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IN THE HIGH COURT OF DELHI AT NEW DELHI

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LPA 150/2000

Date of decision: January 17, 2006

ALL INDIA INSTITUTE OF
MEDICAL SCIENCES

..... Appellant
Through Mr. Mukul Gupta,
Advocate

versus

R.K. UPADHYAY

.....Respondent
Through Mr. Junaid Akhtar,
Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MADAN B. LOKUR

- ✓ 1. Whether Reporters of local papers may be allowed to see the judgment?
- ✓ 2. To be referred to the Reporter or not?
- 3. Whether the judgment should be reported in the Digest ?

MARKANDEYA KATJU, CJ

1. This writ appeal has been filed against the impugned judgment of the learned Single Judge dated 29.11.1999.
2. Heard learned counsel for the parties and perused the record.
3. By means of the writ petition, the petitioner (respondent in this appeal) had prayed for quashing of the adverse entries in his A.C.R. of the years 1990 and 1991 and for a mandamus directing the respondents to convene a review D.P.C. to consider the petitioner for the post of Medical Social Worker, Grade-I without

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taking into account the A.C.Rs of 1990 and 1991 and to promote him to the said post from the date his other colleagues in the cadre of M.S.W. Grade-II were promoted to the post of M.S.W. Grade-I with all consequential benefits.

4. The facts in detail have been set out in the judgment of the learned Single Judge and hence we are not repeating the same, except where necessary.

5. The appellant (respondent No.1 in the writ petition), the All India Institute of Medical Sciences (A.I.I.M.S.) is a premier and advanced Medical Institute constituted by an Act of Parliament, namely, the All India Institute of Medical Sciences Act, 1956 with a Director, A.I.I.M.S. as its overall Administrative Head. The writ petitioner (respondent herein) was appointed as Medical Social Worker, Grade-II on ad hoc basis in June, 1980 and subsequently was regularised on the said post. True copy of the appointment letter dated 20th June, 1980 and the order dated 17th October, 1985, conferring quasi-permanent status to the petitioner are 'Annexure P-1' to the writ petition.

6. It is alleged in the writ petition that respondent No.4, the Medical Record Officer, in the office of respondent No.2 (Dr. Rajendra Prasad Centre for Ophthalmic Sciences) had animosity against the petitioner because the petitioner did not accede to his

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unreasonable directives. It is alleged that respondent No.4 persuaded respondent No.3 on assuming the charge of Additional Medical Superintendent to issue an office order dated 28th July, 1987, wherein Medical Social Workers were put under the direct supervision of respondent No.4. It is alleged that respondent No.4 developed proximity with respondent No.3, the Additional Medical Superintendent, and at the behest of respondent No.4, respondent No.3 made adverse entries in the years 1990 and 1991 in the Annual Confidential Report of the petitioner, though the same have not been communicated. It is alleged that by not communicating the adverse entries, the petitioner was deprived of his right to represent against the same and hence he was condemned unheard..

7. It is alleged in para 4(r) of the writ petition that the petitioner came to know that a D.P.C. met in August, 1993 but did not consider the petitioner for promotion to the post of M.S.W. Grade-I, in view of the adverse entries against the petitioner for the years 1990 and 1991 which have not been communicated. It is alleged that the non-communication of these adverse entries is mala fide.

8. The petitioner represented against this alleged illegal act on behalf of the respondents vide representations dated 5th October,

1993, 16th November, 1993 and 9th/12th March, 1994 vide 'Annexure P-7' but to no avail. Instead the respondents vide office order dated 21st March, 1994 promoted on ad hoc basis persons junior to the petitioner from the post of M.S.W. Grade-II to the post of M.S.W. Grade-I. It is alleged that one Shri A.K. Goswami, M.S.W. Grade-II, junior to the petitioner, has been promoted vide promotion order dated 21st March, 1994 (Annexure P-8).

9. A perusal of the order dated 21st March, 1994, (Annexure P-8) shows that promotions have been done on ad hoc and temporary basis for a period of three months only and the appointment does not entitle the promotees to any regular appointment unless they are, meanwhile, selected for appointment on a regular basis. Their appointment can also be terminated at any time.

10. The petitioner was informed by the respondents vide Memorandum dated 24th May, 1994 that his case has not been recommended by D.P.C. for promotion as M.S.W. Grade-I on ad hoc basis vide 'Annexure P-10'. It is alleged that ad hoc promotions of petitioner's juniors have been extended vide order dated 14th July, 1994 without deciding the petitioner's representation. Aggrieved, the petitioner filed a writ petition

which has been allowed and hence this appeal.

11.A counter-affidavit has been filed in the writ petition by respondents No.1 and 2 and we have perused the same.

12.In para 2 of the preliminary objections it is stated that the D.P.C. met on 19th August, 1993 and considered 20 persons who were within the consideration zone, including the petitioner. The D.P.C. perused the entire service records and after considering the same decided not to recommend the petitioner for promotion.

13.It is alleged in para 3(c) of the counter-affidavit that the criteria for selection as M.S.W. Grade-I is Merit-cum-Seniority.

14.In para 4(y) of the counter-affidavit it is stated that the adverse entries were communicated to the petitioner against which he made a representation and the reply to the representation was also communicated to the petitioner.

15.The learned Single Judge in paragraph 46 of his judgment has observed:-

“The remarks made against the petitioner which was communicated to him for which he had filed the reply and no decision has been taken by the first respondent was wholly unjustified and the petitioner was justified in contending that the petitioner's case had not been considered in accordance with law.”

16. Thus, the learned Single Judge has himself noted that the remarks were communicated to the petitioner and he had filed a reply to the same.

17. Moreover, in **Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another**, (1992) 2 SCC 299, it was held that even un-communicated adverse entries can be taken into consideration.

18. The learned Single Judge lost sight of the fact that the writ petitioner was graded as "Fair" in the years 1990 and 1991 and hence the said entries were not adverse in nature. However, even assuming they were adverse, it has been held in **Baikuntha Nath Das and another** case (supra) that an un-communicated adverse entry can be taken into consideration and this view has been followed by the Supreme Court in **Badrinath v. Government of Tamil Nadu and others**, (2000) 8 SCC 395.

19. Apart from that, since the criterion for promotion as M.S.W. Grade-I was Merit-cum-Seniority, we are of the opinion that the learned Single Judge was not justified in directing the writ petitioner to be promoted. It is well-settled that appointments, promotions, regularisation, creation of posts, etc., are executive functions vide **Delhi Tapedik Unmulan Samiti v. Babita Rani**

and Ors. (LPA No.2554/2005) decided on 16th January, 2006 and it is not proper for the judiciary to encroach into the executive domain. It was for the D.P.C. to assess the petitioner's suitability for promotion, and this Court under Article 226 cannot sit in appeal over the decision of the D.P.C.

20. In view of the above, the ^{appeal} writ petition is allowed and the impugned judgment is set aside and the writ petition is dismissed.

M. Katju
CHIEF JUSTICE

Madan Lokur
MADAN B. LOKUR, J

17 JANUARY , 2006
vk.