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HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 637 of 2007

- B.R. Kosaria, S/o Shri Late G.R. Kosaria, aged about 52 years, Senior Medical Officer, Distt. Hospital, Kawardha District, Kabirdham (C.G.)

---- Petitioner

Versus

1. The State Of Chhattisgarh, Through Secretary, Health and family Planning Department, DKS Bhawan, Raipur (C.G.)
2. Dr. Munna Lal Jaiswal, C.S.C. Dongargaon, District Rajnandgaon
3. Dr. H.S. Sende, District Hospital, Koriya, District Koriya
4. Dr. Devendra Nath Nag, Maharani Hospital, Jagdalpur
5. Dr. Koshorilal Dhruv, District Hospital, Korba, District Korba
6. Dr. Ramchandra Thakur, District Hospital, Kanker, District Kanker

---- Respondents

For Petitioner	: Shri Ajay Shrivastava, Advocate
For State	: Shri R.K. Gupta, Dy. A. G.
For Respondent No.2	: Shri Abhay Kumar, Advocate
For Respondent No.3	: Shri Waquar Naiyyar, Advocate
For respondents No.4,5 & 6	: None

AND

WPS No. 3128 of 2007

- Dr. Gyanesh Kumar Chaubey, 51 Years, S/o Babulal Chaubey, Block Medical Officer, Primary Health Centre, PO Aarang, Distt. Raipur

---- Petitioner

Versus

1. State Of Chhattisgarh, By : Secretary, Health & Family Welfare Deptt. DKS Bhavan, Raipur
2. Dr. Harish Kumar Joshi, Distt Hospital, Distt. Jashpur
3. Dr. Ramnaresh H. Mishra, Distt Hospital, Dhamtari
4. Dr. Vinod Kumar Lohia, Distt Hospital, Rajnadgaon

5. Dr. G.P. Naidu, Distt Hospital, Bilaspur
6. Dr. Shrikant Shukla, Distt Hospital, Mahasamund
7. Dr. Munnalal Jaiswal, Distt Hospital, Kawardha
8. Dr. S.H. Shende Distt Hospital, Distt.Koria
9. Dr. Devendra Nath Nag, Chalit Ekai, Distt. Hospital, Jagdalpur
10. Dr. Kishorilal Dhruve, Distt Hospital, Raigarh
11. Dr. Ramchandra Thakur, Distt Hospital, Kanker

---- Respondents

For Petitioner	:	Shri Raja Sharma, Advocate
For State	:	Shri R.K. Gupta, Dy. A. G.
For Respondent No.5 & 6	:	Shri Ashok Kumar Verma, Advocate
For Res. Nos.2,3, 4 & 7 to 11	:	None

Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

10/04/2017

1. Heard.
2. The aforesaid two petitions are being disposed off by common order as both are involve common issues of law arising for consideration in the matter of promotion of Assistant Surgeon of Ophthalmology to the next higher post of specialist Ophthalmology, assailing legality and validity of promotion of their respective juniors who were promoted in the same Departmental Promotion Committee dated 07/12/2016. Petitioner B.R. Kosaria was initially appointed as Assistant Surgeon Ophthalmology on 06/03/1981. Petitioner Dr. Gyanesh Kumar Chaubey was initially appointed as Assistant Surgeon Ophthalmology on 04/11/1979. the respondents No. 2 to 6 in W.P.(S) No. 637 of 2007 and respondents No. 2 to 11 in W.P.(S) No. 3128 of 2007 were also appointed as Assistant Surgeon Ophthalmology from time to time. Gradation list of Assistant Surgeon was issued on 23/04/2005.
3. The respondent-State in order to consider eligible Assistant Surgeon of Ophthalmology for promotion to the vacant post of Specialist in Ophthalmology convened Departmental Promotion Committee (DPC) on 07/12/2006. Vide order of promotion dated 06/01/2007 14 Assistant

Surgeon of Ophthalmology were promoted to Class-I post of Specialist in Ophthalmology, who have been impleaded as respondents No. 2 to 6. Petitioner B.R. Kosaria felt aggrieved by this order of promotion because respondents No. 2 to 6 in his petition were junior to him and were promoted thereby resulting in his supersession. Similarly, the petitioner Gyanesh Kumar Chaubey also felt aggrieved because the respondents No. 2 to 11 of his petition were all junior officers who were promoted and therefore his supersession. In W.P. (S) No. 637 of 2007 respondent No. 3 Dr. H.S. Shende candidate of Scheduled Caste is junior to petitioner B.R. Kosaria. Another respondents No. 4 Dr. Devendra Nath Nag is also junior to B.R. Kosaria. This is reflected from the gradation list in which Dr. B.R. Kosaria is placed at Sl. No. 294, whereas the aforesaid 2 officers who were promoted in Scheduled Caste category were junior to Dr. B.R. Kosaria and this fact is not in dispute.

4. Gyanesh Kumar Chaubey belongs to General category. Respondents No. 2 to 7 belong to General category and they are junior to Dr. Gyanesh Kumar Chaubey. This factual part has not been disputed in the present case by any of the respondents.
5. Learned counsel for the respective petitioners in the aforesaid two petitions raised a common submission that the promotion of the petitioners is governed by Chhattisgarh Public Service Promotion Rules, 2003 under which, criteria for promotion from Class-II Gazetted to Class-I post is seniority-cum-fitness. As these petitioners had nothing adverse in their service record, they were fit for promotion and therefore their seniority are to be maintained and they ought to be promoted to the next higher post of specialist of Ophthalmology as per criteria prescribed under the Rules. According to them, none of these two petitioners have been communicated any adverse remarks or any departmental enquiry or penalty imposed or any serious complaints found to be true on verification or any other material to doubt their integrity. Therefore, the petitioners were fit for promotion and according to the criteria of seniority-cum-fitness were entitled to be promoted w.e.f. 06/01/2007.
6. On the other hand learned State counsel and counsel for the respective respondents submits that the criteria for promotion has been correctly followed. It is submitted that for the purposes of making

promotion to the next higher post, the criteria of seniority-cum-fitness as prescribed under the Rules was followed and the official respondents laid down the criteria to judge the fitness in the manner that none of the ACR of last five years should have been recorded as 'ग' the ACRs should at least be good and the last one should be at least 'ख' or over and above 'ख' and further that the officer should have secured minimum benchmark of 10 in order to become fit for promotion. All the eligible officers were considered applying the said criteria and the petitioners upon being considered on those criteria were not found fit.

7. The respondents have placed before the Court the relevant DPC records from which the gradation award to the respective petitioners is reflected as above :-

B.R. Kosaria

Year	Grading
2001	क
2002	ख
2003	ग
2004	ग
2005	ग
2006	ख

Gyanesh Kumar Chaubey

Year	Grading
2001	ग
2002	ग
2003	ग
2004	ग
2005	ग

2006	१
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The promotion in Public Service is governed by Chhattisgarh Public Service (Promotion) Rules, 2003 (for short, 'the Rules, 2003'). Rule 4 provides for determination of basis for promotion as below :-

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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”.
8. From the aforesaid statutory prescription, it is clear that in the matter of promotion from the post of Assistant Surgeon to Specialist i.e. for promotion from Class II gazetted post to Class I gazetted post, the rules prescribes 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, which construed as a criteria as entitlement 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 constitutes 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.

9. 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 “द” (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.

10. 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.

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.

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 placed reliance on the decision of the Supreme Court in the case of **B. V. Sivaih and ors. v. K. Addanki Babu and ors., AIR 1998 SC 2565.**

11. What has been submitted by learned State counsel and has 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.

12. 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.

13. In the result, I have to hold that supersession of the petitioner in their respective category was illegal and in violation of the prescribed criteria for promotion laid down under the Rules. Therefore, the official respondents are directed to consider the petitioners' case for promotion on the basis of their ACR as on the date the DPC was constituted i.e. on 07/12/2006. The DPC shall consider the case of these petitioners according to the seniority-cum-fitness and the scope of consideration would be whether there is any adverse material against these petitioners. If no adverse material is found against the petitioners in their service record and the ACR for relevant five years preceding the date of DPC as on 07/12/2006, the petitioners shall be granted due promotion from the same date from which their juniors were promoted by impugned order dated 06/01/2007 with all consequential benefits. If at present there are not posts or vacancies available to promote the petitioner, junior most respondents will have to be reverted.

Sd/-

(Manindra Mohan Shrivastava)
Judge