

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6534 OF 2005

S.B.Dwivedi and ors. ...Petitioners
Versus
Union of India and ors. ...Respondents

Mr. Rahul G. Walia for the Petitioner.
Mr. T.J. Pandian for Respondent Nos.1 and 2/UOI.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 05.07.2018.

ORAL JUDGMENT:

1] Heard learned counsel for the parties.

2] The challenge in this petition is to the judgment and order dated 28.09.2004 and 24.11.2004 in O.A. No. 853 of 2002 and 9 of 2003. Petitioner No.4 has challenged the judgments and orders dated 27.01.2004 and 31.12.2003 in O.A. No. 130 of 1999 instituted by him. Ordinarily, such a joint petition challenging the orders made in separate O.As. ought not to have been filed or entertained. However, now that the matter has reached the stage of final hearing we do not propose to non-suit the petitioners on the basis of such a technical consideration.

3] When the petitioners were working as Welfare Inspectors, on 1.1.1998, Notification was issued for selection and empanellement for promotion to the post of Asst. Personnel Officer (APO) against 75% quota for departmental candidates. In terms of the Notification, selection and emanemllement was to be held in respect of 14 posts. Out of which, 12 were in the general category, '1' for S.C. and '1' for ST category.

4] Written tests/supplementary written tests were held on 22.03.1998 and 18.04.1998. In the results declared on 13.5.1998, the petitioners were declared as passed, thereby, rendering them eligible to appear for viva-voce test. This is the position in terms of communications dated 13.5.1998 and 26.5.1998.

5] In the meantime, there was an enhancement in the retirement age and as a result, there was a variation in existing as well as anticipated vacancies, on the basis of which the Notification dated 1.1.1998 had been issued. The posts were, therefore, reduced from 14 to 8. There is no

dispute that 8 officers in order of merit-cum-seniority were appointed against such reduced 8 posts. Therefore, this is not some case, where the petitioners can claim to have been superseded.

6] The petitioners, however, strongly rely upon the Railway Board's communication dated 14.6.1998 to contend that the respondents, had no right to curtail the number of posts because, before any enhancement in retirement age could be announced and before number of vacancies could be varied, the written tests had already concluded and only, the viva-voce remained to be held. The petitioners state that the Railway Board's directive dated 14.6.1998 requires the respondents to proceed with such selection on the basis of originally indicated vacancies of posts, i.e., 14 posts or vacancies.

7] Mr. Walia, learned counsel for the petitioners, submits that the Railway Board's decision is binding upon the respondents and the respondents had no right or authority to deviate from the directives issued by the Railway Board. He points out that the respondents have relied upon a

clarification dated 15.6.1998, which clarification, does not constitute any amendment to the Railway Board's directive dated 14.6.1998.

8] Mr. Walia points out that this court, had in fact directed the respondents to file a specific affidavit as to whether the Railway Board's Circular dated 14.6.1998 has been revised by the Railway Board's subsequent Railway clarification dated 15.6.1998. In response, the Joint Director, Ministry of Railways, has filed an affidavit to the effect that the Railway Board's Circular dated 14.6.1998 stands as it is and cannot be said to have been amended or modified by the subsequent letter dated 15.6.1998.

9] Mr. Walia submits that from this it is quite clear that the petitioners were required to be considered and promoted against the balance 4 posts. Since, this is not been done, there is violation of the right to be considered for promotion as guaranteed by Article 16 of the Constitution of India.

10] Mr. Walia also submits that in the present case the decisions to curtail the number of vacancies was taken by the authorities, who had no competence to take such decision. In any case, he submits that such authorities, could not have taken any decision inconsistent with the directive of the Railway Board. In this regard, the petitioners have placed reliance upon the Indian Railway Establishment Code (Rule 124).

11] For all these reasons, Mr. Walia submits that this petition is liable to be allowed and set aside the impugned judgments and orders made by the CAT and the petitioners be granted the reliefs as prayed for by them in their respective O.As.

12] Mr. Pandian, learned counsel for the respondents, submits that in the present case, the Full Bench of the Central Administrative Tribunal (CAT) has correctly appreciated the position and has denied the relief to the petitioners. He submits that the petitioners have no right to insist upon the appointment or promotion, even though, they may have cleared their written tests. He submits that

the petitioners have no vested rights in determination of vacancies or posts. He submits that ultimately, it is the matter for the Railways to decide and as long as no mala fides alleged or established the decision in the matter of number of posts, is really no open to judicial review. He submits that the Railway Board's Circular is only enabling. For all these reasons, Mr. Pandian submits that there is no case made out to interfere with the impugned judgments and orders.

13] The rival contentions now fall for our determination.

14] Since the entire case of the petitioners is based upon the Railway Board's Circular dated 14.6.1998, it will be appropriate to reproduce the same for proper appreciation.

*“GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)*

*No.E(GP) 98/2/37
The General managers,
All Indian Railways &
Production Units.
& OSDS.*

New Delhi dt.14.6.98

*Sub: Promotion from Group 'C' to Group 'B'-
reassessment of vacancies on account of
enhancement in the age of retirements.*

Vide Boards letter No.EP&A) 1-98/RT-6. dt. 14.5.98 instructions have been issued that the vacancies for promotion/recruitment should be reviewed consequent upon the enhancement in the age of retirement.

2. Some of the Railways have sought clarifications regarding reassessment of vacancies in respect of selection/LDCE for promotion to Group'B' posts which is at various stages of process.

3. Board have considered the matter and have decided that in respect of selections against 70% quota, if the main written test has been held prior to 13.5.98, the selection may be finalised without reviewing the vacancies on account of revision of retirement age. In case only a notification has been issued, the vacancies should be reviewed and selection conducted on the basis of re-assessed vacancies.

4. It has also been decided that in case selection against 70% quota has been conducted or is to be conducted as per instructions in para 3 above, the corresponding LDCE may be held based on the quota of vacancies already worked out with retirement age as 58 years.

Receipt of this letter may please be acknowledged.

(This desposed of N.E. Rly's d.o. letter No.E/210/0/pt.III(I) dated 20.5.98 and Central Rly's Letter No. HPB/481/R.III/RBE/No.103/98 dt.21.5.98).

*SD/- (J.C. Jain)
Dy. Dir. Estt. (Gaz.P)
Railway Board."*

15] The Railway Board's Circular, quite advisedly states that where written tests has been held prior to 13.5.1998, the selection "*may be finalised*" without reviewing the vacancies on account of revision of retirement age. The deliberate use of the expression "*may*" very clearly indicates that the Board's Circular dated 14.6.1998 is not

some sort of a mandate to the Railway authorities to proceed to make promotions notwithstanding the fact that there may not be sufficient vacancies or sufficient work for such promotees, in view of enhancement in retirement age.

16] The Circular is enabling in the sense that it enables the Railway authorities, in its discretion, to proceed with selection process where, written test has been held prior to 13.5.1998. No doubt, the discretion has to be exercised on basis of valid considerations and by eschewing extraneous considerations. However, from the bare reading of the Circular, it is quite clear that the Circular contains no mandate or diktat to the Railway authorities to fill up the earlier announced posts, even though, the Railway authorities, may honestly entertain the opinion that no such vacancies arise or that there is no necessity for filling-up all such vacancies in the light of changed scenario.

17] It is settled principle in service jurisprudence that the Government or the Railway Authorities, cannot be forced to fill up all the posts merely because some vacancies may have arisen. It is for the Government or for such authorities

to decide the number of posts that required to be filled in and consequently, number of promotions that are required to be made. Merely because, an officer may have attained the eligibility qualifications to be considered for promotion or merely because some officers may have cleared the written tests or even been empanelled in the select list, such officers, cannot claim any vested rights to be appointed or promoted.

18] No doubt, if the appointments are made contrary to the merit list prepared or if there are any mala fides involved in aborting the selection process, judicial review is certainly not ruled out. However, merely because officers may have cleared the written tests, that by itself, gives them no rights to insist that the promotions must be made to the posts or vacancies earlier announced. There is nothing in the Circular of the Railway Board which takes away the discretion of the Railway authorities in such matters. The Circular is only enabling in the sense that it confers discretion of the Railway authorities to proceed with the selection for all the announced posts, in a situation

where written tests have already been held prior to 13.5.1998.

19] Therefore, even if, the letter dated 15.6.1998 is to be ignored, on the basis of plain reading of Railway Board's Circular dated 14.6.1998 itself, it cannot be said that any vested right was created in the petitioners to insist upon the promotion, merely because the petitioners may have cleared the written tests.

20] Then, again, empanellement was remained to valid only for two years. The respondents have placed on record the material which suggest that even the officer who was indicated as 8th in the empanelled list, was promoted towards the end of 2nd year. The fact that the petitioners did not find place in the first eight positions, indicates that they were lower in the merit, even on the basis of the written tests. Therefore, even grant of any relief of empanellement, at this stage, would not assist the petitioners, because the empanelled list would have lapsed within two years. Again, the empanellement would depend upon the results of the viva-voce, which was never held in case of the petitioners.

21] For all the aforesaid reasons, we are satisfied that there is no jurisdictional error in the view taken by the CAT. The view taken by the CAT is a plausible view and therefore, there is no case made out to warrant interference, at this point of time.

22] Accordingly, this petition is dismissed. Rule is discharged. There shall, however, be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

Dinesh
Sadanand
Sherla

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by Dinesh
Sadanand Sherla
Date: 2018.07.11
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