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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 22.09.2020

Pronounced on: 19.10.2020

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W.P.(C) 7400/2013

RAJESH BAHL

..... Petitioner

Through: Mr. Anunaya Mehta & Mr.
Akshaydeep Singhal, Advocates

versus

**INDRAPRASTHA POWER GENERATION
COMPANY LTD. & ANR.**

..... Respondents

Through: Mr. R.K. Vats & Ms. Alka,
Advocates for R-1.
Mr. Naushad Ahmed Khan, ASC
for R-2.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Petitioner through the present petition seeks a mandamus to direct Respondent No. 1 to promote/place the Petitioner in the post of Additional Chief Medical Officer (NFSG) (hereinafter referred to as 'ACMO') w.e.f. 23.09.2012 in the Pay Scale of Rs. 37,400-67,000/- with Grade Pay of Rs. 8,900/- under the Dynamic Assured Career Progression Scheme (hereinafter referred to as 'DACP'), promulgated by the Government of India vide O.M. dated 05.04.2002 and implemented by Respondent No. 1 vide Office Order dated 20.10.2004 as well as for further promotion to the post of CMO with all consequential benefits. A

writ of certiorari is also sought for quashing the Office Order dated 03.10.2013.

2. Petitioner, who was initially a Doctor in the Armed Forces, joined Delhi Vidyut Board (DVB) after resigning from the Forces. He joined as a Medical Officer (MO) vide Office Order dated 23.09.1999 on recommendations of the UPSC under a Package Deal Scheme dated 04.06.1993 (hereinafter referred to as '1993 Policy') formulated by erstwhile DESU (later DVB). The offer of appointment dated 20.09.1999 stipulated that the Petitioner's pay shall be fixed according to Rules and Instructions of the Government of India.

3. Government of India vide O.M. dated 06.06.2000 prescribed that a Non-Functional Selection Grade (NFSG) is a segment of Junior Administrative Grade (JAG) and 'Non-Functional' i.e. appointment to NFSG would be merely placement in the higher Pay Scale and not a promotion.

4. Government of NCT of Delhi declared its Policy to restructure and unbundle DVB for restoring the operational and financial viability to meet the future demand for supply of energy and consequently entered into a Tripartite Agreement dated 28.10.2000 with DVB and the DVB Joint Action Committee to allay the fears of the DVB employees that on restructuring of the DVB, the employees shall neither be retrenched nor their service conditions would be adversely affected. The Agreement vide Clause 3(b) provided that the terms and conditions of service, upon transfer to the Corporate entities, such as promotions, transfers, other

allowances etc. shall be regulated by existing service Rules and any modifications shall be by mutual negotiations with recognized Unions, without detriment to the existing benefits.

5. To implement the Restructuring Scheme, the Delhi Electricity Reforms Act, 2000 (hereinafter referred to as the 'Act') was passed and Section 16(2)(a) thereof provided that the personnel on transfer shall hold office in the transferee Company on the conditions specified in the Transfer Scheme, subject however, to the terms of service in the transferee Company not being less favourable than those before transfer. Consequently, the Delhi Electricity Reform (Transfer Scheme) Rules, 2001 (hereinafter referred to as 'Rules') were made and Rule 6(7) thereof echoed the guarantee given to the employees in Section 16(2)(a) of the Act. To this extent the facts are uncontroverted between the parties.

6. Petitioner was transferred from DVB to a new Corporate Entity GENCO (later known as 'IPGCL'). The case set out by the Petitioner is that provisions of the Tripartite Agreement, the Delhi Reforms Act and the Rules, guaranteed to the Petitioner the same terms and conditions as were applicable to the Petitioner while he was employed with the erstwhile DVB and there could be no modification/alteration qua his service conditions, to his detriment. The terms and conditions applicable to the Petitioner, as averred in para 10 of the petition, at the time of transfer, as reflected in the Office Order dated 04.06.1993, are as under:-

“(1) Medical officer (M.O) to be appointed as Sr. MO Gr-II after completion of 4 years of regular service in the grade on the basis of seniority-cum-fitness.

(2) Sr. M.O. Gr-II to be promoted as Sr. M.O Gr.I on completion of 6 years of regular service as Sr. M.O. Gr-II or on completion of 10 years, combined regular service as M.O. and Sr. M.O. Gr.II of which atleast 2 years shall be as Sr. M.O. Gr-II and without linkage to vacancies.

(3) Sr. M.O Gr-I with two years of regular service to be placed in the non-functional selection grade (NFSG).

(4) For overall supervision, the post of CMO to be filled on the basis of merit-cum-seniority from the NFSG with 2 years regular service in the grade.”

7. Government of India (Ministry of Health and Family Welfare) vide Notification dated 05.04.2002, formulated the DACP Scheme accepting the recommendations of the 5th Central Pay Commission. The Scheme provides for time bound financial upgradations not linked to vacancies and the relevant portions are as follows:

“(1) In the General Duty Medical officer (GDMO) Sub Cadre, Medical Officer (Rs.8000-13500) will be promoted to Senior Medical officer (Rs.10000-15200) on completion of 4 years of regular service.

Senior Medical officer with 5 years of regular service as Senior Medical Officer will be promoted to the post of Chief Medical Officer (Rs.12000-16500) and after completion of 4 years in Chief Medical Officer Grade, officer will be promoted to the post of Chief Medical officer (Non-functional Selection Grade) (Rs.14300-18300). Thus on completion of 13 years of regular service in the GDMO Sub Cadre of CHS, Officer of GDMO will be

promoted to Chief Medical Officer (Non-functional Selection Grade) (Rs. 14300-18300).”

8. Petitioner claims that he was promoted to the post of Senior Medical Officer (SMO) Grade II vide order dated 06.04.2004 w.e.f. 23.09.2003 under the 1993 Policy in a time bound manner, after completion of 4 years of service as Medical Officer (MO). Respondent No. 1 vide Order dated 20.10.2004 (hereinafter referred to as ‘DACP 2004’) implemented the DACP Scheme of the Government of India and the relevant portion of the order dated 20.10.2004 is as follows:

“1(a) The Medical Officer in the grade of Rs.8000-13775 shall be allowed to be promoted as Sr. Medical officer Gr.II in the pay scale of Rs.10,000-15,850 after completion of 4 years of regular service in the grade on the basis of Seniority-cum-fitness.

(b) Persons appointed as Sr. medical officer Gr.II in the pay scale of Rs.10,000-15,850 shall be allowed to be promoted as Sr. Medical Officer Grade-I in the pay scale of Rs.12000-18000 on completion of 5 years regular service as Sr. Medical officer Gr- II.

(c) Sr. Medical Officer Gr.I in the pay scale of Rs.12000-18000 shall be allowed to be promoted to NFSG of ACMO in the pay scale of Rs.14300-18300 on completion of 4 years regular service.”

9. Petitioner points out that while implementing the DACP 2004, Respondent No. 1 kept the post of CMO in the Pay Scale of Rs. 18,400-22,400/- to be filled by promotions by officers holding posts in the Grade of ACMO (NFSG) with 3 years’ service in the Grade or with 17 years

total regular service in the Category - 'A' post and this was linked to availability of vacancy.

10. Petitioner was promoted to SMO Grade I w.e.f. 23.09.2008 vide order dated 12.01.2009 in accordance with the DACP 2004. This was a time-bound promotion, after 5 years of regular service as SMO Grade II. In accordance with DACP 2004, Petitioner was, according to him, due for time-bound promotion on 23.09.2012 to the post of ACOMO (NFSG) on completion of 4 years of regular service as SMO Grade I. On not being so promoted, Petitioner represented to Respondent No. 1 on 24.01.2013 for grant of the time-bound promotion. This was followed by a Reminder dated 22.05.2013.

11. Petitioner avers that instead of promoting him or responding to his Representation, Respondent No. 1 issued a new Scheme of promotion dated 30.04.2013 (hereinafter referred to as '2013 Policy') for the cadre of Doctors which was approved by the Board of Directors. According to the Petitioner, the Scheme is to his detriment and far less favourable than DACP 2004 and he accordingly made a Representation on 28.05.2013 against the Resolution followed by another letter dated 07.08.2013, requesting for promotion w.e.f. 23.09.2012 as well as pointing out that the terms of the 2013 Policy were contrary to the 1993 Policy as well as to the DACP 2004 and would adversely effect the promotion prospects of the Petitioner.

12. Respondent No. 1 rejected the request of the Petitioner vide letter dated 09.09.2013 stating therein that his plea had no merits and that DACP 2004 had been accepted by Respondent No. 1 with certain modifications as per the hierarchy in IPGCL/PPCL and was never

accepted in toto. Petitioner thereafter made several representations but when his grievance was not redressed, he filed the present petition.

13. Mr. Anunaya Mehta learned counsel for the Petitioner contends that the provisions of the Tripartite Agreement and the Act and the Rules made thereunder clearly assured the Petitioner that the transferee Company shall not formulate conditions of service which are comparatively less favourable than those applicable to them prior to the transfer and therefore it is not open to Respondent No. 1 to apply the 2013 Policy, which by a bare perusal is adversely affecting the career prospects of the Petitioner. In order to demonstrate the difference in the two policies i.e. DACP 2004 and 2013 Policy, Petitioner has appended a comparative Chart and it is argued that under DACP 2004, Petitioner would have got his promotion as ACOMO (NFSG) w.e.f. 23.09.2012 and the next promotion as CMO from 23.09.2016, while under the latter scheme i.e. 2013 Policy, Petitioner is entitled to promotion to the post of Assistant Chief Medical Officer, a post introduced as an intermediary post between ACOMO and that too w.e.f. 03.10.2013. Resultantly, Petitioner will become eligible to be promoted as CMO from 23.09.2021.

14. It is also argued that Respondent No. 1 while responding to a petition filed in this Court being W.P.(C) No. 7499/2010 had given a categorical statement that it shall abide by the Tripartite Agreement insofar as it relates to the service conditions of the employees of the erstwhile DVB as they existed when they were transferred. Even today the stand of Respondent No.1 in the Counter Affidavit is that eligible employees shall be given promotional benefits from a retrospective date,

on completion of restructuring process and yet benefits have been denied to the Petitioner.

15. It is further contended that Petitioner had joined DVB on 23.09.1999 and completed 13 years of service on 23.09.2012. There is no dispute that the Petitioner was promoted under DACP 2004, by Respondent No. 1, to the post of SMO Grade I on 23.09.2008. Thus, under the time-bound Policy, Petitioner has become due for promotion to the post of ACMO (NFSG) on 23.09.2012, after completion of 4 years of regular service in the grade of SMO Grade I. Learned counsel relies on the judgement of the Supreme Court in ***YV Rangaih vs. J Sreenivasa Rao (1983) 3 SCC 284*** for the proposition that vacancies that occur prior to the amendment of the Rules would be governed by the old Rules and not the amended Rules. Reliance is also placed on the judgement in ***P. Mahendran vs. State of Karnataka (1990) 1 SCC 411***, where the Court has held that if a candidate applies for a post to an Advertisement issued by the UPSC in accordance with the Recruitment Rules, he acquires the right to be considered for selection in accordance with the existing rules and the right cannot be affected adversely by amendment of the Rules unless the Rule is given a retrospective effect. It is argued that in the present case, the 2013 Policy was never given a retrospective effect and would therefore only apply from the date of its issue. In support, reliance is placed on ***N.T. Bevin Katti etc. vs. Karnataka Public Service (1990) 3 SCC 157***.

16. Respondent No. 1 has filed its Counter Affidavit. Based on the stand in the Counter Affidavit as well as the written submissions filed, learned counsel for Respondent No. 1 submits that Petitioner was

promoted as SMO Grade II under the pre-existing 1993 Policy which was superseded by DACP 2004, which was issued after accepting the DACP Scheme introduced by Government of India in 2002. Petitioner was promoted to the post of SMO Grade I based on completion of 5 years of regular service under DACP 2004. Petitioner accepted his promotion under DACP 2004 and cannot fall back on the 1993 Policy. It is also argued that the post of ACOMO having a Pay Scale of Rs.14,300-18,300/- after 4 years of regular service as SMO Grade I is a non-functional post and the Petitioner has no vested right to be placed in the said post once the scheme of 20.10.2004 itself stands superseded by new set of unified Rules promulgated on 30.04.2013.

17. It is argued that under a Transfer Scheme of 2009, number of employees of IPGCL were transferred and absorbed in Pragati Power Corporation Limited (hereinafter referred to as 'PPCL') to meet the manpower requirement of the latter. Though it was initially decided to hold DPCs for employees of both the organisations but later, a conscious decision was taken to formulate unified Rules of service, after restructuring the cadres of both the organisations and to protect the *inter-se* seniority of employees of IPGCL and PPCL.

18. It is further submitted that much before the date on which the Petitioner entered the zone of consideration for promotion to the 'A' category employees, Respondent No. 1 had put on hold all the DPCs till promulgation of the unified Rules. In the Meeting held on 15.02.2011, it was decided to withhold DPCs in both the Companies for the present, as it had a direct bearing on the *inter-se* seniority of the employees and may affect the smooth operations of Transfer/Absorption Scheme. Before the

Petitioner became due for consideration under DACP 2004 on 23.09.2012, Respondent No. 1 vide Resolution of its Board of Directors dated 15.02.2012 had implemented the new Scheme of promotion and salary structure and unified promotion Rules and combined sanctioned strength for 'A' category employees was approved for most of the cadres while it was still awaited for the cadre of Doctors. As a consequence, promotions in the cadre of Doctors were kept in abeyance, till finalization of the unified Rules. The argument is that any promotion done for a particular individual according to the old Rules when new unified Rules were in contemplation for the entire cadre of Doctors would be against the law and violative of Article 14 of the Constitution of India qua the other Doctors. The unified promotion Rules regarding the Doctors were finalized in the Meeting of the Board of Directors of IPGCL and PPCL on 30.04.2013 and thereafter the DPC was held on 24.09.2013 and Petitioner was duly promoted to the post of Assistant CMO w.e.f. 23.09.2011. Vide order dated 03.10.2013, Petitioner was placed in Pay Band III - Rs. 19,000-39000 with Grade Pay 8300 as per the new salary structure applicable.

19. It is argued that the new unified Rules were formulated after inviting suggestions and having discussions with the employees and none of the Unions or Associations or any other employee has objected to the provisions of the 2013 Policy. It is also argued that a conscious decision was taken to formulate a unified Policy to protect the inter-se seniority and it is a settled law that vacancies may be kept unfilled by the employer in case there is a conscious decision to amend the Rules or the Policy and the amendment is in contemplation. Learned counsel in support of the

legal proposition relies on a judgement of the Supreme Court in ***Dr. K. Ramulu & Anr. vs. Dr. S. Suryaprakash Rao & Ors. (1997) 3 SCC 59***, more particularly, para 15 which is as follows:

“15. Thus, we hold that the first respondent has not acquired any vested right for being considered for promotion in accordance with the repealed Rules in view of the policy decision taken by the Government which we find is justifiable on the material available from the record placed before us. We hold that the Tribunal was not right and correct in directing the Government to prepare and operate the panel for promotion to the post of Assistant Directors of Animal Husbandry Department in accordance with the repealed Rules and to operate the same.”

20. Reliance is also placed on a judgement in ***State of Punjab & Ors. vs. Arun Kumar Aggarwal & Ors. (2007) 10 SCC 402*** and ***Deepak Aggarwal & Anr. vs. State of U.P. & Ors. (2011) 6 SCC 725*** wherein the dictum of law in ***Dr. K. Ramulu (supra)*** was followed. Learned counsel for the Respondent draws the attention of the Court to a recent judgement of the Supreme Court in ***State of Orissa & Anr. vs. Dhirendra Sundar Das & Ors. (2019) 6 SCC 270*** wherein relying on the judgement in ***Deepak Aggarwal (supra)*** and ***Dr. K. Ramulu (supra)***, Supreme Court distinguishing the judgement in ***YV Rangaiah (supra)*** observed that the contesting Respondents therein did not have a vested right of promotion to the concerned posts, as their names had only been recommended for consideration in 2008. In 2009, the State had restructured the cadre and abolished the posts to which the names were recommended and thereafter the reconstituted cadre with new Rules had come into place. The High

Court therefore could not have given any direction for appointment of the Respondent in the vacancies that had occurred in the abolished cadre and in accordance with the repealed old Rules.

21. Learned counsel also argues that under the unified 2013 Policy, restructuring of the cadre of Doctors has taken place resulting in the creation of intermediary posts of Assistant CMO and Deputy CMO between the SMO Grade I and ACOMO and therefore the entire hierarchy and the methodology as well as eligibility of promotion to the post of ACOMO has undergone a change. Petitioner has not challenged the said promotion Policy and therefore cannot even question the same. Respondent No. 1 has acted purely in terms of the conscious decision taken and the 2013 Policy, which is unchallenged and no fault can be found with the action. Petitioner is thus not entitled to be promoted as ACOMO w.e.f. 23.09.2012 and the relief ought to be declined.

22. Insofar as the argument of the Petitioner that the 2013 Policy is detrimental to the Petitioner and contrary to or violative of the Tripartite Agreement or the Act and the Rules thereunder, learned counsel for the Respondent submits that the plea is misconceived and liable to be rejected. DACP 2004 was not, according to the counsel, part of the terms and conditions of service of the Petitioner applicable to him before the transfer i.e. on 01.07.2002 and nor was it the existing service condition of the Board i.e. the erstwhile DVB at the time of transfer. DACP 2004 was implemented only on 20.10.2004 i.e. after the transfer of the Petitioner. Moreover, the erstwhile DVB was a creature of the Central Statute and therefore the Government of India Instructions as well as the DOP&T O.Ms. etc. were not *ipso facto* applicable to the DVB employees, unless

they were so adopted and it is not the Petitioner's case that DACP 2002 was adopted before his transfer. The 1993 Policy of the erstwhile DESU was applicable to the Petitioner before the transfer and the same was continued and the Petitioner was even promoted under the said Scheme on 06.04.2004, but was subsequently superseded by DACP 2004. Petitioner has not laid any challenge to the 2013 Policy and thus it cannot even be contended by the Petitioner that the Policy and its provisions are detrimental.

23. Arguing in rejoinder, learned counsel for the Petitioner reiterates the stand that the Petitioner is entitled to be promoted to the post of ACMO (NFSG) w.e.f. 23.09.2012 on completion of 4 years' service as SMO Grade I, under DACP 2004. It is submitted that Respondent No. 1, as an afterthought is trying to justify its omission to promote the Petitioner on the ground that a conscious decision had been taken on 15.02.2011 to withhold promotions, pending introduction of a unified Policy for IPGCL and PPCL. It is sought to be contended by the Respondent that only after 30.04.2013, when the new Policy was formulated for the cadre of Doctors, the DPC could be held for considering the Petitioner for promotion. This according to counsel for the Petitioner is a misconceived contention. As regards the decision to withhold promotions, Petitioner contends that the decision was taken by the Board of Directors on 15.02.2011 to withhold DPCs, only on account of transfer of employees from IPGCL to PPCL, so as not to affect the *inter-se* seniority while giving effect to the reorganization of the Companies. This is clear from the Agenda of the Meeting more specifically Clauses (ii)(1) and (ii)(8) of the 'Proposed Action Plan'. A

new unified promotion Policy was not even in contemplation when the meeting was convened, which is evident from Clause (i)(4) of the Agenda. Therefore, it is wholly incorrect to link withholding of DPCs to the 2013 Policy. It is argued that the Agenda Note to the Meeting dated 15.02.2012 indicates that the Transfer Scheme subsequently failed and there was discontentment amongst employees due to stagnation. Accordingly, a decision was taken by the Board on 15.02.2012 to recall the earlier decision of withholding the DPCs and a decision was taken to re-start the process of promotion. Reading of the Resolution dated 15.02.2012 makes it clear that the decision to restart the DPC process was absolute and applicable to all employees of the Company except in relation to Bamnauli Project as provided in Clause (b) of Part II Para A of the Agenda Note.

24. Elaborating the argument, learned counsel for the Petitioner submits that the decision to re-start the Promotion process did not exclude the cadre of Doctors as alleged by Respondent No. 1. There is nothing in the 2012 Resolution which reflects that DPCs for Doctors were withheld and/or would be convened after the formulation of a new Policy. Merely because Promotion Rules for Doctors were not changed on 15.02.2012 would not imply that there was a conscious decision to withhold the DPCs contemplating a new policy. Hence once the decision to withhold the DPCs was revoked in specific terms on 15.02.2012 i.e. before the Petitioner was due for promotion on 23.09.2012, there is no reason why the Petitioner should not be promoted under DACP 2004 from the due date.

25. It is reiterated that the case of the Petitioner is squarely covered by the decision in *YV Rangaiah (supra)* as his promotion fell due before the 2013 Policy came into effect. The decision in *Dr. K. Ramulu (supra)* is distinguished on the ground that the files of Respondent No. 1 do not indicate any conscious decision to withhold the DPC process as on 23.09.2012. Learned counsel for the Petitioner in fact takes support from the judgement in *Deepak Aggarwal (supra)* wherein the Supreme Court has held that the law laid down in *YV Rangaiah (supra)* would apply if the promotion process is required to be completed in a time-bound manner. Counsel submits that the present case falls within the exception carved out in *Deepak Aggarwal (supra)* since the promotion in the present case was time-bound. To substantiate this argument, attention is drawn to DACP 2004 Scheme wherein it is stipulated that promotions will be on completion of certain number of years of regular service in the feeder grades, without linkage to vacancy and in fact the Petitioner was promoted as SMO Grade I under DACP 2004.

26. Petitioner counters the argument of the Respondent with regard to the respective terms of DACP 2004 and the 2013 Policy and vehemently submits that the terms of the 2013 Policy are apparently to the detriment of the Petitioner. Under the 2013 Policy, Petitioner would be entitled to promotion to the post of CMO in 21 years as against 14 years under the 1993 Scheme. Further by introduction of intermediary posts between SMO Grade I and ACOMO (NFSG), the promotion to ACOMO stands further postponed and prolonged. It is further pointed out that the post of Deputy CMO equivalent to ACOMO (NFSG) is now tenable on the basis of selection by interview in contrast to the earlier time-bound promotion

and has made it more subjective. In sum and substance the argument is that 2013 Policy shall not apply to the Petitioner and can have a prospective effect only. Petitioner ought to be granted promotion to the post of ACMO (NFSG) either in accordance with DACP 2004 w.e.f. 23.09.2012 or in the alternative in accordance with the 1993 Policy and thereafter consequential promotion to the post of CMO w.e.f. 01.01.2015.

27. I have heard the learned counsels for the parties and examined their rival contentions.

28. It is uncontroverted between the parties that when the Petitioner joined IPGCL in 1999, the 1993 Policy was in operation and the Petitioner was promoted to the post of SMO Grade-II under the said Policy and it was a time bound promotion. It is equally uncontroverted that IPGCL adopted the DACP Scheme introduced by the Government of India on 05.04.2002 and on the said pattern formulated its own Scheme in 2004. Petitioner was promoted to the SMO Grade-I with effect from 23.09.2008 under the DACP 2004.

29. DACP 2004 was a time bound promotion Scheme and provided for promotion to the ACMO Grade in the pay scale of Rs.14300-18300 on completion of 4 years regular service in SMO Grade-I. Thus under the DACP 2004, the Petitioner became eligible and entitled to be promoted as ACMO (NFSG) with effect from 23.09.2012.

30. Respondent No.1 had taken a conscious decision in its meeting held on 15.02.2011 to withhold the promotions. The minutes of meeting which have been placed on record by the Respondent alongwith its written submissions indicate that the Board of Directors had resolved to withhold the promotions in IPGCL /PPCL in respect of various categories

of employees including those in “A” category. However, on account of various representations by the employees, due to stagnation, the Board of Directors resolved in the meeting dated 15.02.2012 that promotions of “A” category employees in IPGCL and PPCL would continue and the DPCs shall be held, in supersession of the earlier decision to withhold promotions, taken in the meeting dated 15.02.2011. Relevant part of the minutes dated 15.02.2012 is as under :-

"Resolved that the approval of the Board of Directors be and is hereby accorded for:

(i). holding DPC for affecting promotions in IPGCL/PPCL as per the proposal approved in the Board meeting, in supersession of the earlier decision to withhold the promotions in IPGCL/PPCL, made in the Board meeting held on 15th February, 2011;

(ii). Manpower structure as submitted in Para-II of the main proposal as combined sanctioned strength of IPGCL/PPCL;

(iii). Seniority, Promotion Rules, Time Bound Promotional scheme and clubbing of posts. Promotion Guidelines, Effective date of promotion as submitted in Points (i) to (vi) of the Para-III of the main proposal, for the purpose of promotions, subject to the incorporation of following modifications : ”

31. It is thus clear that when the Petitioner became entitled to the time-bound promotion under DACP 2004 to the post of ACMO on 23.09.2012, there was no decision by the Respondents to withhold the promotions. Two significant factors thus need to be noticed which existed on the crucial date being 23.09.2012. Firstly, there was no bar to holding DPCs for promotions and secondly, Petitioner had completed 4 years of regular

service as SMO Grade I, being the eligibility criteria for promotion to ACMO. Being a time-bound promotion I find force in the contention of learned counsel for the Petitioner that on the said date the DACP 2004 was applicable and the benefit of promotion could not be denied to the Petitioner.

32. The prime defence of the Respondent in not granting promotion of ACMO to the Petitioner on the above date is that a Unified Promotion Policy was in contemplation and therefore, a conscious decision was taken to withhold promotions of the Doctors till the Promotion Policy was formulated. In this context, learned counsel had relied on the judgements in the case of *Dr. K. Ramulu (supra)*, *State of Orissa (supra)* and *Deepak Aggarwal (supra)*. There cannot be any debate on the law laid down by the Supreme Court in *Dr. K. Ramulu (supra)* that the Government is entitled to take a conscious decision not to fill up the existing vacancies till the Amendment to the Rules, which is in contemplation and once the Rules are amended, the promotions made thereafter shall be governed by the amended Rules applicable when the consideration takes place. This is clearly a binding dicta of the Supreme Court. Learned counsel for the Respondent is right in his contention that the said law has been repeatedly reaffirmed in subsequent judgements by the Supreme Court including in *State of Orissa (supra)* and *Deepak Aggarwal (supra)*.

33. The question that however arises for consideration before this Court is whether the said judgements would apply in the facts of the present case. In my view the answer to the question is in the negative. In the present case the Petitioner seeks promotion to the post of ACMO

under a DACP Scheme. Relevant paras of the Scheme of 2004 have been extracted above and a bare reading shows that it is a time-bound Scheme and after 4 years of regular service as SMO Grade-I, the Petitioner became entitled to the promotion as ACP. It is also an admitted fact that the promotion under the DACP 2004 till the post of ACP was not linked to vacancies. Therefore, the Respondent cannot place reliance on the above judgements where the controversy related to the conscious decision of a Government not to fill up the existing vacancies on account of a contemplated amendment to the Rules. Under a time-bound Promotion Scheme, there is no gain-saying that an employee becomes entitled to promotion on completion of the residual service required for eligibility, irrespective of the existence of a vacancy. In fact the time bound Schemes such as the ACP, MACP and DACP were introduced by the Government as a 'safety net' to grant financial upgradations to employees who were stagnating due to lack of vacancies and this was leading to demotivation. The argument sought to be propounded by the counsel for the Respondent, if accepted, would obliterate the difference between the time-bound promotion schemes and vacancy-based promotions and would place them on the same pedestal. In all the judgements relied upon by the Respondent, the promotions involved were vacancy linked and there were no Rules which mandated the employer to either prepare panels in a time-bound manner or fill up the vacancies on a yearly basis. Therefore even if the argument of the Respondent is accepted that a conscious decision was taken to defer promotions till the formulation of unified Rules for the cadre of doctors the same cannot

inure to their advantage and deprive the Petitioner of the benefit accruing to him under DACP 2004.

34. Pertinent here is to note that in the case of *Deepak Aggarwal (supra)*, the Supreme Court has clearly noticed this distinction to the application of the law laid down in *Dr. K.Ramulu (supra)* while distinguishing the judgement in *YV Rangaiah (supra)* in its application to the said case before the Court. Relevant paras of the judgement in *Deepak Aggarwal (supra)* are as under :-

“19...Under the unamended 1983 Rules, the petitioners would be eligible to be considered for promotion by virtue of Rule 5(2). By virtue of the Note to Rule 8, a combined eligibility list has to be prepared by arranging the names of Assistant Excise Commissioners and Technical Officers in order of seniority as determined by the date of their substantive appointment. The appellants were, therefore, clearly in the feeder cadre of the post for promotion to the post of Deputy Excise Commissioner. Rule 7 provides that the appointing authority shall determine the vacancies to be filled during the course of the year and the number of vacancies. There is no statutory duty cast upon the State to complete the selection process within a prescribed period. Nor is there a mandate to fill up the posts within a particular time. Rather the proviso to Rule 2 [sic Rule 4(2)] enables the State to leave a particular post unfilled.

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23. Could the right of the appellants, to be considered under the unamended 1983 Rules be taken away? The promotions to the 12 vacancies have been made on 26-5-1999 under the amended Rules. The High Court rejected the submissions of the appellants that the controversy herein is squarely covered by the judgment

of this Court in Y.V. Rangaiah [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] . The High Court has relied on the judgment of this Court in Dr. K. Ramulu [(1997) 3 SCC 59 : 1997 SCC (L&S) 625].

24. We are of the considered opinion that the judgment in Y.V. Rangaiah case [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] would not be applicable in the facts and circumstances of this case. The aforesaid judgment was rendered on the interpretation of Rule 4(a)(1)(i) of the Andhra Pradesh Registration and Subordinate Service Rules, 1976. The aforesaid Rule provided for preparation of a panel for the eligible candidates every year in the month of September. This was a statutory duty cast upon the State. The exercise was required to be conducted each year. Thereafter, only promotion orders were to be issued. However, no panel had been prepared for the year 1976. Subsequently, the Rule was amended, which rendered the petitioners therein ineligible to be considered for promotion. In these circumstances, it was observed by this Court that the amendment would not be applicable to the vacancies which had arisen prior to the amendment. The vacancies which occurred prior to the amended Rules would be governed by the old Rules and not the amended Rules.

25. In the present case, there is no statutory duty cast upon the respondents to either prepare a year wise panel of the eligible candidates or of the selected candidates for promotion. In fact, the proviso to Rule 2 enables the State to keep any post unfilled. Therefore, clearly there is no statutory duty which the State could be mandated to perform under the applicable Rules. The requirement to identify the vacancies in a year or to take a decision as to how many posts are to be filled under Rule 7 cannot be equated with not issuing promotion orders to the candidates duly selected for promotion. In our opinion, the appellants had not acquired any right

to be considered for promotion. Therefore, it is difficult to accept the submissions of Dr. Rajeev Dhavan that the vacancies, which had arisen before 17-5-1999 had to be filled under the unamended Rules.”

35. In my view, counsel for the Petitioner is also right in his contention that since the right of the Petitioner for promotion to ACMO crystallized on 23.09.2012 the said promotion shall not be governed by the 2013 Policy, which can only be prospective in its application, in the absence of a stipulation in the Policy, giving it a retrospective effect. The said policy shall however apply to regulate the promotions of the Petitioner which would accrue post 01.01.2013. Thus so far as the promotion to the post of CMO is concerned, the same is vacancy linked and by the Petitioner's own case that he became eligible to be considered to the post of CMO only after 30.04.2013, the said promotion shall be governed by the terms and conditions formulated under the provisions of the 2013 Policy.

36. Looking to the conspectus of facts and the judgements referred to above this Court is of the view that the Petitioner is entitled to be promoted to the post of ACMO (NFSG) with effect from 23.09.2012, being a time-bound promotion in the pre-revised pay scale of Rs.14,300-18,300. Since the 2013 Policy has been notified thereafter on 30.04.2013, the next promotion to the post of CMO will be governed by the said Policy.

37. It is accordingly directed that the Petitioner be placed in the non-functional selection grade of Additional Chief Medical Officer with effect from 23.09.2012 in the Pay Band 4 with Grade Pay of Rs.8900, subject to

his meeting the laid down criteria and norms of the promotion as laid down in DACP 2004. Petitioner shall be considered thereafter for promotion to the post of CMO in accordance with the 2013 Policy and if found fit, promotion shall be granted with all consequential benefits. The entire exercise shall be completed by the concerned Respondent within a period of eight weeks from today.

38. Office Order dated 03.10.2013 promoting the Petitioner as Assistant CMO in Pay Band of Rs.19000-39100 with Grade Pay Rs.8300 is hereby quashed.

39. The writ petition is allowed in the aforesaid terms.

OCTOBER 19th, 2020
rd/yg

JYOTI SINGH, J

सत्यमेव जयते