

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 11.11.2022

% **Judgment delivered on: 06.01.2023**

+ **W.P.(C) 7570/2008**

DR. SHILPI AGARWAL & ANR. Petitioners

Through: Mr. V. K. Garg, Sr. Advocate with
Mr. Sagar Saxena, Mr. K. S. Rekhi,
Mr. Parv Garg, Mr. Pawas
Kulshrestha and Mr. Parmeet Singh,
Advocates.

versus

UIO & ORS. Respondents

Through: Mr. Rajesh Gogna, CGSC with
Ms. Priya Singh, Advocate for
Respondent/ UIO.
Dr. Vikrant Narayan Vasudeva,
Mr. Sarthak Chiller and Mr. Rohit
Lohav, Advocates for Respondent
No.5.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

1. The Petitioners before this Court have filed the present writ petition being aggrieved by the common Judgment and Order dated 17.01.2008, in O.A. Nos.1099/2007 and 1103/2007, passed by the Ld. Central

Administrative Tribunal, Principal Bench, New Delhi (Ld. CAT) (“Impugned Order”).

2. Vide the Impugned Order, the Ld. CAT had dismissed the Petitioners’ prayer for quashing/ modifying the Order No. A-32012/02/2006-CHS.III dated 21.12.2006 and Order No. 32012/2/2006-CHS.III dated 11.01.2007 along with the consequential promotions. Further, the Petitioners’ prayer for directing the Respondent No. 1 & 2 therein to promote the Petitioners to the post/ grade of Professor in the Central Health Services (“CHS”) was also rejected.

3. Before us, the Petitioners have prayed for the following reliefs –

“(a) set aside judgment and order dated 17.01.2008 of the Central Administrative Tribunal, Principal Bench, New Delhi in OA Nos. 1099/2007 & 1103/07; and

(b) grant the prayer as made by the petitioners in OA Nos. 1099/2007 & 1103/07.

(c) pass any such further order or direction as may be deemed fit, proper, necessary and expedient.”

4. The undisputed facts of the case reveal that the Petitioners are members of the Central Health Services and are governed under the provisions of Central Health Services Rules, 1996. The Petitioners, upon their selection by the Union Public Services Commission (“UPSC”) were appointed in the Ministry of Health and Family Welfare, in the Grade of Assistant Professor (Specialist Grade II – Junior Scale) of the Teaching Sub-Cadre in the Department of Pathology, Lady Hardinge Medical College, New Delhi. It has been stated that the next higher post in the relevant hierarchy is Associate Professor, to be filled by direct recruitment, whereas Associate Professor (other than super specialty) is to be filled by promotion

on the basis of seniority-cum-fitness without linkage to vacancies. An Assistant Professor with 2 years of regular service in the grade becomes eligible for promotion to the post of Associate Professor. Accordingly, vide Order No. A32012/4/2000 dated 20.02.2000 of the Respondents, Assistant Professors (Specialist Grade II – Junior Scale Teaching Sub-Grade) were promoted as Associate Professors. Petitioner Nos. 1 and 2 were promoted to the Post of Associate Professor on 20.04.2001 and 10.01.2002, respectively.

5. The statutory provisions as contained under the Central Health Services Rules, 1996 (hereinafter referred to as the ‘Rules of 1996’) provide for promotion to the next higher post, i.e., Specialist Grade-I, Professor. The post of Specialist Grade-I, Professor is to be filled 100% by promotion on non-selection basis without linkage to the vacancies, failing which, by Direct Recruitment. The Rules further provide that an Associate Professor with 6 years of regular service in the grade or an Associate Professor with 8 years combined regular service in the grades of Associate Professor and Assistant Professor is eligible to be promoted as Specialist Grade-I, Professor.

6. The records of the case further reveal that initially the post of Associate Professor was treated to be non-functional. As per Office Memorandum dated 09.10.1999 issued for promotion to the next higher grade, the selection procedure to be followed require at least two “Very Good” gradings in the person’s last 5 ACRs. Further, as per the guidelines issued by the DoP&T, the benchmark for promotion to the post of Professor – which is equivalent to Non-Functional Selection Grade, provided that an officer’s overall performance should be good with at least two “Very Good”

gradings during the last five years, whereas this criterion is not required to be insisted upon in case of SC/ ST Officers.

7. The Government of India constituted a High Power Committee known as Tikku Committee and it was constituted for considering the service conditions of doctors. Based upon the Tikku Committee Report, the distinction between Non-Functional Selection Grade and Functional Grade was eliminated w.e.f. 01.12.1991. This is an undisputed fact.

8. Another fact pertinent for adjudication of this dispute is the recommendations of the 5th Central Pay Commission. When the said recommendations were brought to the force, Para 52.15 of its report had recommended the constitution of a Dynamic Assured Career Profession Scheme (“DACP”) for officers of the Central Health Services. Based upon the recommendations of the Central Pay Commission, Respondent No. 1 introduced DACP Scheme for officers of the Central Health Services vide Circular dated 05.04.2002 bearing No. 21/14/97-PC (H)/CHS-V. Under the same, promotion to the post of Professor required completion of 4 years of regular service as Associate Professor, subject to fulfilling the prescribed benchmark based upon the ACRs. In accordance with the same, the cases of the Petitioners were considered in the year 2006 and 2007 for promotion, however, the Petitioners were not found fit for promotion by the Departmental Promotion Committee (“DPC”).

9. The Petitioners among other Associate Professors were considered by the DPC for promotion on 06.09.2006 under the Dynamic Assured Career Progression (DACP) Scheme. However, when the DPC’s Order dated 21.12.2006 bearing No. A.32012/02/2006-CHS.III was published, the

Petitioners' names were left out in the list of Associate Professors who had been promoted. Aggrieved by the same, the Petitioners had preferred representations to the Respondents. Vide replies dated 11.01.2017 & 25.01.2017, they were informed that their names were duly considered by the DPC, however, they were found 'unfit' for promotion as they did not meet the required benchmark. The Petitioner Nos. 1 and 2 certainly had four years of regular service as Assistant Professors on 20.04.2005 and 10.01.2006, respectively. However, they were not recommended for promotion as both the Petitioners had only one "Very Good" ACR grading during the last 5 years, i.e. 2000-2001 to 2004-2005.

10. However, it has been brought to the notice of this Court by the documents and counter affidavit filed by the Respondents that upon a subsequent DPC meet held on 25.08.2008, the Petitioners were once again considered for promotion, and they were found fit. Hence, they were promoted to the post of Professors in the Teaching Sub-Cadre of CHS vide Order dated 20.11.2008 bearing No. A.32012/01/2008-CHS.III. Petitioner No. 1 was promoted with effect from 20.04.2007 whereas Petitioner No. 2 was granted promotion with effect from 10.01.2008.

11. The Petitioners, prior to their promotion being declared in terms of aforesaid Order, had come before the Ld. CAT by filing Original Applications (OA), and the Tribunal has dismissed the said OAs. The operative paragraph of the Order dated 17.01.2008 – as contained in paragraphs 9 to 14, reads as under:

"9. Since counsel for applicants had submitted that the criterion required to be adopted was that of non-selection, we had called for the records to satisfy ourselves. From the

records, it is noticed that a uniform methodology was followed for all the Associate Professors while considering them for promotion to the grade of Professor under the DACP Scheme. In the proceedings, it was specifically mentioned that as per the guidelines issued by DOP&T, the bench-mark for the grade of Professor, the overall performance should be 'Good' with at least two "Very Good" gradings during the last five years. It is also mentioned that this promotion would be without linkage to vacancies, meaning thereby that the Associate Professors were to be put in the higher grade irrespective of the vacancies in the post of Professor. It is also relevant to note that at the time of issuing the DACP Scheme on 5.4.2002 itself, it was mentioned as follows:

"The Specialists officer of the Non Teaching and Public Health sub cadres will be promoted from Specialist Grade II (Junior Scale) (Rs. 10000-15200) to Specialist Grade II (Senior Scale) (Rs. 12000-165000) on completion of 2 (two) years of regular service. Specialist Grade-II (Senior Scale) Officers with 4 (four) years regular service as Specialist Grade II (Senior Scale) will be promoted to Specialist Grade-I (Rs. 14300-18300). In the Teaching sub cadre Assistant Professor (Rs. 10000-15200) (sic) will be promoted to Associate Professor (Rs. 12000-165000) on completion of 2 (two) years of regular service in the grade of Assistant Professor. Associate Professor with 4 (four) years' of regular service will be promoted to the grade of Professor (Rs. 14300-18300)."

(emphasis supplied)

In para 3 thereof, it is further mentioned that the above mentioned promotions will be made without linkage to vacancies. Other conditions for effecting promotions will be governed by the provisions of the CHS Rules, 1996 and instructions issued by DOP&T from time to time. It has been explained by counsel for the respondents that now all the Associate Professors are granted promotions as Professor

under DACP Scheme only and no regular promotions are made. They continue to perform the same duties but are placed in the next grade of Professor provided they are recommended by the DPC.

10. *This aspect is further clarified because in the promotion order dated 21.12.2006, it is clearly mentioned that on placement in the grade of Rs. 14300-18300 their pay will be fixed under FR 22(1)(a)(2). FR 22(1)(a)(2) for ready reference reads as under:*

“(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time-scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis:

Provided that where the minimum pay of the time-scale of the new post is higher than his pay in respect of the post held by him regularly, he shall draw the minimum as the initial pay:

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time-scale of the old post, in cases where pay is fixed at the higher stage, he shall get his next increment on completion of the period when an increment is earned in the time-scale of the new post.

On appointment on regular basis to such a new post, other than to an ex cadre post on deputation, the Government servant shall have the option, to be exercised within one month from the date of such appointment, for fixation of his pay in the new post with effect from the date of appointment to the new post or with effect from the date of increment in the old post.”

11. *From above, it is clear that on grant of grade Rs. 14300-18300, those Associate Professors who were promoted as Professor were not required to assume duties and responsibilities of greater importance, but were placed in higher grade for assuring time bound career progression without linkage to vacancies. Since this grade is equivalent to the NFSG, respondents had followed DOP&T's instructions where under candidates' overall performance was required to be "Good" with at least 2 "Very Good" gradings.*

12. *This procedure was followed for all in a uniform manner. We have seen the records. Applicant had only one "Very Good" ACR during the last 5 years, therefore, she was not recommended by the DPC. At this juncture, it is relevant to note that promotions in service cannot be sought as a matter of right. A person only has right of consideration. So long as applicants have been considered by the DPC as per the laid down instructions and not found fit, we cannot sit in appeal over the recommendations.*

13. *In view of above, we find no merits in the OAs. The same are accordingly dismissed. No order as to cost.*

14. *Let a copy of this order be placed in the other O.A. also."*

12. The order passed by the Tribunal makes it very clear that the case of the Petitioners were considered for promotion in 2006 and 2007 under the DACP Scheme. Since they did not have two "Very Good" gradings in their ACRs during the past last five years of their service, they were not promoted. Thereafter, on the basis of the DPC which met in the year 2008, they were promoted as they met the eligibility criteria for the grade of Professor.

13. The DACP Scheme – which was introduced in the Department vide notification dated 05.04.2002, is reproduced as under:

“

*No.21/14/97-PC(H)/CHS-V
Government of India
Ministry of Health & Family Welfare
(Department of Health)*

*Nirman Bhawan, New Delhi
Dated the 5th April, 2002*

To

*All Participating Units
Of the Central Health Service.*

Subject: Recommendation of 5th Central Pay Commission regarding Dynamic Assured Career Progression (DACP) Scheme for officers of the Central Health Service – Implementation thereof.

Sir/ Madam,

I am directed to say that the Vth Central Pay Commission in para 52.15 of its report has recommended a Dynamic Assured Career Progression (DACP) Scheme for officers of the Central Health Service (CHS). The matter has been under consideration of Government of India for some time. After careful consideration the Government of India have accepted the recommendation and decided that hereafter in CHS promoting to various grades will be as under:

2. (i) In the Central Duty Medical Officer (GDMO) sub cadre. Medical Officer (Rs. 8000-13500) will be promoted to Senior Medical Officer (Rs. 10000-15200) on completion of 4 (four) years of regular service. Senior Medical Officer with 5(five) years of regular service as Senior Medical Officer will be promoted to the post of Chief Medical Officer (Rs. 12000-16500) and after completion of 4 (four) year in Chief Medical Officer grade, officer will be promoted to the post of Chief Medical Officer (Non Functional Selection Grade) (Rs. 14300-18300). Thus on completion of 13 years of regular service in the GDMO sub cadre of CHS, Officer of GDMO sub cadre will be promoted to Chief Medical Officer (Non Functional Selection Grade) (Rs. 14300-18300).

(ii) *The Specialists officer of the Non Teaching and Public Health sub cadres will be promoted from Specialist Grade II (Junior Scale) (Rs. 10000-15200) to Specialist Grade II (Senior Scale) (Rs. 12000-16500) on completion of 2 (two) years of regular service. Specialist Grade II (Senior Scale) officer with 4 (four) years' regular service as Specialist Grade II (Senior Scale) will be promoted to Specialist Grade I (Rs. 14300-18300). In the Teaching sub cadre Assistant Professor (Rs. 10000-15200) will be promoted to Associate Professor (Rs. 12000-16500) on completion of 2 (two) years of regular service in the grade of Assistant Professor. Associate Professor with 4 (four) years of regular service will be promoted to the grade of Professor (Rs. 14300-18300). In other words, officers of Teaching, Non Teaching and Public Health sub cadres will be promoted to Specialist Grade I/ Professor (Rs. 14300-18300) on completion of 6 (six) years of service. Specialist Grade II (Super Specialities)/ Associate Professor (Super Specialities) in the pay scale of Rs. 12000-16500 will be promoted to Specialist Grade I/ Professor (Rs. 14300-18300) on completion of 4 (four) years of regular service in the grade.*

3. *The above-mentions promotions will be made without linkage to vacancies. Other conditions for effecting promotions will be governed by the provisions of the CHS Rules, 1996 as amended from time to time and Department of Personnel & Training's instructions in this regard.*

4. *The scheme of Dynamic Assured Career Progression shall take effect prospectively from the date of issue of orders.*

5. *This issues with the concurrence of Ministry of Finance (Department of Expenditure) vide their UO No. 69/5/2001-IC dated 26.3.2002.*

6. *The amendments to the Central Health Service Rules, 1996, wherever necessary, consequent upon the above decisions, shall be made in due course.*

Yours faithfully,

Sd/-

(G. K. CHANANA)

DEPUTY SECRETARY TO THE GOVT. OF INDIA"

14. Paragraph 3 of the DACP Scheme makes it very clear that promotions are to be made without linkage to vacancies. Other conditions for effectuating promotions are to be governed by provisions of CHS Rules 1996 – as amended from time to time, and instructions issued by the DoP&T. It was the aforesaid criterion which was required to be considered for the purpose of promotion and considering suitability of an employee for the same under the DACP Scheme. It was a uniform criterion which was made applicable to all employees, including the Petitioners. Since the Petitioners did not have two “Very Good” gradings in their ACRs during the last five years of their service, the Petitioners had not been promoted to the next higher post.

15. Learned counsel for the Petitioners has placed reliance upon the judgment in the case of *Union of India & Others Vs. Lt. Gen. Rajendra Singh Kadyan & Another*, (2000) 6 SCC 698 to substantiate his case. This Court has carefully gone through the judgment delivered in the case of *Lt. Gen. Rajendra Singh Kadyan* (supra) and the said judgment was in reference to an appointment to the post of an Army Commander within the course of regular promotion as envisaged by the relevant rules and provisions governing the same. The aforesaid case was not a case of upgradation under any career progression scheme. The post of Army Commander is a selection post, whereas in the present case, no such category of post is involved. In the present case, the methodology provided that the selection was uniform in respect of all employees. As per the guidelines issued by DoP&T read with Recruitment Rules, the benchmark for promotion to the grade of Professor required at least two “Very Good”

gradings in ACRs of the last 5 years. The Petitioners did not have two “Very Good” grading in the ACRs of the last 5 years when they were considered for promotion in 2006 and 2007. Thus, they were granted promotion only in 2008, when they met the aforesaid eligibility criterion. In the opinion of this Court, the judgment delivered in ***Lt. Gen. Rajendra Singh Kadyan*** (supra) is certainly distinguishable from the facts and circumstances of the present case.

16. Learned counsel for the respondent/ UOI has placed reliance on the Judgment in the case of ***Union of India & Ors. Vs. Pravesh Mehra***, W.P.(C.) No. 7688/2011 decided on 19.11.2012. The issue involved in the aforesaid case was with regards to the date on which the DACP Scheme as recommended by the 5th CPC, was to apply to Dental Surgeons working under the Ministry of Health & Family Welfare/ Central Government. The judgment relied upon is again distinguishable on facts. In the present case, no such dispute is involved.

17. Learned counsel for the respondent/ UOI has also placed reliance on the judgment in ***Ashok Kumar & Another Vs. State of Bihar & Others***, (2017) 4 SCC 357, and his contention is that once the Petitioners have participated in the process of selection, they cannot turn around and challenge the method of selection. The judgment in ***Ashok Kumar*** (supra), in the considered opinion of this Court, is not at all applicable to the facts and circumstances of this case. The Petitioners were considered in the year 2006 and 2007. They were not found fit for promotion to the post of Professor, however, they were found fit for promotion to the post of Professor in the year 2008. Therefore, it does not mean that they cannot

challenge the non-grant of higher pay scale/ promotion to the post of Professor on the basis of the Judgment delivered in the case of *Ashok Kumar* (supra).

18. In the considered opinion of this Court, once the cases of the Petitioners were considered as per the DACP Scheme, and the Petitioners were not able to fulfill the eligibility criterion for promotion, the question of grant of relief to the Petitioners does not arise. This Court is not able to find any illegality or infirmity in the order passed by the Ld. CAT. By no stretch of imagination can it be construed that under the DACP Scheme, an employee/ Associate Professor is entitled to be upgraded to the post of a Professor irrespective of his/her grading in the ACR, in a mechanical manner. There can never be a mechanical manner of upgradation, *de hors* the Recruitment Rules and other relevant provisions governing promotions in service, solely on the basis of completion of number of years of service. In the opinion of this Court, the aforesaid is what the Petitioners are attempting to canvass before us. Therefore, this Court does not find any reason to grant relief to the Petitioners.

19. The writ petition is, accordingly, dismissed.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SUBRAMONIUM PRASAD)
JUDGE

JANUARY 06, 2023

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