

HIGH COURT OF JUDICATUTE AT JABALPUR (M.P.)
SINGLE BENCH : HON'BLE JUSTICE NANDITA DUBEY
WRIT PETITION NO.21583/2015

Dr. Veena Jain
Vs.
State of Madhya Pradesh & others

Shri Anubhav Jain, learned counsel for the petitioner.
Shri S.P. Mishra, learned Govt. Advocate for the
respondents No.1 to 3/State
Shri Abhimanu Singh, learned counsel for respondent
No.4/PSC.
None for respondents No. 5 to 7.

Whether approved for reporting : **Yes**
Law laid down
Significant paragraph numbers : **15 to 20**

ORDER
(14.03.2019)

The petitioner is aggrieved by the order dated 20.10.2015, whereby her juniors, respondents No.5,6 and 7 have been promoted on the post of Class I Officer (Gynecologist).

2. The petitioner's case is that she joined the medical service on 20.07.1998 after clearing the PSC. It is contended that as per the gradation list of 2011 (Annexure P-1), petitioner is senior to private respondents No.5, 6 and

7 as the name of petitioner find place at seniority No.1904 and respondents No. 5, 6 and 7 at seniority No.2083, 2140 and 2169 respectively. The gradation list of 2012, 2013 and 2014 (Annexure P-2) again shows that the petitioner is senior to respondents No.5, 6 and 7.

3. Shri Anubhav Jain, learned counsel appearing for the petitioner has submitted that promotions were due on the post of Gynecologist and Anesthetic. In the list (Annexure P-4) of all the candidates, who were in the zone of consideration for promotion, petitioner's name was at Sl. No.40, whereas respondent No.5, 6 and 7 were at Sl.No.41, 44 and 47 respectively. The promotion in question is from Class II post to Class I post and therefore, as per Rule 4(1) the criteria is seniority subject to fitness, but the Departmental Promotion Committee (DPC) instead of applying the criteria seniority subject to fitness made comparative assessment of the merit by fixing the bench mark for the candidate, which is impermissible, as per the promotion rules. Reliance is placed on **(2006) 6 SCC 698 Union of India Vs. Lt. Gen. Rajendra Singh Kadyan and another, 2016(4) MPLJ 540 S.K. Bhadania and others Vs. M.P. Housing Board and others and**

2009(2) MPLJ 659 Bharat Bhushan Sharma Vs. State of M.P. and others.

4. Per contra, Shri S.P. Mishra, learned Govt. Advocate for respondent No.1 to 3/State has supported the impugned order, it is submitted that the DPC fixed the Bench Mark of minimum 10 marks on the basis of evaluation of the ACRS pertaining to the proceeding 5 years. The petitioner did not achieve the bench mark as she was awarded 9 marks on the basis of her ACRs, hence her name was not recommended for the promotion. It is further submitted that as the private respondents No.5,6 and 7 were found fit on the basis of criteria/Bench mark fixed by the DPC, therefore on the basis of recommendation of the DPC, they were accordingly promoted by the State Government on 20.10.2015.

5. Shri Abhimanu Singh, learned counsel appearing for the respondent No.4/PSC also supported the impugned order. It is submitted that the petitioner was not found fit for promotion because she did not score the requisite 10 marks. It is stated that thereafter the DPC met on 12.08.2013 and 11.08.2015, at that stage also, the

petitioner did not found fit for promotion as she did not score 10 marks, on the consideration of her five years ACRs. However, in furtherance to proceedings of last DPC held on 21.01.2016, she has been promoted to the post of Gynecologist (Class-I).

6. None appeared on behalf of respondents No.5 to 7, though served.

7. No other point is raised by learned counsel for the parties.

8. I have heard the learned counsel for the parties at length and perused the record.

9. Before adverting to the rival contentions, I deem it proper to refer to the relevant Rules the M.P. Public Service (Promotion) Rules, 2002, which prescribed the basis of promotion. The relevant rules are reproduced herein as under:

4. Determination of basis for 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 posts 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”.*

6. Promotion on the basis of seniority subject to fitness :-

- (1) *In such cases where the promotion is to be made on the basis of seniority subject to fitness, there shall be no zone of consideration for all categories.*
- (2) *The names of only such public servant shall be considered for promotion, who have completed the prescribed qualifying service in their feeder case/part of the service/pay scale of post according to the Recruitment Rules. It is, however, not necessary to consider all the names of public servant who have completed the prescribed minimum length of service but only such number of cases of public servant shall be considered according to the seniority which shall be sufficient to cover the number of existing and anticipated vacancies due to the retirement during the year under each category. In addition to this, with a view of inclusion, in the select list, the names of two public servant or 25 percent of the number of public servant included in select list whichever is more, the names of the required number of the public servant shall be considered for each category to fill up the unforeseen vacancies occurring during the course of the aforesaid period.*

Explanation : Manner of computation for eligibility for promotion – period of qualifying service on 1st January of the relevant year in which Departmental Promotion Committee is convened shall be counted from the calender year in which the public servant has joined the feeding cadre/part of the service/pay

scale of the post ant from the date of joining of the cadre/part of the service/pay scale of post.

- (3) the number of vacancies for promotion during the course of the year i.e., from 1st January to 31st December shall be worked out after taking into account the existing and anticipated vacancies on account of retirement and promotion to higher cadres/part of the service/higher pay scales of posts. Vacancies arising out of deputation for period exceeding one year shall also be taken into account. The number of vacancies shall be worked out on the basis of the roster which is required to be maintained in accordance with the provisions of rule of these rules.*
- (4) The meeting of the Departmental Promotion Committee shall be held every year. It shall consider the suitability of the public servants for promotion separately with reference to the vacancies of each year starting with the earliest year onwards. The Departmental Promotion Committee shall consider the suitability of the public servants for promotion to fill up the unfilled vacancies of the earlier year or years separately and prepare the select list for the relevant year accordingly. Thereafter, the Departmental Promotion Committee shall consider the suitability of the public servants for promotion to fill up the existing and anticipated vacancies of the current year.*
- (5) The Departmental Promotion Committee shall assess the suitability of the public servants for promotion on the basis of their service record and with particular reference to the Annual Confidential Reports (ACRs) for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the Departmental Promotion Committee shall see the record with particular reference to the ACRs for the years equal to the required qualifying service.*

- (6) *When one or more ACRs are not available for any reason for the relevant period, the Departmental Promotion Committee shall consider the ACRs of the years preceding the period in question.*
- (7) *For filling up the posts by this method, the Departmental Promotion Committee shall consider the case of each public servant separately on the basis of his own merit, that is to say that there shall be no need to make a comparative assessment of the merits of public servant. The Departmental Promotion Committee shall consider the records of each public servant separately and shall categorize them 'fit' or 'not fit'.*
- (8) *Separate select lists shall be prepared for the public servants of unreserved category. Scheduled Castes and Scheduled Tribes category in which the names of such number of public servants belonging to unreserved category, Scheduled Castes and Scheduled Tribes category shall be included which is equal to the number of posts reserved for each of these categories. In addition to this, names of two public servants or twenty five percent of the number of public servants included in the select list whichever is more, will also be included in the select list of each category as prescribed in sub rule (2).*
- (9) *The names of public servants included in each list shall be arranged in the same order of their seniority as they existed in the cadre/part of the service/pay scale of post from which promotion is to be made.*
- (10) *The promotion of public servants shall be made from these separate select lists according to their seniority in the feeder cadre/part of the service/pay scale of post and according to the prescribed order shown in the roster.*

10. A bare perusal of Rules 4 says that the basis of promotion from Class II to class I post shall be Seniority

Subject to Fitness. Rule 6 of 2002 Promotion Rules provides that whether promotion is to be made on the basis of Seniority Subject to Fitness. There shall be no zone of consideration for all categories. Sub clause (2) says that the names of only those public servants shall be considered for promotion who have completed the prescribed qualifying service in their feeder cadre according to the Recruitment Rules. Sub clause (5) prescribes that the suitability of the candidates be assessed on the basis of their service record and with particular reference to the ACRs for 5 preceding years. Sub clause (7) provides for filling up the posts by this method, the Departmental Promotion Committee shall consider the case of each public servants separately on the basis of his own merit, that is to say, that there shall be no need to make a comparative assessment of merits of the public service servant. The Departmental Promotion Committee shall consider the records of each public servant separately and shall categorize them as 'fit' or 'not fit'.

11. A comparative chart of petitioner and respondents No. 5, 6 and 7 from the year 2011 to 2015 is reproduced herein as under for ready reference:

Final Gradation list as on 01.04.2011

Gradation No.	Name	PG Qualification	PG year	DOJ on service	PSC year
1904	Dr. Veena Jain, Petitioner	MS (Gynac & Obst.)	2007	20.07.98	1996
2083	Dr. Rashmi Kurariya, Respondent No.5.	Diplama (Gynac & Obst.)	2007	07.02.01	2000
2140	Dr. Neeta Parashar Respondent No.6	Diploma (Optho.), MS (Gynac & Obst.)	1991 2009	15.02.01	2000
2169	Dr. Bhavna Mishra, Respondent No.7.	Diplama (Gynac & Obst.)	2007	07.02.01	2000

Final Gradation list as on 01.04.2012

Gradation No.	Name	PG Qualification	PG year	DOJ on service	PSC year
1590	Dr. Veena Jain, Petitioner	MS (Gynac & Obst.)	2007	20.07.98	1996
1754	Dr. Rashmi Kurariya, Respondent No.5.	Diplama (Gynac & Obst.)	2007	07.02.01	2000
1807	Dr. Neeta Parashar Respondent No.6	Diploma (Optho), MS (Gynac & Obst.)	1991 2009	15.02.01	2000
1834	Dr. Bhavna Mishra, Respondent No.7.	Diplama (Gynac & Obst.)	2007	07.02.01	2000

Final Gradation list as on 01.04.2014

Gradation No.	Name	PG Qualification	PG year	DOJ on service	PSC year
---------------	------	------------------	---------	----------------	----------

942	Dr. Veena Jain, Petitioner	MS (Gynac & Obst.)	2007	20.07.98	1996
1062	Dr. Rashmi Kurariya, Respondent No.5.	Diplama (Gynac & Obst.)	2007	07.02.01	2000
1111	Dr. Neeta Parashar Respondent No.6	Diploma (Optho), MS(Gynac & Obst.)	1991 2009	15.02.01	2000
1134	Dr. Bhavna Mishra, Respondent No.7.	Diplama (Gynac & Obst.)	2007	07.02.01	2000

Final Gradation list as on 01.04.2015

Gradation No.	Name	PG Qualification	PG year	DOJ on service	PSC year
40	Dr. Veena Jain, Petitioner	MS (Gynac & Obst.)	2007	20.07.98	1996
41	Dr. Rashmi Kurariya, Respondent No.5.	Diplama (Gynac & Obst.)	2007	07.02.01	2000
44	Dr. Neeta Parashar Respondent No.6	Diploma (Optho), MS(Gynac & Obst.)	1991 2009	15.02.01	2000
47	Dr. Bhavna Mishra, Respondent No.7.	Diplama (Gynac & Obst.)	2007	07.02.01	2000

12. Vide letter dated 21.01.2015, list of names of medical officers due for promotion was sent, asking about any action taken against any of them. In this list, the petitioner's name was at Sl. No.40 and respondent No.5, 6 and 7 were at Sl. No. 41, 44 and 47 respectively. It is

apparent from the list (Annexure P-3) that against the name of petitioner, there was no adverse remark.

13. The minutes of the meeting of the Departmental Promotion Committee convened on 13.04.2012, obtained by the petitioner under the Right to Information Act shows that the Promotion Rules 2002 were made applicable and the criteria for promotion was Seniority Subject to Fitness of those public servants/medical officers having 5 years experience as Medical officer, after obtaining the post graduate degree in speciality or seven years experience as Medical Officer after obtaining post graduate Diploma in speciality from recognized University. For the purpose of seniority, the gradation list, showing the position as on 01.04.2011 was made the basis. It is reflected that the petitioner's name was not considered as she was found lacking in prescribed qualifying service, i.e., 5 years experience as Medical Officer after obtaining post graduate degree in speciality.

14. In the subsequent Departmental Promotion Committee meeting held on 11.08.2015, the final gradation list of medical officers showing seniority as on 01.04.2013

was made the basis and the Promotion Rules 2002 were made applicable and the criteria was again Seniority Subject to Fitness. In this meeting, the petitioner was senior to respondents No. 5, 6 and 7, as apparent from the aforementioned chart, however, her case was again rejected, even though she was senior and better qualified than respondents No. 5, 6 and 7.

15. As per Rule 6 (5) and (7) of the 2002 Rules, the Departmental Promotion Committee needs to categorize the candidate as 'fit' or 'not fit', the meaning of fitness has been considered by the Supreme Court in **1991 Supp. (2) SCC 635, Dharam Vir Singh Tomar Vs. Administrator, Delhi Administration and others** and the Supreme Court has observed :

“It is obvious from the clarification issued by the Director of Education dated 4th April, 1973, Annexure 'AA' (page 22) that Selection Grade to teachers was to be given on the basis of seniority, subject to fitness. The expression 'fitness' means that there should not be any adverse entry in the Character Rolls of the concerned person at least for the last three years and no disciplinary proceedings should be pending against him. So far as the appellant is concerned indisputably there was no adverse entry in his C.Rs. nor was any disciplinary proceeding pending against him at the relevant point of time. Therefore, he was clearly fit to be

placed in the Selection Grade and since he was senior to respondent No.6, it is difficult to understand how his claim was by-passed.”

16. In the present case, also admittedly there was no adverse entry in the remark column of gradation list nor any departmental proceedings were pending against the petitioner, as reflected from Annexure P-3, in such circumstances, the petitioner could not have been denied the promotion.

17. The respondent No.4/PSC in para 3 of its reply has stated that the Departmental Promotion Committee, which met on 11.08.2015, fixed the Bench Mark of minimum 10 marks, on the basis of evaluation of ACRs of preceding 5 years. The Departmental Promotion Committee was authorized to evaluate the record of each candidate with particular reference to the ACRs and in the case of petitioner, the Departmental Promotion Committee has 'downgraded' the ACR of the petitioner, pertaining to the year 2013 from 'Ka' to 'Kha', reducing one mark and accordingly awarded her 9 marks, therefore, she could not achieve the bench mark as fixed by the Departmental

Promotion Committee and her name was not recommended for promotion.

18. In the present case, the fitness is determined on the basis of of bench mark, on various aspects as awarded contained in the ACRS of the medical officers. It is also reflected from the record that despite applying for her ACRs under the Right to Information Act, the same was not supplied to the petitioner. Once, the final authority has marked the grade of the medical officer, the downgrading of the performance of the petitioner in the ACR of the year 2013 by the Departmental Promotion Committee is not valid as the same is done without any authority or competency. Downgrading the ACR from 'Ka 'to 'Kha' has deprived the petitioner from her right of promotion to the post in question. Had this downgrading from 'Ka' to 'Kha' not done, the petitioner would have obtained 10 marks. Hence, the said downgrading of ACR of the year 2013 of the petitioner is illegal and invalid.

19. Further, this downgrading is done without assigning any reason, whatsoever and without communicating the same to the petitioner. It is through the

reply of respondent No.4/PSC that the said fact has been brought to the light for the first time. The overall grading of the ACRS as has been based upon the observation made by the reporting authority, reviewing authority and the final accepting authority. If the ACR of the petitioner is to be used for the purpose of denying promotion, then such ACR was required to be communicated to her, to enable her to make representation against the adverse entry made in the ACR. The criteria for promotion in the present case is Seniority Subject to Fitness. The fitness as held by the supreme Court in the case of **Dharam Vir Singh** (supra), means that no adverse entry or remarks is made in the ACR. It is apparent from the record that there was no adverse entry about any pending departmental enquiry in the remark column of petitioner as evident from the reply to the letter dated 21.01.2015.

20. Under the circumstances, without any material before it, the DPC could not have downgraded the entry in the ACR from 'Ka' to 'Kha'. Moreover, there is no provision in the Promotion Rules 2002 permitting the Departmental Promotion Committee to rewrite the ACR for the purpose of downgrading. The procedure adopted by the Departmental

Promotion Committee in the instant case is contrary to the provisions of law and beyond the power of Departmental Promotion Committee. It is, thus, clear that downgrading the ACR of the petitioner from 'Ka' to 'Kha' was made only with the intent to throw her out from the zone of consideration for promotion and to consider respondents No. 5, 6 and 7, who are junior and less qualified than the petitioner.

21. It is stated by the respondent No.4/PSC that in furtherance to the meeting of the Departmental Promotion Committee held on 21.01.2016, the petitioner has been promoted to the post of Gynecologist. It is pertinent to mention that this promotion has been granted on the basis of the very ACR which was the reason for rejection of her claim in 2015, making it clear that earlier rejection was done with malafide intent.

22. As a result, this writ petition is allowed. It is, therefore, directed that respondent authorities shall issue a fresh order of promotion to the petitioner from the date her juniors, i.e., respondents No. 5 to 7 were promoted. The

petitioner will also be entitled to all the benefits from that date.

23. With the aforesaid direction, this writ petition shall stand allowed.

(Nandita Dubey)
Judge

gn