

Principal Bench

New Delhi, dated this the 10<sup>th</sup> ~~January~~ February, 1997

HON'BLE MR. S.R. ADIGE, MEMBER (A)  
HON'BLE DR. A. VEDAVALLI, MEMBER (J)

O.A. No., 716 of 1991

Dr. S. Akhtar,  
Associate Professor,  
Anaesthesiology,  
Maulana Azad Medical College,  
186, Rouse Avenue,  
New Delhi. .... APPLICANT

(By Advocate: Shri Ajit Puddiserry)

VERSUS

Union of India  
through the Secretary,  
Ministry of Health & F.W.,  
Nirman Bhawan,  
New Delhi. .... RESPONDENTS

(By Advocate: Mrs. Raj Kumari Chopra)

O.A. No. 720 of 1991 ✓

Dr. S. Munshi,  
Associate Professor,  
Anaesthesiology,  
Maulana Azad Medical College,  
No.3, Wardens Flat,  
M.A.M.C. Campus,  
New Delhi. .... APPLICANT

(By Advocate: Shri Ajit Puddiserry)

VERSUS

Union of India through  
the Secretary,  
Ministry of Health & F.W.,  
Nirman Bhawan,  
New Delhi. .... RESPONDENTS

(By Advocate: Mrs. Raj Kumari Chopra)

J U D G M E N T

BY HON'BLE MR. S.R. ADIGE, MEMBER (A)

As both these O.As involve common question of law and fact they are being disposed of by this common judgment.

2. Applicants seek quashing of the impugned orders dated 5.12.90 (Ann. F) and for promotion to the Non Functional Selection of Rs.4500-5700 (NMSG) /from the earliest date the applicants

became available for the same with payment of arrears.

3. Applicants who completed their MBBS in 1961 and 1966 respectively and MD in 1973 and 1974 respectively were selected by UPSC as lecturers in the teaching sub-cadre of CHS w.e.f. 13.1.79 and 7.3.80 respectively. Subsequently with the coming into force of C.H.S. Rules w.e.f. 11.11.82 the post of lecturers (Gr. II Rs.1100-2800/-) was redesignated as Asst. Professor w.e.f. 1.1.83. Applicants were promoted as Associate Professors on seniority-cum-fitness basis by D.P.C. w.e.f. 5.8.86 and 24.6.87 respectively and were confirmed on their post in Anaesthesiology Speciality of Maulana Azad Medical College. Following C.G.H.S. doctors agitation in 1987, Govt. announced a package of incentives whereby Associate Professors in the scale of Rs.3700-5700 were to be placed in the functional scale of Rs.4500-6700 on seniority-cum-fitness basis after 6 years of regular service as Associate Professor or 9 years of combined service in case they did not get promotion earlier (Ann. A). To implement the said package, vide GSR 128 E dated 27.2.89, the C.H.S. Rules were amended which provided that Associate Professors with 6 years regular service in the grade would be entitled to placement in NFSG on seniority-cum-fitness basis (Ann. B).

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In implementing the above clause, a number of orders were issued from time to time granting placement in NFSG. According to the applicants the earliest order is dated 7.10.88 and the latest is dated 5.3.91 (Ann. C). Pursuant to these orders, persons junior to the applicants were promoted thereby superceding the applicants, against which the applicants filed representations which were rejected which have led to these O.As.

4. Respondents' counsel Mrs. Chopra has stated that both applicants were repeatedly considered for promotion to NFSG in D.P.Cs held on 28.2.90, 25.9.90; 1.4.91 and 24.12.91. Applicant Dr. Munshi was eventually promoted to NFSG w.e.f. 24.12.91 while applicant Dr. Akhtar was promoted w.e.f. 30.11.93.

5. In this connection attention has been invited to DOPT's O.M. dated 9.10.89 which stipulates that officers considered for NFSG should have at least 2 (two) 'Very Good' gradings in the CRs for the preceding 5 years and their overall performance should have been graded atleast 'good'. Mrs. Chopra has stated that the DPC did not recommend the applicants for promotion to NFSG earlier as they did not fulfil the above criteria.

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6. On the other hand applicants' Counsel Shri Puddiserry has urged that as the amendments to the CHS Rules, 1982 vide Notification No. GSR 128 (E) dated 27.2.89 were framed under Article 309 of the Constitution and the method of recruitment of Associate Prof. (NSFG) is by promotion on the basis of seniority-cum-fitness from amongst Associate Professors with 6 years regular service in the grade, these promotions are required to be made <sup>by new selection method</sup> strictly in accordance with seniority, rejecting only those who are found to be unfit, and to the extent that O.M. dated 9.10.89 violates the statutory rules dated 27.2.89 it is bad in law, and cannot be allowed to prevail over those rules. Reliance is placed on State of Mysore & Anr. Vs. S. Mahmood & Ors, 1968 (3) SCC 363 wherein relying upon an earlier judgment of the Hon'ble Supreme Court in State of Mysore Vs. H.M. Bellary (1964) 7 SCR 471 respondents' counsel had argued that even in the case of promotion based on seniority-cum-merit, an officer was entitled to promotion by virtue of seniority alone. Reliance was also placed on the Hon'ble Supreme Court's judgments in Dt. Registrar, Palghat & Ors. Vs. M.M. Koyakutty & Ors. (1979) 2 SCC 150 and State of Sikkim Vs. D.T. Bhutia & Ors. JT 1997 (3) SC 456 on the point that executive instructions could supplement, but not supercede or superimpose upon Statutory rules, and SC Jain Vs. State of Haryana & Ors. (1985) 4 SCC 645 on the point that a special

rule, which in this case is the statutory rule<sup>1</sup> notified vide GSR No. 128 (E) dated would prevail over the <sup>general instructions</sup> ~~several rules~~ (DOPT's O.M. dated 9.10.89).

7. We have considered the rival contentions carefully.

8. G.S.R. No.128(E) dated 27.2.89 does not provide that promotion to posts of Associate Professor (NFSG) be made by seniority alone. It does not even provide that promotion is to be made by seniority, subject to rejection of the unfit. It expressly provides that promotion is to be made by seniority-cum-fitness, which means that the aspirant has to be senior enough as well as fit enough to be promoted. Under the circumstances, if by DOPT's O.M. dated 9.10.89 a threshold level to adjudge fitness is provided, and those who cross that threshold are promoted strictly in accordance with their seniority, in our view it cannot be said that it offends the provisions of GSR No. 128(E) dated 27.2.89. If anything, such a bench mark provides a permanent, objective, and uniform yardstick to the DPC, to adjudge fitness and helps eliminate arbitrariness, subjectivism and varying standards, in determining who is fit and who is not yet fit for promotion.

9. It must also be remembered that a Govt. employee has only a legally enforceable right to be considered for promotion. He has no

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legal right to be promoted. In the present case, it is not denied that both applicants were considered by a regularly constituted DPC more than once for promotion, and they were promoted when the DPC found them fit for promotion in accordance with the statutory rules contained in GSR No. 128(E) dated 27.2.89 read with DOPT's O.M. dated 9.10.89.

10. In the above background, the arguments and rulings relied upon by applicants' counsel do not advance the claims of the applicants. It is relevant to mention here that in Syed Mahmood's Case (Supra) their Lordships of the Hon'ble Supreme Court negated the argument that in the case of promotion based on seniority-cum-merit, an officer was entitled to be promoted on the basis of seniority alone, and held that if he was found unfit to discharge the duties of the higher post he may be passed over and an officer junior to him may be appointed.

11. In the result we see no good reasons to intervene judicially in these two O.As. They fail and are dismissed. No costs.

12. Let copies of this order be placed in both O.A. case record.

(Dr. A. Vedavalli)  
Member (J)

(S.R. Adige)  
Member (A)

/GK/  
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