Supreme Court of India
P. Murugesan And Others vs State Of Tamil Nadu And Others on 3 February, 1993
Equivalent citations: 1993 SCR (1) 405, 1993 SCC (2) 340
Author: B Jeevan Reddy
Bench: Jeevan Reddy, B.P. (J)

PETITIONER:
P. MURUGESAN AND OTHERS

Vs.

RESPONDENT:
STATE OF TAMIL NADU AND OTHERS

DATE OF JUDGMENT03/02/1993

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
SHARMA, L.M. (CJ)
ANAND, A.S. (J)

CITATION:
1993 SCR (1) 405 1993 SCC (2) 340
JT 1993 (2) 115 1993 SCALE (1)423

ACT:
Civil Services-Madras Corporation Engineering Service Rules, 1969-Promotion to the posts of Assistant Executive Engineer-Ratio 3:1 between graduate engineers (Assistant Engineers) and diploma-holder engineers (Junior Engineers) Whether violative of Articles 14, 16 of the Constitution.
Madras City Municipal Corporation Act, 1919-Section 87-Vacancies arose prior to Madras Corporation Engineering Service (Amendment) Rules, 1990-Whether to be filled according to unmended Madras Corporation Engineering Services Rules, 1969-Supreme Court's direction.

HEADNOTE:
Under the Madras Corporation Engineering Service Rules, 1969, the recruitment to the posts of, Assistant Engineers was by (1) direct recruitment, (b) by promotion from the category of Supervisors and (c) by appointment on deputation.
The graduate Supervisors were required to put in a minimum of five years service in the category of Supervisors for becoming eligible for promotion, whereas the diploma-holder-Supervisors were required to put in a minimum service of ten years as Supervisors.

In the category of Supervisors, in the matter of pay scales too, distinction was maintained between graduates and diploma-holders; while the pay-scale of the category of Supervisors was Rs. 325-650, the graduates were started at the initial pay of Rs. 400. From 1972 onwards, the pay scales prescribed for the graduates and the diploma-holders were different.

In 1978, the diploma-holder-Supervisors were designated as junior Engineers, while the degree-holder-Supervisors were designated as Assistant Engineers. The Posts of Assistant Engineers were redesignated as Assistant Executive Engineers.

406

In 1978 certain promotions were made to the category of Assistant Executive Engineers by applying the ratio of 3:1 between the graduate-engineers (Assistant Engineers) and the diploma-holder-engineers (junior Engineers).

The respondents-Junior Engineers challenged the promotions in writ petitions in the High Court, which was dismissed by a Single Judge.

On appeal, a Division Bench of the High Court quashed the promotions holding that as the Madras Corporation Engineering Service Rules, 1969 did not provide for any ratio, the Corporation could not prescribe the ratio of 3:1 by a mere resolution or by an executive order.

The Special Leave Petition preferred against the judgment of the Division Beach of the High Court was dismissed by this Court on 25.1.1990.

The State Government thereafter amended the 1969 Rules in 1990 providing for the ratio of 3:1 between the degree-holders and the diploma holders in the matter of promotion to the posts of the Assistant Executive Engineers. The 1990 Amendment Rules also provided that a junior Engineer (diploma-holder) who acquired an engineering degree or its equivalent during his service would be eligible for appointment as Assistant Executive Engineer, if he puts in three years of service in the Corporation Engineering Subordinate Service after obtaining the degree.

The diploma-holders questioned the validity of the 1990 Amendment Rules, in writ petitions before the High Court.

The Single Judge dismissed the writ petitions and upheld the validity of the 3:1 ratio. On appeal, the Division Bench quashed the amendment introducing the ratio of 3:1, against which the present appeal was riled by he graduate Engineers.

The appellants contended that the Assistant Engineers and the junior Engineers constituted different categories though performing similar functions and discharging similar responsibilities; that their payslips were different; that the Statutory Rules of 1969 made a distinction, between the two categories inasmuch as while only five years' qualifying service was prescribed for the Assistant Engineers (graduates), ten years

407

was prescribed for the Junior Engineers (diploma-holders); that in such a situation imposing of an additional restriction upon the promotional chances of Junior Engineers by the 1990 Amendment Rules was neither incompetent nor discriminatory, that Section 87 of the Madras City Municipal Corporation Act was not mandatory but only directory.

The respondents-diploma-holders submitted that in the category of Supervisors graduates were appointed by direct recruitment and diploma-holders by promotion from the category of Overseers; that the Assistant Engineers as well as Junior Engineers performed identical functions and discharged identical responsibilities; that they were inter-transferable; that in such a situation prescription of a quota between them for promotion to the higher category was discriminative and was violative of Articles 14 and 16 of the Constitution; that once the diploma-holders were required to put in ten years' service as against five years' service in the case of the graduates, in the category of Supervisors for becoming eligible for promotion as Assistant Executive Engineers, the eligible graduates and the eligible diploma-holders became equals in all respects and there should not be any distinction thereafter for the purpose of promotion; that at any rates In view of the provisions in Section 87 of the Madras City Municipal Corporation Act, the vacancies which arose prior to the coming into force of the 1990 Amendment Rules should be filled up in accordance with the unamended Rules, i.e. without reference to the quota.

Allowing the appeal, this Court,

HELD : 1.01. It is held by the constitution Bench in Triloki Nath Khosa that a distinction made on the basis of academic qualification for the purpose of promotion to higher category is not violative of Articles 14 and 16. In the said case, a rule barring the non-graduate-engineers from promotion to the category of executive engineers was upheld. If the diploma-holders can be barred altogether from promotion as held in Triloki Nath Khosa, it is difficult to appreciate how and why is the rule making authority precluded from restricting the promotion. The rule making authority may be of the opinion, having regard to the efficiency of the administration and other relevant circumstances that while it is not necessary to bar the diploma-holders from promotion altogether, their chances of promotion should be restricted. [416E, 417D]

1.02. There would be no justification in principle for holding that the

408

rule-making authority has only two options namely either to bar the diploma-holders altogether from promotion or to allow them equal opportunity with the graduate engineers in the matter of promotion. It must be remembered that the power of rule-making under the proviso to Article 309 has been held to be legislative in character. [419C]

1.03. If so, the test is whether such a restrictive view is

permissible vis-a-vis a legislature. If not, it is equally impermissible in the case of the rule-making authority under the proviso to Article 309. The only test that such a rule has to pass is that of Articles 14 and 16. [419D]

1.04. Since 1969 the graduate supervisors and non-graduate Supervisors were treated differently in the matter of pay, designation and in the matter of promotion, though they were discharging identical functions and duties. It is thus clear that though they belonged to one class they represented two different categories, while it is true, they performed similar duties and discharged similar responsibilities. [419G]

1.05. It cannot be said that it is not permissible to the rule-making authority, if it thinks it necessary in the interests of administration to limit the promotional chances of non-graduates to one out of four vacancies, on the basis of academic qualifications. [420B]

1.06. The distinction was also in the matter of promotion and not for any other purpose. If that distinction is not discrimination, it is difficult to see how and why another distinction now created (quota rule) is discriminatory. [422D]

B.S. Vadera v. Union of India, AIR 1969 SC 118; State of Jammu & Kashmir v. Triloki Nath Khosa, [1974] 1 SCR 771; State of Mysore & Anr. v. P. Narasing Rao, [1968] 1 SCR 407; Union of India v. Dr. (Mrs.) S.B. Kohli, AIR 1973 SC 81 1; Roop Chand Adlakha and Ors. v. D.D-4. and Ors., [1988] 3 Supp. SCR 253 and Shamkant Narayan Deshpande v. Maharashtra Industrial Development Corporation & Anr., 1992 (2) Scale 857, referred to.

Mohammad Shujat Ali & Ors. etc. v. Union of India and Ors. etc.,, [1975] 1 SCR 449, explained.

Roshan Lal Tandon v. Union of India, [1968] 1 SCR 185; Menyn v. Collector of Bombay, AIR 1967 SC 52 = [1966] 3 SCR 600; H.C. Sharma

409

and Others v. Municipal Corporation of Delhi and Others,[1983] 3 SCR 372; Punjab State Electricity Board and Anr. v. Ravinder Kumar Sharma and Ors., [1987] 1 SCR 72 and N. Abdul Basheer & Ors. etc. etc. v. KK Karunakaran & Ors., [1989] 3 SCR 201, distinguished.

2.01. Section 87 of the Madras City Municipal Corporation Act does indicate and manifest the concern of the Legislature that the vacancies occurring in the Corporation Service should not be kept unfilled for a period of more than three months. Sub-section (3) which provides for the consequence of default on the part of the council to abide by sub-section (1) emphasises the concern of the Legislature. So also does sub-section (2). Sub-section (4) says that if there is going to be any delay or if a suitable or qualified person is not available, the council may appoint a person on temporary basis. [424H, 425A]

2.02. The vacancies occurring prior to three months

before the date of commencement of the impugned amendment ought to have been filled in accordance with the rules then obtaining. [425B]

2.03. Having regard to the particular facts and circumstances of the present case, it is directed that the Corporation shall ascertain the vacancies in the category of Assistant Executive Engineers, that have arisen three months prior to the coming into force of the impugned amendment (introducing the quota of 3:1 as between degree-holders and diploma-holders ) and shall work out the vacancies which would have gone to the diploma-holders if unamended Rules had been followed. The Corporation shall also ascertain which of the diploma-holders would have been promoted in those vacancies. Such diploma-holders will be promoted in the existing and future vacancies. Until these diploma-holders are so promoted to the category of Assistant Executive Engineers, no degree-holders shall be promoted. After these diploma-holders are so promoted, it is obvious, the amended Rules shall be applied and followed. As and when a diploma-holder is promoted in pursuance of this direction, his promotion shall be given effect to from the date he ought to have been promoted. Such diploma-holder promoters shall be entitled to the benefit of seniority and pay-fixation flowing from such retrospective promotions, but they shall not be entitled to the.arrears of 'difference in salary for the period they have not actually worked as Assistant Executive Engineers. [425E-H]

Ramgiah v. Srinivasa Rao, [1983] 3 SCC 284; P. Ganeshwar Rao v.

410

State of Andhra Pradesh, [1988] Supp SCC 740; P. Mahendran and Others v. State of Karnataka and Ors., [1990] 1 SCC 411 and Devin Katti & Ors. v. Kamataka Public Service Commission and Others, [1990] 3 SCC 157, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 406 of 1993. From the Judgment and Order dated 29.7.1992 of the Madras High Court in Writ Appeal No. 518 of 1991.

M.K. Ramamurthi, Ms. Chandan Ramamurthi, M.A. Chainasamy and Krishnamoorthy for the Appellants.

R. Thyagarajan, S. Navaneethan, V. Balachandran, S. Srinivasan, P.R. Seetharaman, R. Mohan, A.T.M. Sampath and N. Kannadasan for the Respondents.

The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J. Heard the Counsel for the parties. Leave granted.

The dispute is between the degree holders and the diploma holders in the engineering service under the Madras Municipal Corporation.

The Corporation of Madras is governed by the Madras City Municipal Corporation Act, 1919. It employs a good number of engineers in connection with the discharge of its duties. Till 1965, there was only one category of supervisors. Recruitment to this category was by direct recruitment of graduate engineers as well as by promotion from the lower category of overseers. Diploma holders were not eligible for direct appointment as supervisors; they were first appointed to the category of overseers and then promoted as supervisors. The category above the supervisors was that of assistant engineers. Supervisors, whether directly recruited (graduates) or promotees (diploma-holders) were required to put in 20 years' service in the category of supervisors lo become eligible for promotion to the category of assistant engineers. No distinction was made as between the degree holders (graduates) and diploma-holders in the matter of promotion or in the matter of eligibility criteria.

In the year 1965, say the appellants (who are all graduate engineers), the Corporation resolved (on 7.8.65) to follow the rule in vogue in State Government service and apply the ratio of 3:1 between graduates and diploma-holders in the matter of promotion to the category of assistant engineers. The respondents who are all diploma-holders, deny that any such resolution was passed. According to them it was only a recommendation of the Ad-hoc Committee constituted by the Corporation and that the said recommendation was never accepted as such by the Corporation. The respondents rely upon the Division Bench judgment dated 21.12.89 in writ appeal No. 990 of 1984 etc. holding that no such ratio was actually enforced in the Corporation Engineering Service. Be that as it may, some time prior to 1969, the Act was amended empowering the Government to frame rules regulating the recruitment and conditions of service of the employees of the Corporation. In exercise of the said power, the Government of Tamil Nadu framed rules called Madras Corporation Engineering Service Rules (contained in G.O.M.S. No. 31 RD-LA dated 7.1.69). These rules applied only to class 1A, 1B and class IT of engineering services under the Corporation and not to other posts. The post of assistant engineer was in category III in class-II. Recruitment to this category was by (a) direct recruitment (b) promotion from the category of supervisors and (c) by appointment on deputation from the Government department. So far as promotion is concerned, a distinction was made as between degree-holders and diploma-holders. The graduate supervisors were required to put in a minimum of five years service in the category of supervisors for becoming eligible for promotion, whereas the diploma-holder-supervisors were required to put in a minimum service of ten years as supervisors to become eligible for such promotion. At about this time, a practice developed where under graduate- supervisors were referred to as Junior engineers. The diploma-holders-supervisors (who are necessarily promotees in the category of supervisors) continued to be referred to as supervisors.

In the year 1978 the Government of.Tamil Nadu altered the designations of the categories relevant before us by G.O.M.S. No. 954 dated 2.6.1978.Para-2 of the G.O. stated that the diploma-holder-supervisors shall be designated as' junior engineers while the degree-holders-supervisors (who had come to be known as junior engineers meanwhile) would be designated as assistant engineers. Consequently the erstwhile post of assistant engineer was

redesignated as assistant executive engineer. By G.O.M.S. No. 907 dated 20.5.1981, this change in designation was given effect to and incorporated in the Statutory Rules issued in 1969 (Madras Corporation Engineering Service Rules). The recruitment and conditions of service of assistant engineers and juniors (formerly known together as Supervisors) were governed by the by-laws made by the Corporation. In the matter of pay scales too, a distinction was being maintained between graduates and diploma-holders even when they were in the same category of Supervisors. The pay scale admissible to the category of supervisors was 325-650 but the graduates were given a higher start-their initial pay was fixed at 400. No such treatment was given to the diploma-holders. According to the appellants there was yet another distinction from 1972 onwards; the pay- scales prescribed for the graduate engineers and diploma- holder-engineers were different as per the particulars mentioned in para 33 of the S.L.P. They point out that in the counter filed to the Special Leave Petition, the respondents have not denied the said averment; they merely stated in para 20 of their counter that the "allegations in paragraphs 33 to 36 are of no avail to the petitioner." Whether in pursuance of the Resolution of 1965 or otherwise, certain promotions were made to the category of assistant executive engineers, in the year 1978, applying the ratio of 3:1 as between graduate-engineers and diploma-holder- engineers. We may refer to these two categories hereinafter as assistant engineers and junior engineers, since that was the designation given to them by G.O.M.S. No. 954 dated 2.6.1978. The said promotions were questioned by diploma- holders in a batch of writ petitions 2810 of 1978 etc.) in the Madras High Court. It was dismissed by a learned Single Judge. On appeal, however, a Division Bench of that court held judgment dated 21.12.1989 in Writ Appeal No. 990 of 1984 etc.) that inasmuch as the Statutory Rules framed in 1969 did not provide for any such ratio, it is not open to the Corporation to prescribe such a ratio by a mere resolution or by an executive order. Accordingly, the Division Bench quashed the said promotions. A Special leave petition preferred against he said judgment in this Court was dismissed on 25.1.1990. It is then that he Government of Tamil Nadu stepped in and amended the 1969 Rules providing for the said ratio of 3:1 by way of G.O.M.S. No. 138 (Municipal Administration and Water Supply) dated 9th February, 1990. So far as relevant herein, the said G.O. prescribed the "ratio of 3:1 between the degree holders and diploma holders" in the matter of promotion to the assistant executive engineers. It was further provided that a junior engineer (diploma-holder) who acquired an engineering degree or its equivalent during his service as junior engineer will be eligible for appointment as assistant executive engineer if he puts in three years of service in the Corporation Engineering Subordinate Service after obtaining the engineering degree or its equivalent. The result of this amendment was that a two-fold distinction came to be made between graduates and diplomaholders in the matter of promotion to the post of assistant executive engineers. In addition to the hitherto existing distinction in the matter of length of qualifying period of service (10 years for diploma-holders/junior engineers as against 5 years for degree-holders/assistant engineers), the new restriction imposed by the said amendment was that the diploma holders/junior engineers were restricted to only one out of four posts of assistant executive engineers; the remaining three were reserved for graduates/assistant engineers. (Of course, according to the appellant such a ratio was in vogue as a matter of fact since 1965. the respondents deny this assertion. Be that as it may, the ratio or quota, as it may be called was statutorily imposed by the said amendment.

The validity of the 1990 amendments, in particular the introduction of ratio of 5:1, was questioned by diploma- holders in the Madras High Court in a batch of Writ Petitions being Writ Petition 2943

of 1990 etc. A learned Single Judge dismissed the batch by his Judgment and Order dated 21.3.1991, upholding the validity of the said ratio. On appeal, a Division Bench took a contrary view and quashed the amendment introducing the ratio of 3:1. In this appeal the correctness of the view taken by the Division Bench is called in question.

Mr. M.K. Ramamurthy, learned counsel for the appellants' submitted that classification on the basis of academic qualifications is a well accepted basis. for the purpose of promotion and that the Division Bench of the Madras High Court was in error in holding otherwise. He submitted that assistant engineers and junior engineers constituted different categories though performing similar functions and discharging similar responsibilities. Their pay-scales were different-at any rate from 1972. Even earlier, the pay fixation formula was different in the case of graduates. Even the Statutory Rules of 1969 made a distinction between the two categories inasmuch as while only five years' qualifying service was prescribed for graduates, ten years' qualifying service was prescribed for diploma-holders.

In such a situation imposing an additional restriction upon the promotional chances of diploma holders by the impugned amendment is neither incompetent nor can it be characterised as discriminatory. He submitted that right from 1972 onward, a clear distinction was being observed between the graduates and diploma-holders and that the impugned amendment is but another step in the same process. On the other hand the learned counsel for the respondents holders submitted that whether graduates or diploma-holders, they were all in the category of supervisors till the year 1981. There was only one category of supervisors to which graduates were appointed by direct recruitment and diploma- holders by promotion from the lower category of overseers. They performed identical functions and discharged identical responsibilities. They were inter-transferable. On some occasions, graduates (assistant engineers) were posted to assist a diploma holder (junior engineer) in discharging certain duties. Even after 1978 when the graduates-supervisors were designated as assistant engineers and diplomaholders-supervisors were designated as junior engineers, the same situation continued. In such a situation prescription of a quota as between them for promotion to the higher category is discriminatory and is violative of Articles 14 and 16 of the Constitution. Learned counsel submitted that in any event once the diploma-holders were required to put in ten years' service (as against five years' service in the case of graduates) in the category of supervisors for becoming eligible for promotion as assistant executive engineers, the eligible graduates and the eligible diploma-holders became equals in all respects. No distinction is permissible thereafter in the matter of and for the purpose of promotion. Creating such a distinction, imposing a disability upon the diploma- holders, is not only unjust and inequitable, it is also a clear case of hostile discrimination. Lastly and alternatively counsel submitted that the vacancies which arose prior to the coming into the force of the impugned amendment, at any rate, should be filled up in accordance with the unamended Rules. It is pointed out that the impugned amendment is only prospective in operation. Section 87 of the Act is relied upon in this behalf. It is true that theory of classification should not be carried too far lest it may subvert, perhaps submerge, the precious guarantee of equality, as pointed out by Chandrachud, J. in State of Jammu & Kashmir v. Triloki Nath Khosa, [1974] 1 SCR 771. Minute and microcosmic classification should not be permitted nor should the Court countenance "mini classifications based on micro distinctions", as pointed out by Krishna Iyer, J. in the same case. Looked at from this broad angle, it may appear

there is some force in what the respondents contend viz., that once the graduate- engineers and diploma-holder-engineers constitute one class, perform same duties and discharge same responsibilities, placing a restriction on the diploma holders alone (limiting their chances of promotion to one out of four promotions, as has been done by the impugned Amendment) is not justified but this may be a too simplistic way of looking at the issue. We cannot fail to take note of the fact that right from 1974 i.e., since the decision of the Constitutions Bench in Triloki Nath Khosa this Court has been holding uniformly that even where direct recruits and promotees are integrated into a common class, they could for purposes of promotion to the higher cadre be classified on the basis of educational qualifications.

In the Kashmir Engineering Service, the post of assistant engineer could be filled both by direct recruitment as well as by promotion. There were degree-holders and also diploma-holders in the category. By the Kashmir Civil Services (Revised Pay) Rules, 1968 it was provided that a diploma-holder-assistant engineer shall not cross the stage of Rs. 610 in the scale of Rs. 300-30-540-EB-35-610-EB-35- 750, which was the scale applicable to assistant engineers. In 1970, Jammu and Kashmir Engineering (Gazetted) Service Recruitment Rules, 1970 were issued providing that the post of executive engineer (the next higher post) shall be filled only by promotion from among the assistant engineers, who possessed a bachelor's degree in engineering or its equivalent qualification provided they have put in seven years' service in the assistant engineer's category. Assistant engineers who were not degree-holders were thus barred from promotion to the category of executive engineers. Both the Rules, namely 1968 Pay Rules and 1970 Recruitment Rules were questioned by diploma-holders in the J & K High Court. Though a learned Single Judge dismissed the writ petition, his judgment was reversed in appeal by the Division Bench. The Division Bench was of the opinion that where the employees were grouped together and integrated into one unit without reference to their qualifications, they form a single class in spite of initial disparity in the matter of their educational qualifications and that no discrimination is permissible to be made between them on the basis of such qualifications. On appeal this Court reversed the Judgment of the Division Bench. Two judgments were delivered, one by Chandrachud J. on behalf of himself A.N. Ray, C.J. and D.G. Palekar, and the other by Krishna Iyer, J. for himself and Bhagwati J. Chandrachud J. while affirming the principle that a classification must be truely founded on substantial differences which distinguished persons grouped together from those left out of the group and that such differential attributes must bear a just and rational relation to the object sought to be achieved, stated the scope of the Judicial scrutiny in such matters in the following words :

> "Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the courts to substitute their own judgment for that of the legislature or the rule-making authority on the need to classify or the desirability of achieving a particular object."

The learned Judge held that judged from the above stand- point it was impossible to accept the proposition that the classification of Assistant Engineers into Degree-Holders and Diploma-Holders

rests on any unreal or unreasonable basis. They accepted the plea that the said classification was brought about with a view to achieving administrative efficiency in the Engineering services. The higher academic qualifications, the learned Judge held, is atleast presumptive evidence of a higher mental equipment. The learned Judge said "what is relevant is that the object to be achieved here is not a mere presence for an indiscriminate imposition of inequalities and the classification cannot be characterized as arbitrary or absurd. That is the farthest that judicial scrutiny can extend." The learned Judge referred to the earlier decision of this Court in State of Mysore & Anr. v. P. Narasing Rao, [1968] 1 SCR 407 and the Union of India v. Dr. (Mrs.) S.B. Kohli, AIR 1973 SC 811 to demonstrate that a distinction made on the basis of academic qualifications was always upheld by this Court. Indeed, in the latter case, the relevant rule required that a professor of orthopaedics must have a post-graduate degree in the particular speciality. It was upheld as a relevant requirement, The learned Judge then explained the decision in Roshan Lal Tandon v. Union of India (upon which substantial reliance was placed by the respondents in that case) as an authority certainly for the proposition that "no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn" but that it does not bar a classification based upon academic qualifications. In the words of Chandarchud. J. Roshanlal Tandon's case is 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 the one that they were drawn from different sources." Having thus distinguished Roshanlal Tandon's case and Mervyn v. Collector of Bombay, AIR 1967 S.C. 52, the learned Judge concluded :

> "We are therefore of the opinion that though persons appointed directly and by promotion were intregrated into a common class for Assistant Engineers, they could, for purposes of promotion to the cadre of Executive En-
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> gineers, 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 articles 14 and 16 of the Constitution and must be upheld."

This decision clearly supports the appellants contention and goes to sustain the validity of the impugned amendment. If the diploma-holders can be barred altogether from promotion, it is difficult to appreciate how and why is the rule making authority precluded from restricting the promotion. The Rule making authority may be of the opinion, having regard to the efficiency of the administration and other relevant circumstances that while it is not necessary to bar the diploma-holders from promotion altogether, their chances of promotion should be restricted. On principles, there is no basis for the contention that only two options are open to a rule making authority-either bar the diploma-holders altogether or allow them unrestricted promotion on par with the graduates. This aspect has been emphasised by Venkatachaliah J. in Roop Chand Adlakha and Ors. v. D.D.A. and Ors., [1988] 3 Supp. SCR 253 in the following words.

> "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 validily 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 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 recognise Diploma Holders as "eligible" for promotion or wholly exclude them as "not-eligible".

Counsel for the respondents however placed strong reliance upon certain observations made by Bhagwati, J. in Mohammad Shujat Ali & Ors. etc. v. Union of India and Ors. etc., [1975] 1 SCR 449. After referring to the facts of, and the principles enunciated in, T.N. Khosa the learned Judge made the following observations:

"But where graduates and non-graduates are both regarded as fit and, therefore, eligible for promotion, it is difficult to see how, consistently with the claim for equal opportunity, any differentiation can be made between them by laying down a quota of promotion for each and giving preferential treatment to graduates over non-graduates in the matter of fixation of such quota. The result of fixation of quota of promotion for each of the two categories of Supervisors, would be that when a vacancy arises in the post of Assistant Engineer, which, according to the quota is reserved for graduate Supervisors, a non-graduate supervisor cannot be promoted to that vacancy, even if he is senior to all other graduate Supervisors and more suitable than they. His opportunity for promotion would be limited only to vacancies available for non-graduate Supervisors. That would clearly amount to denial of equal opportunity to him."

On the basis of the above observations it is argued that once the diploma-holders are also held eligible for promotion, it is not permissible for the rule-making authority to make any distinction between graduates and diploma-holders. We cannot agree. As a matter of fact this court in Shujat Ali case upheld the validity of the Andhra Pradesh rule which made a distinction between the graduate supervisors and non-graduate supervisors in the matter of promotion to the higher categories on the ground that in the erstwhile States of Andhra and Hyderabad, graduate supervisors were always treated as distinct and separate from the non-graduate super- visors, their pay scales were different; they were never really integrated into one class and graduate supervisors were called Junior Engineers. Accordingly, it was held that reducing the chances of promotion of non- graduate supervisors vis-a-vis graduate supervisors was not discriminatory. (As we shall presently point out, the factual situation in Madras Corporation Engineering service is similar). The observations quoted above cannot be read in isolation nor can they be read as running counter to the ratio of TN. Khosa. Both decisions were rendered by Constitution Benches. In any event, the facts and circumstances of the case before us are akin to those in Shujat Ali. Secondly as

explained hereinbefore there would be no justification in principle for holding that the rule-making authority has only two options namely either to bar the diploma-holders altogether from promotion or to allow them equal opportunity with the graduate engineers in the matter of promotion. It must be remembered that the power of rule-making under the proviso to Article 309 has been held to be legislative in character. Vader A.I.R. 1969 S.C. 118. If so, the test is whether such a restrictive view is permissible vis-a-vis legislature. If not, it is equally imperviously in the case of the rule-making authority under the proviso to Article 309. The only test that such a rule has to pass is that of Articles 14 and 16 and to that aspect we may turn now.

The facts of this case, narrated hereinbefore, clearly disclose that long prior to the impugned amendment, a clear distinction was being maintained between these two categories.

The 1969 Rules, as originally issued, prescribed a five years' qualifying service for graduate engineers while prescribing ten years' qualifying service for diploma holders, though earlier it was twenty years for both uniformly. No one ever questioned it. The graduates were designated as Assistant Engineers while Supervisors were designated as junior engineers in the year 1978. This distinctive designations were recognised by and incorporated into the Statutory Rules (1969 Rules) in the year 1981. No grievance was made on that count. Even when both of them were in the same pay scale, the graduates were being given a higher start at Rs. 400 straightaway, while no such benefit was given to a promote. Further, from 1972 onwards, it appears, their very payscales were different. It is thus clear that though they belonged to one class they represented two different categories, while it is true, they performed similar duties and discharged similar responsibilities. It is asserted by the Respondent's counsel that there is also a common seniority list but this fact is denied by the appellant. According to them, there were two separate seniority lists till 1979 and that when in 1979 a single seniority list was prepared, it was objected to by the graduates, Be that as it 'may, the question still remains whether it is not permissible to the rule-making authority, if it thinks it necessary in the interests of administration to limit the promotional chances of non-graduate to one out or four vacancies, on the basis of academic qualifications. In the light of the Constitution Bench decision in Triloki Nath Khosa, we cannot say that it is not permissible.

In Shamkant Narayan Deshpande v. Maharashtra Industrial Development Corporation & Ors., 1992 (2) Scale 857 a Bench consisting of P.B. Sawant and G.N. Ray, JJ. took the same view as we do in this case. We also agree with the basis upon which the learned Judges distinguished the decision in H.C Sharma and Ors. v. Municipal Corporation of Delhi and Others, [1983] 3 SCR 372.

The learned counsel for respondents relied upon the decision in Punjab State Electricity Board and Anr. v. Ravinder Kumar Sharma and Ors., [1987] 1 SCR 72, a decision rendered by a Bench comprising A.P. Sen and B.C. Ray, JJ. the category of line-men in the service of the Punjab State Electricity Board comprised both diploma- holders and others who may be referred to as non-diploma- holders. They constituted one single category having a common seniority list. By means of the Rules issued under the proviso to Article 309, a quota was prescribed for diploma-holders, the result of which was that diploma- holders who were far junior to the

non-diploma-holders were promoted ignoring the non-diploma-holders. The rule was held to be bad by the learned Subordinate Judge, Patiala. On appeal, the Additional District Judge, Patiala affirmed the judgment. It was affirmed by the High Court as well. The matter was brought to this Court. This court affirmed the judgment of the High Court. A persual of the judgment shows that the attention of the Bench was not drawn either to TN. Khosa or to other decisions. Reference was made only to the obser-

> vations in Shujat All quoted hereinbefore and it was held that the distinction made between the diploma-holders and non-diploma-holders was discriminatory and bad. Apart from the distinction on facts between that case and the case before us, it is evident that non- consideration of the T.N. Khosa and other decisions relevant under the subject has led to the laying down of a proposition which seems to run counter to T.N. Khosa. With great respect to the learned Judges who decided that case, we are unable to accept the broad proposition flowing from the case.

The counsel for the respondents then relied upon N. Abdul Basheer & Ors. etc. etc. v. KK Karunakaran & Ors., [1989] 3 SCR 201 a decision of a Bench of three learned Judges. On an examination of the facts of that case, it was held by Pathak, C.J. speaking for the Bench, that the history of the evolution of the Kerala Excise and Prohibition Subordinate Service does not show that the graduates and non-graduates were treated as two separate categories. The following observations bring out the factual position found in that case.

> "The history has varied with the circumstances prevailing before and after the reorganisation of the State on 1 November, 1956. Originally when more emphasis was laid on the induction of graduates, the ratio of graduate to non- graduate officers was maintained at 3:1 but from 9 September, 1974 the ratio was changed inversely to 1:3. More non-graduates were now inducted into the Service. The trend shows, if anything, that it ran in favour of absorbing more non-graduates. The conditions pertaining to the service, and respecting which the constitution of the service varied from time to time, showed fluctuations. A consistent or coherent policy in favour of graduates was absent. This is not a case where the cadre of officers was kept in two separate divisions. It was a single cadre, and they were all equal members of it. There is no evidence that graduate Preventive Officers enjoyed higher pay than non-graduate Preventive Officers. The High Court has noted that the nature of the duties of Preventive Officers whether graduate or non-graduate was identical, and both were put to field work. Non-graduate Preventive Officers were regarded as competent as graduate Preventive Of-

ficers. There is no evidence of any special responsibility being vested in graduate Preventive Officers. Once they were promoted as Excise Inspectors there was no distinction between graduate and non-graduate Excise Inspectors.' It is thus clear that the facts of that case were entirely different and it is those facts which influenced the decision holding that no distinction can be made between graduates and non-graduates inspectors in the matter of promotion. The said decision, however, cannot be read as containing any proposition contrary to T.N. Khosa. We are, therefore, of the

opinion that the principle of the said decision cannot help the respondents. So far as the factual situation is concerned, the facts of the case before us do show, as discussed hereinbefore, that since 1969 the graduate supervisors and non-graduate supervisors were treated differently in the matter of pay, designation and in the matter of promotion though they were discharging identical functions and duties.

It may also be noticed in this connection that in the government service, the ratio of 3:1 as between graduates and diploma-holders has been in vogue since prior to 1965 and the corporation has been trying to implement the said ratio in its service too.

Another argument urged by the learned counsel for the Respondents is that by prescribing a longer qualifying period of service for diplomaholders, they have been equated with the graduates and that thereafter no further distinction is permissible. We cannot agree. The distinction aforesaid was also in the matter of promotion and not for any other purpose. If that distinction is not discrimination, it is difficult to see how and why another distinction now created (quota rule) is discriminatory. Suppose, if these two requirements (i.e., longer qualifying service and quota rule) had been introduced at the same time, there could have been no room for the present argument. The rule would have been good. How does it become bad, if they are introduced at different times? Both relate to their eligibility and chances of promotion. To wit, the basic question is if they can be barred altogether from promotion, a& held in T N. Khosa, why can't their chances of promotion be restricted, curtailed or hedged in.

Sri Thyagarajan, learned counsel for respondents 3 to 8 (diploma-holders) raised an alternative contention based upon Section 87 of the Madras City Municipal Corporation Act.

Section 87 reads as follows "87. TIME WITHIN WHICH VACANCY IN CERTAIN POSTS MUST BE FILLED UP:

(1) If a vacancy occurs in any office included in Class I-B or Class II, or any new office in Class I-B or Class II is created, the council shall within three months appoint any qualified and suitable person to hold such office.

(2) If the State Government refuse to confirm the appointment so made, the council shall appoint some other qualified and suitable person within forty-five days from the receipt of the order refusing confirmation.

(3) In default of any appointment being made in accordance with sub-section (1) or sub- section(2), as the case may be, the State Government may appoint a person who in their opinion, is qualified and suitable to hold the office and such person shall be deemed to have been appointed by the council.

(4) Pending an appointment under sub-section (1) or sub-section (2), the council may appoint a person to hold the office temporally and assign to him such salary as it may think fit :

Provided always that the salary so assigned shall not exceed the maximum fixed by the State Government by rules in respect of the office."

The contention of the learned counsel is this: sub-section (1) of Section 87 obligates the council to fill up a vacancy within three months of occurrence of a vacancy by a qualified and suitable person. Sub-section (3) provides the consequence of the default of the council in making an appointment within the time prescribed by sub-section (1). In such eventuality the State Government becomes entitled to appoint a person, who in their opinion is qualified and suitable for such office and the person so appointed shall be deemed to have been appointed by the council. Sub-

section (4) empowers the council to make a temporary appointment pending an appointment under section (1) or sub- section (2). Sub-section (2) says that if the State Government refuses to confirm the appointment made by the council under sub-section (1), the council shall have to appoint some other qualified and suitable person within forty-five days from the date of receipt of the order of the Government refusing confirmation. The counsel contends that in view of the said provision, the vacancies which arose three months prior to the date of the commencement of the impugned amendment should be filled according to the unamended rules i.e., without reference to the quota. He relies upon the decisions of this Court in Rangiah v. Srinivasa Rao, 119831 3 SCC 284; P. Ganeshwar Rao v. State of Andhra Pradesh, [1988] Supp. SCC 740; P. Mahendran and Others v. State of Karnataka and Ors., [1990] 1 SCC 411 and Devin Katti & Others v. Karnataka Public Service Commission and Others, [1990] 3 SCC 157.

On the other hand the learned counsel for the appellant submits firstly, that this argument was not raised before the High Court and should not be allowed to be raised at this stage for the first time, secondly, he says Section 87 is not mandatory but only directory. The learned counsel also argues that in pursuance of the judgment of the learned Single Judge dated 21.3.1991 (upholding the validity of the impugned amendment and giving certain directions in the matter of making promotions to the post of assistant executive engineer) and also because stay was refused by the Division Bench of High Court in the Writ Appeals preferred against the said judgment, the Corporation promoted thirty degree-holders including six appellants on 5.6.1991. In fact, it is stated, by an order dated 30.4.1991, the Division Bench allowed the Corporation to make promotions pending the Writ Appeals, of course, subject to the result of the writ appeals. It is submitted further that by another Order passed in May, 1992, the Corporation promoted another twelve degree-holders and three diploma-holders. It is also brought to our notice that in the Special leave petition preferred against the judgment of the Division Bench, this Court stayed the reversion of the appellants/petitioners by its order dated 14.9.1992 which order was continued by another order dated 21.9.1992. It is submitted that in the above circumstances a direction of the nature sought for by respondents 3 to 8 will mean the reversion of the appellants who have been promoted in pursuance of the order of the learned Single Judge. It is pointed out if this Court is upholding the impugned amendment, it would not be just to permit the reversion of degree-holders on the ground urged by the respondents for the first time in this appeal. In our opinion Section 87 does indicate and manifest the concern of the Legislature that the vacancies occurring in the Corporation Service should not be kept unfilled for a period of more than three months. Sub-section (3) which provides for the consequence of default on the part of the council to abide by sub-section (1) emphasises the

concern of the Legislature. So also does sub-section (2). Sub- section (4) says that if there is going to be any delay or if a suitable or qualified person is not available, the council may appoint a person on temporary basis. The said provision is, therefore, analogous to, and indeed more specific than rule 4 of the Andhra Pradesh Registration and Subordinate Service Rules considered in Rangiah v. Srinivasa Rao. Accordingly it must be held that the learned counsel for respondents 3 to 8 is right in his submission that the vacancies occurring prior to three months before the date of commencement of the impugned amendment ought to have been filled in accordance with the rules then obtaining. At the same time we cannot fail to recognise the force in the argument of the learned counsel for the appellants that the respondents not having raised the said contention in the High Court i.e., before the learned Single Judge or the Division Bench should not be allowed to raise the same in this Court for the first time. On a balancing of the contending equities, we are of the opinion that the following direction would be the appropriate one in the particular facts and circumstances of this case. The direction is this :

The Corporation shall ascertain the vacancies in the category of Assistant executive engineers, that have arisen three months prior to the coming into force of the impugned amendment (introducing the quota of 3:1 as between degree- holders and diploma-holders) and shall work out the vacancies which would have gone to the diploma-holders if unamended Rules had been followed. The Corporation shall also ascertain which of the diploma-holders would have been promoted in those vacancies. Such diploma-holders will be promoted in the vacancies that may be existing as on today and those that may arise in future. Until these diploma- holders are so promoted to the category of Assistant Executive Engineers, no degree-holders shall be promoted. After these diploma-holders are so promoted and thereafter, it is obvious the amended Rules shall be applied and followed. It is further directed that as and when a diploma-holder is promoted in pursuance of this direction, his promotion shall be given effect to from the date he ought to have been promoted. Such diploma-holders promotees shall be entitled to the benefit of seniority and pay-fixation flowing from such retrospective promotions, but they shall not be entitled to the arrears of difference in salary for the period they have not actually worked as Assistant Executive Engineers. For the reasons recorded hereinabove the appeal is allowed subject to the direction made in the preceding paragraph. The Order of the Division Bench of the Madras High Court in Writ Appeal No. 518 of 1991 is set aside. There shall be no orders to costs.

V.P.R.

Appeal allowed.