

**IN THE HIGH COURT OF MANIPUR
AT IMPHAL**

WP(C) No. 56 of 2020

1. Dr. Anju Devi Loukham aged about 46 years old W/o,
Rajkumar Roshan a resident of Sagolband Sayang Pukhri
Mapal, P. O. Imphal & P.S Lamphet, Manipur-795001.

..... Petitioner

– Versus –

1. The Jawaharlal Nehru Institute of Medical Science
(JNIMS), Porompat, Imphal East, Manipur, represented by its
Director of JNIMS, P. O. & P.S. Porompat, Imphal East,
Manipur-7950005.

2. The Chief Secretary, Government of Manipur/Chairman of
Selection of Selection Committee JNIMS, Porompat, Imphal
East, Manipur having its office at Old Secretariat (South
Block), P. O & P.S. Imphal, West, Manipur-795001.

3. The Commissioner (Health), / Secretary Health,
Government of Manipur having its office at Old Secretariat
(South Block), P. O & P.S. Imphal, West, Manipur-795001.

4. The Principal Secretary/Commissioner (Department of Personnel & Administrative Reforms), Government of Manipur, its Old Secretariat P. O & P.S. Imphal, West, Manipur-795001.

5. The Medical Council of India represented by its Secretary, having its office at Pocket No.14, Sector-8, Dwarka Phase -1, New Delhi-10077.

6. Dr. Ruma Sarkar aged about 51 years, W/o Professor Ch. Pritam Kumar Singh, a resident of Singjamei Chirom Leikai, Chingamathak, Imphal West District, Manipur, 795001.

.....Respondents

BEFORE
HON'BLE THE ACTING CHIEF JUSTICE MR. M.V. MURALIDARAN

For the Petitioner	:	Mr. T. Momo, Adv.,
For the Respondents	:	Mr. S. Nepolean, GA & Mr. Y. Mr. Nirmolchand, Sr. Adv. Mr. BR. Sharma, Sr. PCCG
Date of hearing &	:	
reserving Judgment & Order :		19.04.2023

JUDGMENT & ORDER

[1]. This writ petition has been filed by the petitioner for issuance of a writ of certiorarified mandamus to quash (i) the impugned DPC held on 16.9.2019 and 26.9.2019 thereby holding the DPC for appointment to the post of Associate Professor in the Department of Radio-Diagnosis in Jawaharlal Nehru Institute of Medical Sciences (JNIMS), Manipur as illegal since the petitioner was the only eligible Assistant Professor for promotion when the vacancy in the said lone post arose in the financial year 2018-2019; (ii) the appointment order dated 20.12.2019 whereby appointing the sixth respondent on the impugned DPC held on 16.9.2019 and 26.9.2019 with effect from 15.10.2019 and to direct the respondent JNMIS to hold a review DPC for promotion to the post of Associate Professor in the Department of Radio Diagnosis in accordance with the Memorandum dated 15.5.2014 and to appoint the petitioner to the post of Associate Professor.

[2]. Brief facts are as follows:

On 6.3.2007, the petitioner was initially appointed as Assistant Professor in Tripura Medical College and Dr. B.R.Ambedkar Memorial Teaching Hospital and she continued to work in the said Medical College till 27.1.2011. Thereafter, she applied for the post of Senior Resident in the Department of Radio-Diagnosis, JNIMS as there was no post of Assistant Professor and, accordingly, she resigned from the said post so as to enable her to join in the new appointment. After resignation from Tripura Medical College and Dr. B.R.Ambedkar Memorial Teaching Hospital, the petitioner was appointed as Senior Resident in the Department of Radio-Diagnosis, JNIMS. She continued to discharge her duties in the said post of Senior Resident till she was regularly appointed to the post of Assistant Professor on direct recruitment by an order dated 31.8.2015 along with other four candidates, including the sixth respondent.

2.1. As per the guidelines of the Medical Council of India, the past services in the equivalent post in the MCI permitted/approved/recognized colleges can be taken into consideration for counting eligibility criteria for promotion to the next higher post and in this regard several other incumbents

also received such benefits in JNIMS and, as such, similar relief is entitled to receive by the petitioner for counting her past service for promotion to the post of Associate Professor in the Department of Radio-Diagnosis in JNIMS. In this regard, the petitioner also preferred representation dated 30.1.2019 for counting her past services. In case, the past services of the petitioner is counted, as per the guidelines of the MCI, she has more than 5 years post PG teaching experience and as on July 2019, she had completed 7 years 9 months as an Assistant Professor in the subject of Radio-Diagnosis. In the event the past services of the petitioner is counted, her case for promotion could have been considered on completion of 5 years' service counting together her past service render at Tripura Medial College and Dr.B.R.Ambedkar Memorial Teaching Hospital and JNIMS. However, the same was not yet considered by the competent authority.

2.2. The sixth respondent filed W.P.(C) No.670 of 2019 praying for directing the respondents to initiate process for promotion to the post of Associate Professor, Radio-Diagnosis by considering all Assistant Professors, Radio-Diagnosis from

31.8.2019 under Rule 8(2) of the JNIMS Service Rules, 2015 and further praying to direct the respondents not to fill up the lone vacant post of Associate Professor, Radio-Diagnosis by invoking Rule 13 by superseding all the Senior Assistant Professors, Radio-Diagnosis. On 29.8.2019, the petitioner's husband submitted a representation to the competent authority and same was not considered till date.

2.3. According to the petitioner, it is the guideline of the Government of Manipur to convene DPC at regular annual intervals as per the Office Memorandum dated 15.5.2014 to draw panels which could be utilized on making promotion against the vacancies occurring during the course of a year. Holding of DPC need not be delayed or postponed on the ground that Recruitment Rules for the post are being revised/amended.

2.4. Since the respondent authorities have failed to consider the representation dated 30.1.2019, the petitioner has filed W.P.(C) No.700 of 2019 directing the first respondent to consider her case for promotion to the post of Associate Professor. When the said writ petition was taken up for hearing, a prayer was made to consider and dispose of the

representations dated 30.1.2019 and 29.7.2019 along the with representation dated 29.8.2019 preferred by the petitioner's husband and also reserve one post of Associate Professor in the Department of Radio-Diagnosis, which was then lying vacant in the JNIMS. During the pendency of the said writ petition, the petitioner came to know that the DPC for promotion to the post of Associate Professors are likely to be considered, the petitioner filed M.C.No.250 of 2019 and by the order dated 24.9.2019, thisCourt, directed not to declare the result of the DPC.

2.5. While so, the petitioner came to know that promotion orders dated 15.10.2019 were issued in favour of some of the Associate Professors in the Department of Anesthesiology and Medicine etc., wherein it has been mentioned that the DPC for the post of Associate Professor were held on 16.9.2019 and 26.9.2019 including the post of Associate Professor in the Department of Radio-Diagnosis in JNIMS along with other eligible persons, who became eligible only on 31.8.2019 which is highly discriminatory and arbitrary in nature as the case of the petitioner alone should have been considered for such promotion

insofar as the post of Associate Professor in the Department of Radio-Diagnosis is concerned.

2.6. The petitioner was certified to have entered in the Indian Medical Registrar as an MBBS and registered in the Assam Medical Council as on 27.4.2001 and she was further qualified to as MD (Regio-Diag./Radio Diag and Imaging), U.Rajiv Gandhi health Sciences in 2006. By the order dated 19.9.2019, W.P.(C) No.670 of 2019 filed by the sixth respondent was dismissed as withdrawn. Thereafter, the sixth respondent has filed W.P.(C) No.892 of 2019 praying for a direction on the respondents to afford promotion to the post of Associate Professor, Radio-Diagnosis. The petitioner also preferred W.P.(C) No.896 of 2019 to quash the impugned DPC as illegal and for a direction on the first respondent to consider the case of the petitioner for promotion to the post of Associate Professor in the Department of Radio-Diagnosis.

2.7. By the order dated 27.11.2019, W.P.Nos.896, 700 and 892 of 2019 were disposed of by permitting the respondent JNIMS to declare the result of the DPC meeting dated 16.9.2019 and 26.9.2019 with liberty to the petitioner to approach the

Court, if aggrieved by any findings of the DPC. On the basis of the impugned DPC held, the appointment order dated 20.12.2019 was issued in favour of the sixth respondent. Challenging the DPC and the appointment order issued in favour of the sixth respondent, the petitioner has filed this writ petition.

[3]. The first respondent JNIMS filed affidavit-in-opposition stating that the DPC had considered all the eligible Doctors who were within the zone of consideration and had recommended the sixth respondent for appointment to the post of Associate Professor in the Department of Radio-Diagnosis vide order dated 20.12.2019 and, as such, there is no illegality or irregularity in the DPC held on 16.9.2019 and 26.9.2019 and the consequential appointment order dated 20.12.2019 issued in favour of the sixth respondent.

[4]. The sixth respondent filed affidavit-in-opposition, inter alia, stating that since the post became vacant on 3.1.2019, the date of determining the eligibility for filling up of the post will be 1.10.2019. The DPC was held after following due procedures and in fact, DPC was held not only for Radiology Department, but also for all other Departments in JNIMS where

vacancies occurred. It is stated that the petitioner joined JNIMS in downgrade post as Senior Resident after resigning from the post of Assistant Professor in Tripura Medical College and Dr. Bram Teaching Hospital. But there was post of Assistant Professor in JNIMS and the petitioner also appeared in the open competition for direct recruitment for the post of Assistant Professor, but the petitioner was not selected. The profile view of the petitioner downloaded from the website shows that the petitioner was relieved on 10.10.2019 from Tripura Medical College and Dr. Bram Teaching Hospital.

4.1. It is also stated that the petitioner appeared in the open competition for Senior Resident on 21.2.2011 and despite her experience as Assistant Professor in Tripura Medical College and Dr. Bram Teaching Hospital, the sixth respondent was selected vide order dated 14.3.2011, however, after four months, the writ petitioner being in the waiting list, she was appointed as Senior Resident vide order dated 14.3.2011 junior to the sixth respondent.

4.2. It is stated that open recruitment and promotion are of two different entities with different procedures. In promotion,

DPC examined merit, seniority etc. As such the experience alleged to be gained by the petitioner in some other private college is immaterial in the matter of promotion in JNIMS. The procedure and requirement in the matter of promotion in JNIMS is already laid down in the Office Memorandum dated 15.5.2014. The prayer for initiating process for promotion to the post of Associate Professor with effect from 31.8.2019 made in W.P.(C) No.670 of 2019 was solely on the ground that all the five Assistant Professors in the Department of Radiology become eligible for the post of Associate Professor with effect from 31.8.2019, which includes the petitioner also. Being a PG teacher is not a requirement for determining the eligibility to become an Associate Professor and the sixth respondent is also eligible to be a PG teacher as per the latest MCI guidelines. The sixth respondent being senior most in terms of merit, age, emolument of pay etc., got promoted on the recommendation of the DPC held on 16.9.2019 and 26.9.2019 and the sixth respondent is also a qualified Assistant Professor eligible for promotion to the post of Associate Professor in the Department of Radiology. Thus, prayed for dismissal of the writ petition.

[5]. Assailing the impugned DPC dated 16.9.2019 and 26.9.2019 held for the post of Associate Professor in the Department of Radio-Diagnosis in JNIMS, Manipur and appointing the sixth respondent as Associate Professor in the Department of Radio-Diagnosis in JNIMS vide impugned appointment order dated 20.12.2019 pursuant to the recommendation of the impugned DPC, the learned counsel for the petitioner submitted that in the DPC held on 16.9.2019 and 26.9.2019, the case of other candidates, including the sixth respondent, who became eligible after 31.8.2019 was wrongly considered along with the petitioner in violation of the Office Memorandum dated 15.5.2014 as the other candidates including the sixth respondent were not eligible to be considered for appointment to the post of Associate Professor in the Department of Radio-Diagnosis on the vacant seat which arose on 3.1.2019 due to promotion of Dr. O.Heramot Singh, Associate Professor on promotion to the post of Professor which falls within the financial year of 1st April, 2018 to 31st March, 2019.

[6]. The learned counsel for the petitioner would submit that the other candidates including the sixth respondent only became eligible to be promoted to the post of Associate Professor in the Department of Radio-Diagnosis on or after 31.8.2019, therefore, they will be only considered for appointment to the post of Associate Professor in the Department of Radio-Diagnosis against any vacancy which arises in the financial year of 1st April, 2019 to 31st March, 2020. Thus, the respondent authorities had illegally and arbitrarily considered the case of the candidates including the sixth respondent along with the petitioner by ignoring the relevant rules and regulations in the DPC held on 16.9.2019 and 26.9.2019.

[7]. The learned counsel for the petitioner further submitted that treating the petitioner equally with the other candidates including the sixth respondent who became eligible only after 31.8.2019 is violative of the equality clause enshrined under Article 14 and 16 of the Constitution of India, inasmuch as the respondent authorities have treated unequals as equals, which is not permissible in law.

[8]. Adding further, the learned counsel for the petitioner submitted that since the petitioner as per the guidelines of the MCI, being lone eligible person, her case is required to be considered for promotion to the post of Associate Professor, Radio-Diagnosis as the vacancy falls in the month of January, 2019 and no other person should be considered for the said vacancy. Thus, a prayer has been made to quash the impugned DPC held on 16.9.2019 and 26.9.2019 and the consequential appointment order dated 20.12.2019 issued in favour of the sixth respondent. To fortify his submissions, the learned counsel relied upon the decisions of the Hon'ble Supreme Court in the cases of *Major General H.M. Singh v. UoI*, (2014) 3 SCC 670 and *Ajay Kumar Shukla and others v. Arvind Rai and others*, (2021) SCC Online SC 1195.

[9]. Per contra, drawing this Court's attention to the JNIMS Service Rules, 2015, MCI Minimum Qualification for Teachers in Medical Institutions Regulations, 1998 and the Office Memorandum dated 15.5.2014, the learned senior counsel appearing for the respondents 1 to 4 submitted that the Department has to calculate the vacancies financial year-wise

for reporting to the DPC. For example, when there is more than one vacancy to be considered by the DPC for promotion, the Department has to calculate the vacancies year-wise so that the DPC could prepare the select panel or the recommended list year-wise.

[10]. The learned senior counsel would submit that for the purpose of determining the eligibility of a candidate/officer for promotion to the next higher post, the crucial date should be 1st October. In other words, it is submitted that the 1st October would mean the 1st October of the particular year of the vacancy which arose for holding the DPC. In the instant case, the vacancy which arose for consideration by the DPC was of 3.1.2019. Therefore, the candidate to be considered by the DPC was those candidates who became eligible by 1.10.2019 because the right to be considered for promotion of those candidates who became eligible prior to the vacancies arose i.e. 2.1.2018 to 2.1.2019 would be deprived of consideration for promotion to the next higher post.

[11]. Elaborating further, the learned senior counsel submitted that the vacancy which arose on 3.1.2019 is to be

considered financial year-wise i.e. March, 2018 – March, 2019 and the crucial date for determining the eligibility is fixed on 1.10.2018 and in that event the fundamental right of the candidates to be considered by the DPC who became eligible prior to the vacancy arose i.e. 2.10.2018 to 2.1.2019 would be deprived of. Therefore, the purpose of determining the eligibility of a candidate in the present case should be those candidates who became eligible on or before 1.10.2019. Therefore, the instant writ petition is misconceived and, as such, the same is liable to be dismissed.

[12]. Secondly, the learned senior counsel for the respondents 1 to 4 argued that the petitioner could not raise the issue which had already been raised in the earlier round of litigation and no relief has been granted by this Court. In fact, this Court in the earlier round of litigation, after hearing the parties at length, was pleased to dispose of the writ petitions by permitting the JNIMS to declare the result of the DPC held on 16.9.2019 and 26.9.2019. Therefore, the relief claimed by the petitioner in the earlier two writ petitions for consideration of her case alone for promotion to the next higher post of Associate

Professor against the vacancy which arose on 3.1.2019 has not been granted and, as such, it shall be deemed to have been rejected by this Court.

[13]. Thirdly, the learned senior counsel submitted that in the earlier writ proceedings, this Court granted liberty to the petitioner to approach this Court if aggrieved by any finding of the DPC. Therefore, the petitioner cannot now u-turn and question and challenge the eligibility of the other candidates including the sixth respondent who have been considered by the DPC held on 16.9.2019 and 26.9.2019. In other words, the only liberty granted by this Court to the petitioner to approach this Court again was limited to the finding of the DPC. Therefore, the petitioner instead of filing the present writ petition, she ought to have filed writ appeal challenging the order dated 27.11.2019 passed in W.P.(C) No.896 of 2019 and connected petitions. Arguing so, the learned senior counsel prayed for dismissal of the writ petition. In support, the learned senior counsel placed reliance upon the decisions of the Hon'ble Supreme Court in the cases of *M.V.Thimmaiah v. UPSC, (2008) 2 SCC 119* and *SBI v. Ram Chandra Dubey, (2001) 1 SCC 73*.

[14]. Supporting the impugned DPC and the subsequent appointment order issued in favour of the sixth respondent, the learned counsel for the sixth respondent submitted that the petitioner is the junior most Assistant Professor (Radio-Diagnosis) and the sixth respondent being senior most Assistant Professor, the DPC recommended his name rightly. The crucial date of eligible officer should be the 1st October, 2019 and all the five Assistant Professors, including the petitioner and the sixth respondent was considered by the DPC. The petitioner was fully aware of the fact and situation applied for the said DPC and filed the present writ petition after she was not selected for the post of Associate Professor, Radio-Diagnosis.

[15]. The learned counsel for the sixth respondent further submitted that the petitioner's claim for counting her service as Assistant Professor in a private medical college having different pay scale, before joining in JNIMS on regular service as Senior Resident on 30.7.2011 is not proper. She did not claim anything of her past service in the said private medical college at the time of promotion to the post of Assistant Professor in JNIMS. She

only claimed for past service in the private medical college at the time of promotion to the post of Associate Professor, which is not tenable in the eye of law.

[16]. The learned counsel next submitted that the petitioner has failed to implead the other three Assistant Professors who are senior to her and considered by the same DPC. If the claim of the petitioner is granted, it will cause adverse consequences for the other three senior Associate Professors. Therefore, there is no reason to interfere with the DPC held for promotion to the post of Associate Professor, Radio-Diagnosis. The claim of the petitioner is defective and devoid of merit. Thus, a prayer has been made to dismiss the writ petition. In support, the learned counsel relief upon the decisions of the Hon'ble Supreme Court in the cases of *Meghalaya Electricity Board and others v. Thuleshwar Barbaruah and others*, (2008) 1 SCC 671; *R.B.Desai and another v. S.K.Khanolker and others*, (1999) 7 SCC 54 and *Union of India v. Sadhana Khanna (SMIT)*, (2008) 1 SCC 720.

[17]. This Court considered the rival submissions and also perused the materials available on record.

[18]. The grievance of the petitioner is that in the DPC held on 16.9.2019 and 26.9.2019, the case of other candidates including the sixth respondent who became eligible after 31.8.2019 was wrongly considered along with the petitioner in violation of the Office Memorandum dated 15.5.2014, as the other candidates, including the sixth respondent, were not eligible to be considered for appointment to the post of Associate Professor in the Department of Radio-Diagnosis of JNIMS on the vacant seat which arose on 3.1.2019 due to promotion of Dr. O.Heramot Singh, Associate Professor on promotion to the post of Professor which falls within the financial year of 1st April 2018 to 31st March, 2019. The sixth respondent and the other candidates only became eligible to be promoted to the post of Associate Professor on or after 31.8.2019. Therefore, they will be only considered for appointment to the post of Associate Professor in the Department of Radio-Diagnosis against any vacancy which arises in the financial year of 1st April, 2019 to 31st March, 2020.

[19]. The aforesaid grievance of the petitioner has been refuted by the official respondent by contending that for the purpose of determining the eligibility of a candidate for promotion to the next higher post, the crucial date should be 1st October of the particular year of the vacancy which arose for holding the DPC. In the instant case, the vacancy which arose for consideration by the DPC was of 3.1.2019. Therefore, the candidate to be considered by the DPC was those candidates who became eligible by 1st October, 2019. Because, the right to be considered for promotion of those candidates who became eligible prior to the vacancies arose i.e. 2.10.2018 to 2.1.2019 would be deprived of consideration for promotion to the next higher post. Therefore, for the purpose of determining the eligibility of a candidate in the instant case should be those candidates who became eligible on or before 1.10.2019.

[20]. Since the petitioner contended that the Office Memorandum dated 15.5.2014 stipulates that DPC may be convened every year if necessary on a fixed date i.e. 25th January or April, it would be appropriate to quote hereunder the frequencies at which DPCs should meet stated in paragraph 3 of

the Office Memorandum dated 15.5.2014 issued by the Department of P&AR (Personnel Division), Government of Manipur:

"3. Frequencies at which DPCs should meet

The DPCs would be convened at regular annual intervals to draw panels which could be utilized on making promotion against the vacancies occurring during the course of a year, DPCs may be convened every year if necessary on a fixed date e.g. 25th January or April. Holding of DPC meetings need not be delayed or postponed on the ground that recruitment rules for a post are being revised/amended. A vacancy shall be filled in accordance with the recruitment rules in force on the date of vacancy, unless rules made subsequently have been expressly given retrospective effect."

[21]. Thus, it is clear from the above paragraph 3 of the Office Memorandum, the DPC should be held 25th January or April according to the convenience of the competent authority. As per paragraph 4(B) of the Office Memorandum dated

15.5.2014, the calculation of vacancies has been stated as under:

"B. Calculation of vacancies:

4.2. For preparation of a Select panel, Departments may calculate the vacancies (for reporting to DPC) financial year-wise unless the relevant RR specifies otherwise."

[22]. As per paragraph 4(C) of the Office Memorandum, the crucial date for determining eligibility has been stated as under:

"C. Crucial date for determining eligibility:

4.3 The crucial date for determining the eligibility of Officers for promotion would be as per applicable RRs of the Serve/Post. If the RRs are silent, the crucial date for this purpose would be 1st October."

[23]. Rule 8 of the JNIMS Service Rules, 2015 states method of recruitment. Rule 8(2) stipulates recruitment by promotion as under:

"(2) Recruitment by promotion:

(i) Recruitment by promotion to any Grade of the Service shall be made on the recommendation of

duly constituted Departmental Promotion Committee for the respective grades.

(ii) The Departmental Promotion Committee shall forward to the President a list of candidates, in order of merit, of the officers recommended for promotion, taking into account the actual number of vacancies and vacancies likely to arise during the next twelve months.

(iii) The list shall be valid until the next selection for the same Grade or specified post takes place or a period of twelve months from the date of selection, whichever is earlier.

Provided that the aforesaid period of twelve months may be extended by the President for a further period not exceeding six months.

Provided further that, in respect of a person against whom disciplinary proceedings under the CCS (CCA) Rules, as adopted in the Government are in progress, the recommendation of the Selection Board shall be kept under sealed cover to be opened only at the conclusion of the proceedings and such person shall not be appointed until he is exonerated from the charges as a result of the proceedings.

(iv) The qualification for promotion shall be as specified in sub-rule (3) of Rule 9.

(v) The selection for inclusion in the list shall be based on merit and suitability in all respects for appointment to the Grade with due regard to seniority.

(vi) The Selection board shall, ordinary, assess suitability on the basis of records of performance of the officers.

Provided that it shall be open to the Selection Board to interview the officers and to give such weightage as they deem fit for the performance at the interview.

Provided further that if the interviews are held it shall be open to the Selection Board to co-opt subject experts to assist it."

[24]. Rule 9 states qualifications and eligibility. Sub rule (5) of Rule 9 provides as under:

"(5) Every vacancy in the grade of Associate Professors and Professors shall be filled by promotion from amongst eligible and serving Assistant Professors and Associate Professors of JNIMS respectively as per the MCI and DCI norms. If no eligible serving Assistant Professors and Associate Professors of JNIMS are available,

recruitment through open direct recruitment shall be applied."

[25]. The Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998 (amended upto 8th June 2017) issued by the Medical Council of India lays down criteria for appointment to the post of Associate Professor, Radio-Diagnosis as under:

<i>Post</i>	<i>Academic Qualification</i>	<i>Teaching & Research Exp.</i>
<i>Associate Professor (5 year Post PG experience)</i>	<i>A post graduate qualification MD/MS in the concerned subject and as per TEQ Regulations</i>	<i>As Assistant Professor in subject for 4 years in a permitted/approved/recognized experience with the 2 Research Publication in Indexed Journals as 1st Author or as corresponding author.</i>

[26]. In the present case, for the vacancy which arose for consideration by the DPC was of 3.1.2019. However, the respondent authorities have taken 1st October, 2019 as crucial date for determining the eligibility for consideration of promotion to the post in question. In the affidavit-in-opposition filed by the first respondent, it has been stated as under:

"4. Further, it is submitted that the DPC had considered all the eligible Doctors who were within the zone of consideration and had

recommended the Private Respondent No.6 for appointment to the post of Associate Professor in the Department of Radio Diagnosis vide order dated 20.12.2019 and as such, there is no illegality or irregularity in the DPC held on 16.09.2019 and 26.09.2019 and the consequential appointment order dated 20.12.2019.”

[27]. At this juncture, it would be necessary to quote the proceedings of the impugned DPC hereunder for ready reference:

“PROCEEDINGS OF THE DEPARTMENTAL PROMOTION COMMITTEE 3 MEETING FOR PROMOTION TO THE POST OF ASSOCIATE PROFESSOR IN THE DEPARTMENT OF RADIO DIAGNOSIS, JNIMS, HELD ON 16.09/2019 AND 26/09/2019 IN THE OFFICE CHAMBER OF CHIEF SECRETARY, MANIPUR WITH CHIEF SECRETARY, MANIPUR IN THE CHAIR

Members of the DPC:-

- 1.Dr.J.Suresh Babu, Chief Secretary, Manipur - Chairman*
- 2.V.Vumlunmang, Principal Secretary - Member*
(Health & F.W.), Govt. of Manipur
- 3.Vice Chancellor, Manipur University - Member*
(Absent)
- 4.Prof.Th.Bhimo Singk, Director JNIMS - Member*
Secretary
- 5.Prof.S.Subhaschandra (Subject Expert) - Member*

2. There are 3 (three) sanctioned posts of Associate Professor in Department of Radio Diagnosis. 1 (one) regular vacancy post of Associate Professor is available as on 26.09.2019.

3. Rules 9(5) of the JNIMS Service Rules, 2015 provides that, every vacancy in the grade of Associate Professors shall be filled by promotion from amongst eligible and serving Assistant Professors of JNIMS who fulfills MCI norms, failing which by direct recruitment.

4. Minimum Qualifications for Teachers in Medical Institutes Regulations, 1998, MCI (amended upto August 2017), provides the requirements of academic qualifications, teaching and research experience for being appointed as Associate Professor are as below:-

<i>Post</i>	<i>Academic Qualification</i>	<i>Teaching & Research Exp.</i>
<i>Associate Professor (5 year Post PG experience)</i>	<i>A post graduate qualification MD/MS in the concerned subject and as per TEQ Regulations</i>	<i>As Assistant Professor in subject for 4 years in a permitted/approved/recognized experience with the 2 Research Publication in Indexed Journals as 1st Author or as corresponding author.</i>

5. As per Final Seniority list of Assistant Professor in the Department of Radio Diagnosis notified vide Notification No.01/290/Seniority/JNIMS/2015 (Pt II), dated 20.09.2019 and Reports of the Screening Committee dated 16.08.2019 & dated 20.09.2019, 4 (four) out of 5 (five) Assistant Professors are eligible for promotion to the post of Associate Professor in the Department of Radio Diagnosis as under:-

<i>Sl. No.1</i>	<i>Name of the Assistant Professor</i>	<i>Date of appointment to Assistant Professor</i>	<i>Teaching Experience (as Asst. Prof.) as on the date of DPC for promotion to the post of Associate Professor</i>	<i>Remark of the Screening Committee on Publication</i>
<i>1.</i>	<i>DR. RUMA</i>	<i>31.08.2015</i>	<i>4 yrs. 1 month</i>	<i>Eligible</i>

	SARKAR			
2.	DR. KHUMANTHEM	31.08.2015	4 yrs. 1 month	Eligible
3.	DR. OKRAM PUSPARANI DEVI	31.08.2015	4 yrs. 1 month	Eligible
4.	DR. ANJU DEVI LOUKHAM	31.08.2015	7 yrs. 11 months	Eligible

6. The DPC after due assessment of the eligible candidates on the basis of the JNIMS Service Rule, 2015, MCI norms, Vigilance Clearance ACRs etc. recommended DR. RUMA SARKAR, Assistant Professor for promotion to the post of Associate Professor in the Department of Radio Diagnosis.”

[28]. It is clear from the facts narrated above, the post of Associate Professor in the Department of Radio-Diagnosis, JNIMS became vacant with effect from 3.1.2019 due to promotion of one Dr. O.Heramot Singh, Associate Professor on promotion to the post of Professor in JNIMS, which is the financial year i.e. 1st April 2018 to 31st March, 2019. However, the competent authority has failed to follow the Office Memorandum dated 15.5.2014 while taking into consideration the crucial date. As per paragraph 3, the competent authority ought to have held the DPC on 25th January or April. However, despite the vacancy available on 3.1.2019, the DPC was not held during the financial year 2018-2019. The petitioner was found

to be eligible as on 1st October, 2018 as she possessed necessary requisites as prescribed by the Medical Council of India Rules. Since the post in question became vacant with effect from 3.1.2019, the case of the petitioner ought to have been considered by the competent authority for the said vacancy which arose in the financial year i.e. 1st April, 2018 to 31st March, 2019.

[29]. If we take into consideration the case of the petitioner, we find that as per the guidelines of the MCI, the petitioner has more than 5 years PG teaching experience and as on July, 2019, she had completed 7 years 9 months as an Assistant Professor in the subject of Radio-Diagnosis. On a perusal of the DPC proceedings, it is clear that this has not been clearly discussed and considered by the DPC in its proceedings.

[30]. As stated supra, the vacancy which arose for consideration by the DPC was of 3.1.2019. On a perusal of the materials produced by the parties, it is seen that on 31.1.2019, the Dean Academic, JNIMS, Porompat, informed the petitioner that in order to declare her as a recognized P.G. Teacher of Manipur University, Imphal, she must submit her relevant

documents. Thereafter, the University vide its letter dated 25.2.2019 addressed to the Director, JNIMS, informed the list of recognized P.G. Teachers and in the said letter the name of the petitioner appeared at Serial No.10 and no other Assistant Professors of the Department of Radio-Diagnosis were appearing in the said list, which means that other Assistant Professors were not eligible as on 25.2.2019 as P.G. Teacher of JNIMS, except the petitioner. Therefore, it is clear that at the relevant point of time, the petitioner alone is the Assistant Professor serving in the Department of Radio-Diagnosis, who is eligible to be considered for promotion to the post of Associate Professor in the Department of Radio-Diagnosis.

[31]. That apart, the competent authority considered the case of other eligible persons for promotion to the post of Associate Professor in the Department of Radio-Diagnosis without considering the case of the petitioner in the DPC held on 16.9.2019 and 26.9.2019, which is also in violation of paragraph 4G of the Office Memorandum dated 15.5.2014, which reads thus:

"G. preparation of year-wise panels by DPC where they have not met for a number of years.

5.9 Where for reasons beyond control, the DPC could not be held in a year (or Years), even though the vacancies arose during that year (or years), the first DPC that meets thereafter should follow the following procedures:-

(a) Determine the actual number of regular vacancies that arose in each of the previous years(s) immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.

(b) Consider in respect of each of the years those Officers only who would be within the field of choice with reference to the vacancies of each year starting with the earliest year onwards.

(c) Prepare a "Select List" by placing the select list of the earlier year above the one for the next year and so on."

[32]. In the light of the above provisions, when this Court examines the case of the petitioner, it is clear that in the DPC held on 16.09.2019 and 26.9.2019 the case of other candidates

including the sixth respondent who became admittedly eligible after 31.8.2019 was wrongly considered along with the petitioner who according to the respondent authorities got 7 yrs. 11 months teaching experience at the relevant point of time, in violation of the Office Memorandum dated 15.5.2014 as the other candidates including the sixth respondent were not eligible to be considered for appointment to the post of Associate Professor in the Department of Radio-Diagnosis on the vacant seat which arose on 3.1.2019, which falls within the financial year of 1st April, 2018 to 31st March, 2019. Therefore, contention of the official respondents that for the purpose of determining the eligibility of a candidate should be those candidates who became eligible on or after 31.8.2019 is not acceptable and the competent authority erred in arriving at such a conclusion. That apart, as stated above, there is no proper reasoning given in the DPC for not considering the petitioner for promotion to the post in question.

[33]. It is also the say of the respondent authorities that the issue raised herein was already raised by the petitioner in his earlier round of litigation in W.P.(C) No.700 of 2019, wherein

the petitioner has also filed MC.No.250 of 2019 and, this Court by the order dated 24.9.2019, directed the respondents not to declare the result of the DPC for the post of Associate Professor. Subsequently, the sixth respondent and others have filed W.P.(C) No.892 of 2019 to issue direction on the respondents to announce the result of the DPC that held its meeting on 16.9.2019 and 26.9.2019 and the petitioner has also filed W.P.(C) No.896 of 2019 challenging the proceedings of the DPC held on 16.9.2019 and 26.9.2019. Arguing so, the learned senior counsel for the respondents 1 to 4 submitted that the issue already attained finality by the common order of this Court dated 27.11.2019 and, therefore, the petitioner once again cannot question the proceedings of the DPC in question.

[34]. On a perusal of the order of this Court dated 27.11.2019 passed in W.P.(C) Nos.896, 700 and 892 of 2019, it is true that the aforesaid writ petitions were disposed of by this Court. However, in paragraph 6, this Court held as under:

"[6] The factual aspect involved in the three writ petitions being projected in the aforesaid paragraphs, this Court is of the considered opinion that it would serve no purpose

to any of the parties if the result of the DPC that held its meeting on 16.9.2019 and 26.9.2019 is kept in a sealed cover till date.

In that view of the matter, the respondent authorities/JNIMS are permitted to declare the result of the DPC that held its meeting on 16.9.2019 and 26.9.2019.

Liberty is also granted to the petitioner in W.P.(C) No.700 of 2019 and W.P.(C) No.896 of 2019 to approach this Court if aggrieved by any findings of the DPC.

With the above directions, these writ petitions are dispose of.

Interim order passed in MC (WP(C) No.250 of 2019 stands vacated."

[35]. The respondent authorities issued the impugned appointment order dated 20.12.2019 in favour of the sixth respondent pursuant to the DPC held on 16.9.2019 and 26.9.2019, the petitioner again challenged the proceedings of the DPC and the appointment order. Since this Court in the

earlier round of litigation granted liberty to the petitioner to approach this Court if aggrieved by any findings of the DPC, the petitioner was right in challenging the DPC proceedings and its consequential appointment order issued in favour of the sixth respondent. Therefore, the contention of the official respondents as well as the private respondent that if the petitioner is aggrieved by the order dated 27.11.2019 passed in W.P.(C) No.700, 892 and 896 of 2019, she ought to have filed writ appeal is unacceptable and this Court is of the view that the present writ petition is very well maintainable. That apart, on a reading of the entire order dated 27.11.2019, it is clear that this Court has not dealt with the merits of the DPC and, in fact, it has observed as under in paragraph (5):

"[5]

In the absence of any declaration of the proceedings of the DPC, this Court cannot comprehend on what grounds the petitioner is challenging the proceedings of the DPC in WP(C) No.896 of 2019."

[36]. This Court is of the view that in the earlier round of litigation this Court has not delved into the merits of the DPC and liberty was granted to the petitioner to challenge the

findings of the DPC, if aggrieved by the petitioner. Thus, it is clear that pursuant to the said liberty granted by this Court, the petitioner is now before this Court. Therefore, the writ petition filed by the petitioner questioning the impugned DPC is very well maintainable and the non-filing of the writ appeal against the order dated 27.11.2019 canvassed by the respondents would no way affect the present writ petition.

[37]. By placing reliance upon the decisions of the Hon'ble Supreme Court in the case of *M.V.Thimmaiah*, supra, the learned counsel for the respondent authorities submitted that this Court cannot sit as an appellate authority to examine the recommendation of the Selection Committee like the Court of appeal and, therefore, taking into account the overall aspects of the matter, the DPC considered the name of the sixth respondent for promotion to the post of Associate Professor. Therefore, there is no necessity to interfere with it.

[38]. In *M.V.Thimmaiah*, supra, the Hon'ble Supreme Court held:

"19. So far as the allegation of mala fide against Shri B.S. Patil is concerned, he was not impleaded as a party. Therefore, the allegation of mala fide

could not be entertained by the Tribunal. As such, the allegation of mala fide against Shri B.S. Patil could not be taken into consideration and rightly so, by the High Court as well as by the Tribunal. The allegation of mala fide is very easy to be levelled and it is very difficult to substantiate it, specially in the matter of selection or whoever is involved in the decision-making process. People are prone to make such allegations but the courts owe a duty to scrutinise the allegation meticulously because the person who is making the allegation of animus does sometimes bona fide or sometimes mala fide due to his non-selection. He has a vested interest. Therefore, unless the allegations are substantiated beyond doubt, till that time the court cannot draw its conclusion. Therefore, we reject the allegation of mala fide.

...

"21. Now, comes the question with regard to the selection of the candidates. Normally, the recommendations of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules. The courts cannot sit as an Appellate Authority to examine the recommendations of the Selection Committee like the court of appeal. This

discretion has been given to the Selection Committee only and courts rarely sit as a court of appeal to examine the selection of the candidates nor is the business of the court to examine each candidate and record its opinion. In this connection, learned Senior Counsel for the appellants has taken us through various following decisions of this Court

22. Keeping in view the ratio laid down by this Court in several decisions, now we shall examine the argument of learned Senior Counsel for the appellants which had been addressed. But we may at the very outset observe that the Court while considering the proceedings of the Selection Committee does not sit as a court of appeal. Courts have limited scope to interfere, either selection is actuated with mala fide or statutory provisions have not been followed. In the present case, 39 candidates were examined by the Selection Committee for being recommended for appointment to IAS. The selection process took place between 24-11-2003 and 28-11-2003 whereby the Selection Committee scrutinised the service records of the individual candidates and interviewed them and the Selection Committee

selected those candidates who were found to be having outstanding merit and ability.

...

29. It is also contended that the marking given by the Selection Committee was arbitrary. The grievance was that confidential report of Shri S. Daya Shankar for the year 2000-2001 was not available and in case of Shri R. Ramapriya, the confidential report for the year 1997-1998 was not available. Yet the reports of Shri S. Daya Shankar was assessed to be outstanding and Shri R. Ramapriya was assessed to be very good without there being any basis for it. This was found by the Tribunal to be patently arbitrary. It is the selection process and what prevailed with the Committee after review of the annual confidential reports of all these officers cannot be dilated in writing. When the Selection Committee sits and considers the candidature of both the officers and in case of both the officers, looking at the 5 years' annual confidential reports, one is found to be overall outstanding and the other is found to be overall very good, this marking of the Selection Committee cannot be interfered with in extraordinary jurisdiction or even by the Tribunal.

30. We fail to understand how the Tribunal can sit as an Appellate Authority to call for the personal records and constitute Selection Committee to undertake this exercise. This power is not given to the Tribunal and it should be clearly understood that the assessment of the Selection Committee is not subject to appeal either before the Tribunal or by the courts. One has to give credit to the Selection Committee for making their assessment and it is not subject to appeal. Taking the overall view of ACRs of the candidates, one may be held to be very good and another may be held to be good. If this type of interference is permitted then it would virtually amount that the Tribunals and the High Courts have started sitting as Selection Committee or act as an Appellate Authority over the selection. It is not their domain, it should be clearly understood, as has been clearly held by this Court in a number of decisions. Our attention was invited to a decision of this Court in R.S. Dass [1986 Supp SCC 617 : (1987) 2 ATC 628] wherein at para 28 it was held as follows: (SCC pp. 638-39)

"28. ... It is true that where merit is the sole basis of promotion, the power of selection becomes wide and liable to be abused with less difficulty. But that does not justify presumption regarding

arbitrary exercise of power. The machinery designed for preparation of select list under the regulations for promotion to all-India service, ensures objective and impartial selection. The Selection Committee is constituted by high-ranking responsible officers presided over by Chairman or a member of the Union Public Service Commission. There is no reason to hold that they would not act in fair and impartial manner in making selection. The recommendations of the Selection Committee are scrutinised by the State Government and if it finds any discrimination in the selection it has power to refer the matter to the Commission with its recommendations. The Commission is under a legal obligation to consider the views expressed by the State Government along with the records of officers, before approving the select list. The Selection Committee and the Commission both include persons having requisite knowledge, experience and expertise to assess the service records and ability to adjudge the suitability of officers. In this view we find no good reasons to hold that in the absence of reasons the selection would be made arbitrarily. Where power is vested in high authority there is a presumption that the same would be exercised in a reasonable manner and if the selection is made on extraneous considerations, in arbitrary manner the courts have ample power to strike down the same and that is an adequate safeguard against the arbitrary exercise of power.”

.....

[36]. Therefore, in view of a catena of cases, courts normally do not sit as a court of appeal to assess ACRs and much less the Tribunal can be given this power to constitute an independent Selection Committee over the statutory Selection Committee. The guidelines have already been given by the Commission as to how ACRs to be assessed and how the marking has to be made. These guidelines take care of the proper scrutiny and not only by the Selection Committee but also the views of the State Government are obtained and ultimately the Commission after scrutiny prepares the final list which is sent to the Central Government for appointment. There also it is not binding on the Central Government to appoint all the persons as recommended and the Central Government can withhold the appointment of some persons so mentioned in the select list for reasons recorded. Therefore, if the assessment of ACRs in respect of Shri S. Daya Shankar and Shri R. Ramapriya should have been made as "outstanding" or "very good" it is within the domain of the Selection Committee and we cannot sit as a court of appeal to assess whether Shri R. Ramapriya has been rightly assessed or Shri Daya Shankar has been wrongly assessed. The overall assessment of ACRs of both the officers were taken; one was found to be "outstanding" and the second one was found to be "very good". This assessment cannot be

made subject of court's or Tribunal's scrutiny unless actuated by mala fide.

....

39. It was also pointed out that in the case of Shri N. Sriraman and Shri K. Ramanna Naik, the Selection Committee downgraded their reports from "outstanding" to "very good" yet they were selected. Similar is the case with Shri K.L. Lokanatha who has not been selected. Likewise the Selection Committee upgraded the assessment for the year 2001-2002 from "very good" to "outstanding" yet he could not be selected. Therefore, this is also the process of selection and the Selection Committee is constituted by the Commission and headed by the member of the Commission, we have to trust their assessment unless it is actuated with malice or apparent mistake committed by them. It is not the case of pick and choose, while selection has been made rationally. The selection by expert bodies unless actuated with malice or there is apparent error should not be interfered with. Lastly, the High Court considered the case of the two candidates who were eliminated by the Selection Committee and their cases were not sent to the Commission for selection to the IAS

cadre. The High Court found that this was the selection process by the Screening Committee headed by the Chief Secretary and these persons were not found more meritorious to be recommended for appointment. This assessment of the Screening Committee was found by the High Court to be proper and there was nothing on record to show that the candidates who were shortlisted were not meritorious."

[39]. It is settled that normally the recommendation of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules. In the case on hand, the impugned DPC was not in conformity with the MCI guidelines, the JNIMS Service Rules, 2015 and the Office Memorandum dated 15.5.2014 as the sixth respondent who had not become eligible for promotion against the vacancy which arose in financial year 2018-2019 i.e. period from 1.4.2018 to 31.3.2019 was given promotion ignoring the fact that the petitioner who was the sole person eligible for promotion against the said vacancy. In view of the aforesaid proved fact, it is to be held that there is mala fide and serious violation of the

relevant rules in holding the impugned DPC in respect of the ineligible persons considered along with the petitioner and selected an ineligible person leaving the petitioner.

[40]. Since the respondent authorities considered the name of the petitioner as eligible candidate for promotion to the post of Associate Professor by taking into account the contribution of the petitioner's services as an Assistant Professor at Tripura Medical College and Dr. B.R.Ambedkar Memorial Teaching which is recognized by the Medical Council of India, the argument of the learned counsel for the sixth respondent that the petitioner was initially appointed to the post of Senior Resident in the Department of Radio-Diagnosis, JNIMS on 30.7.2011 and on the other hand, the sixth respondent was appointed initially to the post of Senior Resident on 14.3.2011 and the sixth respondent is senior to the petitioner and for the above reason while promoting the sixth respondent and the petitioner to the post of Assistant Professor, the sixth respondent was placed above the petitioner at Serial No.1, cannot be countenanced.

[41]. The further argument of the learned counsel for the sixth respondent that as per paragraph 4.3 of the Office Memorandum dated 15.5.2014, the crucial date of determination of eligible officer should be 1st October of the year. As the vacancy occurred on 3.1.2019, the crucial date for determining the eligibility of the officers shall be 1st October, 2019 and there was no vacancy available for the post of Associate Professor in the Department of Radio-Diagnosis before 1.10.2018. In view of the discussions held supra, the argument of the learned counsel for the sixth respondent that the crucial date of eligible officer should be 1st October, 2019 cannot be accepted, as it is also the admitted case of the sixth respondent that DPC may be convened every year, if necessary on a fixed date i.e. 25th January or April. However, the learned counsel for the sixth respondent contended that the word "may" in conjoin reading with the word "if necessary" indicates discretionary in nature and not mandatory and there is no hard and fast rule that DPC should be held immediately on the availability of vacancies. This Court has already held that the promotion against the vacancy in question was arisen in the financial year 2018-2019 i.e. the

period from 1.4.2018 to 31.3.2019. Ignoring the aforesaid factual aspects and the Office Memorandum dated 15.5.2014 and also the relevant recruitment rules, the DPC has considered the name of the sixth respondent for promotion to the post of Associate Professor in the Department of Radio-Diagnosis. Thus, it is clear that the sixth respondent and others, who were ineligible at the relevant point of time were considered as eligible by the DPC for promotion to the post of Associate Professor. On the other hand, the petitioner proved that she is the lone person eligible to be considered for promotion to the post of Associate Professor, Department of Radio-Diagnosis, which fell vacant on 3.1.2019.

[42]. In *Major General H.M. Singh VSM*, supra, the Hon'ble Supreme Court held:

"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 seniormost serving Major-General eligible for consideration (which he undoubtedly was), he most definitely had 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

acquired 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."

[43]. In *Ajay Kumar Suhkla*, supra, the Hon'ble Supreme Court held:

"37. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in the case of Director, Lift Irrigation Corporation Ltd. v. Pravat Kiran Mohanty⁶ in paragraph 4 of the report 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."

38. A Constitution Bench in case of Ajit Singh v. State of Punjab², 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. Jagannadha Rao, J. speaking for himself and Anand, CJI., Venkataswami, Pattanaik, Kurdukar, JJ., observed the same as follows in paragraphs 21 and 22 and 27:

"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."

39. This Court in Major General H.M. Singh, VSM v. UOI⁸, 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.”

40. If the seniority list is allowed to be sustained then the engineers who are more meritorious in the Mechanical and Civil streams than the Junior Engineers of the Agricultural stream would be deprived of their right of being considered for promotion and in fact their right would accrue only after all the Junior Engineers of the Agricultural stream selected in the same selection are granted promotion. For these reasons also the seniority list in question must go.”

[44]. Thus, it is clear 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. As stated supra, in the case on hand, the denial of promotion to the petitioner violates her right, which had accrued to her.

[45]. On over all analysis of the respective cases put forth by the parties, this Court reiterated that the respondents have completely misread the Office Memorandum dated 15.5.2014, particularly paragraph 4.3 as the said paragraph does not

speaks of vacancy year. As stated supra, paragraph 4.2 of the said Office Memorandum states that the preparation of a Select Panel and the Department may calculate the vacancies for reporting to DPC financial year-wise unless the relevant recruitment rules specified otherwise. Paragraph 4.3 states that the crucial date for determining the eligibility of officers for promotion would be as per applicable recruitment rules of the service. If the recruitment rules are silent, the crucial date for this purpose would be 1st October. Since the petitioner who had already qualified to be considered for promotion to the post of Associate Professor as on 1.10.2018 and the vacancy for one post of Associate Professor had arose in the financial year 2018-2019, the petitioner being the only Assistant Professor who was qualified for promotion to the post of associate Professor in the said financial year, as she had fulfilled all the eligibility criteria as per the Minimum Qualifications for Teachers in Medical Institutes Regulations, 1998 and she should have been considered against the said vacancy which arose in the said financial year. Thus, it is a fit case to review the impugned DPC.

[46]. At this juncture, it is relevant to mention that paragraph 10 of the Office Memorandum dated 15.5.2014 states review DPCs. For proper appreciation, paragraph 10 of the Office Memorandum dated 15.5.2014 is extracted hereunder:

"10 Review DPCs:

The proceeding of any DPC may be reviewed only if the DPC has not taken all material facts into consideration or if material facts have not been brought to the notice of the DPC or if there have been grave errors in the procedure followed by the DPC. Thus, it may be necessary to convene Review DPCs to rectify certain unintentional mistakes, e.g.:-

(a)Where eligible persons were omitted to be considered; or

(b)Where ineligible persons were considered by mistake; or

(c)Where the seniority of a person is revised with retrospective effect resulting in a variance of the seniority list placed before the DPC, or

(d)Where some procedural irregularity was committed by a DPC; or

(e)Where adverse remarks in the CRs were tone down or expunged after the DPC had considered the case of the Officer."

[47]. As stated supra, it is a clear case of ineligible person was considered by mistake, apart from procedural irregularity committed by the impugned DPC.

[48]. It is apposite to note that pending writ petition, the petitioner filed MC (WP) No.4 of 2021 to direct the respondents 1 to 4 not to conduct any DPC meeting for promotion to the post of Associate Professor in the Department of Radio-Diagnosis in JNIMS without the leave of the Court contending that another post of Associate Professor in the Department of Radio-Diagnosis in JNIMS is likely to become vacant due to upcoming promotion of Khaidem Mani Singh, Associate Professor to the post of Professor in the Department of Radio-Diagnosis and the respondent authorities notified the time scale promotion scheme for teacher of J.N.Institute of Medical Sciences Rules, 2020 (for short, "TSP Rules") on 18.12.2020, which are applicable to the regularly appointed Assistant Professors and Associate Professor of JNIMS. Therefore, in the light of the said development, there is a strong possibility that another DPC proceedings will be held for promotion to the post of Associate Professor due to the

vacancy. In the event that if a DPC for promotion to the post of Associate Professor in the Department of Radio-Diagnosis is conducted during the pendency of the writ petition, the petitioner will be again denied a chance for promotion to the post of Associate Professor.

[49]. Opposing the miscellaneous case, the first respondent filed affidavit stating that there is only one post of Professor in Radio Diagnosis Department, JNIS and it is presently holding by Prof. Dr. Okram Hiramot and, as such, there is no vacant post of Professor in the Department of Radio Diagnosis. Accordingly, the question of holding any DPC for appointment on promotion to the post of Professor in the Department of Radio-Diagnosis does not arise at the moment. Consequently, there will be no DPC for appointment on promotion to the post of Associate Professor in Radio-Diagnosis Department in the near future and, as such, the contention of the petitioner does not arise and the relief sought by the petitioner in the miscellaneous case is not sustainable.

[50]. The sixth respondent filed affidavit opposing the application stating that the idea of vacancy coming up in the Radiology Department alleged by the petitioner in the miscellaneous case is a wild imagination as any promotion and there is no increase in the total number of faculty. If the petitioner is eligible and senior enough in the common seniority list of JNIMS, she too will be promoted and benefitted.

[51]. Since the first respondent themselves stated that there will be no DPC for appointment on promotion to the post of Associate Professor in Radio-Diagnosis in JNIMS in the near future, the question of stopping the DPC for promotion to the post of Associate Professor in the Department of JNIMS as alleged by the petitioner does not arise. Therefore, recording the statement of the first respondent that there will be no DPC for appointment on promotion to the post of Associate Professor in Radio-Diagnosis in JNIMS, MC (W) No.4 of 2021 is closed.

[52]. It is to be pointed out that on 4.3.2020 when the writ petition was taken up, this Court passed the following interim order:

"Heard Mr. T.Momo, learned counsel for the petitioner.

Mr. Suraj, learned counsel appearing for the JNIMS has produced the records as directed by this Court.

Mr. Y.Nirmolchand, learned senior counsel appearing for the private respondent. Mr. Suraj, learned counsel for the JNIMS, Mr. B.R.Sharma, learned counsel for respondent No.5 are allowed one week's time to file their respective counter affidavits.

List on 20.03.2020.

The appointment of private respondent No.6 shall be subject to the outcome of this writ petition."

[53]. As stated supra, when there is a procedural irregularity in the conduction of the impugned DPC and ineligible person was considered by mistake, the same can be rectified by conducting a review DPC by the competent authority. In the case on hand, this Court held that the sixth respondent who is an ineligible person at the relevant point of time was considered

for promotion to the post of Associate Professor in the Department of Radio-Diagnosis and also there appears to be irregularity committed by the DPC.

[54]. In the aforesaid situation, the learned counsel for the petitioner argued that as per Rule 14 of the JNIMS Service Rules, 2015, a supernumerary post can be created for adjustment of the petitioner or the sixth respondent either of the regular post and the supernumerary post. This Court finds some force in the said submission made by the learned counsel for the petitioner.

[55]. Rule 14 of the JNIMS Service Rules, 2015 provides as under:

"14. Supernumerary Posts:

(1) In case of exigencies, the President in consultation with the Governing Council may create such supernumerary posts for a period as specified.

(2) Such supernumerary posts so created shall stand abolished as soon as the term of appointment of the person appointed against such post is terminated, until and unless the president in consultation with Governing Council decides to continue.

(3) Further the posts of Professor filled on contract basis by persons after retirement be treated as supernumerary, subject to the condition that they stand abolished after their tenure is completed.”

(emphasis supplied)

[56]. In view of the above and in the interest of justice, this Court is of the view that the petitioner and the sixth respondent may both be adjusted in either of the regular post and the supernumerary post and in order to create a supernumerary post a review DPC needs to be conducted, for which, the matter is required to be remitted back to the respondent authorities for passing orders in this regard, as the appointment of the sixth respondent on promotion to the post of the Associate Professor in the Department of Radio-Diagnosis in JNIMS is subject to the result of the writ petition as per the interim order of this Court.

[57]. For all the reason stated above, the writ petition is allowed. The impugned DPC held on 16.9.2019 and 26.9.2019 thereby holding the DPC for appointment to the post of Associate Professor in the Department of Radio-Diagnosis in

JNIMS, Manipur and the consequent appointment order dated 20.12.2019 whereby appointing the sixth respondent on promotion to the post of Associate Professor in the Department of Radio Diagnosis, JNIMS with effect from 15.10.2019 on the recommendation of the impugned DPC held on 16.9.2019 and 26.9.2019 are set aside. The matter is remitted back to the respondent authorities for conducting a review DPC to create a supernumerary posts of Associate Professor in the Department of Radio-Diagnosis to adjust the petitioner and the sixth respondent in either of the regular post and the supernumerary post to be created by the respondent authorities to give quietus to the issue.

There will be no order as to costs.

FR/NFR

Ab. Surjit

ACTING CHIEF JUSTICE