

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

.....

LPA no.130/2022

Managing Director, J&K Road State Transport Corporation and others

..... Appellants(s)

Through: Mr Altaf Haqani, Senior Advocate
with Mr Shakir Haqani, Advocate

Versus

Syed Arshad Tramboo and others

.....Respondent(s)

Through: Mr M. M. Dar, Advocate for
respondent no.1

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR JUSTICE WASIM SADIQ NARGAL, JUDGE

ORDER

04.08.2022

CM no.4101/2022

1. Caveat application no.701/2022 shall stand discharged.
2. On no objection from the other-side, the condonation delay application (CM no.4101/2022) is allowed and delay of 19 days in filing the appeal is condoned.
3. Appeal is taken up for consideration.

LPA no.130/2022

Per Wasim Nargal J:

4. By virtue of judgement and order dated 28th April 2022, passed in a writ petition, bearing SWP no.2611/2015, titled *Syed Arshid Tramboo v. State of J&K and others*, the learned Single Judge has been pleased to allow the said writ petition in the following manner:

“11. For the foregoing reasons, this petition is allowed and the petitioner is held entitled to the promotion as Deputy General Manager (Maint.) in the respondent-Corporation w.e.f. 11.02.2013 and as General Manager w.e.f. 11.02.2018 with all consequential service benefits. Let the respondents consider the case of petitioner in the light of observations made herein above and pass appropriate orders of substantive promotion of the petitioner as Deputy General Manager (Maint) and General Manager respectively w.e.f. the dates indicated above and release all consequential benefits, if any, in his favour within a period of two months from the date copy of this judgment along with paper book is served upon the Managing Director of the respondent-Corporation. This is, however, subject to the petitioner’s fulfilling other requirements of promotion as per Rules.”

5. Before proceeding further, it would be apt to give concise factual background of the case with a view to clinch/decide the controversy in question.

FACTS:

6. Respondent no.1 herein (petitioner before the Writ Court) was appointed as Assistant Works Manager in J&K State Road Transport Corporation (hereinafter referred to as “appellant-Corporation”) vide appointment order no.SRTC/EC-II/1287 dated 20th June 1988. After ten years, pursuant to the recommendation made by Departmental Promotion Committee and approval granted by the Chairman, JKSRTC, petitioner was promoted as Works Manager vide Order no.JKSRTC/DPC/EC-T dated 2nd November 1999. Petitioner, vide Order no.06/JKSRTC/ MD/PS/Sgr dated 28th July 2007, was posted as Incharge Deputy General Manager (for short “DGM”) in his own pay and grade. He consistently represented before appellant-Corporation for his confirmation but his request was not acceded to.
7. It was a specific case of petitioner before the Writ Court that while he was representing for his confirmation in the post of DGM and

consequent promotion to the post of General Manager (for short “GM”), which as per petitioner was lying vacant, the Corporation vide communication dated 26th November 2015, requested the Administrative Department for appointment of Shri Abdul Hamid Wani, Drilling Engineer, Geology and Mining Department as GM on deputation. The petitioner feeling aggrieved of the same, challenged the aforesaid communication before the Writ Court as appellant-Corporation instead of confirming him against the post in question imported employees from other departments on deputation at the cost of petitioner when according to petitioner the post in question was required to be filled up 100% by promotion as per Recruitment Rules. It was a specific case of the petitioner before the Writ Court that in terms of the Recruitment Regulations of the Jammu and Kashmir State Road Transport Corporation, 2013 (hereinafter referred to as for the sake of brevity as the “Rules of 2013”) the posts of GM as well as DGM were required to be filled up 100% by promotion by making selection amongst the categories shown in the Schedule and petitioner, *albeit* being eligible in all respects, was still being ignored by appellant-Corporation leaving petitioner with no option except throwing challenge to the impugned communication on the ground that on one hand the Corporation was forwarding his case for confirmation and on the other hand, allowing deputation to carry and as a corollary thereof, infringing the right of petitioner for promotion.

8. In writ petition, the petitioner, apart from throwing challenge to impugned communication, also prayed for a direction to appellant-

Corporation to confirm his promotion as DGM from 28th July 2007, i.e., the date when he was eligible and was assigned the charge of the post with all consequential benefits. Petitioner also sought relief for further promotion to the post of GM with effect from 28th July 2012, in conformity with the Regulations of 2013.

9. Appellant-Corporation filed its Reply Affidavit before the Writ Court, contesting the claim of petitioner, contending, *inter alia*, that the promotion to the post of DGM and GM in the Corporation was being regulated in terms of Regulations of 2013 which came into force with effect from 11th February 2013. The specific stand had been taken by appellant-Corporation before the Writ Court that appellant-Corporation in terms of the Regulations of 2013, the post of DGM was required to be filled up from eligible categories, including Works Manager with seven years' experience. It was also the case of appellant-Corporation that in the year 2007, when post of DGM fell vacant due to elevation of one Shri Suhail Ahmad Khan to the post of General Manager on incharge basis, the Regulations of 2013 were not in place and, therefore, petitioner was placed as incharge DGM vide order dated 28th July 2007, followed by release of charge allowance in his favour with effect from 1st September 2010. Appellant-Corporation had further pleaded that in the order dated 28th July 2007, it was specifically mentioned that petitioner's placement to the post of DGM was in his own pay and grade without conferring any right to claim promotion on substantive basis and the said order was unconditionally accepted by petitioner and after promulgation of the Regulations of 2013, petitioner along with other

officers were considered by the Board of Directors in its meeting held on 11th August 2016 and consequently petitioner was recommended for promotion to the post of DGM. Under this background facts, the case of petitioner was sent for vigilance clearance. It had been categorical stand of respondents that the formal order of promotion of petitioner would be passed after vigilance clearance is received.

The record further speaks that petitioner, who was working as DGM, was also ordered to look-after the post of GM (Mech/P&S) vide Order no.361 of 2015 dated 8th December 2015.

SUBMISSION OF PARTIES:

10. From perusal of writ petition, filed by petitioner, the factual foundation laid by petitioner therein to the relief claimed is impugned communication, by virtue of which the persons belonging to different departments were deputed to appellant-Corporation, which was detrimental to the fundamental rights of petitioner for seeking consideration for promotion.

11. Mr Altaf Haqani, learned senior counsel, representing appellant-Corporation, has vehemently argued that there is no finding with regard to impugned communication and learned Single Judge instead of quashing impugned communication has allowed the petition, by holding the petitioner entitled to the promotion as DGM with effect from 11th February 2013 and GM from 11th February 2018 with all consequential service benefits, with a further direction to consider the case of petitioner in light of observations made in the impugned judgement and pass appropriate orders of substantive promotion of

petitioner as DGM and GM with effect from the dates indicated in operative portion of the judgement, by releasing all consequential benefits, if any, in his favour within a period of two months. According to Mr Haqani, the aforesaid direction has been passed by learned Single Judge on the basis of presumption of promotion of respondent no.1 to the post of DGM as on 11th February 2013 and completion of five years' experience in the said post as a matter of requirement of promotion to the post of GM. The finding has been recorded by learned Single Judge without taking into consideration the availability of post of GM, which post otherwise in terms of the rules was required to be filled up by selection amongst other eligible candidates and, thus, the direction by learned Single Judge, which is based on presumptions and assumptions, cannot sustain the test of law and is liable to be set-aside.

Besides that, Mr Haqani has also argued that in terms of the Regulations of 2013, the appellant-Corporation placed respondent no.1/petitioner as incharge of the post of DGM on 28th July 2007 as he was not eligible for promotion in absence of vacant post. It is also admitted case of parties that the Regulations of 2013 were not retrospective in operation and, accordingly, it was not permissible for learned Single Judge to hold respondent no.1/petitioner entitled to promotion as DGM with effect from 11th February 2013, particularly when he did not place on record any document showing availability of post as on 11th February 2013. The appellant-Corporation has specifically pleaded before the Writ Court that the post of DGM had not fallen vacant substantively on 28th July 2007, when petitioner was incharge of the

said post because the incumbent of the post of DGM, namely, Shri Suhail Ahmad Khan, had as well been placed in the post of GM on incharge basis. Mr Haqani has also argued that impugned judgement passed by the learned Single Judge is liable to be set-aside as admittedly, petitioner had not held the post of GM and, consequently, no direction could be passed for holding him entitled to promotion as GM along with consequential benefits inasmuch as he has not discharged any duties entitling him to such benefits.

12. *Per contra*, Mr M. M. Dar, learned counsel appearing on behalf of respondent no.1/caveator, has argued that on 28th July 2007, petitioner (respondent no.1 herein) was senior most Works Manager and, as such, was entitled for further promotion as DGM. Mr Dar has admitted that in the year 2007, when petitioner was placed as incharge DGM, the Recruitment Rules of 1986 were in vogue and as per the said Rules, the Works Manager was placed in Category B Class V in the Schedule and, as such, was entitled to be promoted as DGM (O), DGM(E) Secretary Corporation, DGM(M). He concedes that petitioner was not entitled to be promoted as DGM (Maintenance) as per aforesaid Rules, and justifies that due to non-availability of the post in the line of his promotion, petitioner was directed to held the post of DGM (Maintenance).

Mr Dar has vehemently argued that petitioner continued to work as DGM in incharge capacity and while he was so continuing, the Regulation of 2013 were promulgated vide Notification dated 11th February 2013. As per Schedule-II appended to the Regulations of

2013, the post of Works Manager is put in Category A Class VI and the post of DGM is indicated in Category A Clause V and is provided to be filled up by selection from Class VI Category A&B with minimum seven years' experience as Traffic Manager/Works Manager/ Manager (Finance).

Mr M. M. Dar, appearing for petitioner/respondent no.1, has argued that petitioner on the date of promulgation of the Regulations of 2013, was having more than seven years' experience as Works Manager and, thus, entitled to be promoted as DGM, which post he was holding in incharge capacity since 28th July 2007.

On the basis of the aforesaid arguments, the learned Single Judge presumed that petitioner, though entitled to promotion as DGM in terms of Rules of 1986, could not have been promoted as DGM due to non-availability of relevant post and as per finding recorded by learned Single Judge that in terms of Regulations of 2013, petitioner, who was possessing more than seven years' experience as Works Manager, became entitled to promotion as DGM immediately on its promulgation in light of the fact that petitioner was already holding the post of DGM, for which post he became eligible and entitled to only under the Regulations of 2013. As per the observations of the learned Single Judge this was the basis that the learned Single Judge held petitioner entitled to substantive promotion as DGM with effect from 11th February 2013 with all consequential benefits.

ANALYSIS

13. The Courts time and again have laid emphasis on right to be considered for promotion to be a fundamental right, as was held by the Hon'ble

Supreme Court in the case of *Director, Lift Corporation Ltd v. Pravat Kiran Mohanty (1991) 2 SCC 295*, in paragraph 4, which is reproduced below:

“4... There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified.”

14.A Constitution Bench of the Hon’ble Supreme Court in the case of *Ajit Singh vs. State of Punjab, (1999) 7 SCC 209*, laying emphasis on Article 14 and Article 16(1) of the Constitution of India, held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her’s fundamental right. Paragraphs 21, 22 and 27 would be advantageous to be reproduced hereunder:

“21: Articles 14 and 16(1): is right to be considered for promotion a fundamental right 22: Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State". It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right. “Promotion based on

equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)

xxxx xxxx xxxx xxxx xxxx

27. In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and other cases, if it is intended to lay down that the right guarantee to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950."

15. The Hon'ble Supreme Court again in *Major General H.M. Singh, VSM vs. UOI and another, (2014) 3 SCC 670*, again reiterated the legal position, i.e., right to be considered for promotion as a fundamental right enshrined under Article 14 and Article 16 of the Constitution of India. The relevant extract from paragraph 28 is reproduced below:

"28. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition that the respondents were desirous of filling the vacancy of Lieutenant-General, when it became available on 1-1-2007. The factual position depicted in the counter-affidavit reveals that the respondents indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the senior most serving Major-General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29.2.2008, and thereafter, by a further Presidential Order dated 30.5.2008. The above orders clearly depict that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant-

General (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet, stands affirmed). The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant-General would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary.”

16.Promotion is a condition of service and consideration thereof is a fundamental right. For facility of reference, it would be apt to reproduce relevant extract of Schedule attached to Rules of 1986 below:

Class	Category	Grade	Designation of the post	Qualification for Direct Rectt.	Qualification for Rectt. By promotion	Method of recruitment	Ratio
IV	A	1350-2150	Dy. Gen. Manager (O) Dy. Gen. Manager(E) Secy. Corporation		By selection from Class(V) Category “B”		
	B	1350-2150	Dy. Gen. Manager(M)		By selection from class (V) category “A” with 5 years’ experience in Class V		
V	A	835-1510	Traffic Manager Manager Pass, Services MTS Manager Estates Manager, Admn P.F.O. Labour Officer	Graduate with diploma in management from recognized institute with 3 years’ experience	5 years’ experience AMTS, AMBS, D.M. & T.C.O	Direct/ Promotion	25:75
	B		Manager(P&S) Manager BBS Purchase Officer Works Manager	Degree/ Diploma in Auto Engg. From an institute recognized by GOI with 3 yrs’ experience	5 years’ experience as AWM, Ind. Enggr. Foreman/Stor es Officer	-do -	25:75

17.Appellant-Corporation approved and promulgated the Regulations of 2013 vide Notification dated 11th February 2013. The relevant portion of the Schedule appended to the Regulations of 2013 is also reproduced hereunder:

Class	Category	Designation	Pay Band with Grade Pay	Minimum qualification for Direct Recruitment	Qualification for Recruitment By promotion	Method of recruitment	Ratio of recruitment	
							Direct	Promotion
Xxx	xxxxx	xxxxx	xxxxx	xxxxx	xxxxx	xxxxx	xxx	xxx
IV		General Manager G.M.(Admn) G.M.(Ops) Kmr G.M.(Cargo Ser.) G.M. (Mech/P&S)	15600-39100		By selection from Class V Category A with minimum five years' experience	By promotion		100%
IV	A B	Dy. Gen. Manager -DSU(Kmr) -TSD(Jammu) _Cargo(Jammu) Maint/P&S (Kmr) Maint/P&S(Jmu) -Adm/PRO-cum-Protocol Officer (Kmr)			By selection from Class VI Category A&B with minimum 7 years' experience as Traffic Manager/ Works Manager/ Manager (Finance)	By promotion		100%

18. From perusal of the Rules of 1986, it is apparent that post of DGM (Maintenance) was to be filled by way of selection from Class V Category A with five years' experience in Class V; and from perusal of the Regulations of 2013, it is apparent that the post of DGM is to be filled up by way of selection from Class VI Category A&B with minimum seven years' experience as Traffic Manager/Works Manager/ Manager (Finance). Admittedly the posts of DGM and GM are to be filled up by way of selection, which means that question of seniority will act as a second fiddle while making selection, thus, it is for appellant-Corporation to place such an officer as it considers most suitable, eligible, qualified, meritorious. Therefore, all these factors have to be gone into by the competent authority and the decision entirely rests with the Corporation. In other words, appellant-

Corporation is the sole judge to decide as to who is most suitable candidate for being appointed on the post. Thus, learned Single Judge was not justified in holding petitioner entitled as DGM with effect from 11th February 2013 and subsequently as General Manager with effect from 11th February 2018, with all consequential benefits when both the posts can be filled 100% by promotion by way of selection from the feeding channel.

19. The Corporation is empowered to lay down criteria for promotion and all the promotions shall be made on the ground of merit, ability, performance, besides good report and the seniority is to be considered only when the merit and ability is approximately equal. The qualification for the promotion is for both the posts by way of selection which clearly enjoin on the appointing authority to have a fair and objective application of its mind at the time of making selection for promotion strictly in conformity with the rules. Mere existence of vacancy is not a sole criterion to hold somebody entitled for promotion when merit, eligibility, suitability, APRs and vigilance clearance are also relevant factors to accord promotion as per rules. Thus, the merit, eligibility, suitability in all respects including vigilance clearance should be governing the consideration for according promotion as per rules and the seniority plays only consequential role. It is only when merit and suitability are equal, then the seniority will be the determining factor and all these factors can be gone into by Establishment Committee constituted by the Government in this regard, which goes into all these factors and consequently, the matter is placed before the

Board of Directors, which takes a conscious decision after subjective satisfaction and subsequently the decision is taken by the Corporation. The Court has no yardstick or mechanism to go into all these questions and, thus, the finding of the learned Single Judge holding the petitioner entitled for retrospective promotion as DGM and GM in absence of the matter being examined by the Selection Committee cannot sustain the test of law.

As the issue in question with regard to confirmation of petitioner was pending adjudication before the competent authority, learned Single Judge, swayed away by existence of vacancy, held petitioner entitled to the post of DGM and GM. The selection based on merit tested impartially and objectively is essential foundation of any public service. When the rules specifically provide that the promotion has to be made on the basis of selection where merit is a guiding factor, seniority takes back seat and merit has to be given preference. Since both the posts in question can be filled 100% by promotion by way of selection by resorting to merit-cum-seniority and as per law laid down by the Hon'ble Supreme Court in catena of judgments that there is no fundamental right to promotion but an employee can only have a right to be considered for promotion, which right is yet to be gone into by the competent authority and the learned Single Judge without waiting for outcome of the same, has held the petitioner entitled for retrospective promotion as DGM and GM, which is against the mandate and spirit of rules in vogue mentioned supra.

20. In addition to this, Regulation 12 of the Regulations of 2013 in categorical terms provides that all the posts are to be filled up by promotion in accordance with the regulations on the basis of recommendations of the designated promotion committee of the Corporation based on merit, suitability and seniority. Thus, merit, suitability and seniority is yet to be assessed by the aforesaid committee and without having the opinion of the said committee, the judgement impugned to the extent of holding petitioner entitled to promotion as DGM and GM retrospectively is in contravention to the aforesaid provisions of law. For facility of reference, Regulation 12 is reproduced hereunder:

“12. Promotions: -

All the posts to be filled up by promotion shall be filled in accordance with these regulations on the basis of recommendations of the designated promotion committee of the Corporation based on merit, suitability and seniority.”

21. Besides that, the learned Single Judge did not record any finding with regard to impugned communication dated 26th November 2015, which was called in question by petitioner before the Writ Court and the basis for filing the said writ petition was issuance of aforesaid communication, whereby employees of different departments were being deputed, which according to petitioner was against his fundamental right. The learned Single Judge without recording any finding with regard to impugned communication whereby posts of Corporation were being usurped by outsiders, held petitioner entitled as DGM and GM.

22. The whole writ petition filed by petitioner revolves around issuance of impugned communication and the primary relief which was sought by

petitioners was quashment of the said communication and other reliefs were ancillary to the main relief. The learned Single Judge without recording any finding with regard to impugned communication granted the ancillary relief when the issue in question with regard to merit, eligibility, suitability was pending adjudication before the competent authority.

23. How and under what circumstances, learned Single Judge arrived at subjective satisfaction that petitioner is entitled for retrospective promotion as DGM and GM, when all the guiding factors with regard to merit, eligibility, suitability and vigilance clearance have yet to be gone into by appropriate authority, i.e., Establishment-cum-Selection Committee constituted in this regard in conformity with rules in vogue. The Committee constituted in this regard has to assess merit, eligibility, suitability of each and every candidate and the said Committee after verifying the facts on record, arrived at subjective satisfaction and the decision of the Establishment-cum-Selection Committee is placed before the Board of Directors, which subsequently, takes a final decision in this regard on the recommendations of the Establishment Committee and pursuant thereto, a final decision is taken by the competent authority on the basis of the said recommendation, whether, the person is entitled for promotion or not. It appears that the learned Single Judge while bypassing the aforesaid procedure has in haste manner held the petitioner entitled for retrospective effect as DGM and GM, when the post in question can be filled up 100% by promotion by way of selection from the feeding category.

24. The Court has no mechanism to assess the suitability, eligibility, merit, integrity, vigilance clearance of the candidates as it is the domain of competent authority to go into all these questions as the only right vests in the petitioner is right to consideration for promotion and not right of being promoted and the said consideration has to be accorded by competent authority in conformity with the rules and not otherwise.

25. A bare perusal of the Recruitment Rules, which are in vogue, would reveal that the post of DGM and GM can be filled up 100% by promotion by way of selection from the feeding category with requisite experience and the rules nowhere provide that the outsiders can be brought in by way of "deputation" infringing fundamental right of persons, who are born on the establishment of the Corporation, who have preferential right of being considered for promotion. Whether to bring officers from outside or not by way of deputation has to be strictly followed in conformity with the rules in vogue and not otherwise. To bring the officers from outside by way of deputation to the Corporation can be only in the eventuality if no suitable person is found eligible in the Corporation after assessing their merit, eligibility and suitability. What was the basis of impugned communication dated 26th November 2015 is not forth coming from the record, when suitable candidates from the Corporation are available. On one hand, appellant-Corporation has taken steps to accord confirmation to the petitioner for post of DGM and in this regard, vigilance clearance was also sought and without taking case of petitioner to its logical conclusion, the appellant-Corporation issued impugned communication dated 26th November

2015, by virtue of which one Abdul Hamid Wani from Geology and Mining Department was being deputed to the Corporation against the post of GM, which was lying vacant in the Corporation. Thus, cause of action has accrued to the petitioner at a stage, when appellant-Corporation instead of regularizing the services of petitioner, proceeded to depute an outsider to the Corporation against the post of General Manager which was violative of fundamental right of petitioner of seeking consideration for promotion.

26. As per the record, the appellant-Corporation instead of regularizing the services of petitioner (respondent no.1 herein) for the post of DGM initiated the process of considering deputation of private respondent to function as GM, which was lying vacant. The specific case of petitioner before the Writ Court was that since appellant-Corporation is trying to import employees from other departments on deputation at the cost of petitioner when the post in question is required to be filled up 100% by promotion as per recruitment rules, then there is no scope for the Corporation to depute the outsiders against the said post and by doing so the posts, which were to be utilized by employees of the Corporation, were being usurped by the deputationists which infringes the fundamental right of petitioner and such like Corporation employees. Besides that, it was a specific case of petitioner before the Writ Court that as per Regulations of 2013, the posts of GM as well as DGM were required to be filled 100% by promotion by way of selection amongst the categories shown in the Schedule, on the basis of which the petitioner was eligible in all respects which has been admitted by

appellant-Corporation while addressing various *inter se* communications for according confirmation.

27. Since there is no scope in the recruitment rules for the deputationist to fill the posts in question, which are to be filled up 100% by promotion through selection, then, in that eventuality, policy of Corporation to bring outside employees to the Corporation is bad in the eyes of law and the same is in conflict with the rules in vogue and thus cannot be sustain the test of law, more particularly, when Regulation 18 of the Regulations of 2013 in clear cut terms provide for relaxation of any provisions of the Regulations of 2013 so as to benefit the member of the Corporation insofar as the recruitment, promotions, period of probation, retention in service or otherwise, qualification, age, experience, passing of examination or test and training/refresher courses etc. For facility of reference, Regulation 18 is reproduced hereunder:

“18) Power to relax: -

The Corporation, with the prior approval of the Board of Directors and in extreme circumstances may at any time, for the reasons to be recorded in writing relax in favour of member of the service, the operation of any of the provisions of these regulations in so far as they concern the matters like, recruitment, promotions, period of probation, retention in service or otherwise, qualification, age, experience, passing of examination or test and training/refresher courses etc.”

Thus, the said policy of the Government to bring outsiders to the Corporation by way of deputation is in contravention of the rules, being illegal, irrational and without any logical basis. However, we leave it open for the respondents to examine the said policy to bring outsiders to the Corporation by way of deputation, on the touchstone of **rationality, reasonableness and legality** as the same is violative of the

fundamental rights of employees borne on the establishment of the Corporation having preferential claim and **right of consideration for promotion.**

28. The fact whether the petitioner is entitled or not as DGM/GM can be gone into by competent authority, i.e., Board of Directors, who are yet to take a decision pursuant to the clearance of petitioner by Vigilance Organization in conformity with the recruitment rules. Instead of according confirmation to the case of petitioner, issuance of impugned communication is in contravention and mandate of the recruitment rules being violative of fundamental right of petitioner and such like employees of the Corporation.

29. It is well settled that the Courts in exercise of power of their judicial review do not ordinarily interfere with the policy decisions of the executive, unless the policy can be faulted on the grounds of *mala fide*, unreasonableness, arbitrariness or unfairness etc. Indeed arbitrariness, irrationality, perversity and *mala fide* will render the policy unconstitutional. The decision/policy of the Corporation to bring employees from other departments to the Corporation by way of deputation contrary to rules without according consideration to the case of employees, who are born on the establishment of the Corporation, cannot sustain the test of law as it violates the fundamental right of employees of the Corporation. However, in the interests of administration, the Corporation can import the officers by way of deputation from outside only, if no suitable and eligible candidate is available in the Corporation to man such a post and to run the affairs of

the Corporation. No such situation has arisen as the Corporation is yet to arrive at a subjective satisfaction with regard to eligibility, suitability of petitioner, and in absence of such subjective satisfaction, it cannot be presumed that petitioner was not eligible and there was need for importing officers from outside. Then by no stretch of imagination, the communication dated 26th November 2015 or the policy can sustain the test of law, reasonableness, fairness and rationality.

30. Since, the direction passed by the learned Single Judge with regard to entitlement of petitioner for promotion to the post of DGM (Maintenance) in appellant-Corporation from 11th February 2013 and General Manager from 11th February 2018 with all consequential benefits, is premature as the issue in question was pending adjudication before the competent authority, i.e., Committee/Board of Directors, which has yet to arrive at subjective satisfaction with regard to merit, eligibility and suitability of petitioner after his vigilance clearance and in conformity with the rules in vogue. We, accordingly, set-aside the direction passed by the learned Single Judge to the extent of holding petitioner entitled for promotion to the post of DGM in the Corporation with effect from 11th February 2013 and General Manager with effect from 11th February 2018 with all consequential benefits, and in turn direct the appellant-Corporation to finalize the case of petitioner for his promotion as DGM strictly in conformity with the rules and subsequently if petitioner becomes entitled for being promoted as GM, the same be given from the date the petitioner becomes eligible with all consequential benefits.

31. We further direct the appellant Corporation to place the petitioner at an appropriate place in the seniority list once the decision is taken by competent authority with regard to his eligibility, merit coupled with seniority for the post of DGM and subsequently for the post of GM (if he is entitled).

32. We leave it open to the appellant-Corporation to accord consideration to the case of petitioner/respondent no.1, within a period of one month from the date copy of this judgement along with copy of the LPA is served upon appellant-Corporation.

33. The present appeal is **disposed of** and the impugned judgement and order stand modified to the above extent.

(Wasim Sadiq Nargal)
Judge

(Pankaj Mithal)
Chief Justice

Srinagar
04.08.2022
"Manzoor"

Whether approved for reporting? Yes/No

