

**Central Administrative Tribunal
Principal Bench, New Delhi.**

**OA-2735/2014
MA-2344/2014
MA-2345/2014
MA-2343/2014**

New Delhi, this the 30th day of November, 2016.

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. Shekhar Agarwal, Member (A)**

1. Dr. Om Prakash, S/o Late Girwar Singh
Aged 58 years, Medical Officer,
55-B, Pocket-6, MIG Complex
Mayur Vihar Phase-3, Delhi-110096.
2. Dr. R.K.Sharma, S/o Sh. S.K.Sharma,
Aged 54 years, Medical Officer,
M-112-A, Uttam Nagar, New Delhi-110059.
3. Dr. Arvind Sharma, S/o Sh. R.C.Sharma,
Aged 54 years, Medical Officer,
G-131, Ashok Vihar Phase-1, Delhi-110052.
4. Dr. Z.A.Zaidi, S/o M.Hussain,
Aged 58 years, Medical Officer,
A-31, Vasant Apartment,
C-58/2, Sector-62, Noida-201301.
5. Dr. Bharat Bhushan, S/o P.D.Gupta,
Aged 54 years, Medical Officer,
H.No.2/112, Sunder Vihar,
New Delhi-110087.
6. Dr. Romi Khurana, S/o Sh. K.L.Khurana,
Aged 54 years, Medical Officer,
19/411, Satyam Khand,
Vasundhra, Ghaziabad, U.P.
7. Dr. Ram Kumar, S/o Sh. C.Lal,
Aged about 55 years, Medical Officer,
D-2-34-D, Janakpuri,
New Delhi-110058.
8. Dr. J.P.Jain, S/o Sh. Jyoti Prasad,
Aged about 56 years, Medical Officer,
C-56, Balram Nagar,
Loni, Distt. Ghaziabad, UP. -Applicants.

(By Advocate: Shri Amrish Chandra Tiwari with Ms. Aman Priya)

Versus

1. Employees State Insurance Corporation
Through its Director General
Shri Anil Kumar Aggarwal
Kotla Road, New Delhi.
2. Secretary, Ministry of Labour & Employment,
Shram Shakti Bhawan, Rafi Marg,
New Delhi. (Contesting respondents)
(By Legal Petitioner)
3. Narendra Kumar, MBBS,
U.P.
4. Satish Kumar Azad, MBBS,
D(M) D, Delhi
5. R.K.Kataria, MBBS, MD (CHA)
ESIH, Okhla, Delhi
6. Kajal Goldar, MBBS, DHA & MD (CHA)
D(M) D, Delhi
7. Anshu Chhabra, MBBS,
D(M) D, Delhi
8. K.C.Biswas, MBBS,
D(M) D, Delhi
9. R.D.Ojha, MBBS,
ESIH, Basaidarapur, Delhi
10. K.K.Pal, MBBS,
ESIH, Joka, West Bengal
11. R.K.Saxena, MBBS,
ESIH Model, Faridabad, Haryana.
12. S.K.Chaudhary, MBBS,
ESIH, Joka, West Bengal
13. Vinod Chauhan, MBBS,
D (M) D, Delhi.
14. Girish Kumar, MBBS,
ESIH, Okhla, Delhi
15. S.K.Raju,
MBBS, DIP, IN HOSP. ADMN.
Head Quarters.

16. M.N.Roy, MBBS,
West Bengal
17. Hari Mohan,
MBBS, MD (Path)
D (M) D, Delhi.
18. Kayam Singh,
MBBS, MD (Path)
ESI Model Hospital, Gurgaon,
19. Bhagat Singh, MBBS,
D (M) D, Delhi.
20. Rakesh Kumar,
ESI Model Hospital,
Vapi, Gujarat.
21. Neelima, MBBS,
ESI Model Hospital,
Jaipur, Rajasthan.
22. Deepak Kr.Sharma, MBBS,
ESI Model Hospital, Andheri (E),
Mumbai.
23. N.K.Taneja,
Dip. In Anaesthesia,
ESI Model Hospital, Ram Darbar,
Chandigarh.
24. Pradeep Kumar, MBBS,
ESI Model Hospital,
Jaipur, Rajasthan.
25. Anju Agnihotri, MBBS,
ESI Model Hospital,
Manesar, Haryana.
26. Shubhra Gupta, MBBS,
ESI Model Hospital, Manesar,
Gurgaon,
27. Naresh Kr. Arora, MBBS,
SME, Dehradun, Uttarakhand
28. A.P. Singh,
MBBS, MD (Genl. Med.)
ESIMH, Phulwari,
Patna, Bihar.
29. Anita Mittal,
SME, Himachal Pradesh

30. Arun Kumar Gupta, MBBS,
SME, Chandigarh.
31. Parimal Maji, MBBS,
ESIH, Joka, West Bengal
32. Raj Pal, MBBS,
ESIMH, Jammu
33. Ramesh Kumar, MBBS,
ESIH, Noida, U.P.
34. Subhash Chhokara, MBBS,
MS ESIMH, Ahmedabad.
35. Ajay Kumar-II, MBBS, MD
ESIH, Noida, U.P.
36. S.M.Jode, MBBS,
ESIMH, Andheri,
Mumbai, Maharashtra
37. Praduman Kr. Jain, MBBS, DCH,
SMC, Hyderabad.
38. Sant Ram, MBBS,
SMC, Hyderabad.
39. Mamta Singh, MBBS,
SME, Jaipur, Rajasthan
40. Dr. Surender Kaur, M.S.
Baddi, Himachal Pradesh.
41. Dr. Sainika Horo,
SMC, Chhattisgarh.
42. Dr. Balraj Bhandar, M.S.
Sant Nagar, Hyderabad.
43. Dr. Ashok Kumar, M.S.
Bangalore.
44. Dr. Priya Datta Talib Kumar
SMC, Kanpur (U.P.)
45. Dr. Venone Nandrum, M.S.
Bhiwadi.

-Respondents.

(By Advocate: Ms. Rekha Palli, Sr. Adv. with Ms. Shruti Munjal for respondent
Nos.1 & 2)

ORDER(ORAL)**Hon'ble Mr. Justice Permod Kohli**

None for respondents 3-45 despite service. They are set ex-parte.

2. The applicants in the present OA are MBBS/MD qualified doctors. On the basis of interview held for the post of Insurance Medical Officers Gr-II, they were appointed as Insurance Medical Officers Gr-II on purely temporary and adhoc basis in ESIC Corporation for a period not exceeding 90 days from the date of joining of service of the Corporation. On the basis of interview, applicant no. 1 was appointed vide order dated 03.04.1986 with the following stipulation:

“With reference to his/her interview held in this office for the post of Insurance Medical Officer Gr.-II the undersigned is directed to say that Dr. Om Prakash has been selected and is offered a post of Insurance Medical Officer Grade-II on a purely temporary and adhoc basis in the ESI Corporation for a period not exceeding 90 days from the date of his/her joining the service of the Corporation which will not be extended under any circumstances.

3. ...d) The above appointment will not confer on him/her any benefit of seniority or claim for regular appointment or for further continuance and placement in the ESIC Medical Cadre.

8. In case, he/she accepts the offer of appointment for the post of Insurance Medical Officer Gr-II on the terms and conditions mentioned in the preceding paragraphs, he/she should please report for duty to the Director (Medical ESI Scheme, ESI Hospital Complex, Basaidarapur, Ringh Road, New Delhi immediately in any case not later than 10 days from the date of receipt of this letter, failing which it will be presumed that he/she is not interested in the post and this offer of appointment shall stand automatically cancelled without any further intimation/correspondence on the subject.”

3. Other applicants were also appointed in similar manner though on different dates. Their dates of appointment are indicated at page 51 at serial nos. 7, 8, 9, 10, 12, 15, 17 and 20.

4. It is admitted case of the applicants that after their appointment for a period of about ninety days or so, their services were sought to be terminated. They approached Central Administrative Tribunal, Principal Bench against the

proposed termination. Applicant No.1 filed Application under Section 19 of the Administrative Tribunals Act, 1985 being numbered as OA No. 627/86. One Dr. (Mrs.) Prem Lata Chaudhary also filed a Writ Petition before the Hon'ble High Court of Delhi which came to be transferred to the Tribunal and registered as TA No.492/86. Dr. (Mrs.) Prem Lata's petition was decided by this Tribunal vide judgment dated 19.02.1987. The relevant observations/directions contained in the aforesaid judgment are reproduced hereunder

“..Whether or not the applicant acquired any right to the post by virtue of their appointments and whether they could be treated as permanent appointees or not, certainly the employment under the ESI being governed by statutes and the Corporation, being an instrumentality of the State it cannot act arbitrarily. As stated above, the posts exist and there is a need to fill up these posts either on temporary, ad hoc or regular basis. In fact, after the services of the applicants were terminated at the end of a period of 9 months, other doctors with identical qualifications are sought to be appointed again on “temporary ad hoc basis”. So long as the posts continue and there is a need to make even “temporary ad hoc” appointment, the mere fact that such appointees if continue beyond a period of 12 months are likely to claim that they are regular appointees, cannot be a ground for terminating their appointment. That would be wholly arbitrary and violative of articles 14 and 16 of the Constitution. Assuming that such would be the consequence, which we very much doubt, having regard to the Regulations governing “recruitment to the concerned post, the Respondents must make regular appointments and not terminate the services of the “temporary and ad hoc appointees when the vacancies continue to exist and “temporary and ad hoc” appointees are duly qualified to be appointed and continued. If after consultation with the UPSC, any one of the applicants appointed temporarily or on an officiating basis is not appointed or not continued or if his services are terminated, it would be open to that applicant to challenge that action and it will also be open to the respondents to resist that claim and that petition would be considered on its own merits. However, if on consultation with the UPSC, the UPSC advises that they may be continued, there would be no occasion for terminating the services of the applicants herein. In fact, even according to the respondents, under the Regulations, one of the methods of appointment is appointment in consultation with the UPSC.

In view of the above discussion, we hold the termination of the services to be illegal and unsustainable and accordingly quash the same. All the petitioners herein except Dr. Guru Prasad (T.497/87) are continuing in services of Dr. Guru Prasad were terminated even before he approached this court and, therefore, he is not continuing in service. They shall be

continued and Dr.Guru Parsad shall be deemed to have been reinstated in service forthwith. Among the petitioners, Dr.(Mrs.) Prem Lata Choudhary and Dr.Shanker Lal have since been selected by the UPSC for appointment and they have been accordingly appointed on regular basis. Whether they are entitled to claim the benefits of their earlier service for the purpose of reckoning their seniority, is a matter which does not concern us in this petition. When the seniority list is drawn up, if they are aggrieved, they may make that claim and nothing said herein would affect their rights in this regards.

The only other question, therefore that requires to be considered at this stage is whether the applicants are entitled to the scale of pay of Rs.700-1300 allowed to regular Insurance Medical Officers Grade II. The learned counsel for the respondents contends that the offer of appointment specifically stipulated that the applicants would be paid a fixed salary of Rs.650/- plus allowances admissible to those drawing a basic pay of Rs.650/-. They were also told that they would not be entitled to leave and other benefits admissible to the permanent Insurance Medical Officers Grade II. Whether an Insurance Medical Officer Grade II is appointed on ad hoc or temporary or officiating or on regular basis after selection, duties and responsibilities attached to the post discharged by all of them are identical. It is now well settled that among persons appointed to a post carrying a particular scale of pay and discharging the same duties and responsibilities attached to that post, no distinction can be made in the matter of pay and allowances merely on the ground that some are temporary or ad hoc or officiating and others are appointed on regular basis. The principle of equal pay for equal work is so well entrenched in service jurisprudence that it is too late in the day to dispute that proposition. However, Respondents bound as they are by the instructions contained in the Government of India Office Memorandum No.A-12015/1674-CHS II dated 1.5.1975, appear to have offered to the petitioners a fixed basic pay of Rs.650/- with allowances. Para 2 of the said OM reads as follows:

"There are number of officers working as Junior Medical Officers on ad hoc basis under the various participating organizations against G.D.O. Grade II posts. These officers will not be entitled to the Junior Class I scale till their regular selection through UPSC. In view, however, of the existing scale of Rs.350-900 with N.P.A. at the rate of 33-4% of pay subject to a minimum of Rs.150/- p.m. having become non-existent from 1-1-73 on the basis of recommendations of the Third Pay Commission, it has been decided that the pay of the existing ad hoc appointees against G.D.O. Grade II posts now working under the Ministry of Labour etc. may be fixed in the standard class II (Gazetted) revised scale of pay of Rs.650-30-740-35-810-EB-880-40-1000-EB-40-1200 with effect from the 1st January, 73. The revised rates of N.P.A. for those officers whose pay are fixed in the above scale will be as detailed below:-

1st stage to 8th stages at the rate of Rs.150/- p.m.

9th stage to 13th stage at the rate of Rs.200/- p.m.

14 th stage onwards	Rs.250/- p.m.
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Respondents have, however, ignored the fact that the pay scale of Insurance Medical Officers Grade II at the relevant time when the petitioners were appointed on ad hoc basis, was Rs.700-1300 and not Rs.650-1200. If they were appointed for a period of 90 days or even 9 months, the applicants would start at Rs.700/- and they would have earned an increment at the end of one year. Therefore, there is no justification for not allowing the basic pay of Rs.700/- and allowing only Rs.650/- p.m. Since the applicants are discharging the same duties and responsibilities as are discharged by regular Insurance Medical Officers Grade II, they would be entitled to the same pay scale i.e. 700-1300 and allowances and also to the same benefits of leave, maternity, increment on completion of one year and benefit of their service conditions.

Even so, Shri Gambhir, learned counsel for the respondents, next contends that the applicants should be declared entitled to receive the higher emoluments, pay and allowances now being allowed by the Tribunal only prospectively from the date of the judgment. We are unable to accede to this request. If the principle of equal pay for equal work is accepted as correct, the applicants will be entitled to the same pay and allowances as are admissible to regular Insurance Medical Officers Grade II w.e.f. the date they were initially appointed and also so long as they are continued as such. However, in the case of Dr. Guru Prasad, we find that his services were terminated on 3.5.1986 (AN). As that order is hereby quashed, he will be reinstated forthwith. He shall be entitled to pay and allowances as now allowed by the Tribunal for the period he was actually in service earlier and for the period pursuant to this order. During the interregnum period, since he did not actually serve as Insurance Medical Officer Grade II, obviously he cannot be paid any amount whatsoever. If any of the applicants had applied for leave and that was refused and the salary for that period was not paid, the leave to which a regular Insurance Medical Officer Grade II is entitled shall be allowed to the applicant concerned and the salary and other emoluments shall be granted such leave and emoluments in future as well. If any of them were absent from duty only because leave was not sanctioned, such period of absence shall be treated as leave to which they are entitled. The intermittent breaks in service given at the end of 90 day's period of service were artificial and unwarranted. The orders of termination at the end of every period of about 90 days are held to be illegal and invalid and do not operate as valid termination of their service; they are to be disregarded and as not affecting the continuity of their service. The High Court in CWP No.3743/82 in its judgment dated 20.12.84 held that "repeated short term appointments with one day break in the service was certainly a malafide act and done with a view to overcome the provisions of Section 17 (3) of the Employees' State Insurance Corporation Act. The methodology adopted by the respondents in making the appointment for 90 days with a break of one day is to be deprecated. I am of the view that the present petition is fully covered by the decision of this court

in Dr.G.P.Sarabhai and others (supra)". We find ourselves in agreement with that view. Notwithstanding the break, they shall be deemed to be continuing in service ever since the day of their first appointment. However, as they did not actually discharge any duties during these artificial breaks at the end of every 90 days, we declare that while that period would count as duty for continuity of service, that period will be treated as leave to which the applicants are entitled on par with regular Insurance Medical Officers Grade II."

5. The aforesaid judgment came to be challenged before Hon'ble Supreme Court of India in Civil Appeal No. 2191/1989, wherein an interim stay was granted on 14.08.1987. However, SLP was disposed of vide order dated 19.10.1994 upholding the judgment of this Tribunal. In the counter affidavit filed by the respondents, it is stated that the Selection Board was constituted in 1990-92 by the Respondent Corporation for the benefit of the applicants for the purpose of their regularisation. Though Mrs. Palli, learned Sr. Adv. appearing for the respondents submits that in view of the directions of the Tribunal, the corporation approached UPSC, however, UPSC did not interfere and the selection board was constituted by Respondent Corporation. However, we find there is no specific averment in this regard either in the OA or in the reply filed by the respondent corporation. The fact remains that the selection board was constituted to consider the question of regularisation of the applicants, and vide order no. 446/95 (M) dated 15.06.1995, the applicants came to be appointed in the light of judgment dated 19.02.1987 passed by the Tribunal. The appointment order also stipulated as under:

"The above benefits are being granted to the Doctors concerned in the light of the judgment dt. 19.2.87 by the CAT New Delhi. Their regular appointment shall be reckoned from the date he/she was selected by the UPSC/ESIC Selection Board in accordance with the Rules and Regulations applicable to such doctors.

...The other terms and conditions of their appointment are as laid down in their offer of appointment to the post of IMO Gr. II on regular basis issue to them by the ESIC."

6. Consequent upon their regularisation, some of the doctors including some applicants herein, filed OA No. 2491/1997 before the Tribunal claiming seniority from the date of their initial appointment on adhoc basis. This OA was disposed of vide judgment dated 25.08.2000 with the following directions

"9. For the reasons given above, the OA fails on the preliminary objection as well as on merits, as mentioned above. Accordingly, OA is dismissed along with M.As. No order as to costs."

The aforesaid judgment of the Tribunal became subject matter of challenge in Writ Petition No. 2173/2002 before Delhi High Court. The said Writ Petition was dismissed vide order dated 09.05.2013 upholding the judgment of this Tribunal with the following observation:

"....The issue surviving is one of seniority and in situ promotion as also regular promotion and for which we are of the opinion that without impleading such persons whose seniority is likely to be effected it would not be permissible to further grant any relief to the writ petitions.

2.The said decision notices that medical doctors engaged in ESIC as IMO Grade-II for a period of six months on contract basis but subsequently appointed on regular basis would not be entitled to benefit of ad-hoc appointment.

3. Both the writ petitions are accordingly dismissed but without any order as to costs."

7. Not being satisfied with the aforesaid decision, applicant no. 1 and some other applicants filed Special Leave Appeal (Civil) No. 18323/2013 before the Hon'ble Supreme Court of India. The said SLP was however, dismissed as withdrawn in following manner :

"Upon hearing counsel the Court made the following

ORDER

Learned senior counsel for the petitioners seeks permission to withdraw this petition. The special leave petition is dismissed as withdrawn."

It seems that another Special Leave Petition (Civil) No. 37732/2013 titled R.K. Sharma & Ors. vs. Employees State Insurance Corp. was also filed before Hon'ble

Supreme Court. The said SLP was dismissed as withdrawn in the following manner:

Upon hearing counsel the Court made the following

ORDER

Heard Ms. Asha Jain Madan learned counsel for the petitioners in support of this petition. She states that the petitioners will apply to the High Court for recalling the order which is impugned herein and also if the High Court so permits, will apply for amendment to add the affected persons as the additional respondents. We allow the petitioners to withdraw the special leave petition with liberty to apply to the High Court. We also make it clear that it will be for the High Court to consider the application and decide the same on its own merits provided the application for recalling is filed within a period of 30 days from today.

The special leave petition is dismissed as withdrawn accordingly.

Thereafter, the applicants approached Hon'ble High Court. The Hon'ble High Court passed order dated 21.02.2014 with the following observations/directions:

"3. It is not a case where the Supreme Court has granted liberty to the petitioners to seek review of the decision dated May 09, 2013.

4. That apart, the claim in the writ petitioners was to regularize their services.

5. Said relief had already been granted to the petitioners by the department by the time the writ petition came up for hearing.

6. It was noted by us that the surviving issue of seniority could not be adjudicated upon without proper pleadings and without impleading such persons whose seniority was likely to be affected.

7. We do not know whether the regularization of services of the petitioners was from the date of initial joining ad-hoc service or from the date of regularization.

8. Be that as it may, if the petitioners have an issue of seniority they are free to approach the Central Administrative Tribunal after impleading such persons whose seniority is likely to be affected by the claim made by the petitioners.

9. Review Pet No.69/2014 and CM No.1694/2014 are accordingly dismissed.

10. No costs.

8. In view of the observations made in Para 8 of the judgment of High Court, the applicants have filed the present OA by impleading such of the Doctors who were appointed between the period of adhoc appointment of the applicants and their regularisation. Relief claimed in the present OA is as under :

- (i) Call for the records relating to the present case and quash and set aside the action and orders of the respondents in refusing the regularisation of the applicants' services w.e.f. the dates of initial appointment and the refusal of the respondents to consider the said period of continuous service from initial appointment for the purpose of seniority, study leave, the scale of Senior Medical Officer, the scale of Chief Medical Officer etc being malafide, arbitrary, discriminatory and in violation of the fundamental rights of the applicants under Articles 14 and 16 of the Constitution of India.
- (ii) declare the action and orders of the respondents in refusing the regularization of the applicants' services w.e.f. the dates of initial appointment and the refusal of the respondent to consider the said period of continuous service from initial appointment for the purpose of seniority, study leave, the scale of Senior Medical Officer, the scale of Chief Medical Officer etc. are null and void being malafide, arbitrary discriminatory and in violation of the fundamental rights of the applicants under Articles 14 and 16 of the Constitution of India.
- (iii) Direct the respondents to treat the applicants on regular service w.e.f. the date of initial appointment and to consider the said period of continuous service from initial appointment for the purpose of seniority, study leave, the scale of Senior Medical Officer, the scale of Chief Medical Officer and all other consequential benefits.
- (iv) Direct the respondents to grant the seniority to the applicants from the date of initial appointment on ad-hoc / officiating basis.
- (v) Award sufficient compensation and damages from the respondents for the violation of fundamental rights of the applicants.
- (vi) Award the cost of the application in favour of the applicant .
- (vii) Pass such other further order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

9. It appears that the applicants are claiming regularisation from the date of their initial appointment on adhoc basis as also seniority and further promotions

to the scale of Senior Medical Officer and Chief Medical Officer along with other service related benefits like study leave etc.

10. The claim of the applicants is, however, seriously opposed by the Corporation. It is stated that the Tribunal in its judgment dated 19.02.1987 though protected the increments payable to the applicants, however, the judgment is silent on the point of seniority. Regularisation of the applicants was pursuant to the selection made by ESIC Board. It is further stated that the respondents did not act arbitrarily as alleged. Provisional gradation/seniority list was circulated as on 09.05.1996 with seniority as on 01.01.1996 whereunder seniority was granted to permanent regular employees. The respondents have further stated that seniority cannot be granted to adhoc employees and only when the applicants were regularised, they are eligible to regular promotion in accordance with Tribunal's order.

11. In the rejoinder filed by the applicants, primarily the averments made in the OA have been reiterated. The applicants were engaged by the respondent no. 1 Corporation. This Corporation is a statutory corporation established under Section 3 of the Employees State Insurance Act, 1948. Section 17 of the Act deals with staff of the Corporation. Sub-section (2) of Section 17 deals with method of recruitment, salary and allowances, discipline and other conditions of service whereas sub-section (3) of Section 17 prescribes that every appointment to the post (other than medical posts) corresponding to Group A and Group B posts under Central Government shall be made in consultation with UPSC. Section 17 is reproduced hereunder:

“17. Staff. 6

(1) The Corporation may employ such other staff of officers and servants as may be necessary for the efficient transaction of its business provided that the sanction of the Central Government shall be obtained for the creation of any post⁷⁵ [the maximum

monthly salary of which ⁷⁶ [exceeds such salary as may be prescribed by the Central Government]].

⁷⁷ [(2) (a) The method of recruitment, salary and allowances, discipline and other conditions of service of the members of the staff of the Corporation shall be such as may be specified in the regulations made by the Corporation in accordance with the rules and orders applicable to the officers and employees of the Central Government drawing corresponding scales of pay: Provided that where the Corporation is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters aforesaid, it shall obtain the prior approval of the Central Government: ⁷⁸ [Provided further that this sub-section shall not apply to appointment of consultants and specialists in various fields appointed on contract basis.]

(b) In determining the corresponding scales of pay of the members of the staff under clause (a), the Corporation shall have regard to the educational qualifications, method of recruitment, duties and responsibilities of such officers and employees under the Central Government and in case of any doubt, the Corporation shall refer the matter to the Central Government whose decision thereon shall be final.]

(3) Every appointment to ⁷⁹ [posts ⁸⁰ [(other than medical posts)]] corresponding to ⁸¹ [Group A and Group B] posts under the Central Government], shall be made in consultation with the ⁸² [Union] Public Service Commission: Provided that this sub-section shall not apply to an officiating or temporary appointment for ⁸³ [a period] not exceeding one year: ⁸⁴ [Provided further that any such officiating or temporary appointment shall not confer any claim for regular appointment and the services rendered in that capacity shall not count towards seniority or minimum qualifying service specified in the regulations for promotion to next higher grade.]

⁸⁴ [(4) If any question arises whether a post corresponds to a ⁸¹ [Group A and Group B] post under the Central Government, the question shall be referred to that Government whose decision thereon shall be final.]

First Proviso to sub-section (3) further permits the corporation for making temporary appointment for a period not exceeding one year whereas second proviso to sub-section (3) further provides that such officiating or temporary appointment shall not confer any claim for regular appointment and the services rendered in that capacity shall not count towards seniority or minimum qualifying service specified in the regulations for promotion to next higher grade.

However, second proviso was added vide Act 29 of 1989 w.e.f 20.10.1989.

12. We have heard learned counsel for the parties at length.

13. Learned counsel for the applicants submits that since the Tribunal granted all the service benefits to the applicants by maintaining their initial appointment and also allowing the regular pay scale etc., they are entitled to seniority from the date of their initial appointment notwithstanding any stipulation in their regularisation order. The applicants have also relied upon the judgment of High Court of Delhi dated 12.07.1985 reported as 1986 (11) DRJ 260, **J.P. Gupta & Ors.**

Vs. MCD & Ors., whereunder following has been observed

"8. It may be mentioned now that this appeal has been heard along with a number of other appeals and writ petitions which raise a somewhat similar question. We have cases dealing with persons directly recruited to the post of Assistant Engineer. We have also cases of persons promoted to the post of Executive Engineer from the post of Assistant Engineer. Various judgments by different learned single Judges have been dealt with by us. In some cases, the case of Ishwar Chander Sanger v. DESU, LPA 110/69 had been followed. In others it had been distinguished, but we have found that the said judgment applies to all the cases. The reason we have found is that the delay in making recruitment rules and making regular appointments in accordance with the procedure envisaged by the Act has really been the result of a conflict between the Corporation and the Union Public Service Commission. In the result, for years on end, persons have continued on an ad hoc basis. This has happened even in cases where the appointment was not on ad hoc basis initially. In such cases, the period of continuous ad hoc service cannot be treated as a stop gap arrangement. This is, infact, a regular appointment, which is held in abeyance because the recruitment rules were not settled and the procedure not finalised. These appointments have eventually been regularised after the recruitment rules had been settled and the procedure laid down. The period prior to the so-called regular appointment is also a period of regular service as held by the Division Bench in Ishwar Chander Sanger's case. The judgments we have delivered are in the cases of MCE v/ K.K. Bhatia LPA 159/77 Lashkar Singh & Ors. v. MCD and J.P. Gupta & Ors. vs. MCD, the present case. We have also taken the same view in the case of MCD which is a case of a direct recruit and also B C Gupta & Ors. v. MCD CW 327/71 and other connected writs and Rameshwar Aggarwal and Ors. v. MCD LPA 154 of 1977. Therefore, the petitioners will succeed in this appeal and their seniority will relate back to the date of initial appointment. The appeal is allowed. The petitioners will get costs. Counsel fee Rs. 250/-"

Another judgment relied upon is dated 18.03.1993 passed by Hon'ble Supreme Court in case of ***Union of India & Anr. Vs. P. Srinivasulu & Ors.***, (2012) 8SCC633, whereunder Hon'ble Supreme Court has held as under:

"The learned counsel for the Union of India has relied on the judgment of this Court in Dr. M.A. Haque & Ors. vs. Union of India & Ors. The learned counsel for the Union of India has relied on the judgment of this Court in Dr. M.A. Haque & Ors. vs. Union of India & Ors. (Interlocutory Application No. 1 of 1992 in Writ Petition No. 1165 of 1986) decided on February 18, 1993. We have been taken through the said judgment. In Dr. Haque's case, the applicants before this court had not appeared in any written examination or interview and had not gone through any process of selection by the UPSC. The applicants in that case were regularised under the directions of this Court. It was in these circumstances that this Court refused to grant the applicants in Dr. Haque's case the benefit of their adhoc service towards seniority. The focus in the present special leave petition are entirely different. The respondents herein were selected through the Union Public Service Commission and were regularised. They have been rightly given the benefit of their adhoc service towards seniority by the Central Administrative Tribunal. The special leave petition is dismissed."

14. Learned counsel for the respondents has however, vehemently argued that these judgments will have no application to the facts of the present case. According to Mrs. Palli, learned Senior Advocate, the question of seniority is governed and regulated by the OMs issued by DoPT. Her further contention is that service conditions of the applicants are primarily governed and regulated by statutory rules framed under sub section (1) of Section 97 of ESIC Act. She has placed on record and referred to a notification dated 16.12.1959 whereby the "Employees State Insurance Corporation (Staff and Conditions of Service) Regularisations, 1959 were notified.

15. Section 97 of the Employees State Insurance Act, 1948 deals with powers of the Corporation to make regulations, interalia with respect to the method of

recruitment and other conditions of service of employees of the Corporation.

The extract relevant for the purpose of this application is noticed hereunder:

"(xxi) the method of recruitment, pay and allowances, discipline, superannuation benefits and other conditions of service of the officers and servants of the Corporation other than the [Director General and Financial Commissioner];"

16. Employees' State Insurance Corporation (Staff and Conditions of Service)

Regulations, 1959 have been framed in exercise of powers conferred under sub-section (1) of Section 97 read with clause (xxi) of sub-section (2) and sub-section (2A) of that Section and sub-section (2) of Section 17 of the Employees' State Insurance Act, 1948. Regulation 24 thereof deals with other conditions of service of the employees and reads as under:

"24. OTHER CONDITIONS OF SERVICE

In respect of all other matters relating to the conditions of service of employees, for which no provision or insufficient provision has been made in these regulations, the rules applicable from time to time to the correspondent category of Central Government servants shall apply, subject to such modifications and variations or exceptions, if any, as the Director General may, with the approval of the Standing Committee, by order from time to time, specify."

17. From the conjoint reading of the aforesaid statutory provisions, it emerges that regulations do not contain any specific provision with regard to seniority, hence, corresponding rules applicable to Central Government servants shall apply, subject to such modifications and variations or exceptions,, if any, as the Director General may, with the approval of the Standing Committee, by order from time to time, specify. Based upon aforesaid stipulation in 1959 Rules, it is contended that since there is no specific rule or regulation governing the seniority of doctors in the respondent corporation, the relevant corresponding norms issued by the Government shall apply. Mrs. Palli, learned Senior Advocate has also placed on record copies of OMs issued by DoPT from time to time.

Relevant of them are OMs dated 29.10.1975, 23.09.2001 and 03.04.2013.

Relevant extracts of the same are reproduced hereunder:

No. 22011/3/75-Estt(D)
 Government of India
 Ministry of Home Affairs,
 Department of Personnel & A.R.

New Delhi-110001 dt. 29 Oct. 1975.
OFFICE MEMORANDUM

Subject : Adhoc appointments do not bestow any claim on the person for regular appointment- instructions regarding.

“2. ...It has, therefore, been decided that whenever an appointment is made on adhoc basis, the fact that the appointment is adhoc and that such an appointment will not bestow on the person a claim for regular appointment, should be clearly spelt out in the orders of appointment. It should also be made clear that the service rendered on ad-hoc basis in the grade concerned would not count for the purpose of seniority in that grade and for eligibility for promotion to next higher grade.”

The aforesaid memorandum has been followed by another memorandum dated 23.07.2001. Relevant extract of the same is reproduced hereunder:

“No. 28036/1/2001-Estt (D)
 Government of India
 Ministry of Personnel, Public Grievances and Pensions
 Department of Personnel and Training

New Delhi-110001
 July 23, 2001

OFFICE MEMORANDUM

Subject:- Restriction on regularization of ad-hoc appointment-regarding.

The undersigned is directed to say that as per the Department of Personnel and Administrative Reforms O.M. No. 22011/3/75-Estt (D) dated October 29, 1975 and the Department of Personnel and Training O.M. No. 28036/8/87-Estt (D) dated March 30, 1988, persons appointed on ad-hoc basis to a grade are to be replaced by persons approved for regular appointment by direct recruitment, promotion or transfer (absorption), as the case may be, at the earlier opportunity. These instructions also provide that whenever an appointment is made on ad-hoc basis, the fact that the appointment is ad-hoc and that such an appointment will not bestow on the person a claim for regular appointment should be clearly spelt out in the orders of appointment. It should also be made clear that the service rendered on ad-hoc basis in the grade concerned would not count for the purpose of seniority in that grade and for eligibility for promotion to the next higher grade.”

This OM was further supplemented by another OM dated 03.04.2013. Relevant extract of the OM is reproduced hereunder:

“No. 28036/1/2012-Estt (D)

GOVERNMENT OF INDIA
MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
DEPARTMENT OF PERSONNEL AND TRAINING

North Block, New Delhi
Dated the 3rd April, 2013

OFFICE MEMORANDUM

Subject:- Ad-hoc Appointment/Promotion-Review of- Regarding.

...5. As already provided in this Department's OM No. 22011/3/75-Estt.(D) dated 29th October, 1975, and reiterated in OM No. 28036/8/87-Estt. (D) dated 30.03.1988 and OM No. 28036/1/2001-Estt.(D) dated 23.07.2001, a ad-hoc appointment does not bestow on the person a claim for regular appointment and the service rendered on ad-hoc basis in the grade concerned also does not count for the purpose of seniority in that grade and for eligibility for promotion to the next higher grade. As per existing provisions, these facts are to be clearly spelt out in the orders of the ad-hoc promotions/ad-hoc appointments. Therefore, such ad-hoc arrangements are neither in the interest of the individuals nor the organizations concerned. It is, thus, not appropriate to resort to ad-hoc arrangements in a routine manner."

18. From a reading of the aforesaid OMs, it is apparent that right from 1975, the norms as laid down by DoPT for Central Govt. employees are against the grant of seniority by taking into consideration adhoc period where initial recruitment was purely temporary for a limited period notwithstanding their later regularisation.

19. Respondents have also relied upon the following judgments:

1. State of Haryana & Ors. vs. Vijay Singh & Ors. (2012) 8 SCC 633

2. Direct Recruitment class 2 engineering officers association & Ors. Vs. State of Maharashtra & Ors., (1990) 2 SCC 715

3. Z. Ajeesudeen vs. Union of India & Ors. [Civil Appeal No. 1256/2008 decided on 12.02.2008]

20. No doubt, in the judgments cited by the applicants, Hon'ble Supreme Court has allowed adhoc period to be counted towards seniority. However, these directions in the aforesaid judgment do not refer to any rules/regulations

of the relevant service in question and thus such directions can be construed to be emanating from Article 142 of the Constitution of India.

21. In the present case, there are specific OMs which govern the service conditions, particularly seniority of the staff/employees in the respondent corporation and these OMs issued by Central Government have been adopted by virtue of regulation 24 of the regulations framed by corporation, that is notified vide notification dated 16.12.1959 and thus the OMs of 1975, 2001 and 2013 would apply to regulate the issue of seniority of the employees of respondent corporation. The regulations specifically prohibit counting of adhoc service towards seniority of the employees. Apart from that, as we have noticed hereinabove that the offer of appointment made to the applicants at the time of their initial appointment on adhoc basis, in Para 'd' specifically provide that the appointment would not confer any benefit of seniority or claim for regular appointment or for further continuance in the Corporation. In Para 8, there is a specific stipulation that if the conditions incorporated hereinabove are acceptable, the appointment shall be made. Applicants have not been able to place on record any material that at the time of their initial engagement, the conditions offered in the letter of offer of appointment were not accepted by them. This is not even a case pleaded in the present OA or even in earlier litigations. Apart from above, we find that the recruitment/service has to be in accordance with the mandate of Article 14 and 16 of the Constitution of India. Mrs. Palli, learned Senior Advocate has also brought to our notice the method of recruitment for the post of Insurance Medical Officer which is to be filled up in the following manner:

"Method of recruit. whether by direct recruitment or by deputation/transfer & percentage of the vacancies to be filled by various methods.

(10) By direct recruitment on the basis of a written examination to be conducted by the Commission followed by an interview; or selection by interview in accordance with age limit and educational qualification and experience as may be prescribed in consultation with the Commission; or any other method as may be decided in consultation with the Commission.

Note 1: The exact method of recruitment to be followed shall be decided in consultation with the Union Public Service Commission on each occasion."

The aforesaid regulations prescribe the mode of recruitment to the post by direct recruitment on the basis of written examination to be conducted by the Commission, followed by interview; or selection by interview in accordance with age limit and educational qualification and experience as may be prescribed, in consultation with the Commission; or any other method as may be decided in consultation with the Commission. Thus, these are the three prescribed modes of selection/appointment to service as Insurance Medical Officer, Grade II. Initial appointment of the applicants was not by adopting any of these modes, though interview was conducted. There is nothing on record to indicate that the mode of interview was decided by the competent authority in consultation with the Commission. In any case, admittedly, the vacancies were never notified providing opportunity to all the eligible candidates to apply and compete in the selection process. This per se is in contravention to the mandate of Articles 14 and 16 of the Constitution of India.

22. Be that as it may, the initial appointment on adhoc basis was for a period of 90 days with specific stipulation that it shall not be extended, though the fact remains that the applicants continued for a period of about nine months when their services were sought to be dispensed with. However, subsequently, due to intervention of courts/tribunals, the applicants have been regularised under the direction of court and the direction categorically provide for selection by UPSC and subsequently in view of the circumstances noticed hereinabove,

regularisation was carried out by separate process of selection by ESIC Board and the applicants have been regularised prospectively i.e, w.e.f the date they were considered for regularisation by ESIC Board. A Constitution Bench of the Apex Court in the matter of direct recruits case in **M. K. Shanmugam vs. Union of India** [(2004) 4 SCC 476] has held as under:

"If the ad hoc selection is followed by regular selection, then the benefit of ad hoc service is not admissible if ad hoc appointment is in violation of the rules. If the ad hoc appointment has been made as the stop gap arrangement and where there was a procedural irregularity in making appointments according to rules and that irregularity was subsequently rectified, the principle to be applied in that case was stated once again. There is difficulty in the way of the appellants to fight out their case for seniority should be reckoned by reason of the length of the service whether ad hoc or otherwise inasmuch as they had not been recruited regularly. As stated earlier, the appellants were regularly found fit for promotion only in the year 1977 and if that period is reckoned their cases could not be considered as found by the Tribunal. The view expressed by this Court in these cases have been again considered in the decisions in [Dr. Anuradha Bodi & Ors. v. Municipal Corporation of Delhi & Ors.](#), 1998 (5) SCC 293; [Keshav Deo & Anr. v. State of U.P. & Ors.](#), 1999 (1) SCC 280; [Major Yogendra Narain Yadav & Ors. v. Bindeshwar Prasad & Ors.](#), 1997 (2) SCC 150; [I.K. Sukhija & Ors. v. Union of India & Ors.](#), 1997 (6) SCC 406; [Government of A.P. & Anr. v. Y. Sagareshwara Rao](#), 1995 Supp. (1) SCC 16, 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."

23. Considering the ratio of the aforesaid judgment, we find that initial appointment of the applicants being purely adhoc and temporary, could not be counted towards seniority in view of the rules of seniority notified by various OMs, noticed and reproduced hereinabove. The OMs are binding and applicable in the case of applicants in absence of any statutory rules or regulations to the contrary. There is another aspect. Applicants are claiming seniority over and above private respondents. Though the private respondents have chosen not to contest this Application, however, the fact remains that

they were selected and appointed by direct recruitment in accordance with the procedure established by law and in consonance with the mandate of Articles 14 and 16 of the Constitution of India. Their appointment was between the period 1986-1991, i.e., between the period applicants were engaged on adhoc basis and till their regularisation. Private respondents having been appointed on substantive and regular basis right from the day of their appointment, cannot be made to suffer in the matter of seniority merely because the applicants have succeeded in seeking their regularisation. Since the date of regularisation is admittedly later in time, the appointment of applicants shall be deemed to be on substantive and regular basis from the date of their regularisation. They did not become members of the service during the period they were engaged on adhoc/temporary basis. The rights of private respondents cannot be affected to their disadvantage at the instance of the applicants, who entered government service through backdoor, though later regularized.

24. In view of the above circumstances, we do not find any merit in this OA, which is dismissed. No order as to costs.

(Shekhar Agarwal)
Member (A)

(Justice Permod Kohli)
Chairman

/ns/