
(2011) 10 DEL CK 0238
In the Delhi High Court
Case No : LPA No. 280 of 1997

M.A. Khan and Another

APPELLANT

Vs

New Delhi Municipal Council and Others

RESPONDENT

Date of Decision : 19-10-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 309

Citation : (2011) 9 AD 409

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shaktiher, J

Bench : Division Bench

Advocate : Sandeep Sethi, with Mr. Pramod Gupta, for the Appellant; Madhu Tewatia and Ms. Sidhi Arora, Advocates for Respondent No. 1/NDMC, Mr. Naresh Kaushik, Ms. Aditi Gupta and Ms. Amita Kalkal Chaudhary, Advocates for Respondents 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The New Delhi Municipal Council (for short "NDMC")/ respondent No.1 has an Engineering Cadre. The line of promotion is from a Junior Engineer (for short "JE") to an Assistant Engineer (for short "AE") to an Executive Engineer (for short "EE") to a Superintendent Engineer (for short "SE") and then to the Chief Engineer (for short "CE") and the Engineer-in-Chief. From the post of SE onwards only such of the candidates who have degree are eligible. We are concerned in the present dispute with the promotion from a JE to an AE.

2. The entry point for an AE is both through direct recruitment and departmental recruitment. 25 per cent posts are reserved for direct recruitment. A Graduation in Civil Engineering is a qualifying requirement for such recruitment. 75 per cent posts used to filled in through promotion from the post of JE. The entry point for JE was both for diploma holders and degree holders.

3. There were, however, some candidates who though were diploma holders at the time of recruitment as JE acquired the degree during the course of service.

The JEs who were degree holders enjoyed a quicker route of promotion as the qualifying service was less as compared to a diploma holder. However, no preference was apparently being given for such of the diploma holders who acquired a degree during the course of service and in this behalf representations were received by respondent No.1 for reserving 25 per cent quota from 75 per cent quota of the promotes to the post of JEs. These representations received a favorable response in a meeting held on 13.6.1990 of the Sub- Committee to review the Recruitment Rules for the post of AE (Civil) and it was proposed that out of the 75 per cent departmental quota for the promotion of JE to the post of AE (Civil), 25 per cent quota is reserved for departmental Graduate JEs. A resolution No.44 dated 17.8.1990 was passed in terms whereof the draft Recruitment Rules received the imprimatur of respondent No.1. The relevant portion of the Rules is reproduced herein under:

7. Educational & Other Qualification for:

a. Direct Recruitment 25 per cent.

1st Class or second high class Univ. Graduate Civil Engg. From any recognized Institution or passed Section A & B examination of Institution of Engineers (India) with 3 years experience/service.

b. Departmental Recruitment (75% post out of which 50% of posts for Diploma holders 25% for Graduate JE(C).

1. Diploma Holder JE(C) with 8 yrs. service in the grade.

2. University Graduate JE (C) with 4 years service in the grade.

3. Jr. Engineer (C) who while in service pass section A & B of Institution of Engineers (India) or Graduate in Civil Engg. from any recognized Institution with 3 yrs. service from the date of passing section A & B of AMIE or Graduation in Civil Engineering or 5 years service whichever is more beneficial to the officer.

4. The effect of the aforesaid modified Recruitment Rules was that out of the 75 per cent posts meant for promotes, 50 per cent of the total posts are for the diploma holders and 25 per cent were for Graduate Engineers. A sub-classification was made for such of the diploma holders who acquired the degree during the course of service. Thus, while a diploma holder was required to have a pre-requisite of eight (8) years service before being considered for promotion to the post of AE, and a University Graduate was entitled to be considered within four (4) years of service in the grade, a JE who while in service acquired the degree in Civil Engineering and served for a period of three (3) years after acquiring such a degree, i.e., from the date of possessing of the degree or five (5) years service whichever is more beneficial to the officer became entitled for consideration for promotion.

5. We may add at this stage that there were various litigations arising from these Rules some because the period prescribed as qualifying service for degree

holders vis-à-vis diploma holders were less while others related to the requirement of having a certain number of years post acquiring the degree qualification but wanted the period of service prior to acquiring the degree to be taken into account. All these endeavors failed and to that extent the controversy stands settled.

6. In the present case we have to examine another controversy, which is an off shoot of providing for quota for promotion for diploma holders who have acquired the degree during the course of service. The appellants claim that this is a separate line of promotion and thus you cross the entry point when you acquire a degree. Thus, the seniority for being considered for promotion in this line should be based on the date of acquisition of the degree. On the other hand, respondents 2 & 3 (original petitioners) had laid a challenge to the seniority list prepared in this manner as it is their claim that so long as you acquire a degree and complete the necessary years of service post acquisition of degree, a common pool of such persons would arise and thus the promotion would be based not on the date you acquire the degree but your entry into the cadre of JE. It is, thus, their say that the seniority list drawn at the entry point of JE would prevail amongst the diploma holders who acquired a degree during the course of service subject to their fulfilling the required number of years of service post the acquisition of the degree.

7. Respondents 2 & 3 filed CW No.1570/1992. The submission of the said respondents found favor with the learned single Judge who held that the seniority of the JEs fixed on the basis of length of service could not be changed. The amended Recruitment Rules were, thus, held not to change the seniority from the length of service to date of acquiring the degree. The principle of service jurisprudence that in the absence of any specific rules the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of length of service and not on any other fortuitous circumstances, was relied upon, with the observation that the acquisition of a degree during the continuation of service simply accelerated the entitlement to promotion to the post of an AE. The seniority rules in question were held not to deal with the fixation of seniority of the JEs which in the historical perspective of these JEs were determined on the basis of length of service. The seniority list framed vide Resolution No.44 dated 17.8.1990 was, thus, struck down while placing reliance on the judgment of the Supreme Court in *M.B. Joshi and Others Vs. Satish Kumar Pandey and Others*, .

8. The appellants were not parties to that writ petition. However, on being affected they filed an appeal and leave was granted to them to do so.

9. The preliminary submission of the appellants is that respondents 2 & 3 failed to implead them or their class of persons as a party and thus the impugned order could not have been passed in their absence. In this behalf, learned counsel for the appellants has relied upon the judgment of the Supreme Court in *Prabodh Verma and Others Vs. State of Uttar Pradesh and Others*, . It was held that the

High Court should not proceed to hear a writ petition under Article 226 of the Constitution of India without insisting on such persons or some of them in representative capacity, being made respondents. On the other hand learned counsel for respondents 2 & 3 referred to the case of V.P. Shrivastava and Others Vs. State of M.P. and Others, holding that the conclusion of the Tribunal that non-inclusion of the affected parties is fatal to the appellants" case is unsustainable in law. The appellants had not challenged the ad hoc appointments of the promotee respondents in the writ petition but they did challenge the position of the said ad hoc promotee respondents over the appellants in the seniority list. Thus, the very principle of determination of seniority made by the State Government was under challenge and for such a case State is a necessary party who had been impleaded.

10. In the present case respondents 2 & 3 were only aggrieved by the placement of the appellants ahead of them in the list for the promotional quota of persons who acquired a degree during the course of service and thus the observations in V.P. Srivastava & Ors. case (supra) would apply. The promotions are stated to have been made subject to the final outcome of the writ petition and the appellants, if they so chose could have got themselves impleaded. We may also add that in any case the merits of controversy are being examined in appeal and an interim stay has been operating in favor of the appellants. We, thus, see no reason to set aside the impugned judgment on the basis of the plea advanced by the appellants.

11. Now coming to the crux of the controversy. The appellants pleaded that the carving out of the quota for such of the diploma holders who acquired degree during the course of service was based on the need to have accelerated promotional avenues so that more degree holders were available for manning the higher posts of SEs and onwards for which only a degree holder was eligible. There is stated to be qualitative difference in the work and experience of a degree vis-a-vis a diploma holder and thus the experience of one cannot be counted for the other. Since the recruitment regulations mentioned only the eligibility criteria two eligibility lists necessarily have to be prepared at the time of making promotions in the quota of degree holders and diploma holders and thus a combined seniority list loses its significance. It is, thus, pleaded that acquisition of a degree has to be at the entry point in the channel of degree holders and thus any diploma holder who acquires a degree subsequently, even if he was senior in service cannot be placed senior to a degree holder who acquired the degree prior to him. A contrary view, as per the submissions of the appellants, would defeat the entire purpose of culling out a separate quota for the degree holders. The acquisition of degree is, thus, pleaded to be a new birthmark in the cadre of a degree holder as otherwise there would be a fluid situation.

12. On the other hand it is the say of respondents 2 & 3 that the controversy is not one of eligibility but inter se seniority of the parties who were originally

diploma holders but acquired the degree at different points of time. Since the said respondents at the time of promotion of the appellants in 1992 were already eligible in terms of the eligibility rules and were senior to the appellants ought to have been promoted earlier than the appellants. The position emerging regarding the appointment, date of acquiring the degree and promotion is set out as under:

Party

Appointment as JE (diploma holder)

Date of acquiring degree

Promotion as AE

Petitioner No.1

February, 1979

1983

7.5.1992

Petitioner No.2

August, 1976

1980

May, 1992

Respondent No.2

April 2, 1974

1988

1998

Respondent No.3

January, 1976

1986

1996

13. Respondent No.1 is stated to have prepared a seniority list on 31.7.1986 wherein respondent No.2 was at serial No.117, respondent No.3 at serial No.141, appellant No.1 at serial No.206 and appellant No.2 at serial No.151. The amendment to the Recruitment Rules by the NDMC did not envisage any change in the seniority rules nor any provision to draw a seniority list on the basis of acquiring the degree/eligibility but despite this a new seniority list was prepared which was impugned in the writ petition. This seniority list was also contrary to the practice of respondent No.1 of operating a seniority list on the basis of date of joining (an admission made by respondent No.1/NDMC in an affidavit affirmed

on 17.1.2004). Such a practice was in conformity with the Delhi Administration (Seniority) Rules, 1965, where para 6(i) states as under:

6. PROMOTIONS:-

(1) The relative seniority of persons promoted to the various grade shall be determined in the order of their selection for such promotions.

14. These seniority rules are stated to have been adopted by respondent No.1 and not withdrawn.

15. Learned counsel for respondents 2 & 3 referred to the amended rules to contend that out of the 75 per cent posts to be filled in through departmental recruitment 50 per cent are meant for diploma holders and 25 per cent for degree holders. The degree holders in turn may be either degree holders who acquired such a degree prior to the entry into the feeder grade of JE or those who acquired the degree in the course of service. The qualifying services are, however, different from all these. For a degree holder having a degree at the entry point the qualifying service is four (4) years. For a diploma holder it is eight (8) years. The requirement of qualifying service for a diploma holder who acquires a degree during the course of service is a little more complex as it requires three (3) years service post the date of acquisition of the degree or five (5) years service whichever is more beneficial to the officer. The requirement of five (5) years service is not "post acquisition of degree". Thus, the intention of amendment of the recruitment rules is clear, i.e. to give an additional avenue of promotion to degree holders who acquired a degree while in service but the same does not wash away the service rendered by diploma holders JEs.

16. It is the submission of respondents 2 & 3 that the post is one, i.e., JE where both diploma holders and degree holders were carrying out the same function. The acquisition of the degree is, thus, an additional factor for promotion to the post of an AE and gives a more accelerated promotion as per the time period. It also provides a minimum qualifying service post acquisition of degree of three (3) years. Once all these qualifications are met, then on the date when the promotion is made all eligible persons would stand together and their inter se seniority of the degree acquiring diploma holders would be as per their original seniority at the point of entry.

17. In the aforesaid factual matrix we now refer to various judgments cited at the bar by learned counsels for the parties. The basic judgment relied upon by the appellants is of the Supreme Court in Shailendra Dania and Others Vs. S.P. Dubey and Others, . The Civil Appeal arose out of a judgment of a Full Bench of this Court in WP (C) No.4696/1993 titled S.P. Dubey Vs. MCD and connected matters decided on 25.1.2002. The questions referred to before the Full Bench were answered and it was held that the experience gained by the diploma holders as JEs has to be counted for promotion to the post of AE in the event they are duly qualified as degree holders. The Supreme Court analyzed various aspects. It upheld the different periods of service attached to qualification as an

essential criterion for promotion, the same being based on administrative interest in the service. It was held that the diploma holders JE who obtained a degree during the tenure of service would be required to complete three (3) years service on the post after having obtained a degree to become eligible for promotion to the higher post if they claim promotion in the channel of degree holder JE there being a quota fixed for such graduate Engineers and diploma holders JEs for promotion to the post of AE. Learned counsel for the appellant emphasized on the question which was referred to the Full Bench and was answered, i.e., the experience gained by diploma holders as JEs is to be counted to the post of AEs in the event they are qualified as degree holders. On the other hand learned counsel for respondents 2 & 3 submitted that the only question examined by the Supreme Court was the determination of eligibility and not the seniority position of diploma holders after acquiring the degree subsequently.

18. The Supreme Court noticed the judgment in M.B. Joshi case (supra) in paragraph 27 which was relied upon by the learned single Judge and concluded that the court in that judgment was considering the experience/qualifying service of eight (8) years and twelve (12) years amongst the diploma holders Sub-Engineers and not vis-à-vis the degree holders Sub-Engineers. The reduction of qualifying service from twelve (12) years to eight (8) years accelerated the entitlement to promotion for the post of AE by Sub-Engineers from twelve (12) years to eight (8) years and the qualifying service required to be considered was of diploma holders Sub-Engineers which had no relation with the Degree of Engineering. Thus, the equivalence of any period of service with qualification of acquiring a degree in Engineering was not in issue. The conclusions are contained in paragraphs 44 & 45 of the said judgment, which read as under:

44. 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.

45. 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.

(emphasis supplied)

19. The emphasis of learned counsel for the appellants is the observations made aforesaid regarding the watertight compartments for graduate JEs and diploma holder Engineers and they are being entitled to promotion in their respective quotas. On the other hand learned counsel for respondents 2 & 3 emphasized on the corollary in paragraph 45 aforesaid that the completion of three (3) years service on the post after having obtained a degree to become eligible for promotion to the higher post if the claim for promotion was in the channel of degree holder JEs.

20. Learned counsel for the appellants also referred to the judgment in CW No.6048/1999 titled A.K. Kashyap Vs. Commissioner, DDA & Ors. decided on 20.5.2002 by one of us (Sanjay Kishan Kaul, J.). The facts of the case are apposite inasmuch as the dispute involved the seniority inter se diploma holders who had acquired the degree. It was held that once a person acquired a degree and sought to come in the channel of degree holders, he cannot claim seniority over persons who are either senior to him in the line of degree holders or who may be junior to him in the line of diploma holders but who happened to have acquired a degree prior to him. This order was assailed in LPA No.473/2002. The LPA was dismissed on 14.2.2007 holding that once the diploma holders acquires a degree the erstwhile inter se seniority, if any, loses significance.

21. In State of Gujarat Vs. C.G. Desai and Others, , it was observed in paragraph 17 as under:

17. If a person, like any of the respondents, to avoid the long tortuous wait leaves his position in the "never-ending" queue of temporary/ officiating Deputy Engineers etc. looking for promotion, and takes a short cut through the direct

channel, to Class II Service, he gives up once for all, the advantages and disadvantages that go with the channel of promotion and accepts all the handicaps and benefits which attach to the group of direct recruits. He cannot, after his direct recruitment claim the benefit of his pre-selection service and thus has the best of both the worlds. It is well-settled that so long as the classification is reasonable and the persons falling in the same class is treated alike, there can be no question of violation of the constitutional guarantee of equal treatment.

22. In *PSE Board, Patiala & Anr. Vs. Ashok Kumar Sehgal & Ors.* 1990 Lab I.C. 249, a Full Bench of the Punjab & Haryana High Court has looked into the question which inevitably arose as to who should get the promotional post, i.e., the senior of the two even though the senior acquired eligibility later than the junior or should it go to the one who acquired the eligibility first. It was held that the seniority per se cannot be intended to be taken as a basis for promotion as otherwise it would lead to undesirable results of breeding manipulations, machinations, calculations and caprice. The case of promotion of the first eligible person can deliberately be kept delayed with oblique motives so as to let suitable rivals come in and in this manner his acquired eligibility can be frustrated by someone senior acquiring eligibility far later. This Full Bench judgment was upheld by the Supreme Court in Civil Appeal No.1633/1989 decided on 14.9.1994. The Full Bench was relied upon by a Division Bench of Punjab & Haryana High Court in *Pirthvi Singh Vs. HSEB* 1993 (5) SLR 108 and the said judgment of the Division Bench received the imprimatur of the Supreme Court by dismissal of SLP No.13782/1993 on 10.9.1993 against the said judgment.

23. In *Challa Jaya Bhaskar & Ors. Vs. Thungathurthi Surender & Ors.* 2010 XI AD (SC) 97, the Supreme Court examined the plea of Civil Assistant Surgeons in the Andhra Pradesh Medical & Health Services who had acquired the post graduate degree and were subsequently included in the teaching cadre claiming the benefit of their past service as non-teaching staff for reckoning seniority. This plea was negated taking note of the judgment in *Shailendra Dania & Ors.* case (supra).

24. In *Chandravathi P.K. & Ors. Vs. C.K. Saji & Ors.* AIR 2004 SC 2717, it was observed in paragraph 43 as under:

43. The State as an employer is entitled to fix separate quota of promotion for the degree-holders separately in exercise of its rule-making power under Article 309 of the Constitution of India. Such a rule is not unconstitutional. The state may, therefore, in our opinion, cannot be said to have acted arbitrarily by giving an option to such diploma-holders who acquired a higher qualification so as to enable them to either opt for promotion in the category of degree holder or diploma-holder. Such option was to be exercised by the concerned officer only. He, in a given situation, may feel that he would be promoted in the diploma-holders quota earlier than degree-holders quota and vice versa but once he opts to join the stream of the degree-holders, he would be placed at the bottom of the seniority list.

(emphasis supplied)

25. Learned counsel for respondents 2 & 3, on the other hand, relied upon the three pronouncements of the Supreme Court. In *R. Prabha Devi & Ors. Vs. Government of India, through R. Prabha Devi and Others Vs. Government of India, through Secretary, Ministry of Personnel and Training, Administrative Reforms and Others*, , it was observed that where a rule making authority has laid down conditions for promotion to a higher post in the service rules, it cannot be said that a direct recruit who is senior to the promotee is not required to comply with the eligibility condition and he is entitled to be considered for promotion to a higher post merely on the basis of seniority. The seniority will be relevant only amongst persons eligible and seniority cannot be substituted for eligibility nor it can over ride it in the matter of promotion to the next higher post. It was, thus, the submission that a distinction must be drawn between the seniority and eligibility and once respondents 2 & 3 are eligible, the seniority must prevail. In *R.B. Desai and Another Vs. S.K. Khanolkar and Others*, , the accepted principle of service jurisprudence that once persons from different sources enter a common cadre their seniority will be counted from the date of their continuous officiation in the cadre to which they are appointed was recognized. At the time of consideration for promotion the candidates concerned who have acquired the eligibility, unless rule specifically gives an advantage to a candidate to an earlier eligibility the date of seniority should prevail over the date of eligibility. Since the rule under consideration did not give any such priority to the candidates acquiring earlier eligibility, the seniority ought to count. The judgment of the High Court was over ruled on the ground that the rule did not specifically contemplate such an advantage of having acquired eligibility first as against seniority.

26. In *A. K. Raghumani Singh and Others Vs. Gopal Chandra Nath and Others*, the requirement of having minimum years of service specified in the rule was held to be independent of educational qualification eligibility criteria. Thus, if the requisite experience had been obtained before obtaining educational qualification, the professional experience need not entirely be gained after obtaining education qualification.

27. We have set out all the aforesaid judgments because of the principle of law which is sought to be urged in the present proceedings, of course, qua the rule in question.

28. The catena of judgments cited by learned counsel for the appellants proceeds on one fundamental principle. There can be more than one channel of promotion requiring different periods of service and different educational qualifications. If it is so, a person with lesser educational qualification becomes eligible under the rules to be promoted albeit after a delayed period of time. This does not make the rule arbitrary and the benefit can accrue to a person with higher qualification. Thus, the choice is with the candidate to avail of the route which is more beneficial to him but once he opts to join a stream of the degree holders he

would be placed at the bottom of the seniority list as observed in Chandravathi P.K. & Ors. case (supra).

29. Nothing prevented respondents 2 & 3 from acquiring the qualifications first. They chose to continue as diploma holders and would, thus, have been considered for promotion only as diploma holders but for the opportunity made available by amendment of the promotion rules giving another fast track for promotion for such of the diploma holders who acquired a degree. The moment they acquired a degree they come in a different category and stream and thus have obviously a chance for faster promotion because that would be the only reason for them to seek promotion in that channel. This is also obvious from the minimum time period required of service before a diploma holder or degree holder gets promoted. It is, in fact, to encourage diploma holders to acquire a degree and thus they become eligible for holding higher posts which are reserved for degree holders that such an amendment to the rules came into force. No doubt there is a minimum period of service required post acquiring the degree before a person becomes eligible. But then such eligibility will be acquired at different points of time depending on when a diploma holder obtains a degree as a person obtaining a degree later would come into the eligibility stream later, the three (3) years period starting post acquiring the degree. The person obtaining the degree first, thus, comes into the eligible pool earlier and is ranked higher for purposes of consideration for promotion, the date of his having acquired the degree becoming material.

30. In PSE Board, Patiala & Anr. case (supra), the Full Bench cautioned the possibility of breeding manipulations, machinations, calculations and caprice, which would arise if a view to the contrary is adopted as the promotions may not be given effect to, so as to permit more seniors to acquire the eligibility of the degree with three (3) years of service and they would get promotion first despite a person who was junior but took the initiative to acquire the degree first. Thus, the system would permit suitable rivals to come into the pool from which promotion has to be made and then claim that they have a prior right of promotion arising from the initial date of appointment even if they have acquired the qualifying degree later, a mischief best avoided!

31. We fully agree with this reasoning and this judgment has received the imprimatur of the Supreme Court by dismissal of the Civil Appeal as referred to aforesaid.

32. The aforesaid principle has been followed in A.K. Kashyap case (supra) and, once again, received the imprimatur of the Division Bench of this Court in LPA No.473/2002 and to our minds there can really be no doubt about this proposition.

33. The most material aspect is the judgment which has been rendered in Shailendra Dania & Ors. case (supra). The judgment of the Full Bench of this Court rendered on a reference holding the view that the experience claimed by

the diploma holders as JEs has to be counted for promotion to the post of AEs in the event they are duly qualified as degree holders was itself called into question in this case. In fact, the hearing in this appeal was deferred on a number of occasions on account of the interim orders granted in the appeal before the Supreme Court arising from the Full Bench decision. We may notice that on 13.1.2005 the question whether this appeal should await the decision of the Supreme Court was examined and the interim order passed by the Supreme Court in Appeal on 1.11.2004 was noticed. The Supreme Court had observed that the impugned order had been stayed which necessarily meant that the experience gained by diploma holders prior to their obtaining a degree could not be counted and their seniority must necessarily start from the date the degree is obtained. Thus, it is hardly permissible for respondents 2 & 3 to plead that the controversy in the present case was not actually examined in *Shailendra Dania & Ors.* case (supra). The question answered by the Full Bench is noticed at the end of paragraph 21 and the judgment in *M.B. Joshi* case (supra) relied upon by the learned single Judge has been explained away in paragraph 28 of the judgment. Paragraph 22 specifically states that the court was concerned with the rule relating to promotion from the post of JE to the post of AE. Merely because this judgment now does not favor respondents 2 & 3 does not imply that it should not apply to the facts of the case when the judgment arises from the same rules and the same controversy.

34. In so far as the judgments referred to by respondents 2 & 3 are concerned, in our considered view, *R. Prabha Devi & Ors.* case (supra) is not of much assistance to respondents 2 & 3. It only lays down a proposition that a person must be eligible for promotion having regard to qualifications presented for the post before he can be considered for promotion and that seniority cannot be substituted for eligibility. This does not imply that the inter se seniority of the same category of degree holders cannot be fixed on the criteria of who acquired the degree first. *R.B. Desai & Anr.* case (supra) and *A.K. Raghmani Singh & Ors.* case (supra) was in the context of the rules in question.

35. No doubt the earlier norms being adopted as per an affidavit filed by respondent No.1 was of seniority having precedence but then that was not when this rule providing for accelerated possibility of promotion to the diploma holders on acquiring a degree was in question. The promotion rules were amended in pursuance to the representations received from the diploma holders who wanted to shift the stream by acquiring a degree and thus a quota was carved out for them. If they want to get promotion through this quota then their seniority in this quota would alone be the criteria, the date of acquiring the degree and not the period rendered in service as a diploma holder. That is why some period of service has to be post acquiring the degree.

36. We are, thus, of the considered view that the impugned judgment of the learned single Judge cannot be sustained in view of the aforesaid legal position and more specifically in view of the pronouncements in *Shailendra Dania & Ors.*

case (supra).

37. The impugned order is set aside and the modified seniority which has now been made applicable in terms whereof the appellants are senior to respondents 2 & 3 are upheld, the date of acquiring the degree being the material date with requisite period of service post acquiring the degree.

38. The appeal is accordingly allowed leaving the parties to bear their own costs.