitment. The educational qualification required is Diploma in Civil Engineering with two years' experience or Graduate in Engineering as has been introduced since 1968. Appointment by direct recruitment to the post of Junior Engineer for Diploma-holders in Civil Engineering, would be coupled with two years' experience, whereas Graduates in Engineering are not required to have any experience. For promotion to the post of Assistant Engineer, the rule prescribes that 50% of the posts will be filled up by direct recruitment from the candidates having educational qualification as Graduate in Civil Engineering, whereas the remaining 50% of the posts are to be filled up by promotion from the post of Junior Engineers. Under clause (a), 50% of the 50% promotion quota, i.e. 25% of the total posts, have to be filled up by promotion from the category of graduate Junior Engineers, i.e., the persons who held the Degree at the entry point in Engineering with three years of service, whereas under clause (b) 25% of the total posts would be filled up by diploma-holders with eight years' service. The rule prescribes two sources for promotion from the post of Junior Engineers – a graduate with three years' service experience and a diploma-holder with eight years' service experience. A separate quota is, thus, prescribed for promotion of Junior Engineers for degree and diploma-holders to that of higher post of Assistant Engineer. For further promotion from the post of Assistant Engineer to the post of Executive Engineer, the requirement of the rule is – for graduates, eight years' service in the grade; and, for diploma-holders, ten years' service in the grade. This distinction between the graduate Engineers and diploma-holders is maintained for promotion to the post of Executive Engineer, although there is no separate quota prescribed for graduates or diploma-holders, by prescribing different experience for promotion on the basis of a person being a graduate or a diploma-holder.

In *Roop Chand Adlakha and Others v. Delhi Development Authority and Others*, 1989 Supp. (1) SCC 116, application of the rules governing same service conditions as involved in the present case, was called in question in regard to promotion of diploma-holder Junior Engineers and graduate Junior Engineers, from the post of Assistant Engineer to the post of Executive Engineer. The diploma-holders in the cadre of Junior Engineers and in the cadre of Assistant Engineers assailed the constitutional validity of the rules prescribed in the matter of difference in service experience between the graduates and diploma-holders for promotion to the higher cadres. They also challenged the promotion of graduate Engineers to the higher cadres adopting the relevant CPWD Rules prescribing three years' and eight years' experience for graduates and diploma-holders respectively and the discrimination

thus brought about between them. W. P. No. 2082 of 1984 pertained to the constitutional validity of the analogous provisions in the rules adopted by Resolution No.105 dated 16.6.1971. The High Court prescribed differential service experience based on differences in educational qualifications, violative of Articles 14 and 16 of the Constitution. The High Court drew a distinction between the situation where the diploma-holders were wholly excluded from eligibility for promotion to the higher cadres and a situation where they were considered eligible for promotion, however, were subjected to least advantageous condition for such promotion. The High Court distinguished the decision of this Court in *State of Jammu and Kashmir v. Triloki Nath Khosa and Others*, (1974) 1 SCC 19, and said that "this was a case where diploma holders were found completely ineligible for promotion to the higher post for lack of essential educational qualification but the considerations may vary if they are found eligible for promotion to the higher post but still certain conditions are laid as distinct from degree holders before they become eligible for promotion. The question then would arise whether such distinction can be justified and is based on any rationality or not."

The above-mentioned order of the High Court was challenged in this Court and after considering various authorities this Court held in para 29 as under :-

"In *Triloki Nath* case Diploma Holders were not considered eligible for promotion to the higher post. Here, in the present case, the possession of a diploma, by itself and without more, does not confer eligibility. Diploma, for purposes of promotion, is not considered equivalent to the degree. This is the point of distinction in the situations in the two cases. If Diploma Holders of course on the justification of the job requirements and in the interest of maintaining a certain quality of technical expertise in the cadre could validly be excluded from the eligibility for promotion to the higher cadre, it does not necessarily follow as an inevitable corollary that the choice of the recruitment policy is limited to only two choices, namely, either to consider them "eligible" or "not eligible". State, consistent with the requirements of the promotional posts and in the interest of the efficiency of the service, is not precluded from conferring eligibility on Diploma Holders conditioning it by other requirements which may, as here, include certain quantum of service experience. In the present case, eligibility determination was made by a cumulative criterion of a certain educational qualification plus a particular quantum of service experience. It cannot, in our opinion, be said, as postulated by the High Court, that the choice of the State was either to recognize Diploma Holders as "eligible" for promotion or wholly exclude them as "not eligible". If the educational qualification by itself was recognized as conferring eligibility for promotion, then the superimposition of further conditions such as a particular period of service, selectively, on the Diploma Holders alone to their disadvantage might become discriminatory. This does not prevent the State from formulating a policy which prescribes as an essential part of the conditions for the very eligibility that the candidate must have a particular qualification plus a stipulated quantum of service experience. It is stated that on the

basis of the "Vaish Committee" report, the authorities considered the infusion of higher academic and technical quality in the personnel requirements in the relevant cadres of Engineering Services necessary. These are essentially matters of policy. Unless the provision is shown to be arbitrary, capricious, or to bring about grossly unfair results, judicial policy should be one of judicial restraint. The prescriptions may be somewhat cumbersome or produce some hardship in their application in some individual cases ; but they cannot be struck down as unreasonable, capricious or arbitrary. The High Court in our opinion, was not justified in striking down the rules as violative of Articles 14 and 16."

Although the Court considered the case in the perspective of Articles 14 and 16 of the Constitution of India, it is clear to us that the classification was upheld between diploma-holder and graduate Engineers on the basis of the requirements of the promotional posts and in the interest of the efficiency of the service. While referring to experience required for promotion, the Court has specifically said that eligibility determination was made by a cumulative criterion of a certain educational qualification plus a particular quantum of service experience. Thus, as per the Court, the requirement for promotion is the educational qualification plus a particular quantum of service experience. The Court further observed that if the educational qualification by itself is the only criterion conferring eligibility for promotion, then the superimposition of further conditions such as a particular period of service, selectively, on the diploma-holders alone, to their disadvantage, might become discriminatory, but as it is the eligibility criteria it cannot be held as a discrimination. The Court has made distinction between the service rendered as diploma- holder and graduate Engineer and thus has not found any discrimination in different period of experience provided for promotion for degree-holder and diploma-holder. Degree and a diploma with different period of service is held to be a valid classification whereby a different period of service has been made eligibility criteria along with educational qualification for promotion to the higher post.

Taking into consideration the entire scheme of the relevant rules, it is obvious that the diploma-holders would not be eligible for promotion to the post of Assistant Engineer in their quota unless they have eight years' service, whereas the graduate Engineers would be required to have three years' service experience apart from their degree. If the effect and intent of the rules were such to treat the diploma as equivalent to a degree for the purpose of promotion to the higher post, then induction to the cadre of Junior Engineers from two different channels would be required to be considered similar, without subjecting the diploma- holders to any further requirement of having a further qualification of two years' service. At the time of induction into the service to the post of Junior Engineers, Degree in Engineering is a sufficient qualification without there being any prior experience, whereas diploma-holders should have two years' experience apart from their diploma for their induction in the service. As per the service rules, on the post of Assistant Engineer, 50% of total vacancies would be filled up by direct recruitment, whereas for the promotion specific quota is prescribed for a graduate Junior Engineer and a diploma-holder Junior Engineer. When the quota is prescribed under the rules, the promotion of graduate Junior Engineers to the higher post is restricted to 25% quota fixed. So far as the diploma- holders are concerned, their promotion to the higher post is confined to 25%. As an eligibility criterion, a degree is further qualified by three years' service for the Junior Engineers, whereas eight years' service is required for the diploma-holders.

Degree with three years' service experience and diploma with eight years' service experience itself indicates qualitative difference in the service rendered as degree-holder Junior Engineer and diploma-holder Junior Engineer. Three years' service experience as a graduate Junior Engineer and eight years' service experience as a diploma-holder Junior Engineer, which is the eligibility criteria for promotion, is an indication of different quality of service rendered. In the given case, can it be said that a diploma-holder who acquired a degree during the tenure of his service, has gained experience as an Engineer just because he has acquired a Degree in Engineering. That would amount to say that the experience gained by him in his service as a diploma-holder is qualitatively the same as that of the experience of a graduate Engineer. The rule specifically made difference of service rendered as a graduate Junior Engineer and a diploma-holder Junior Engineer. Degree-holder Engineer's experience cannot be substituted with diploma-holder's experience. The distinction between the experience of degree-holders and diploma-holders is maintained under the rules in further promotion to the post of Executive Engineer also, wherein there is no separate quota assigned to degree-holders or to diploma-holders and the promotion is to be made from the cadre of Assistant Engineers. The rules provide for different service experience for degree-holders and diploma-holders. Degree-holder Assistant Engineers having eight years of service experience would be eligible for promotion to the post of Executive Engineer, whereas diploma-holder Assistant Engineers would be required to have ten years' service experience on the post of Assistant Engineer to become eligible for promotion to the higher post. This indicates that the rule itself makes differentia in the qualifying service of eight years for degree-holders and 10 years' service experience for diploma-holders. The rule itself makes qualitative difference in the service rendered on the same post. It is a clear indication of qualitative difference of the service on the same post by a graduate Engineer and a diploma-holder Engineer. It appears to us that different period of service attached to qualification as an essential criterion for promotion is based on administrative interest in the service. Different period of service experience for degree-holder Junior Engineers and diploma-holder Junior Engineers for promotion to the higher post is conducive to the post manned by the Engineers. There can be no manner of doubt that higher technical knowledge would give better thrust to administrative efficiency and quality output. To carry out technical specialized job more efficiently, higher technical knowledge would be the requirement. Higher educational qualifications develop broader perspective and therefore service rendered on the same post by more qualifying person would be qualitatively different.

After having an overall consideration of the relevant rules, we are of the view that the service experience required for promotion from the post of Junior Engineer to the post of Assistant Engineer by a degree-holder in the limited quota of degree-holder Junior Engineers cannot be equated with the service rendered as a diploma-holder nor can be substituted for service rendered as a degree-holder. When the claim is made from a fixed quota, the condition necessary for becoming eligible for promotion has to be complied with. The 25% specific quota is fixed for degree-holder Junior Engineers with the experience of three years. Thus, on a plain reading, the experience so required would be as a degree-holder Junior Engineer. 25% quota for promotion under the rule is assigned to degree-holder Junior Engineers with three years' experience, whereas for diploma-holder Junior Engineers eight years' experience is the requirement in their 25% quota. Educational qualification along with number of years of service was recognized as conferring eligibility for promotion in the respective quota fixed for graduates and diploma-holders. There is

watertight compartment for graduate Junior Engineers and diploma-holder Junior Engineers. They are entitled for promotion in their respective quotas. Neither a diploma-holder Junior Engineer could claim promotion in the quota of degree-holders because he has completed three years of service nor can a degree-holder Junior Engineer make any claim for promotion quota fixed for diploma-holder Junior Engineers. Fixation of different quota for promotion from different channels of degree- holders and diploma-holders itself indicates that service required for promotion is an essential eligibility criterion along with degree or diploma, which is service rendered as a degree-holder in the present case. The particular years of service being the cumulative requirement with certain educational qualification providing for promotional avenue within the specified quota, cannot be anything but the service rendered as a degree-holder and not as a diploma- holder. The service experience as an eligibility criterion cannot be read to be any other thing because this quota is specifically made for the degree-holder Junior Engineers.

As a necessary corollary, we are of the view that the diploma-holder Junior Engineers who have obtained a Degree in Engineering during the tenure of service, would be required to complete three years' service on the post after having obtained a degree to become eligible for promotion to the higher post if they claim the promotion in the channel of degree-holder Junior Engineer, there being a quota fixed for graduate Junior Engineers and diploma-holder Junior Engineers for promotion to the post of Assistant Engineers.

For the above reasons, the appeals are allowed and the impugned judgment of the High Court is set aside. The writ petitions shall now be decided by the Division Bench of the High Court in accordance with law laid down herein. The writ petitions which were transferred to, and registered as Transferred Cases in, this Court, shall also be sent back to the High Court for their decision in accordance with law.