

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 6th August, 2021

+ W.P.(C) 415/2021, CM No. 19312/2021

SACHIN KUMAR GUPTA & ORS.

..... Petitioners

Through: Mr.Saurabh Agrawal, Ms.Komal
Mundhra, Mr.Shantanu Singh,
Advs.

versus

**DEDICATED FREIGHT CORRIDORS CORPORATION OF INDIA
LIMITED**

..... Respondent

Through: Mr. V S R Krishna and Mr.V
Shashank Kumar Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J (ORAL)

1. The present petition has been filed by the petitioners with
the following prayers:-

*In view of the aforementioned facts and
circumstances, this Hon'ble Court may be pleased
to:*

*a. Issue a writ, order and/or direction in the
nature of mandamus directing the Respondent to fill
up the 22 posts created on 22.10.2020 in the S&T
Department, as per the extant rules at the time of
creation of such posts; AND*

*b. Issue a writ, order and/or direction in the
nature of mandamus directing the Respondent to
call the Petitioners for interview against the 22
posts, in accordance with the old Promotion Policy,
as applicable on 22.10.2020; AND*

*c. Issue, a writ, order and/or direction in the nature of mandamus to quash the Office Order No. HQ/HR/Misc/S&T/Vol.-I dated 30.12.2020;
AND/OR*

*d. Issue a writ, order and/or direction in the nature of mandamus to quash the Vacancy Notice No. 02/2021 dated 04.01.2021;
AND/OR*

*e. Issue a writ, order and/or direction in the nature of mandamus directing the Respondent to place on record all the relevant documents by way of which additional posts were created by surrendering of existing posts and Circular No. 640/2020 dated 22.10.2020 was issued;
AND/OR*

f. Pass any other order(s) and/or direction(s), that this Hon'ble Court may deem fit in the facts and circumstances of the present case."

2. It is the case of the petitioners that they were appointed with the respondent's organization at E0 level on March 27, 2012 in the pay scale of Rs.12600 – 32500. They were promoted to E1 level (Senior Executive) on June 02, 2017. On May 16, 2019, vide Circular No. 07/2019, the promotion policy for E0 and above grade employees was amended whereby it was stated that no written test for promotion from Grade E1 to E2 would be taken and the same would be on the basis of interview of eligible employees.

3. It is their case and so contended by Mr. Saurabh Agrawal that the petitioners being in Engineering department which consist of Electrical and S&T department in which the petitioners

are working, all eligible employees of electrical department were promoted to the E2 grade, i.e., Junior Manager on May 14, 2020 whereas the petitioners were denied the same benefit despite the petitioners being eligible.

4. On October 13, 2020, the Board of Directors created 22 posts (14 in E2 grade and 08 in E3 grade) with matching surrender from E0 grade to ease out the promotional prospects of employees in S&T Department, as a one-time measure and accordingly a circular No.648/2020 dated October 22, 2020 was issued. He contended that the respondents had also issued Circular no. 640/2020 dated October 16, 2020, revising recruitment and promotion policy whereby as per Clause 8.7.1(b)(i) of the said circular, a new criteria of competitive examination (Computer Based Test) has been added for promotion to E2 grade and has been made applicable to all those employees in the lower cluster, who have 03 years' service experience, whereas the petitioners herein had to wait for 8 years for the opportunity of promotion.

5. Mr. Agrawal submits that the petitioners being eligible for promotion to the post of E2 level with effect from January 01, 2020, as per promotional rules as existing earlier, the vacancies which occurred prior to amendment of service / promotional rules would be governed by the old rules and not by the amended rules as per circular dated October 16, 2020. In other words, Circular dated October 16, 2020 will not be applicable to the filling up of 22 post notified on October 22, 2020, as the said policy will come into effect from January 01, 2021 in accordance with Clause 9 of

the said circular. He lays stress on the fact that the 22 posts created in the S&T department by way of circular dated October 22, 2020 were intended to rectify the great disparity in promotional opportunities. However, the respondent Organization rather than promoting the employees of E1 level, have sought to fill up the post of E2 level by way of deputation as per the vacancy notice dated January 04, 2021. He relied upon the judgment in the cases of *State of Rajasthan v R. Dayal (1997) 10 SCC 419* and *Y.V. Rangaiah And Ors. vs J. Sreenivasa Rao And Ors. AIR 1983 SC 852*. He seeks the relief as prayed for.

6. On the other hand, Mr. V.S.R. Krishna submits that the plea of Mr. Agrawal is totally misconceived, inasmuch as the petitioners could not be promoted earlier because there were no vacancies at E2 level. It is precisely for that reason that the Board, in its meeting dated October 13, 2020 decided to create 22 vacancies at E2 level and also revised the recruitment and promotion policy and accordingly, the circulars dated October 16, 2020 and October 22, 2020 have been issued. He states that the plea of Mr. Agrawal that 22 vacancies, out of which 14 have been created at E2 level need to be filled under the old promotion policy only on the basis of interview, is without any merit. In this regard, he has drawn my attention to the policy dated October 16, 2020 to contend that the same clearly stipulates vide Clause 9, which reads as under:-

“In grades where CBT is not prescribed as method of promotion, policy shall be effective from date of issue. For grades where CBT will be conducted, policy shall be effective from 01.01.2021.

The above policy is applicable on Permanent Cadre and may be reviewed from time to time.”

7. He also, by drawing my attention to page 127 of the paper book, which refers to Grade E2(Jr. Manager), E3 (Asst. Manager) and E4 (Manager) in Cluster D submits that 50% posts in E2 to E4 grade shall be filled by direct recruitment and 50% posts shall be filled by promotion from eligible employees in E0 / E1 grade having three years minimum service through competitive examination. In other words, the promotion criteria which stipulates CBT shall be effective from January 2021 as per Clause 9 reflected above.

8. On the circular dated January 04, 2021 issued by the respondent, he submits that the said vacancies pertain to construction phase whereas the petitioners are to be considered for vacancies in operations phase. Therefore, the petitioners have no claim against the vacancies, which are to be filled through deputation. He also justifies filling up of vacancies through deputation by contending that the respondents operates the posts in two different categories viz. Construction phase and Operations phase. The construction posts are always temporary in nature while the regular employees of the respondents are in Operations. The construction posts is a short term exercise for which the respondent engages specialist and expert depending upon the functional requirements. The vacancy notice dated January 04, 2021 is only with respect to construction posts, i.e., for recruitment to temporary posts and the notice itself indicates that only post holders in CPSUs, Central and State Government

have been invited to apply as these personnel would be those, who have specific technical know-how to deal with the management of the project in the construction phase. The said notice does not concern the regular posts of E2 level on which the petitioners are staking claim. The challenge to vacancy notice, is unsustainable and is liable to be dismissed.

9. On the aspect of promotion from E1 to E2 is concerned, the same is subject to availability of vacancies. As reflected above, the minimum residency period for promotion from Sr. Executive (E1) to Jr. Manager (E2) is three years subject to availability of vacancies. There is no provision to consider an employee in case of non availability of vacancy in higher cluster. He seeks the dismissal of the writ petition.

10. Having heard the learned counsel for the parties, the only issue, which arises for consideration is whether the posts, which have been created by the Board of Directors in its meeting dated October 13, 2020, as notified on October 22, 2020 need to be filled under the old policy i.e. by way of only interview and not in terms of circular dated October 16, 2020. The said issue is clearly covered by Clause 9 of the circular dated October 16, 2020, which has already been reflected above, inasmuch as for grades where CBT will be conducted, policy shall be effective from January 01, 2021. I have already reproduced the manner, in which the promotions have to be made from E1 to E2, i.e., by way of competitive examination.

11. The clause regarding mode of filling the vacancies in the grade E2 to E4 from E0/E1 in terms of recruitment and

promotion policy is concerned the same reads as under:-

<i>Grade</i>	<i>Post / Hierarchy</i>	<i>Cluster</i>	<i>Mode of Filling Vacancies</i>	<i>Educational qualifications for Direct recruitment / Immediate Absorption for entry in lowest grade of the cluster</i>
<i>E4</i>	<i>Manager</i>	<i>D</i>	50% posts in E2 to E4 grade (cluster D) shall be filled by direct recruitment. 50% posts shall be filled by promotion from eligible employees in E0 / E1 grade having three years minimum service through competitive examination.	Relevant degree from a recognized Institute with minimum 60% marks
<i>E3</i>	<i>Assistant Manager</i>			
<i>E2</i>	<i>Junior Manager</i>			

12. The above provision states 50% posts shall be filled by promotion from eligible employees in E0 / E1 grade having three yeas minimum service through competitive examination. There is no dispute that the petitioners being in E1 level, are eligible for promotion to E2 level. Hence, the same has to be through competitive examination (CBT). If that be so, the promotion policy shall be effective from January 01, 2021. Hence, this plea of Mr. Agrawal is rejected.

13. The reliance placed by Mr. Agrawal in the cases of ***State of Rajasthan v R. Dayal (supra)*** and ***Y.V. Rangaiah And Ors.***

(*supra*) is concerned, they have no applicability in the facts of this case inasmuch as the recruitment and promotion policy was notified on October 16, 2020 before the circular of creation of posts was notified on October 22, 2020, though decision with regard to both was taken by the Board on the same day, i.e., October 13, 2020. In other words, the recruitment and promotion policy was in place when the vacancies created, were notified. That apart, there is a conscious decision taken by the competent authority to fill up the vacancies for promotions in terms of the new recruitment and promotion policy with effect from January 01, 2021. The Supreme Court in the case of **Deepak Aggarwal v. State of UP 2011 (6) SCC 725** has held as under:

“24. We are of the considered opinion that the judgment in Y.V. Rangaiah case 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.*

26. *It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the “rule in force” on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in Y.V. Rangaiah case lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment.”*

(emphasis supplied)

So, the Judgments of the Supreme Court in *Y.V. Rangaiah (supra)* and *State of Rajasthan (supra)* have no applicability on facts and as such distinguishable.

14. Insofar as the challenge to the vacancy notice dated January 04, 2021 is concerned, the same is also without any merit, inasmuch as the same clearly stipulates that the manner of appointment is deputation from Officers working in the Central / State Government / PSU employees in the analogous grade. Hence, the petitioners cannot lay a challenge to the said vacancy notice dated January 04, 2021, as they are not contenders.

15. On the aspect of the promotion of the petitioners to E2 level is concerned, Mr. Krishna has stated that the same shall be subject to availability of vacancies and there is no provision to consider the employee in case of non availability of vacancy in higher cluster. It goes without saying, any promotion to a higher post has to be subject to availability of vacancy. In this background, he justifies the rejection of the representation of the petitioners vide communication dated December 30, 2020 wherein it has been clearly stated by the respondent that they will be considered for promotion as Jr. Manager, as per the revised promotion policy dated October 16, 2020.

16. In view of the aforesaid position and the fact that the respondents have called for applications for making promotions through competitive examination (Computer Based Test) to E2 level and Mr. Agrawal in the hearing of July 05, 2021 has also stated that without prejudice to the rights and contentions, the petitioners intend to apply for promotion in terms of the circular

dated June 15, 2021 and the corrigendum dated June 21, 2021 thereof and if the petitioners have actually applied, there cannot be any dispute that their case for promotion to E2 level shall be considered. Even the grievance of promotion to E2 level does not survive.

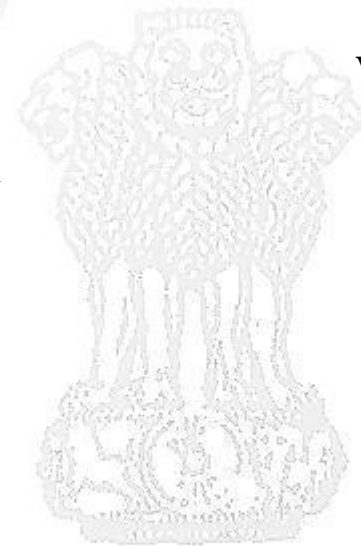
17. In view of my above discussion, I do not see any merit in the petition. The same is dismissed.

CM No. 19312/2021 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

AUGUST 06, 2021/ak



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