

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No.501 of 2008**

- Dr. Dilip Kumar Jha S/o Shri M. L. Jha, Medical Officer, Civil Hospital, Mana Camp, Distt. Raipur

---- Petitioner**Versus**

1. State Of Chhattisgarh, By: Secretary, Health & Family Welfare Department, DKS Bhawan, Raipur.
2. Dr. R. K. Sukhdev, Distt. Hospital, Distt. Korea
3. Dr. K. K. Jain Distt. Hospital, Durg
4. Dr. Vijay Singh Thakur Distt. Hospital, Bastar
5. Dr. Motilal Bachkar PHC Pandariya Distt. Kawardha
6. Dr. Khemraj Sonwani PHC Kasdol Distt. Raipur
7. Dr. Manoj Kumar Dani District Hospital, Durg

---- Respondents

For Petitioner	:	Shri Raja Sharma, Advocate
For Respondent/State	:	Shri R. K. Gupta, Dy.AG

S.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****11/04/2017**

Heard.

2. This petition has been filed by the petitioner aggrieved by the supercession and promotion of his juniors to the next higher post of Specialist Medicine in the Department of Health Services, State of Chhattisgarh.

3. Quintessential facts necessary for decision of the present case are that the petitioner was initially appointed as Assistant Surgeon (Medicine) in the year

1987 and duly confirmed in the services in the year 1989. In the gradation list, which was issued in the year 2005, the comparative seniority position of the petitioner and respondents No.2 to 7 was reflected as below:-

Number	Name	Gradation/Position	Selection Year and Rank
1.	Dr. Dilip Kumar Jha	356	1987/907
2.	Dr. R. K. Sukhdev	380	1987/872
3.	Dr. K. K. Jain	400	1987/983
4.	Dr. Vijay Singh Thakur	538	1987/1568
5.	Dr. Motilal Bachkar	621	1990/168
6.	Dr. Khemraj Sonwani	726	1996/266
7.	Dr. Manoj Kumar Dani	759	2000/93

4. Departmental Promotion Committee was convened on 11-09-2006 to consider cases for grant of promotion from the post of Assistant Surgeon to Class I post- Specialist Medicine, in which, the name of the petitioner and respondents No.2 to 7 were considered. However, when promotion order was issued on 23-01-2007, name of the petitioner was not included and juniors of the petitioner have been promoted. Aggrieved by supercession, the petitioner preferred representations, but when his grievance was not redressed, this petition was filed.

5. Contention of learned counsel for the petitioner is that in the matter of promotion from the post of Assistant Surgeon to the next higher post of Specialist Medicine, which is Class I post, criteria of promotion is seniority-cum-fitness as provided in Rule 4 of the Chhattisgarh Public Service (Promotion)

Rules, 2003 (In short “the Rules of 2003”). He further submits that the provision contained in Rule 4 to 6 clearly mandates consideration of cases of promotion by applying the criteria of seniority-cum-fitness and not the criteria of merit-cum-seniority or seniority-cum-merit. However, while considering cases for promotion, even though, the petitioner was fit for promotion as there was no adverse remark or pending departmental enquiry or any penalty imposed or any other verified complaint of such a nature would have constituted an element of unfitness for promotion, the petitioner was superceded and his juniors were promoted by applying the criteria of seniority-cum-merit by fixing the minimum bench mark of merit which is impermissible under the law. Therefore, in these circumstances, the impugned order, by which, juniors of the petitioner have been promoted be set aside or in the alternative, the petitioner be granted promotion on the available vacancy with seniority from the date when his juniors have been promoted by placing the petitioners over and above his juniors.

6. On the other hand, learned State counsel opposed the prayer on the submission that the respondents have taken an objection with regard to delay in filing the petition by submitting that though promotion order was issued on 23-01-2007, the petitioner filed this petition on 16-01-2008 i.e. after almost one year without any plausible explanation for such delay, therefore, this petition is liable to be dismissed only on the ground of delay and laches. Learned State counsel next submitted that the respondents have not committed any illegality in considering the cases of promotion of the petitioner and other Assistant Surgeons in the matter of promotion to the post of Specialist Medicine. He contends that the criteria of seniority-cum-fitness was duly applied. According to him, in order to judge the fitness of the eligible officers, the respondents laid down the criteria as reflected in Clause III of the Minutes of Meeting dated 11-09-2006 (Annexure R/2), according to which, for the purpose of making

assessment of fitness, preceding five years ACRs were to be evaluated and only those officers, whose ACRs were at least 'good' without there being any poor grading of "Gha" and necessarily having "Kha" in the last ACRs and on that basis having achieved minimum 10 as bench mark, were to be treated as fit for promotion. The petitioner failed to secure minimum bench mark of 10 Number, upon evaluation of his ACRs for the relevant five years, therefore, he could not be promoted. It is also submitted that the respondents No.2, 5 & 6, though juniors, belonged to reserved category of Scheduled Caste and they have been promoted in their respective category, therefore, in so far as these respondents are concerned, no legitimate grievance could be raised by the petitioner, who belongs to general category.

No appearance has been made for respondents No.2 to 7, despite service of notice.

7. In so far as objection to maintainability of the petition on the ground of delay is concerned, it is found that the promotion order was issued on 23-01-2007. The petitioner preferred first representation to the Secretary of the Department on 31-01-2007 and number of representations made to Director also, last representation being dated 06-08-2007 addressed to the Secretary. Having waited for another four months, the petitioner filed this petition on 16-01-2008. Therefore, I do not find that the petitioner was indolent and not vigilant and the objection that the petition is so delayed with unexplained delay as to warrant dismissal only on the ground of delay and laches, is therefore overruled.

8. Rule 4 and Rule 6 of the Rules of 2003 provides for determination of basis for promotion as below -

4. Determination of basis of promotion—(1) Promotion from Class IV to higher pay scale of Class IV, Class IV to Class III, Class III to higher pay scale of Class III, Class III to Class II, Class II to higher pay scale of Class II and Class II to Class I shall be made on the basis of “seniority subject to fitness”.

(2) Promotion from Class I to higher pay scale of Class I posts shall be made on the basis of “merit-cum-seniority”.

9. From the aforesaid statutory prescription, it is clear that in the matter of promotion from the post of Assistant Surgeon to Specialist Medicine i.e. for promotion from Class II gazetted post to Class I gazetted post, the rules prescribe criteria as seniority-cum-fitness. The criteria of seniority-cum-fitness, in the absence of there being any specific meaning assigned to it under the rules, has to be construed as criteria for promotion of an employee on the basis of seniority unless there is anything adverse against him. Thus, fitness would mean that there is nothing adverse against the employee in the sense that there is no adverse remark, no departmental enquiry pending or any penalty imposed or any other verified complaint of such a nature which would constitute an element of unfitness for promotion. If that is not there, the officer will have to be held fit for promotion.

The rule does not provide for any particular criteria for adjudging fitness. In the absence of any special provision made under the rules, the criteria of seniority-cum-fitness has to be understood in the manner that if there is nothing adverse against an employee, he should be treated as fit for promotion.

10. In the present case, State could not come out with any material to show that the petitioner was communicated any adverse remark or was graded as “घ” (poor) so as to constitute an adverse material. There is nothing to show that the petitioner has suffered any penalty in any departmental enquiry nor is there any material to show that any verified complaint constitute adverse material. It is not even the case where any departmental enquiry was pending on the date when

petitioner's case was considered for promotion.

11. Contention of learned State counsel that fitness was required to be assessed on the criteria of being possessed of gradings of a particular minimum merit, if accepted, would become an assessment based on merit. The distinction between a criteria of seniority-cum-fitness, seniority-cum-merit and merit-cum-seniority needs to be underlined.

12. As has been disclosed herein above, where the criteria for promotion is seniority-cum-fitness, fitness is to be judged by considering whether there is any adverse material like the adverse entry, penalty, departmental enquiry, serious complaint which have been verified etc. This may also include the case of doubtful integrity. If there is no adverse material, the only natural conclusion would be that the officer is fit for promotion.

Where the criteria for promotion is seniority-cum-merit, the minimum benchmark of merit is required to be prescribed and all the officer who fulfill minimum benchmark of merit have to be considered for promotion in the order of their seniority.

13. In a case where promotion is based on merit-cum-seniority, more meritorious officer, though junior, march-past his seniors and supersedes them because in this case, selection is based on comparative merit assessment and not merely on fitness or based on any minimum benchmark of merit. That is how the three criteria of promotion differ from each other. For this conclusion, this Court places reliance on the decision of the Supreme Court in the case of **B. V. Sivaih and Ors. vs. K. Addanki Babu and Ors., AIR 1998 SC 2565.**

14. What has been submitted by learned State counsel and also borne out from the photo copy of the minutes of meeting, a minimum benchmark of merit

was fixed as a criteria for promotion by prescribing that the ACR grading should be atleast "Good", grading of the last year should be atleast "ख" or better grading and the minimum benchmark of 10 to be secured. This kind of criteria is essentially a criteria of seniority-cum-merit. The criteria of seniority-cum-merit was not intended to be applied under the Rules of 2003 in the matter of promotion from Class II to Class I post, as per the provisions contained in Rule 4 of the Rules of 2003. In the absence of there being any adverse material against the petitioner, there is nothing to say that the petitioner was not fit for promotion. Prescription of minimum benchmark of merit was clearly a transgression of statutory prescription. The DPC seems to have evolved its own minimum criteria of merit, contrary to the mandate of the rules.

15. In view of above consideration, I have to hold that the supercession of the petitioner by their juniors was illegal. Respondent No.3-Dr. K. K. Jain, respondent No.4-Dr. Vijay Singh Thakur and respondent No.7-Dr. Manoj Kumar Dani, were admittedly juniors to the petitioner placed much below the petitioner. It is stated at the bar that the petitioner has been promoted though on adhoc basis on 2011. In these circumstances, the respondents are directed to consider the cases of the petitioner for grant of regular promotion by considering his case strictly in accordance with the criteria of seniority-cum-fitness. Upon due consideration, according to criteria, the respondents shall grant promotion to the petitioner from due date, i.e. date from which his juniors were promoted to the post of Specialist Medicine. As there is a post available and the petitioner is continuing against the vacant post of Specialist, upon adhoc promotion in the year 2011, I am not inclined to set aside the promotion of juniors to the petitioner. However, seniority will be accorded to the petitioner over and above his juniors. The petitioner would be entitled to other consequential benefits.

16. Accordingly, the petition is allowed.

SD/-
(**Manindra Mohan Shrivastava**)
Judge