

**Central Administrative Tribunal
Principal Bench**

**OA No.604/2014
with
OA No.238/2015**

Reserved on : 19.01.2017
Pronounced on : 23.05.2017

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Ms. Nita Chowdhury, Member (A)**

1. OA No.604/2014

Dr. Yoginder Gupta
S/o Late Jagan Nath,
Aged about 47 years,
R/o 26, Anuradha Apartment,
A-2 Paschim Vihar,
New Delhi 110 063.

Presently working as Medical Specialist &
Head of Department of
Medicine at Bhagwan Mahavir Hospital,
Govt. of NCT of Delhi,
Pitampura, Delhi 110 034. ... Applicant.

(By Advocate : Ms. Aishwarya Bhati with Shri Jaideep Singh, Shri
Dilip Nayak and Ms. Tanuja S. Patra)

Vs.

1. Govt. of NCT of Delhi through its Secretary
Department of Health and Family Welfare
9th Level, 'A' Wing, Delhi Secretariat
I.P. Estate, New Delhi-110002.
2. The Director, Directorate of Health Services
Government of NCT of Delhi, F-17
Karkardooma, Delhi-110032.
3. Union Public Service Commission through
Secretary, Dholpur House, Shahjahan Road
New Delhi-110069. ..Respondents

(By Advocate: Shri Vijay Pandita)

2. OA No.238/2015

1. Dr. Anupma Singh, D/o Mr. I.P. Singh
W/o Dr. Vikash Chopra, Aged about 41 years
R/o B-79, First Floor, Sector 44
Noida, Uttar Pradesh presently posted at Lal Bahadur Shastri Hospital Govt. of NCT of Delhi.
2. Dr. Deepti Mittal, W/o Dr. Arun Kumar Aggarwal
Aged about 47 years, R/o Vidya Sagar Apartment
Plot No.34, Flat No.50, Sector 6, Dwarka
New Delhi presently posted at DGHC Rajnagar II SWD.
3. Dr. Dinesh Chawla, S/o Mr. Ved Parkash Chawla
Aged about 42 years, R/o B-301, Anant Apartments
Plot 25A, Sector-4, Dwarka, New Delhi presently posted
At DGHC Pandwala Kalan DHS (SWD)
4. Dr. Kamna Agarwal, W/o Dr. N.V. Singh
Aged about 35 years, R/o 545, Ground Floor
Sector 17, Pocket A, Dwarka, New Delhi
Presently posted at DGHC, Sec-12, Dwarka
CDMO SWD, New Delhi.
5. Dr. Krishna Bharadwaj, W/o Dr. Girish Bharadwaj
Aged about 53 years, R/o House No.293
Ambika Vihar, New Delhi, presently posted at
DGD Bakkarwala DHS (WD)
6. Dr. Manoj Kumar Prasad, S/o Mr. Narendra Prasad
Aged about 50 years, R/o R-Z-A/257, Dayal Park
Gali No.6, West Sagarpur, New Delhi-110046
Presently posted at DGHC Sagarpur NDD
7. Dr. Ram Chandra, S/o Mr. Heera Lal
Aged about 55 years, R/o C/o Madhu Shaw
10885, Idgah Baptist Church Comp., Idgah Road
New Delhi, presently posted at DDU Hospital,
Hari Nagar, New Delhi.
8. Dr. Ravindra Narayan Das, S/o Mr. G.N. Das
Aged about 48 years, R/o 64, Sita Ram Apartment
Plot No. 102, I.P. Extension, Delhi, presently
Posted at Nursing Home Cell, Directorate of
Health Services, F-17, Karkardooma, Delhi.

9. Dr. Rohit Agarwal, S/o Mr. V.K. Agarwal
Aged about 44 years, R/o B-1/1847, Vasant Kunj
New Delhi presently posted at Achalya Shree Bhikshe
Govt. Hospital Moti Nagar, New Delhi.
10. Dr. Savita Saini, W/o Dr. Anil Kumar Saini
Aged about 48 years, R/o 41-A, GH-10
Sunder Apartments, Paschim Vihar, New Delhi
Presently posted at DGD Tilangpurkotca DHS (WD)
11. Dr. Seema, D/o Mr. Gourishanker
Aged about 43 years, R/o Shiv Mandir, Lucknow Road
(Near MCD School), Timarpur, Delhi, presently
Posted at Casualty Incharge, I/C Surgical Store
12. Dr. P.S. Sarangi, S/o Late B.B. Sarangi
Aged about 53 years, R/o B-II/304, Param Puneet
Apartments, Plot No.27, Sector-6, Dwarka
New Delhi, presently posted at D.D.U. Hospital
Harinagar, New Delhi.
13. Dr. Vijay Kumar, S/o Mr. Shyam Lal Thakur
Aged about 47 years, R/o A-603, Express Green
Apartment, Plot D-10, Sector 44, Noida, Uttar Pradesh
Presently posted at Lal Bahadur Shastri Hospital, Delhi
14. Dr. Anuradha Khanna, W/o Dr. Ashwani Khanna
Aged about 51 years, R/o E-202, Greater Kailash-I
New Delhi presently posted at Aruna Asaf Ali Hospital
15. Dr. Poonam Taneja, W/o Dr. N.K. Taneja
Aged about 47 years, R/o C-1/156, Second Floor
Janakpuri, Delhi presently posted at Dr. B.S.A. Hospital
Rohini, Govt. of NCT of Delhi.
16. Dr. Vandana Chugh, W/o Dr. Deepak Bhasin, Aged
About 43 years, R/o 32C, Citizen Enclave
Extension Sector 14, Rohini, Delhi, presently posted
At Dr. Baba Saheb Ambedkar Hospital, Rohini
Govt. of NCT of Delhi.
17. Dr. Vivek Ranjan, S/o Late Jagannath Prasad
Aged about 58 years, R/o 310, Manchahat
Apartments, Plot 42, Sector 10, Dwarka, New Delhi
Presently posted at Rao Tula Ram Memorial Hospital

Jaffarpur Kalan, New Delhi.

18. Dr. Bhavesh Kumar, S/o Late Krishan Kumar
R/o EC-249, Maya Enclave, New Delhi
Presently posted at Rao Tula Ram Memorial Hospital
Jaffarpur Kalan, New Delhi.
19. Dr. Kavita Goyal, D/o Mr. S.B. Aggarwal
W/o Mr. C.P. Goyal, Aged about 46 years
R/o B-89, Second Floor, Gulmohar Park
New Delhi presently posted at Lok Nayak Hospital
New Delhi.
20. Dr. Mani Shankar, S/o Mr. Ram Chander Pandit
Aged about 36 years, R/o 1-12, Indraprastha
Apartment, Plot No.114, I.P. Extension, Patparganj
New Delhi, presently posted at Medical & Health
Center, Delhi High Court, Sher Shah Road
New Delhi.
21. Dr. Mamta Pandey, W/o Mr. Bharat Pandey
Aged about 48 years, R/o B-104/1
Western Avenue, Maharani Bagh, New Delhi
Presently posted at Sardar Vallabh Bhai Patel
Hospital, Patel Nagar, New Delhi.
22. Dr. Anil Kumar/ S/o Mr. Mahipal
Aged about 47 years, R/o 11/240, Vasundra
Ghaziabad, Uttar Pradesh, presently posted
At Jag Pravesh Chandra Hospital, Shastri Park
Delhi.
23. Dr. Ranjana Gupta, W/o Dr. R.K. Gupta
Aged about 58 years, R/o E-106, Gaur Green
Avenue, Abhay Khand-II, Indirapuram
Ghazibabad, Uttar Pradesh, presently posted
At J.P.C. Hospital, Shastri Park, Delhi.
24. Dr. Urvashi Razdam, W/o Mr. Kuldeep Koul
Aged about 45 years, R/o A-241/23
Surya Nagar, Ghaziabad, Uttar Pradesh
Presently posted at J.P.C. Hospital, Shastri
Park, Delhi.
25. Dr. Rashmi Jain, W/o Dr. Hemant Jain

Aged about 42 years R/o 71, Veernagar
 Jain Colony, Near Rana Pratap Bagh
 G.T. Karnal Road, Delhi presently posted
 at Sardar Vallabh Bhai Patel Hospital
 Patel Nagar, Delhi.

26. Dr. Saurabh Narayan, S/o Mr. Sudhir Kumar Narayan, Aged about 40 years
 R/o Flat No.A2/101, Printer's Apartment Sector 12, Rohini, New Delhi presently Posted at Dr. Baba Saheb Ambedkar Hospital Sector 6, Rohini, New Delhi.
27. Dr. Ritu Saxena, D/o Mr. Surendra Saxena
 Aged about 45 years, R/o Flat No.272
 Gulmohar Enclave, DDA SFS Flat
 New Delhi, presently posted at Pt. Madan Mohan Malviya Hospital, Malviya Nagar
 New Delhi.
28. Dr. Anil Yadav, S/o Mr. Ram Jiwan Yadav
 Aged about 37 years, R/o 565, Sector 10
 Gurgaon, Haryana, presently posted
 At Rao Tula Ram Memorial Hospital
 Jaffarpur Kalan, New Delhi.
29. Dr. Rajiv Ranjan Kumar, S/o Late Shree Ambika Garain, Aged about 53 years
 R/o Q No.4, Type-V, Dr. B.S.A. Hospital Residential Complex, Sector 6, Rohini, Delhi
 Presently posted at Dr. B.S.A. Hospital
 Rohini, Delhi.
30. Dr. Vevok Rana, S/o Late Dr. R.S. Rana
 Aged about 50 years, R/o B.G. 40
 Shalimar Bagh (East), Delhi, presently
 Posted at Dr. B.S. Ambedkar Hospital
 Rohini, Delhi. ..Applicants

(By Advocates: Shri S.B. Upadhyay, Sr. Counsel with Shri Jaideep Singh, Ms. Kumud lata Das, Ms. Tanuja S. Patra, Shri Dilip Nayak, Ms. Aishwarya Bhat and Shri Nishant Kumar)

Versus

1. Govt. of NCT of Delhi through its Secretary
Department of Health and Family Welfare
9th Level, 'A' Wing, Delhi Secretariat
I.P. Estate, New Delhi-110002.
2. The Director, Directorate of Health Services
Government of NCT of Delhi, F-17
Karkardooma, Delhi-110032.
3. Union Public Service Commission through
Secretary, Dholpur House, Shahjahan Road
New Delhi-110069. ..Respondents

(By Advocates: Shri N.K. Singh for Ms. Avnish Ahlawat, Shri Naresh Kaushik in the OA and Shri Shri Ajesh Luthra for Intervenor in MA No.3239/2016 & 3082/2016.)

: O R D E R :

Justice Permod Kohli, Chairman:

The issues being common, both these OAs (OA No.604/2014 & OA No.238/2015) are being disposed of by this common order.

2. Following reliefs are claimed in OA No.238/2015 (Dr. Anupama Singh & Ors. vs. Govt. of NCT of Delhi & Ors.):-

“a) direct the Respondents to consider the length of services rendered by the Applicants and consequently grant them seniority and other consequential benefits entitled to them, from the date of their initial appointment;

b) direct the respondents to grant permanent status to the Applicants from the date of their initial/first appointment and accordingly grant them service and seniority;

c) set-aside the notification dated 20.08.2014 (Annexure A-1) by Govt. of NCT of Delhi granting seniority to the Applicants from the year 23.12.2009.”

3. These Applications are based upon certain admitted facts.

Briefly stated, the facts are:-

The Government of National Capital Territory of Delhi (GNCTD) came into existence in 1992. A number of Hospitals, Dispensaries and Health Centres were created and some existing hospitals were also placed under GNCTD for providing health services to the residents of Delhi. There were no cadres of Doctors of Delhi Government. The Doctors were either borrowed from Central Health Services (hereinafter referred to as CHS) or their engagements made on contract basis annually. It is stated that the engagement of Doctors on contract basis was after due assessment of the candidates at the level equivalent to those who are appointed in regular CHS Cadre.

In the year 1998, some of the contractual Doctors filed OA No.2564/1997 with OA No.2984/1997 and other OAs claiming same pay scales of Junior Medical Officers, and also benefits like Leave, Provident Fund, Medical Attendance etc., as admissible to regularly appointed Doctors under CHS. Their grievance was that they were given only consolidated pay of Rs.6000/- per month. Their Further claim was that their initial recruitment being through public advertisement and selection, they are entitled to the same pay scale and benefits as granted to regularly appointed Junior Medical

Officers (hereinafter referred to as JMOs). The Tribunal vide its judgment dated 23.04.1998 issued following directions:-

“13. In the result the aforesaid OAs are allowed. The respondents shall grant the applicants the same pay scale and allowances and also the same benefits of leave increment on completion of one year maternity leave and other benefits of service conditions as are admissible to Medical officer’s appointment on regular basis in the corresponding pay scales. Notwithstanding the break of one of two days in service in their contract they shall be deemed to have continued in service from the date of their first appointment full regular appointments are made to the respondents to these posts in accordance with the extant rules and instructions in the circumstances of the case respondents shall also consider giving age relaxation to the applicants in accordance all the rules if they are candidates before UPSC for regular appointment to the extent of the number of years of service rendered on contract/ad hoc basis.

The aforesaid 9 OAs are allowed with the above directions to the respondents to implement the order within three months from the date of its receipt. No order as to costs. A copy of this order be kept in each of this aforementioned files.”

In the year 2006, GNCT of Delhi decided to constitute its own health cadre. A Cabinet Decision No.1139 was taken on 13.11.2006 for formation of the new service, namely, “Delhi Health Services” for managing health delivery in NCT of Delhi. The relevant extract of the Cabinet Note is reproduced hereunder:-

“1. Until 1996 the requirements of doctors for the purpose of operation and maintenance of health delivery in the NCT of Delhi were being met exclusively from the Central Health Service Cadre. In mid 90s the Central Government had stopped the process of encadrement of new posts that were created by the Lieutenant Governor of NCT of Delhi

to meet the growing requirement of health delivery. As a result a large number of such posts remained outside the Central Health Service cadre. This resulted in practical difficulties in managing the health services in NCT of Delhi. Under these circumstances the Ministry of Health and Family Welfare suggested to the Government of NCT of Delhi to fill the vacant posts by making contract appointment.

2. As on date the Government of NCT of Delhi has 1174 sanctioned posts of General Duty Medical Officers (GDMOs), 410 Non-Teaching Specialist, 349 Teaching Specialist and 04 Public Health Specialists as against which 438 posts of General Duty Medical Officers and 242 posts of Non-Teaching Specialist area being operated as ex-cadre posts. In accordance with the suggestions of Ministry of Health and Family Welfare, contract appointment have been made against 418 posts of General Duty Medical Officers and 252 posts of Non-Teaching Specialists. Even after making appointments against the ex-cadre posts, the Department is short of 238 General Duty Medical Officers and 53 Non-Teaching Specialists.

3. The continuing uncertainty over the fate of contract appointee and declining supply of manpower required for expanding the health delivery infrastructure in NCT of Delhi is adversely impacting the quality of Health service. A number of health centers/hospital that have been opened in the recent past are not working to their full potential, as a result the residents of Delhi are not able to get the full benefits from expanded infrastructures. A list of hospital working under the Government of NCT of Delhi is enclosed as Annexure A.

4. On 26.04.2006 a meeting was held between the officers of the Government of NCT of Delhi and the Ministry of Health and Family Welfare, Government of India wherein it was decided that a practical solution to the current impasse lies in requesting the Government of NCT of Delhi to form its own cadre of doctors. This would relieve the Central Government of the responsibility of servicing the requirements of NCT of Delhi from the Central Health Services Cadre on one hand and empower the Government of NCT of

Delhi to over-come current difficulties that are being faced by it in organizing/re-organizing the health services.

5. At official level it was agreed that the initial constitution of the new service would be drawn from two sources:-

- (a) Members of the CHS who opt to be a part of the new service being proposed.
- (b) Individuals who have been appointed by the Government of Delhi on contract basis against ex-cadre posts from the year 1995-96 onwards as per the advice of the Ministry of Health and Family Welfare. A copy of D.O. letter No.C/18011/1/97-CHS/III (Pt.) dated 10th May, 1999 from Smt. Renu Sahni Dhar, then Joint Secretary in the Ministry of Health and Family Welfare is enclosed as Annexure-B.”
- (c) As regards the future management of the new service, it was also agreed that the Ministry will not fill the vacant posts of General Duty Medical Officers and Non-Teaching Specialists cadre and instead transfer the vacant posts to the cadre being proposed for Delhi.”

Following proposal was placed for approval of the Council of

Ministers:-

“11. The Council of Ministers may kindly approve the following proposal:-

- (a) To create a new service known as “Delhi Health Service” and to initiate the process of forming the new service.
- (b) Approve the proposal contained in paras 5 and 8 of the Note.
- (c) The Department of the Health & Family Welfare may be authorized to take consequential steps including holding of consultation with the Union Public Service Commission either for the purposes of framing of the service regulations or

seeking assessment of the suitability of persons to be appointed under initial constitution."

The aforesaid proposal was accordingly accepted by GNCT of Delhi Cabinet and consequential steps were initiated. In consultation with the Ministry of Health and Family Welfare, it was decided to constitute the GDMO and Non Teaching Specialists Cadre in the first place and add public health and teaching cadre at a later date. Consequently, in consultation with the UPSC, Delhi Health Services (Allopathy) Rules, 2009 (hereinafter referred to as Rules, 2009) were notified vide Notification dated 23.12.2009.

The aforesaid Rules contain provisions for initial constitution of service. Rule 6 of the Rules, 2009 reads as under:-

"6 (1) All the officers appointed under the Central Health Service Rules, 1996, who are working in the Government of NCT of Delhi as on the date of publication of these rules in the official gazette and who opt to be part of this service shall be deemed to have been appointed under these rules and they shall be members of the service in the respective grades.

6 (2) All officers appointed on contract basis/ad hoc basis on or before 18th December, 2006, i.e. the date of issue of the Government of Delhi's O.M. No.F.70/49/206/H&FW/SSHFW 463-475 dated 18th December, 2006, on the basis of their suitability as assessed by the Commission and requisite educational qualifications and experience prescribed for the post and being found fit, shall be deemed to have been appointed under these rules and assigned to the Sub-Cadre of General duty Medical Officers or Non-Teaching Specialists, as the case may be, and they shall be members of the Service at the entry level of the respective Sub-Cadre at the initial constitution stage."

On coming into force of the aforesaid rules, and with a view to include contractual doctors in the initial constitution of service, UPSC assessed the suitability of 532 Doctors (320 General Duty Medical Officers + 212 Non-Teaching Specialists) by constituting Assessment Boards from 27.03.2012 to 04.04.2012. All the applicants before us in these OAs were found suitable and their names were recommended for inclusion in the list of GDMOs. As many as 526 Doctors who were found suitable were recommended vide letter dated 01.05.2012. Consequently, on the recommendations of the Commission, the GNCT of Delhi vide order dated 15.05.2012 appointed the Doctors in their respective sub cadres under Delhi Health Service with immediate effect.

The GNCT of Delhi vide its letter dated 30.04.2013 informed the Commission that the Doctors included in DHS on the basis of their suitability assessed by the Commission have raised the issue that date of their induction should, in no case, be later than the date of notification of the Rules, 2009, and accordingly sought advice of the Commission under Rule 18 of the Rules, 2009 regarding the effective and legally tenable date of induction of the Doctors as Members of Delhi Health Service. Department of Health and Family Welfare also consulted the Law, Justice and Legislative Affairs Department of GNCT of Delhi. The Health and Family Welfare department recommended that "...It would appear to be logical, fair and

equitable to give them an ab-initio regular status in the cadre with effect from 23.12.2009, the date of legal formal notification of the cadre...". The Commission examined the issue pursuant to the communications of GNCT of Delhi, referred to above, and concurred with the proposal of Delhi Government to adopt the date of notification of DHS (Allopathy) Rules, 2009, i.e., 23.12.2009 as the date of induction of ad hoc/contractual Doctors recommended to be appointed as Doctors of Delhi Health Service under provisions of Rule 5 (2) and Rule 6 (2) of the Rules, 2009. The Commission communicated the same to the Government vide its letter dated 16.01.2014. Consequently, a Notification dated 28.08.2014 was issued. The relevant extract of the notification reads as under:-

"In exercise of the powers conferred under Article 309 of the Constitution of India, read with Government of India, Ministry of Home Affairs O.M. No.24/78/68-DH(S) dated 24-09-68 and in continuation of this officer order nos.F.70/49/2006/H&FW/Vol.iv/PF/2670-2700 dated 15/02/2012, F.11/101/2011/H&FW/2769-86 dated 22/05/2014 OA/1074/2012/H&FW/Court matter/825-40 dated 04/02/2014 and F.70/49/2006/H&FW/PF/233-47 dated 06/05/2014 and on the recommendation of the Union Public Service Commission vide letter No.F.1/31(3)/2011-AP-2 dated 17/01/2014, the Lt. Governor of Delhi is pleased to appoint 528 Medical Officers and Specialist Gr.III (various disciplines) as per list below in the GDMO and Non Teaching Specialist sub-cadre respectively of the Delhi Health Service with effect from 23rd December, 2009."

Vide the aforesaid notification names of 528 Medical Officers were notified as inductees to the DHS at the initial constitution of service w.e.f. 23.12.2009. It is this notification which is impugned in the

present OAs. The grievance of the applicants is that they have rendered pretty long years of service on contract basis and though their initial appointment on contract basis was for short tenure, however, the same was extended from time to time. It is further case of the applicants that they have been discharging the same duties as performed by regularly appointed Doctors in CHS. They have contributed for the health care of the people of Delhi while working on contract basis and thus their seniority is to be considered from the date of their initial appointment on contract basis. They were initially appointed pursuant to the advertisement and assessment by the Assessment Board constituted by the GNCT of Delhi. Their initial recruitment is thus not illegal and was in accordance with rules. The applicants thus seek seniority by taking into consideration entire length of service rendered by them on *ad hoc* /contract basis, as also they be granted permanent status from the date of their initial appointment with all consequential benefits, and for this purpose, impugned Notification dated 20.08.2014 has been challenged whereby the applicants have been given the benefit of service and seniority from 23.12.2009, the date of Notification of 2009 Rules.

4. The GNCT of Delhi and Union Public Service Commission have filed their separate counter affidavits. The UPSC after detailing the factual aspect has simply stated that on receipt of the requisition from the GNCT of Delhi, they assessed the suitability of 532 Doctors (320

General Duty Medical Officers + 212 Non-Teaching Specialists) by constituting Assessment Boards from 27.03.2012 to 04.04.2012 for their appointment/engagement as Members of Delhi Health Service at the initial constitutional stage in terms of Rule 6 (2) of Rules, 2009. The Commission has further referred to the communication of GNCT of Delhi seeking its advice regarding the date of initial constitution of service and appointment of contractual/ad hoc Doctors from the date of notification of the Rules, 2009.

5. The GNCT of Delhi in its separate counter affidavit dated 23.08.2016 filed in OA No.238/2015 while admitting the factual averments noticed by us hereinabove, stated that under Rule 6 (1) of Rules, 2009, GDMOs working in GNCT of Delhi from CHS Cadre and who have opted for DHS Cadre shall be deemed to have been appointed under these Rules and they shall be members of the service in their respective grades. Regarding contractual Doctors, reference is made to Rule 6 (2) of DHS Rules stating that those officers appointed on contract basis/*ad hoc* basis on or before 18.12.2006 on the basis of their suitability assessed by the Commission and requisite educational qualifications and requisite experience prescribed for the post and being found fit, shall be deemed to have been appointed under these Rules and assigned to them sub cadre of GDMO or Non Teaching Specialists, as the case may be. The respondent-GNCT of Delhi have also referred to Rule 9

(4) of the Rules, 2009 which deals with seniority and Rule 14 (c) which deals with application of New Pension Scheme applicable after 01.01.2004. Learned counsel appearing for GNCT of Delhi submits that the claim of the applicants for seniority prior to operation of Rules, 2009 is not admissible.

6. During the pendency of these OAs, MA No.3299/2006 in OA No.604/2014 and MA No.3082/2016 in OA No.238/2015 have been filed seeking impleadment of the applicants therein as party respondents in the present OAs. The Tribunal vide order dated 19.01.2017, however, permitted them to argue as Intervenors without any right to file pleadings. They were accordingly heard.

7. The intervenors are direct recruits appointed in CHS prior to the creation of DHS. They are opposing the relief claimed by the applicants. They contended that the initial appointment of the applicants being without following due process of law and without consultation of UPSC was illegal. They have further contended that at the time of their initial appointment there was no service against which the applicants could be appointed, although some posts had been created but no service was constituted. According to the Intervenors, Delhi Health Service came to be constituted only on 23.12.2009, and the applicants have been duly considered by the UPSC and brought into the cadre under Rule 6 (2) of the Rules, 2009.

They became members of CHS on the said date, i.e., 23.12.2009 and thus are not entitled to seek any benefit of seniority or service rendered by them on *ad hoc* or contract basis.

8. The Intervenors have relied upon OA No.988/2001 along with other OAs, titled *Dr. Divpreet Sahni and ors. vs. GNCT of Delhi and Ors.*, decided by Principal Bench of this Tribunal on 19.09.2002. In the aforesaid OAs, the applicants therein, who were also Doctors appointed on *ad hoc*/contract basis in GNCT of Delhi from time to time, prayed for a direction to the respondents to regularise their services on the post of CAS Grade-I (Dental) from the date of their initial appointment in consultation with UPSC. They had also sought a direction to treat them as a separate block and not to compel them to compete with other aspirants and further to consider them for regularisation purely on the basis of their performance and work conduct.

9. In another set of OAs No.225/2002 with OA No.2221/2002 titled *Dr. Anju Gupta and ors. vs. GNCT of Delhi & Ors.* decided vide judgment dated 13.04.2004 by a Coordinate Bench of this Tribunal, the applicants therein made a prayer for direction to encadre the posts and regularise their services in consultation with UPSC on the basis of their past service and service record from the

date of their initial appointment. Both these OAs were dismissed by this Tribunal.

10. In another judgment relied upon by the Intervenors, *The Director, Central Bureau of Investigation and Anr. vs. Shri D. P. Singh* reported in (2009) 1 SCC 647, the question before the Apex Court was regarding the grant of seniority to the deputationists on absorption . The Apex Court has held that normally a deputationist on absorption is entitled to claim seniority from the date of absorption, however, where a person was holding equivalent post in the earlier service and after deputation absorbed in the equivalent or in the same rank, he is entitled to claim such seniority. On facts, it was found that the applicants who were not holding the rank of DSP or equivalent post in the parent department are not entitled to seniority for the previous service.

11. Another case relied upon by the Intervenors is *Surender Singh and Ors. vs. Narender Kumar and Ors.* W.P. (C) No.5043/2011 decided by Hon'ble Delhi High Court vide judgment dated 11.03.2016. In the said case, a Constable was appointed on temporary basis in Delhi Police. He was promoted as Head Constable (Executive). Later, he was transferred from Executive Cadre to Motor Transport Cadre as Head Constable/Motor Transport (Operations). He was promoted to the rank of Assistant Sub Inspector/Motor

Transport (Operations). His seniority was refixed as Head Constable w.e.f. the date he was promoted as Head Constable (Executive) in the Executive Cadre. Later, vide another letter, he was granted ante dated seniority in the grade of Assistant Sub Inspector/Motor Transport (Operations), and was being promoted retrospectively. By another order, he was deemed to be promoted as Sub Inspector from an earlier date. The Tribunal quashed the promotion granted to him retrospectively and the order of the Tribunal was upheld by Hon'ble Delhi High Court.

12. In the rejoinder filed by the applicants they have heavily relied upon the cabinet decision which *inter alia* proposed *inter se* seniority of the members appointed under initial constitution to be determined by the Government in consultation with the Commission having due regard to the length of service rendered in the grade and the medical speciality concerned. It is, however, stated that while framing Delhi Health Services (Allopathy) Rules, 2009, the aforesaid cabinet decision has not been implemented and the ad hoc/contractual GDMOs have been inducted to the initial constitution of service under Rule 6 (2) of the Rules of 2009 from the date of notification of the Rules without giving them the credit of their length of service from the date of their initial appointment against the available vacancies on ex-cadre basis. The applicants in their rejoinder have also drawn a comparison between the CHS Doctors who were

inducted into DHS under Rule 6 (1) and the ad hoc/contractual employees who were inducted into DHS under Rule 6 (2) of Rules, 2009. A comparative chart as mentioned in the rejoinder is reproduced hereunder:-

Medical Officer inducted by Rule 6 (1)								
	1996 Year of joining MO	2000 SMO	2005 CMO	2009 CMO (NFSG)	2013 CMO (NFSG)	2015 SAG	2013 SAG	2019 Retired as SAG
Gross Pay						Rs.209022		Rs.253000
Pension	Old Pension Scheme							
Medical Officer inducted by Rule 6 (2)								
	1996 Year of joining MO	2000 SMO	2005 MO	2009 MO	2013 SMO	2015 SMO	2018 CMO	2019 Retired as CMO
Gross Pay						Rs.118683		Rs.129000
Pension	Contributory pension scheme starts from 2009. Total contribution, subscription and interest as on date till 2019 will be approx. Rs.2600000. amount of monthly pension approx. Rs.12000/month.							

Based upon the aforesaid chart, it is argued that those Doctors who were inducted under Rule 6 (1) in the year 1996 have earned promotions as SMOs in the year 2000, as Chief Medical Officer in the year 2005, CMO (NFSG) in the year 2009, again CMO (NFSG) in the year 2013 and SAG in the year 2015, and will retire in 2019 as SAG whereas ad hoc/contractual doctors who were inducted as Medical Officers in 1996 continued to be Medical Officers up to 2009 and could become SMO only in the year 2013 and could earn next

promotion as CMO in 2013, and would retire as CMO in 2019. It is accordingly pleaded that non consideration of the applicants from the date of their initial appointment is arbitrary and discriminatory in nature.

13. The contention of the applicants is, however, seriously opposed by the respondents as also the intervenors on the ground that (i) the initial appointment of the applicants is not as per the prescribed rules/procedures which *inter alia* require a process of selection to be carried out by the UPSC where the selection to the post of GDMOs or non teaching specialists is made through a public notice and by a written examination, whereas in the case of the applicants the process of selection was by a committee constituted by the department without any written examination; (ii) the appointment of the applicants (ad hoc/contractual) is at the initial level of the sub cadre of GDMOs or non teaching Specialists whereas the CHS Doctors who opted for DHS service and were working with the Delhi Government under different cadres were to be inducted at their respective cadres. In the event, the applicants are granted seniority they may claim promotions from time to time and their induction under Rule 6 (2) would not be at the initial level of sub cadre of GDMO/Non teaching Specialists but at a higher level which is impermissible under the rules and (iii) the ad hoc appointees were initially appointed on ex

cadre basis and were not member of any service as no service was in existence.

14. The Delhi Health Service came to existence only by virtue of 2009 Rules, that too, with effect from the date of notification of the Rules, i.e., 23.12.2009. The applicants are not entitled to seniority prior to the said date as there was no service at all. Referring to Rule 9 of the DHS Rules, it is contended that sub rule 4 of Rule 9 specifically prohibits counting of ad hoc period for purposes of seniority or promotion. The said rule is not under challenge.

15. It is deemed necessary to refer to some of the relevant rules, namely, Delhi Health Service (Allopathy) Rules, 2009, which are as under:-

“2. Definitions :-

- (d) “Duty Post” means any post, whether permanent or temporary, specified in Schedule-II.
- (h) “Service” means the Delhi Health Service (Allopathy);
- (i) “Sub Cadre” means any of the two streams of the Service, namely, General Duty, and Non teaching Specialist as the case may be.”

4. Authorized strength of the Service-

- (1) The authorized strength of the duty posts included in the various grades of the Service on the date of commencement of these rules shall be as specified in Schedule-II.
- (2) After the commencement of these rules, the authorized permanent strength of the duty posts in the various grades shall be such as may, from time to time, be determined by the Government.

(4) The Government may, in consultation with the Commission, include in the Service any post other than those included in Schedule-II or exclude from the service a post included in the said Schedule.

(5) The Government may, in consultation with the Commission, appoint an officer whose post is included in the Service under sub-rule (4), to the appropriate grade of the Service, in a temporary capacity or in a substantive capacity, as may be deemed fit, and fix his seniority in the grade after taking into account continuous regular service in the analogous grade.

5. **Members of the Service**

(1) The following persons shall be members of the Service, namely:-

- (a) Persons appointed under sub-rule (5) of rule 4.
- (b) Persons appointed to duty post under rule 6, and
- (c) Persons appointed to duty posts under rule7.

(2) A person, appointed under clause (b) of the Sub-rule(1) shall, on such appointment, be deemed to be the member of the Service in the appropriate Grade applicable to him in Schedule-II.

(3) A person appointed under clause (c) of Sub-rule (1) shall be the Member of the Service in the appropriate grade applicable to him in Schedule-II from the date of such appointment.”

7. **Maintenance of Service**

(1) The vacancies in any of the grades referred to in Schedule-II shall be filled in the manner as hereinafter provided under these rules.

(2) The method of recruitment, the field of selection for promotion, including the minimum qualifying service in the immediate lower grade or lower grades as the case may be, for appointment or promotion to the posts in the respective Sub-Cadres and specialities within the Sub-Cadre concerned,

included in the Service shall be as specified in Schedule-III.

- (3) (i) The Departmental promotions shall be confined to officers of the respective Sub-Cadres.
- (ii) The departmental promotions to higher posts in the respective Sub-Cadres shall be made on the basis of selection from among the officers of the service in the immediate lower grade or lower grades, as the case may be, in the respective Sub-Cadres on the recommendations of the Departmental Promotion Committee constituted as at Schedule-IV.

(9) Seniority:

- (1) The relative seniority of members of the service appointed to a grade in the respective sub-cadres or in the respective speciality of the sub-cadre of the Service, as the case may be, at the time of initial constitution of these rules.
- (2) The seniority of officers recruited to the Service other than those appointed under rule 6 (1) shall be determined in accordance with the general instructions issued by the Government in the matter from time to time.
- (3) The seniority of persons recruited to the Service in accordance with sub-rule (5) of rule 4 shall be fixed in the manner provided therein.
- (4) The protection, if any accorded in towards increments drawn by the doctors who worked on contract/ad hoc basis prior to placement at the initial constitution stage shall not be taken into account for determining the length of service or seniority for consideration for promotion on time scale basis subsequent to their placement at the initial constitution stage.

(14) Pension & other conditions of service.

- (1) The conditions of service of the members of the service in respect of matters not expressly provided for in

these rules, shall, mutatis mutandis and subject to any special orders issued by the government in respect of the Service, be the same as those applicable to officers of the Central Civil Services in general.

- (2) (a) Officers appointed under Sub-rule (1) of Rule 6, prior to 1.1.2004, before the commencement of these Rules, shall be governed by the CCS (Pension) Rules, 1972.
- (b) Officers appointed under Sub-rule (1) of Rule 6, after 1.1.2004, shall be governed by the new Pensions Scheme.
- (c) Officers appointed under Sub-rule (2) of Rule 6 will be governed by the new Pensions Scheme, applicable after 1.1.2004.

(16) Power to relax.

Where the Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing, and in consultation with the Commission, relax any of the provisions of these rules with respect to any class or category of persons."

From the Scheme of the Rules, it is noticed that under Rule 2 (h) "Service" has been defined as "Delhi Health Service (Allopathy)". Under Rule 2 (i) "Sub Cadre" consists of two streams, i.e., General Duty and Non-teaching Specialist. By virtue of Rule 4, authorized strength of the duty posts included in various grades of the Service on the date of commencement of these rules is as indicated in Schedule-II. Under this Schedule, there are 25 posts of Super time Grade/Senior Administrative Grade in the Pay Band of PB-4 Rs.37,400-67,000 with Grade Pay of Rs.10,000/-, 563 posts of Non-Teaching Specialist Sub Cadre and 1225 posts of GDMOs. Sub-rule (4) of Rule 4 empowers the Government to add or exclude any post other than those specified in Schedule-II from the Service in

consultation with the Commission. Sub-rule (5) of Rule 4 further authorizes the Government to appoint an officer whose post is included in the Service under sub-rule (4) to the appropriate grade of service in a temporary capacity or in a substantive capacity as may be deemed fit and to fix his seniority in the grade after taking into account continuous regular service in the analogous grade. Rule 5 prescribes three categories of persons who could be a member of service. Those appointed (i) under sub-rule (5) of rule 4, referred to herein above, (ii) appointed to duty posts under rule 6 which *inter alia* includes both absorption from CHS under Rule 6 (1) and *ad hoc*/contractual persons appointed in the initial constitution of service under Rule 6 (2), and (iii) appointed on duty posts under Rule 7.

16. Rule 9 deals with seniority in respect to the Doctors who are inducted in service from CHS. Their relative seniority shall be as existing on the date of commencement of rules, meaning thereby, their *inter se* seniority shall be as per their position in CHS, and in respect to the officers recruited other than those appointed under sub-rule (1) of Rule 6 their seniority shall be determined in accordance with the general instructions issued by the Government from time to time. In respect to those who were appointed under sub-rule (5) of Rule 4, their seniority shall be determined by taking into account continuous regular service in the analogous grade. In respect to the Doctors who have worked on contract/*ad hoc* basis

prior to their induction in the initial constitution of service under Rule 6 (2), they are entitled to get protection towards their increments drawn but their *ad hoc*/contractual service is not be taken into account for determining the length of service or seniority for consideration for promotion on time scale basis after their placement at the initial constitution of service, meaning thereby, they would not be entitled to the benefit of their past *ad hoc*/contractual service for purposes of seniority or for promotion on their induction into the initial constitution of service.

17. Rule 14 deals with Pension and other conditions of service. In respect to the appointees under sub-rule (1) of Rule 6 who were appointed in their original service after 01.01.2004, new Pension Scheme would apply. In respect to the appointees under sub-rule (2) of Rule 6, they would be governed by the new Pension Scheme applicable after 01.01.2004 irrespective of the fact whether their initial engagement on *ad hoc*/contract basis was prior to 01.01.2004 or thereafter.

18. Rule 16 empowers the government to relax rules if it is necessary or expedient by recording reasons in writing and in consultation with the Commission with respect to any class or category of officers.

19. Before we address implication of the rules, we may refer to various judgments relied upon by the applicants. The same are as follows:-

Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and Others [(1990) 2 SCC 715:-

“31. Mr Tarkunde took great pains in analysing the practical effect of the judgment in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] with which we agree and contended that the direct recruits shall suffer seriously if the present civil appeals, writ petitions and the special leave petitions are not allowed. Mr Singhvi challenged the figures worked out on behalf of the appellants. We do not consider it necessary to go into this controversy as it cannot be denied that as a result of *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] and on dismissal of present cases a large number of promotees have to be treated as senior to the direct recruits, and in that sense the direct recruits do suffer. This, however, cannot be avoided. If their case on merits is not correct, it cannot be assumed that they were at any point of time clothed with any right, which they are being deprived of. If the decision in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] had been given effect to promptly, many of them would have been reverted to inferior posts but by their persistence, both before the higher authorities of the State and the courts, they have sufficiently delayed the matter so as to avoid the reversion of any one of them.”

“44. A counter-affidavit on behalf of the State of Maharashtra was filed inter alia denying several allegations in the writ petitions explaining certain circumstances by giving all the relevant materials, and explaining the situation. S. B. Patwardhan, the petitioner in the reported case, also intervened and refuted the claim of the petitioners. Respondent 4 has retired in the meantime and has not appeared in this case.”

Rudra Kumar Sain and Others vs. Union of India and Others
[(2000) 8 SCC 25]:-

“20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post

and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be "fortuitous/ad hoc/stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous."

Union of India and Another vs. Lalita S. Rao and Others

[(2001) 5 SCC 384:-

"3..... Doctors who had been appointed by the Railway Administration on ad hoc basis or on temporary basis and had got themselves regularised prior to 1.10.1984, by appearing in the selection test held by the Union Public Service Commission then in their case the period prior to their regularisation could be counted for determining their seniority applying Principle 'B' of Direct Recruit Engineering Officers' Assn. Case and in fact, the Tribunal decided the case of Dr. Srinivasulu on that basis and this Court upheld the said decision."

***Amarendra Kumar Mohapatra and Ors. vs. State of Orissa and Ors.* [(2014) 4 SCC 583]:-**

"Re: Question (iii)

67. Section 3(2) of the impugned legislation deals entirely with the inter se seniority of Assistant Engineers whose appointments are validated/regularised by the said enactment and stipulates that such inter se seniority shall be determined according to the dates of appointment of the officers concerned on ad hoc basis as mentioned in the schedule. It further stipulates that all those regularised under the legislation shall be en bloc junior to the Assistant Engineers of that year appointed to the service in their respective discipline in their cadre in accordance with the provisions of the Recruitment Rules. Sub-section (3) of Section 3 makes the ad hoc service rendered by such Assistant Engineers count for the purpose of their pension, leave and increments and for no other purpose."

“76. The ratio of the decision in the above case was not faulted by the Constitution Bench of this Court in *Direct Recruit case [Direct Recruit Class II Engg. Officers' Assn.v. State of Maharashtra, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348]* . As a matter of fact the Court approved the said decision holding that there was force in the view taken by this Court in that case. This Court observed: (SCC p. 726, para 13)

“13. ... In *Narender Chadha v. Union of India* [(1986) 2 SCC 157 : 1986 SCC (L&S) 226] the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.”

77. In the light of what we have said above, we do not see any illegality or constitutional infirmity in the provisions of Sections 3(2) or 3(3) of the impugned legislation.”

Secretary, Minor Irrigation Department and RDS vs. Narendra Kumar Tripathi [(2015 11 SCC 80]:-

“15. The scheme of the working of the Rules in the Department shows that right from 1979, the Department has been making direct recruitment after due selection and by applying the 1979 Rules which Rules have been extended from time to time to subsequent recruitments, services were regularised. Validity of the scheme of these recruitments is not under challenge. In such circumstances, when the Rules provide that such ad hoc appointments have to be regularised and seniority counted from the date of appointment, the writ petitioner could not be deprived of the past service rendered by him from 12-6-1985 till the date of regularisation. It is not a case of appointments made without due selection or without vacancy or without qualification or in violation of the Rules. The larger Bench

[*Farhat Hussain v. State of U.P.*, 2004 SCC OnLine All 1289 : (2005) 58 ALR 581] failed to observe that the appointment of the writ petitioner was not dehors the Rules nor was by way of stopgap arrangement. The Rules had the effect of treating the appointment as a regular appointment from initial date of appointment. In these circumstances, the principle laid down in *Keshav Chandra Joshi* [*Keshav Chandra Joshi v. Union of India*, 1992 Supp (1) SCC 272 : 1993 SCC (L&S) 694 : (1993) 24 ATC 545] was not applicable. It is not a case where service rendered is either fortuitous or against the rules or by way of stopgap arrangement. Applying the principle laid down in *Direct Recruit Class II Engg. Officers' Assn.* [*Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348], the writ petitioner is entitled to count service from 12-6-1985. Moreover, the Department has allowed the benefit of past service to other similarly placed incumbents as observed in the judgment giving rise to the appeal of the Department.

In sum and substance, the contention raised on behalf of the applicants is that in all the above judgments and, in particular, the constitutional bench judgment in *Direct Recruit Class II Engineering Officers' Association* (supra), it has been held that where the initial recruitment is irregular and the appointee continues uninterruptedly and regularized subsequently, he is entitled to seniority from the date of initial appointment.

20. The above contention is, however, seriously disputed by learned counsel for the respondents. Shri Vijay Pandita, learned counsel appearing for the respondents in OA No.604/2014 submits that this OA has been filed ten days before the retirement of the applicant. His contention is that the applicant had accepted the seniority position all along on being inducted at the initial stage of

constitution of service under Rule 6 (2) of Rules, 2009 and never objected to his seniority position with effect from the date of notification of the Recruitment Rules of 2009 and it was only at the fag end of service that he filed this Application on 21.02.2014 .

21. Per contra, Mr. Naresh Kaushik, learned counsel appearing on behalf of UPSC has raised various issues noticed by us. We proceed to deal with such issues:-

That prior to Rules of 2009, there was no service in existence and thus the applicants could not claim the benefit of seniority as the question of seniority has relation with the cadre of service. Referring to the definition of "Service" under Rule 2 (h) of Delhi Health Service (Allopathy) Rules, 2009, it is stated that "Service" as defined under the said rules came into existence only on 23.12.2009. Even the definition of "Member of the Service" under Rule 5 of the said Rules would make an appointee member of service from the date of his appointment, and in the present case the date of appointment is 23.12.2009. According to Mr. Kaushik, prior to creation of Service by virtue of the aforesaid rules, the post against which the applicants were appointed on *ad hoc*/contractual basis was not a permanent or regular post. In any case, those posts were ex-cadre posts. The applicants would have continued on ex-cadre posts on *ad hoc*/contractual basis but for creation of service, i.e., Delhi Health Service vide Rules of 2009. It is also the case of the respondents that

even after creation of Service, the applicants have been granted special privilege to become members of service without due course of process. By virtue of Rule 6 (2) of Rules of 2009, they become members of service at the initial level, i.e., entry level, meaning thereby their regular service would commence from the date of their entry into the service as created by the aforesaid rules. They cannot claim seniority prior to the said date under any circumstances. His further contention is that all judgments cited by the applicants including the *Direct Recruit Class II Engineering Officers' Association* (supra) case have no application in the facts and circumstances of the present case as in all those cases initial appointments though *ad hoc*/contractual but against the regular vacancies borne on the cadre of service and it was under those circumstances that the Hon'ble Supreme Court and other Courts granted them seniority as the posts against which they were appointed were in existence and borne on the various cadres of service. Those were the regular posts. In the present case, there were no regular posts, and thus the initial appointment of the applicants on *ad hoc*/contractual basis is of no significance. His further contention is that the procedure for regular appointment is prescribed under the rules, i.e., consultation with UPSC for making regular appointments. The UPSC while making appointments on regular posts in CHS or even in DHS conducted written examination

and based upon the merit in the written examination selection is made and consequently appointment. In the case of the applicants, no written examination was conducted by the UPSC which is an independent body. The applicants were simply interviewed by a committee constituted by the department. Such selection process is not at par with selection conducted by the UPSC. Such appointees cannot claim the benefit or privileges at par with the regular appointees against the sanctioned posts borne on the cadre of service appointed through the rigours of selection conducted by the UPSC.

In support of this contention, the respondents have relied upon the judgment in *State of Uttarakhand vs. Archana Shukla & Ors.* [(2011) 15 SCC 194], wherein the Apex Court has observed as under:-

“The respondents herein were appointed on ad hoc officiating post in the year 1988 for a fixed term which was continued. They were regularised in the year 2004 under the Uttarakhand Regularization of Ad hoc Appointments (Posts under the purview of Public Service Commission) Rules, 2002 (for short ‘the Rules’). The respondents claimed benefit of their service from 1988 to 2004 for the purpose of seniority and this has been granted by the High Court. Hence, this appeal. We are afraid, we cannot agree with the view taken by the High Court. Rule 7 (1) of the Rules states as under:

“A person appointed under these rules shall be entitled to seniority only from the date of order of appointment after selection in accordance with these rules and shall, in all cases, be placed below the persons appointed in accordance with the relevant service rules or as the case may be, the regular prescribed procedure, prior in the appointment of such person under these rules.”

Admittedly, the respondents were appointed after a selection under the Regularization Rules in the year 2004. Hence, in our view, they can get seniority only from the year 2004 and not

from 1988. The rule is clear and hence we cannot debar from the clear meaning of the rule."

The respondents have further relied upon the decision of Apex Court in the matter of *M. K. Sharmugam v. Union of India* [(2004) 4 SCC 476], wherein three Judge Bench held that in none of its decisions had it held that ad hoc service of the appointee regularised later was to be counted towards seniority. The court held after referring to its own decision in several cases:-

"But all these decisions do not point out that in case the promotions had been made ad hoc and they are subsequently regularised in the service in all the cases, ad hoc service should be reckoned for the purpose of seniority. It is only in those cases where initially they had been recruited even though they have been appointed ad hoc the recruitment was subject to the same process as it had been done in the case of regular appointment and that the same was not a stop gap arrangement. This is not the position in the present cases at all. Therefore, we are of the view that conclusion reached by the Tribunal appear to us to be correct and call for no interference."

In *J. & K. Public Service Commission vs. Dr. Narinder Mohan* [1994 AIR 1808], the Apex Court has held as under:-

" Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The later are the product of order and regularity. Every eligible person need not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitment for appointment assures fairness in selection and inhibits arbitrariness in appointments."

In another judgment reported in (2012) 8 SCC 633, *State of Haryana vs. Vijay Singh*, the Hon'ble Supreme Court after going

through number of cited cases observed that none of the aforesaid judgments can be read as laying down a proposition of law that a person who is appointed on purely *ad hoc* basis for a fixed period by a authority other than the one who is competent to make regular appointment to the service and such appointment is not made by the specified recruiting agency is entitled to have his *ad hoc* service counted for the purpose of fixation of seniority.

22. We have also considered Delhi Health Service (Allopathy) Rules, 2009. It is admitted legal position that the services of the applicants are governed by the aforementioned statutory rules. The rules prescribe the mode of appointment including the appointment of the applicants. The appointment of the applicants at the initial constitution of service who were working on *ad hoc*/contract basis before 18.12.2006 is by virtue of Rule 6 (2). However, their regular appointment is w.e.f. 23.12.2009 when the rules were notified. The order impugned whereby the applicants were appointed in the initial constitution of service w.e.f. 23.12.2009 is only a consequential order in accordance with the mandate of rules. Rule 9 (4) of DHS (Allopathy) Rules, 2009 deal with the seniority position. The said sub-rule 4 of Rule 9, noticed hereinabove, clearly prohibits counting of *ad hoc*/contractual service prior to the placement of the applicants at the initial constitution stage for determining their length of service or seniority for consideration for promotion on time scale basis

subsequent to their placement at the initial constitution of service. Neither Rule 6 nor Rule 9 is under challenge. Sub-rule (5) of Rule 4 whereunder the earlier service could be taken into account for purposes of seniority must be a continuous regular service in the analogous grade. Since prior to notification of the Rules, there was no earlier service in existence, the question of continuous regular service in the analogous grade does not arise. The seniority has to be determined in accordance with Rule 9 of the Rules of 2009.

23. It is relevant to notice that earlier validity of the rules was challenged in OA No.1259/2011 fixing 18th December, 2006 as the cut off date for initial recruitment for contractual doctors. The said OA was dismissed vide judgment dated 07.05.2012 upholding the validity of Rule 6 (2) of the Rules of 2009. The judgment of the Tribunal in OA No.1259/2011 has been upheld by the Hon'ble Delhi High Court in Writ Petition (Civil) No.8034/2014 decided on 12.08.2016. The relevant observations of the Delhi High Court are as under:-

“28. The issue which survives relates to the challenge to the judgment and order dated 7th May, 2012 by which OA No. 1259/2011 was dismissed. The petitioners had, in the said OA, challenged validity of Rule 6(2) of the Rules by which the cut off date for initial recruitment for contractual doctors was fixed as 18th December, 2006. Doctors appointed post the said date and up to the notification of the recruitment rules on 23rd December, 2009 were excluded. We are in agreement with the finding of the tribunal that the date fixed in Rule 6(2) is valid and constitutional. Whatever be the stand and stance of the Government of NCT of Delhi, it is an accepted fact that the

Rules, i.e., Delhi Health Service (Allopathy) Rules, 2009 notified on 23rd December, 2009 in exercise of power under Article 309 of the Constitution fixed the said date in Rule 6(2). It is therefore, not possible to accept the contention of the petitioners that the Government of NCT of Delhi had earlier recommended or suggested that the cutoff date for initial induction should be the date on which the Rules were notified, i.e., 23rd December, 2009. This was an internal matter or opinion that would not confer any legal rights on the petitioners. This date was not accorded acceptance in the Rules when they were finalized and published. Cut off dates are normally fixed keeping in view the several facets and parameters. In the present case, it is the date on which the Delhi Health Service was created and came into existence as a new service. The date mentioned in Rule 6(2), is 18th December, 2006, i.e. the date on which OM No. F.70/49/2006/H&FW/SSHFW/463-475 was issued. This date is the foundation and the basis. The said date can be declared unconstitutional in case there is violation of any constitutional rights or Fundamental Rights. No such contention or argument has been raised. The Delhi Health Service is a Group A service. Regular appointments to a Group A service can be made only in consultation with the UPSC. In the present case, the petitioners were not appointed in a selection process initiated and undertaken by the UPSC.

29. The claim of the petitioner-doctors, that those appointed prior to 18th December, 2006 have been treated differently has to be rejected for the simple reason that the said appointments were before the creation of Delhi Health Service. Further, if the said cut-off date is changed and declared to be invalid, doctors appointed by way of contractual or ad hoc appointments after 23rd December, 2009, could possibly claim regularization of such appointment as falling within the initial constitution. Possibly, no end point should then be fixed. The appointments of the petitioners was on contract and as ad hoc doctors with the clear stipulation that they would not be entitled to regular absorption nor would their appointments be treated as conferring any such right. It was and is open to the petitioners to participate in the selection process and compete with other candidates. Indeed several other doctors similarly situated had participated in the selections as advertised for appointment as regular doctors. Many of them have succeeded, while others have not succeeded or did not participate. As noted above, the Government of NCT of Delhi and the UPSC have agreed to grant age relaxation. The challenge to Rule 6(2) and the cut-off date as fixed is rejected.

24. In the matter of *Raghunath Rai Bareja & Another vs. Punjab National Bank & Others* [2007 (2) SCC 230], the Hon'ble Supreme Court has held that when there is a conflict between law and the equity, it is the law which has to prevail in accordance with the latin maxim 'dura lex sed lex' which means 'the law is hard but it is the law'. Equity can only supplement the law, but it cannot override it.

25. Shri S. B. Upadhyay, learned senior counsel lastly submitted that the applicants are ready and willing to surrender their seniority in favour of CHS Doctors and their separate seniority can be maintained by relaxing the rules under Rule 16 of the Delhi Health Service (Allopathy) Rules, 2009. His further contention is that the applicants should at least be granted benefit of the pension counting their past *ad hoc*/contractual service. With a view to project his view he has relied upon Rule 3 (1) (q) of CCS Pension Rules. The said rule defines the qualifying service. He has also relied upon Rule 13 of CCS Pension Rules providing for commencement of qualifying service. The relevant extract reads as under:-

"13. Commencement of qualifying service.

Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:-

Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post:"

Rule 17 of CCS Pension Rules further deals with counting of service on contract, which reads as under:-

"17. Counting of service on contract

(1) A person who is initially engaged by the Government on a contract for a specified period and is subsequently appointed to the same or another post in a substantive capacity in a pensionable establishment without interruption of duty, may opt either-

- (a) to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service; or
- (b) to agree to refund to the Government the monetary benefits referred to in clause (a) or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.

(2) The option under sub-rule (1) shall be communicated to the Head of Office under intimation to the Accounts Officer within a period of three months from the date of issue of the order of permanent transfer to pensionable service, or if the Government servant is on leave on that day, within three months of his return from leave, whichever is later.

(3) If no communication is received by the Head of office within the period referred to in sub-rule (2), the Government servant shall be deemed to have opted for the retention of the monetary benefits payable or paid to him on account of service rendered on contract."

Based upon the aforesaid rules, it is urged by Shri S. B. Upadhyay, learned senior counsel that period of contractual service be counted towards the qualifying service for purposes of pension. Rule 3 (1) (q) of CCS Pension Rules includes within the ambit of qualifying service, the service rendered while on duty. Rule 13 of the Pension Rules also takes into account the service rendered even if in officiating capacity

from the date government servant takes charge of the post to which he is first appointed, provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post. The applicants were engaged on contract basis for a fixed period. Their contractual services were, however, extended from time to time with breaks. The applicants approached this Tribunal for grant of regular pay scale and other service benefits at par with regularly appointed CHS Doctors by filing OA No.2564/1997 & other OAs. This OA along with various other OAs was allowed vide judgment dated 23.04.1998 with the following directions:-

“13. In the result the aforesaid OAs are allowed. The respondents shall grant the applicants the same pay scale and allowances and also the same benefits of leave increment on completion of one year maternity leave and other benefits of service conditions as are admissible to Medical Officer's appointed on regular basis in the corresponding pay scales. Notwithstanding the break of one of two days in service in their contract they shall be deemed to have continued in service from the date of their first appointment full regular appointments are made to the respondents to these posts. In accordance with the extant rules and instructions in the circumstances of the case respondents shall also consider giving age relaxation to the applicants in accordance all the rules if they are candidates before UPSC for regular appointment to the extent of the number of years of service rendered on contract/ad hoc basis.”

26. In view of the observations/directions contained in the aforesaid judgment, the applicants were granted regular pay scale while working on contract basis. Thus, from the conjoint reading of Rule 3 (1) (q) and Rule 13 of CCS Pension Rules, the qualifying

service for purposes of pension would commence from the date of initial appointment in temporary capacity on substantive appointment of the applicants. Rule 17, however, imposed a condition for counting of service on contract basis as qualifying service subject to fulfilment of the conditions laid therein. Since this question was raised during the course of arguments without any specific averment and the question being a legal one, we heard the parties on this aspect.

27. Insofar as the question of grant of seniority to the applicants is concerned, they are not entitled to seniority by counting the service rendered by them on *ad hoc*/contract basis for two reasons; firstly, their appointment on *ad hoc*/contract basis was not in accordance with the established procedure for selection, i.e., selection by UPSC although some procedure for selection was adopted by a departmental committee. Such procedure is not the same as adopted for regular appointment in view of the dictum of judgments in *State of Uttrakhand vs. Archanan Shukla & Ors.* [(2011) 15 SCR 615] and *M. K. Sharmugam vs. Union of India* [(2000) 4 SCC 476]. Secondly, the clear embargo created under Rule 9 (4) of DHS (Allopathy) Rules, 2009 is that the past *ad hoc*/contractual service is not to be counted for the purpose of seniority and promotion etc., hence, the applicants are not found entitled to the relief claimed in the OA. However, the period of *ad hoc*/contractual service can be counted towards the

qualifying service for purposes of pension under Rule 13 of CCS Pension Rules subject to compliance of Rule 17 of the said Rules. The respondents are accordingly directed to consider the counting of period spent on *ad hoc*/contractual basis by the applicants towards the qualifying service in accordance with Rule 3 (1) (q), Rule 13 and Rule 17 of CCS Pension Rules. Such consideration be granted to the applicants within a period of four weeks from the date of receipt of certified copy of this order.

28. These OAs (OA No.604/2014 with OA No.238/2015) are accordingly disposed of with the above directions.

(Nita Chowdhury)
Member (A)

/pj/

(Justice Permod Kohli)
Chairman