

**CENTRAL ADMINISTRATIV TRIBUNAL
PRINCIPAL BENCH**

OA No.1699/2012

Reserved on: 26.04.2016
Pronounced on: 28.10.2016

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. Sudhir Kumar, Member (A)**

Dr. Niruta Sharma,
(Chief Medical Officer)
Dr. Ram Manohar Lohia Hospital,
New Delhi.

R/0 C-10, Kendriya Vihar,
Sector-51, NOIDA-201301
Distt. Gautam Budh Nagar
U.P.

... Applicant

(By Advocate: Mr. Rajeshwar Singh)

VERSUS

1. Union of India
Through its Secretary,
Ministry of Health & Family Welfare,
Govt. of India, Nirman Bhawan,
New Delhi-110011

2. Dr. Ram Manohar Lohia Hospital
Through its Administrative Officer
Medical Superintendent,
New Delhi. ... Respondents

(By Advocate : Mr. Rajinder Nischal)

O R D E R

Mr. Sudhir Kumar, Member (A):

The applicant of this OA is before this Tribunal because she is aggrieved by the fixation of her pay after her absorption in the Central Health Service (CHS in short) cadre w.e.f. 09.10.2003, after which the respondents have, through the impugned OM dated 02.03.2012, rejected her claim for fixation of her pay in the scale of pay of Rs.14300-18150, which she had enjoyed in her parent cadre in Himachal Pradesh.

2. The applicant had joined as a Medical Officer, Government of Himachal Pradesh on 09.08.1985, after having been selected through Himachal Pradesh Public Service Commission. She completed her probation, and her services were regularized on 18.04.1988. In the year 2001, she sought deputation to the CHS, and on 02.07.2001 she was appointed as Senior Medical Officer in CHS, on deputation basis, in the pay scale of Rs.10,000-15,200. In the meanwhile her accrual of seniority and higher pay scale in the parent cadre continued, and she was granted in her parent Cadre the new pay scale w.e.f. 1.1.1986 under the Fifth Pay Commission, the pay scale of Rs.12000-15500 on completion of 9 years of service, and the pay scale of Rs.14,300-18150 w.e.f. 01.01.2000, after completion of 14 years of service. Since she was on deputation, the benefits of such pay enhancements sanctioned to her in her parent Cadre were made available to her by CHS. Thereafter, the applicant requested and her name was recommended on 26.09.2003 for appointment on absorption basis in CHS on the post of Senior Medical Officer, under the Central Health Service Rules, 1996, the post which was already occupying on deputation basis. It was further stated in the OM circulating the post for being filled up on absorption basis that her seniority after such absorption will be further subject to the condition as laid down in DoP&T OM dated 03.10.1989 in this regard, and it will also be subject to the orders to be issued by the Government in consultation with the UPSC on the basis of December 1999 judgment of the Hon'ble Supreme Court in **SI Roop Lal and Anr. Vs. Lt.Governor, Delhi and Ors** (JT 1999 (9) SC 597). On the basis of this OM dated 26.09.2003, and the recommendation of her case on 9.10.2003, the applicant ultimately got her services absorbed under CHS.

3. Initially, on 20.10.2003, on the request of the applicant, her pay scale was fixed w.e.f. 02.07.2001 in the pay scale of Rs.14,300-18150, which was at par with her pay drawn in her parent cadre. Upon being granted financial upgradation under the Assured Career Progression (ACP) Scheme, admissible to her in her parent cadre, she was also granted pay scale of Rs.14300-18,150 w.e.f. 02.07.2001 in the earlier parent cadre in Himachal Pradesh. It was, however, directed that her designation will remain same, and that she will not be entitled to any deputation allowance, which was earlier being given to her, and she had agreed that she will continue to draw the same pay till date.

4. After her absorption in the CHS, her seniority ultimately came to be fixed in the combined civil list of CHS Senior Medical Officers vide order dated 29.08.2006. She is aggrieved that even though her seniority has been fixed in between the doctors who are in the grade of Senior Administrative Grade/Non Functional Selection Grade Chief Medical Officers (SAG/NFSG, CMOs, in short), she has been denied the grade of pay which has already been granted to them, and which she has earned by virtue of her uninterrupted regular service.

5. When she sought clarification about her pay fixation on absorption after she had joined CHS, it was clarified that when she had joined CHS on 2.07.2001 on deputation, she had opted for pay and allowances as applicable under the Central Government to be paid to her, and, accordingly, her pay was fixed at Rs.12,600/- as on 02.07.2001, in the grade of Senior Medical Officers. She was further allowed to draw the higher pay scale, as made available to her in her the then parent cadre in Himachal Pradesh, in the pay scale of Rs.14300-18150 w.e.f. 02.07.2001, subject to the condition that her designation on deputation

in CHS will remain the same, and that she will not be entitled to any deputation allowance, which was earlier being paid to her. Accordingly only her pay was fixed at the rate of Rs.14700/- plus Non-Practicing Allowance (NPA) through Office Order dated 06.02.2004 w.e.f. 02.07.2001.

6. When she represented about her seniority, and sought intervention for pay fixation, and release of increments, that was not done by the respondents for quite sometime, as has been alleged by her. Thereafter, as mentioned earlier also on 29.08.2006, the respondent No. 2 issued an order granting her revised pay scale of Rs.37400-67000 plus grade pay of Rs.8700/- w.e.f. 01.01.2006 provisionally, with the remark that her arrears may be released only after clarification has been received in this regard from the Ministry of Health and Family Welfare, respondent No.1. She represented once again thereafter on 04.11.2009, after which the respondent no.1 issued the impugned order, wherein it was directed that her pay may be fixed at Rs.15,500/-, even above the maximum of the pay scale of Rs.10,000-15,200/- on 09.10.2003, the date of her absorption, and the difference of Rs.300/- may be paid as personal pay to her, to be absorbed in future increments, and that no arrears would be paid to her.

7. It has been submitted by the applicant that it is a well settled universal rule that on absorption, deputationists are to be given seniority and fixation of pay taking into account the full period of equivalent service rendered by them in their parent department. Apart from claiming to be covered under the OM dated 03.10.1989, and the judgment of Hon'ble Supreme Court in **SI Roop Lal** (supra), it has been claimed by the applicant that her case is also covered by the judgment of

Hon'ble Supreme Court in **K.Madhvan and Another Vs. Union of India and Ors** (1987) (4) SCC 566), as well as this Tribunal's order dated 22.04.2009 in OA No.1436/2007. The applicant had, therefore, first filed her earlier OA no. 3644/2009, seeking quashing/set aside of the impugned order/communication dated 04.11.2009. But, during the pendency of that OA, on 15.03.2010 the pay of the applicant was fixed as follows:-

- “1. Pay as on 9.10.2003 in the pay
Pay scale of Rs.10000-325-15200. Rs.15200/-+ Rs.300/- as
Personal pay=Rs.15500/-
- 2. Stagnation increments on 1.10.2005. Rs.325/- to be absorbed increments
- 3. Pay as on 1.10.2005 Rs.15525/-

No arrears would be paid for the said fixation.”

which was taken note of by a Coordinate Bench while disposing of said OA on 27.10.2010, by directing as follows:-

“5. We have heard the learned counsel for the parties. There is no dispute that vide order dated 21.10.2003, the applicant was allowed to draw pay in the pay scale of Rs.14300-18150 in her parent cadre w.e.f. 2.7.2001. We are of the firm view that this order could not be set aside or varied without even putting the applicant to notice. Surely, by the impugned order, rights of the applicant have been adversely affected and principles of natural justice necessarily require notice and hearing to the applicant before passing such order.

6. For the reasons as mentioned above, the impugned order is set aside. If the respondents are inclined to proceed in the matter of reducing the applicant's pay, we direct that they shall put her to notice before passing an order which may adversely affect her and further that the order that may be passed shall take into consideration the objections as may be raised by the applicant which may be relevant for deciding the issue.

7. With the observations and directions as made above, this OA is disposed of leaving parties to bear their own costs.”

8. Since the respondents did not pass any order for sometime, the applicant filed a Contempt Petition No. 80/2012, in which notices were issued on 03.02.2012, returnable on 06.03.2012. However, the respondent no.1 thereafter passed the order dated 17.02.2012 (Annexure A-11), giving her the details of fixation of her pay, and asking her to put forth any objection on the issue. The applicant has submitted that she then asked to be supplied with the entire set of documents for her being able to furnish a proper and effective reply. However, respondent no.1, thereafter issued the Office Memorandum dated 02.03.2012, without having considered her reply. However, since the respondents had passed an order, her CP came to be dismissed on 06.03.2012, but she has now laid a challenge to that order dated 02.03.2012

9. The applicant has submitted that the respondents have acted in a malafide and arbitrary manner by reducing her pay which she had already drawn in terms of order dated 21.10.2003 passed by the respondents and the order through which the applicant was allowed to draw pay scale of her the then parent cadre i.e. Rs.4300-18150, and in complete violation of principles of natural justice. The applicant has stated that in passing the impugned order dated 2.03.2012, the respondents have completely overlooked their own earlier Office Memorandums dated 27.03.2001, 29.03.2008, and the resolution issued by the Ministry of Finance dated 28.09.2008, in regard to the issue of grant of seniority of the persons absorbed after being on deputation, and the benefit to be given after absorption in the department. She has taken the same aspects in the grounds for filing the OA, and has contended that the respondents have even violated the terms mentioned in the order dated 26.09.2003 (supra), through which her services had been absorbed, which had taken into account the higher pay scale of

Rs.14,300-18,150 granted to her in her the then parent cadre in Himachal Pradesh w.e.f. 2.07.2001, even though it was directed that her deputation as Senior Medical Officer will remain same, but that she will not be entitled to any deputation allowance. She has taken the further ground that on the one hand her seniority has been fixed appropriately, and on the other hand she has been denied the grade of the pay earned by her through uninterrupted regular permanent service. She has also assailed that her annual increments have been stopped illegally w.e.f. January, 2005, after her absorption to CHS, and that the respondents have not adhered to even her pay fixation ordered as per 6th Pay Commission, granting her Grade Pay of Rs.8700 w.e.f. 1.1.2006, in the revised Pay Band of Rs.37400-67000. Malafide was alleged by her, as the respondents had reduced her pay scale lower than what she had drawn already in terms of the order dated 21.10.2003. In the result, the applicant has prayed for the following reliefs:-

“8.1. The Tribunal declares that the impugned office memorandum no.C.17011/01/2010-CHS dated 02.03.2012 passed by the respondent no. 1 in question available at Annexure A-1 is required to be quashed/set aside and declared illegal tainted with abuse of power and miscarriage of justice and based in extraneous circumstances, malafide, biased, prejudiced, arbitrary and is violative of provisions of natural justice and the rules thereto and uphold the order dated 21.10.2003 passed by the respondent no. 1 in favour of the applicant with directions to all increment due as on date.

8.2. The costs of this OA may kindly be awarded in favour of the applicant and against the respondent.”

10. Respondent no. 2 filed the counter reply on 19.11.2012, denying that the respondent no. 2 was in any way concerned with the decision, since the pay of the applicant had been fixed as per the instructions of respondent no. 1, Ministry of Health & Family Welfare. It was submitted that the respondent No. 1 had already, through the impugned OM dated

02.02.2012, explained the full details to the applicant as to why her claim cannot be acceded to.

11. The applicant filed a rejoinder thereto on 21.07.2014, more or less reiterating the same contentions as made out in the OA, and reiterating that she had been treated in a malafide manner. It was submitted that respondent no. 2 had sought wrong advise from respondent no. 1, by placing wrong facts and figures, because of which the applicant has been harassed and put to financial loss. It was therefore, prayed that the OA may be allowed.

12. Yet another counter affidavit, purporting to be on behalf of respondents no. 1 and 2, was filed on 7.03.2016. It was pointed out that while the applicant had come on deputation to CHS for a period of 3 years, but even before completion of her deputation, and soon after her joining on 02.07.2001, she had applied for absorption in CHS, against the circular dated 20.09.2001. It was submitted that since in her parent cadre in Himachal Pradesh she had been granted her ACP Scheme financial upgradation benefit, and since she was still only on deputation to CHS during that period, her pay was enhanced from the date of her deputation, but without any deputation allowance.

13. It was further submitted by the respondents that as per DOP&T circular dated 21.02.1983, read with M/o Finance OM dated 20.01.1970, when a deputationist is absorbed in public interest, his/her pay on such absorption has to be fixed in the relevant pay scale of the post as if the person concerned had elected to draw pay in the scale of the post against which he/she has been absorbed from the date of his/her initial appointment to that post on deputation/foreign service, subject to the

restrictions laid down in Ministry of Finance OM dated 09.03.1964. This pay fixation is further subject to the condition that the pay thus fixed should not be more than the pay plus deputation/duty allowance drawn immediately before such permanent absorption. It was submitted that it has been further laid down that no arrears are payable on account of such pay fixation upon absorption, nor any adjustment can be made in respect of the deputation allowance already drawn till the date of such absorption. However, in cases where such fixation of pay on permanent absorption against the concerned post results in a drop in the emoluments drawn by the Govt. servant concerned, the difference between the pay so fixed on such absorption, and pay plus deputation allowance drawn prior to such absorption, may be allowed as personal pay, to be absorbed in future increments in pay.

14. It was, therefore, submitted that accordingly only, on the date of applicant's absorption on 9.10.2003, the respondent no. 2 was correctly directed to fix the pay of the applicant at Rs.15,500, which was more than even the maximum of the relevant pay scale of Rs.10,000-15,200 in respect of the post against which she had been absorbed, and her pay was protected, and the difference amount of Rs.300/- was ordered to be paid as personal pay of the applicant, to be absorbed in future increments. It was submitted that upon the directions of this Tribunal the applicant was informed about this position through OM dated 17.02.2012, and she was advised to respond within seven days from the date of receipt of that letter dated 17.02.2012, and it was intimated that if no such representation is received, it would be presumed that she has nothing to say in the matter. The applicant had replied through her letter dated 27.02.2012, and accordingly only the impugned OM dated 2.03.2012 had been issued, stating that her claim for fixation of pay in

the scale of pay of Rs.14300-18150, as granted to her in her earlier parent department in Himachal Pradesh, could not be acceded to as on the date of absorption of her services in the CHS cadre w.e.f. 9.10.2003, in the relevant pay scale of Rs.10000-15200/- associated with her post. The scheme of option allowed to a deputationst was thereafter explained, as already discussed above. In reply to para 4.9 of the OA, the respondents had stated as follows:-

“4.9. The seniority of the applicant was fixed in CHS on her absorption in the grade of Senior Medical Officer (SMO). While deciding about seniority, the issue of promotional benefits was also taken up with DoPT who advised that seniority fixed by protecting past service, rendered in the parent organization, does not make the absorbed doctors eligible for promotion to the next grade in CHS with retrospective effect. The absorbed doctors in GDMO sub-cadre are required to complete the prescribed qualifying service in the feeder grade in addition to any other eligibility requirement. It was also provided that qualifying service is **to be counted only from the date of absorption**. Accordingly, in the order dated 29.08.2006, it was specified that for the purpose of promotion to next grade in GDMO sub-cadre of CHS, the required qualifying service in respect of these officers would be counted from the date of absorption under CHS.”

(emphasis supplied)

15. It was submitted that the respondents had no malafide intention, and had not violated the principles of natural justice, and that the case of the applicant, as well as her representation, had been duly considered, as per the prevailing instructions on the subject.

16. The case was argued vehemently by both the sides and learned counsel for the applicant relied upon the order dated 30.09.2015 passed in OA no. 622/2012 - **Dr. Pankaj Agnihotri Vs. Union of India through the Secretary, Ministry of Health & Family Welfare and Dr. Ritu Chawla.** The counsel for the applicant sought to derive sustenance and strength from this order of the Tribunal, and submitted that the past service rendered by the deputationist in her parent Cadre at Himachal

Pradesh shall have to be taken into consideration while computing the total period of her service, for the purpose of determining the seniority, and also for consideration of her case for promotion to the next higher grade, as has been held by the Hon'ble Supreme Court also in the case of **SI Roop Lal** (Supra).

17. On the other hand, learned counsel for the respondents produced and cited three Members' Full Bench judgment dated 22.04.2009 in OA 1436/07 with OA 1437/2007 and OA 1438/2007- **Dr. Snehal Bhave Vs. UOI & Ors** and the connected two cases, in which Dr. Pankaj Agnihotri, who had filed the above cited OA 622/2012 was also the applicant in the batch of aforesaid OAs before the Tribunal. It is seen that somehow, while deciding the OA no. 622/2012, the Division Bench had on 30.09.2015 not noticed the previous judgment in the case of same applicant in his earlier OA 1438/07 (with OA Nos. 1436/07 and 1437/07-supra) delivered by a three Members' Full Bench. It is seen that in those three connected cases before the Full Bench on 22.04.2009, the issues formulated for consideration by the Full Bench were mentioned in para 7 as follows, which are relevant in the present case also:-

- “(1) Is it a universal rule that deputationists are to be given seniority taking into full account the equivalent service rendered by them in the parent department;
- (2) Whether such recognition will infringe upon the settled rights of the existing personal (sic personnel), including their career prospects;
- (3) In the light of later decisions what could be the nature and extent of rights available to deputationists who ultimately come to be regularized in the new employment;
- (4) Is it mandatory that the special rules as applicable also are to be taken notice of.”

18. It is seen that in that Full Bench Order also the Supreme Court judgment in the case of **SI Roop Lal** (supra) was cited and considered, along with the cases of **R.Prabha Devi and Ors Vs. Government of India and Ors** (1988) (2) SCC 233) and **K.Madhavan and Anr.** (supra) as follows:-

“11. The Recruitment Rules provide for absorption of deputationists, although such provision had been incorporated at a later stage. (In the earlier order presently reviewed, we had observed that there was no provision in the Rules for absorption of persons, who had come on deputation). As such, there cannot be any dispute that the appointment of applicants had been validly done. **As the officers were working in an equivalent grade, seniority from the date they commenced service in the earlier post required to be assigned to them on the strength of SI Roop Lal, and as the O.M. stands today. The only issue is whether on the basis of such seniority, it is possible for them to press for promotional rights as if they had remained always with the CHS.**

12. We have noticed the submission of Mr. Krishna that Roop Lal does not at all deal with the aspect of promotional claims. Nor there was occasion for the Supreme Court to examine about requirements laid down by particular special rules governing the service. But counsel is only partly right. Reference order had noticed about the possible impact of a later decision of the Supreme Court on the issue. Mr. Krishna argues that **observations in Indu Shekhar Singh & Ors. Vs. State of UP & Ors. (2006 (8) SCC 129), have changed the scenario. The Court had observed that there is no fundamental right in regard to counting of past services rendered by a person when he came over to a new service on deputation and later on was absorbed.** Past services could be taken into consideration only when the rules permit the same or where a special situation existed which entitled the employee to claim such benefits, by express terms. Counsel submits that this principle is applicable on all fours here.

13. It may be that in a case of deputation, almost always there may not be any compulsion for the employee to accept such change. Of course, in administrative exigencies, the Government has reserve powers, to utilize the services of an officer at its discretion. But that is altogether different. In the present case, it could be assumed that the officers had opted for a deputation taking notice of personal advantages they might gain. The lending authority as well as the receiving authority had agreed upon a situation whereby the employees could be taken over on the rolls of the transferee. The governing O.M. had come to their aid in that

the past services rendered were also to be treated as tagged on to their full credit. He submits that this alone would have been admissible. According to the counsel, the Department had a duty to ensure that the fiction as above even if taken to its logical end, was not to adversely affect persons who had been in the Department from the inception of their career. **The Rules also referred to the incumbency required to be in CHS for gaining promotability.** The applicants were deficient in this crucial qualification. That was the underlying reason to incorporate the restriction in the impugned order.

14. **Since aspects other than seniority were not within the purview of consideration of Supreme Court in SI Roop Lal, and such matters had been examined in Prabha Devi and as also Indu Shekhar Singh (cited supra), Mr. Krishna asserts that question of promotability necessarily requires to be adverted to.** If the rules did not at all provide for a restriction of the rights of deputationists, that would have been another matter. But Mr. Krishna submits that the rules sufficiently enough indicate that provision for a smooth ride, as claimed by the applicants, to the higher echelons of the Service, overreaching their counterparts were not there, going by the letter of the statute, and the practice that was in vogue. This appears to be the crux of the issue, and the alleged impact of the rules, as coming to the detriment of the applicants could, therefore, be examined.

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16. There is no difficulty in understanding the principle, as it is wholesome. Nobody is expected to ignore Rules. According to Mr. Krishna, the same view has been taken in Indu Shekar Singh[†] s case as well. The Court reiterated that terms and conditions of recruitment for adjudging seniority, and other terms and conditions of service are indeed there, governed by statutory rules. Adverting to Ram Janam Singh Vs. State of UP (1994 (2) SCC 622), the Supreme Court had highlighted the following observations:

“It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service which will be consistent with the requirement of Articles 14 and 16 of the Constitution. Of course, if the circumstances so require a group of persons can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment in matters of seniority has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution. Normally, such classification should be by statutory rule or rules framed under Article 309 of the Constitution. The far-reaching implication of such rules need not be impressed

because they purport to affect the seniority of persons who are already in service. For promotional posts, generally the rule regarding merit and ability or seniority-cum-merit is followed in most of the services. As such the seniority of an employee in the later case is material and relevant to further his career which can be affected by factors, which can be held to be reasonable and rational.”

The Supreme Court had specifically stressed on an aspect that the plight of persons, who are already in service, should not go unnoticed, when new comers are required to be assigned seniority for whatever reasons. In the light of these, we may examine the present controversy so as to see whether the orders could be upheld in toto. In the course, we may also advert to the questions formulated.

17. Mr. Krishna had invited our attention to the **Schedule-III of the Central Health Service Rules, 1993.** Para IV deals with Public Health Sub-Cadre Posts. In the medical officers grade, Chief Medical Officer is a promotion post on the basis of seniority cum fitness, of course, without linkage to the vacancies. The feeder category is Senior Medical Officer in the General Duty Sub Cadre with six years[↓] regular service in the grade or on completion of 10 years combined regular service as Medical Officer and Senior Medical Officer of which at least two years shall be as Senior Medical Officer. Mr. Krishna points out that experience as a Medical Officer in the General Duty Sub Cadre was one of the essential qualifications for a candidate to aspire for the post of Chief Medical Officer. When the officers had their date of absorption as 01.10.2003, according to him, it could not at all be possible for them to claim that they are to be recognized as having the qualifications for appointment as Chief Medical Officer as well. **The seniority, which they carry with them, could not have ipso facto, led also to an assumption that they were officers, in the General Duty Sub cadre.** He submits that the benefit of seniority had been given to the applicants as envisaged by Rule, and this alone was necessary. Minimum condition of service for promotion was not satisfied by them, they could not have claimed automatic promotion and Annexure A-1 only reflected this legally settled position.

18. Mr. Behera, however, countered this argument by citing two decisions of the Supreme Court, **K. Madhavan and Anr. vs. Union of India & Ors. (1987 (4) SCC 566)** as well as **SI Roop Lal (cited supra).** In Madhavan[↓] s case, the expression used by the statute was minimum 8 years service in the grade. The meaning of the term “grade” had been explained by the Supreme Court holding that the period of 8 years could be counted from the date of appointment as the DSP in the parent Department including the two years probation later on in the CBI.

Supreme Court, according to the counsel, indicated that, in the absence of any specific provision to the contrary, the general principle was that length of service from the date of appointment to the post should be taken into consideration both for purpose of seniority and eligibility in the higher post. **Being a case of deputation, as in the present one, period of service in the parent department, could be counted for appointment for satisfying the minimum incumbency prescribed by the rules. Counsel submits, in S.I Roop Lal as well, the principle decided was that for purpose of seniority and consequential benefits, which, according to him, impliedly included promotional benefits, the entire service in the equivalent post required to be considered.** The court had adverted to the decision in Madhavan¹ s case to opine that it will be against all rules of service jurisprudence if a Government servant holding a particular post is transferred to the same or equivalent post in another Government Department and the period of his service in the post before he is transferred is not taken into consideration in computing his eligibility in lock stock and barrel.

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20. Then the relevant part is whether after conferment of seniority, right for promotion could be restricted. **There is nothing in S.I. Roop Lal directly requiring rights of promotion as well to be conferred, as falling out from the propositions to which we had adverted. But the rights could be denied only if the statute expressly prohibits such ancillary benefits. The stipulation in CHS Rules is !! Six years regular service in the General Duty Sub Cadre in the Grade.¶** Mr. Krishna submits that as was approved in Prabha Devi !! the qualifications for any post are prescribed having regard to the nature of the post and the duties and responsibilities attached to it.¶ Factors like experience over certain number of years in service and holding a post of a certain level are relevant. By direct incumbency, they acquire knowledge of men and matters and gradually come to possess ability to deal with the issues special to the Organization. Supreme Court had also approved the observation of the Tribunal that "However, brilliant a person may be, he needs experience such as can be gathered only by discharging the duties and responsibilities attached to a post."

21. On the above premises, Mr. Krishna submits that by working under the CHS the exposure that is obtained by a Medical Officer may be far superior to that would have come to be possessed by a person who is working in hospitals of Jammu & Kashmir or Tripura. When minimum service in CHS is statutorily required for promotion, and when the respondents have correctly understood the situation while issuing Annexure A-1 order, counsel submits, there has been no arbitrariness or irrationality in advising the applicants that only because of their length of service, they

cannot be treated as equal in matters of promotion. Total length of service alone may not empower the applicants to get a walk over overlooking the rules and the essential condition that eligibility requires to be assessed at every stage by a statutory DPC.

22. The argument is attractive. **But for robbing the right of promotion to a person who came to the service on a later date when he could carry his seniority, the rules should specifically provide for the ineligibility. Schedule III of the CHS Rules, 1996 lays down the parameters of promotion. The qualification for promotion is specified number of years[↓] regular service in the grade. That does not speak of any specific service in the CHS. As such the restriction found in Prabha Devi (supra) is not attracted. Resultantly, we find here that the restriction in the matter of promotion cannot be successfully practiced.** This leads us to the conclusion that the impugned order is liable to be struck down to the extent it stipulates that,

"However for the purpose of promotion to next grade in GDMO sub cadre of CHS the required qualifying service in respect of these officers will be counted from their date of absorption under CHS."

The Rules do not provide for any such restriction.

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24. Resultantly and as a fall out of our discussions hereinabove made, we answer the reference as following:

As per the interpretation given by the Supreme Court in SI Roop Lal's case (supra) **deputationists are to be given seniority taking into full account the equivalent service rendered by them in the parent department.**

The recognition of service of a transferred employee may infringe rights of existing personnel or may affect their career prospects but if the situation is postulated and permitted by the governing rules, it definitely requires obedience, since seniority or promotions cannot be recognized as fundamental rights but only rights conferred by statute;

In the matter of promotions, as far as the present case is concerned, deputationists who got absorbed will be able to claim weightage on the basis of the seniority that is carried by them. As general rule, in respect of DPC clearance and minimum incumbency, the position will be governed by the respective special rules as are in force.

25. Annexure A-1 order will stand modified as referred to in Paragraph 22. Original Applications are

allowed to the extent as above stated. **In matters of promotions, the applicants will have to work out remedies as permissible under law.** We make no order as to costs.”

(Emphasis supplied)

19. Therefore, in so far as the regular and substantive posts of General Duty Sub-Cadre in CHS is concerned, we are bound by the orders of the Full Bench of the Tribunal, as reproduced above. However, one aspect which had been left untouched even in this Full Bench judgment was that in CHS there was a provision for grant of Non-Functional Selection Grade (NFSG) also, which is personal to a person, and is not connected with any of the functions associated with the regular work as assigned to such a person.

20. It is, therefore, clear that something which is personal to a person, and not at all connected to the functions associated with the regular work assigned to a person, cannot give rise to a claim of parity in respect of another person, who has not yet been so assigned such NFSG. In the instant case, it is seen that even in OA 622/2012, the Coordinate Bench had noticed the application of Dynamic Assured Career Progression (DACP) Scheme for the officers of CHS, and number of years' experience required for General Duty Medical Officer (GDMO, in short), SMO, and CMO, and the provision in the rule that CMO can after completion of four years of service in the grade be promoted to the grade of CMO (NFSG), but had then gone on to decide that OA as follows:-

“11. The above letter states that on completion of 13 years of service in GDMO sub-cadre of CHS (including four years as MO), officer of GDMO sub-cadre will be promoted as CMO (NFSG). This is a modification of the earlier provision according to which an officer with 16 years standing in the profession was to be promoted to the super time grade. The letter further lays down that SMO with five years service will be promoted to the grade of CMO, and after completion of four years as CMO, the officer will be promoted to the post of CMO

(NFSG), i.e., from the date of promotion to the grade of SMO an officer has to serve for nine years before promotion to the grade of CMO (NFSG). The above scheme takes care of career progression of the officers recruited in batches by the UPSC as has been alluded to by the learned counsel for the respondents in the context of consideration of the senior whenever a junior is considered for promotion. **In a situation where an officer has been absorbed under rule 8 of the CHS Rules 1996, it is logical that the latter part of the provision requiring 13 years of cumulative service since joining as Medical Officer, implying 9 years service in the grade of SMO, would become applicable.** The applicant had completed about 11 years in the grade of SMO on the date of absorption and therefore was eligible for promotion to the grade of both CMO and CMO (NFSG). Having been given the benefit of past service, the applicant ought to have been considered for the NFSG immediately after promotion to the grade of CMO. The question of gaining experience in the post of CMO for 4 years before grant of CMO (NFSG) grade will also not be relevant in this case since **a non-functional grade, by definition, does not envisage a change in the functional characteristics of the post and it is intended to be only an in situ upgradation.** We are therefore of the view that the recruitment rules as modified by the Government letter dated 05.04.2002 do not place any restriction on promoting an officer with requisite years of cumulative service, having no other disqualification, to the post of CMO (NFSG). With regard to other points raised by the respondents including the judgments, a perusal of the earlier judgments of this Tribunal and the Hon'ble High Court reveals that these had been considered and discussed while giving the benefit of past service to the applicant, and therefore will not have any further implication in the consideration of the issue before us.

12. In the light of the preceding discussion and the specific provision of the CHS Rules 1996, as modified by the Government letter dated 05.04.2002, we are of the view that **the applicant is entitled for promotion to the grade of CMO (NFSG) immediately after his promotion to the grade of CMO on 30.09.2003, and not from the date of promotion of respondent No.2.** Accordingly the respondent no. 1 is directed to take action to promote the applicant to the grade of CMO (NFSG) from the date next to the date of promotion to the grade of CMO, within a period of two months. The OA is disposed of in terms of aforesaid directions. No costs.”

(Emphasis supplied)

21. With the proposition as decided by the Coordinate Bench in the above mentioned OA 622/2012, NFSG being the essence of the matter

was rightly considered by the Coordinate Bench and it was stated correctly that it does not envisage a change in the functional characteristics of the post, and it is intended to be only an in situ upgradation. Therefore, it was also held that the in situ upgradation of one person cannot give rise to a claim for similar in situ upgradation by another person, either under the Next Below Rule, or in any other manner whatsoever, without facing the DPC for grant of such NFSG in his/her own case. We agree with the ratio as laid down.

22. We are also bound by the orders of the Full Bench, Paragraphs 11 to 25 of which have been reproduced above. The Full Bench had held that the deputationists are given seniority and fixation of pay, taking into account the full period of equivalent service rendered by them in their earlier parent Department. Therefore, in so far as her seniority is concerned, the present applicant is entitled to claim the seniority which had accrued to her by way of the equivalent service rendered by her with the Himachal Pradesh Government, including the period of her deputation with the Respondent No.2 of this O.A. In this context, it is seen from the reply of the respondents in response to Para-4.9 of the OA that the respondents have, under the advice received by them from DoPT, already fixed her seniority by protecting that past service of hers, rendered by her in her earlier parent organization, including the period of deputation with Respondent No.2. Therefore, the ratio of the Full Bench judgment has been fully complied with by the respondents in her case.

23. The Full Bench had further held that in the matter of promotions, deputationists who get absorbed will be able to claim weightage on the basis of the seniority that is so carried forward by them. It is apparent from the reply of the respondents in response to Para 4.9 of the OA that

they have already given due weightage to the applicant's seniority as carried/brought forward by her from her previous employment with Himachal Pradesh Government in the matter of fixation and seniority, in the Seniority List of the CHS cadre.

24. However, though the stand of the respondents that such protection of past service does not make the absorbed doctors eligible for promotion to the next higher grade in CHS with retrospective effect, is also correct, the absorbed doctors in the GDMO Sub-Cadre of CHS need not be required to once again complete the prescribed qualifying service in the feeder grade of GDMO Sub-Cadre, into which they have been so absorbed, after the date of such absorption, in addition to any other eligibility requirement, since they have already worked on analogous post during the period of their deputation service. The respondents are, therefore, not fully justified and right in making the submission that such qualifying service can count only from the date of absorption of the absorbee Doctor into the GDMO Sub-Cadre of CHS, and no weightage can be ascribed to their analogous service in the past, during the period of their deputation.

25. While it is correct that the absorption in CHS is the point of time on which there is a new start of service of the applicant in a new cadre of CHS, in the pay scale of the post concerned, in which the absorbee Doctor's entitlements would start counting afresh, because he/she has joined the CHS cadre only from that date of absorption in substantive capacity, but her past service with the Himachal Pradesh Government, and her period of analogous service while on deputation with CHS, while retaining her lien with the Himachal Government, would not only count for the purpose of seniority to be fixed, by protecting such past service,

but should also count towards the qualifying service for further promotions in CHS. However, she would not be entitled for any retrospective promotion.

26. This aspect of the matter had not been properly appreciated and dealt with in accordance with the law as laid down by the Full Bench by the Coordinate Bench while deciding OA No.622/2012 on 30.09.2015. But, rather than being bound by the order of a Coordinate Bench in this case, since a Bench of higher Coram, the Full Bench, has laid down the law in this regard earlier, we are bound to follow the *ratio decidendi* of the Full Bench order only. Therefore, the applicant is not entitled to claim for quashing of the OM dated 02.03.2012 (Annexure A-1) in its entirety as illegal, as has been prayed for by her through this OA.

27. Therefore, while the claim of the applicant for fixation of her initial pay in CHS in the higher pay scale, as had been granted to her in her previous substantive employment with the Himachal Government, from the date of her absorption in CHS itself cannot be granted to her, more so when she had knowingly and willingly accepted her absorption under the CHS cadre only as a Senior Medical Officer w.e.f. 09.10.2003, in the pay scale of Rs.10,000-15200, in the interest of her remaining at Delhi, instead of reverting back to her earlier parent cadre in Himachal Pradesh, but the weightage of her having already rendered analogous service during the period of her deputation also would have to be provided to her, and, only if that period of analogous service falls short of the period prescribed for the consideration of her case for promotion, she would be required to render only such balance period of qualifying service after her absorption into CHS. If her analogous service experience while being on deputation with CHS has already exceeded the

qualifying period, her eligibility for consideration of her case for promotion would start soon after such absorption.

28. Therefore, the OA is partially allowed, but there shall be no order as to costs.

(Sudhir Kumar)
Member (A)

(Permod Kohli)
Chairman

cc.