

PETITIONER:
N. C. SHINGHAL

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT 19/03/1980

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
VENKATARAMIAH, E.S. (J)

CITATION:
1980 AIR 1255 1980 SCR (3) 44
1980 SCC (3) 29
CITATOR INFO :
RF 1983 SC 509 (28)

ACT:

Central Health Services Rules, 1963 as amended by Central Health Service (Amendment) Rules, 1966, -Rule 8(3), Scope of-Promotions to Supertime Grade II posts, whether made in accordance with Rule 8(3)-Whether transfers in posts which are in the same grade or one considered equivalent can be effected on administrative exigencies-Refusal to accept the promotion by an employee whether the employer can offer to next junior to the offeree-Adverse inference against parties remaining ex-parte and therefore not served, whether can be drawn.

HEADNOTE:

The Union of India has enacted Central Government Health Scheme and in implementation thereof has set up various institutions for medical relief and medical education. A Central Health Service became a necessity for effectively implementing the scheme. With a view to constituting the service, Central Health Service Rules, 1963 were framed and brought into operation on May 15, 1963. The Rules envisaged categorisation of personnel manning the service into five different categories, to wit, category 'A' supertime scale Rs. 1600-2000; Category 'B' supertime scale Rs. 1300-1600; Category 'C' Senior scale Rs. 675-1300, Category 'D' Junior scale Rs. 425-950; and Category 'E' class II scale Rs. 325-800. On account of various imponderables the service could not be constituted and 1963 Rules were amended by Central Health Service (Amendment) Rules, 1966. Initial constitution of service was to be on and from September 9, 1966. 1966 Rules contemplated again the division of service into four categories, namely, Category I comprising supertime scale Grade I Rs. 1800-2250; supertime scale grade II Rs. 1300-1800, Category II consists of Specialists' grade Rs. 600-1300; Category III includes General Duty officers Grade I Rs. 450-1250. and Category IV comprises General Duty officers Grade II Rs. 350-900. 1966 Rules provided the method for initial constitution of the service. Rules 7A(1) and 7A(2) provided for absorbing departmental candidates holding posts in categories 'A' and 'B' under 1963 Rules in supertime Grade I and supertime

Grade II respectively of reorganized service under the 1966 Rules. Those in service on September 9, 1966 and holding posts in Categories 'C', 'D' and 'E' were either absorbed in specialists' grade or General Duty Officers Grade as the case may be. For the purposes of selection and absorption of departmental candidates on the date of initial constitution of reorganised service, a Selection Committee was set up and absorption was made in accordance with the recommendation of the Committee. This process of absorption was over in March 1967, but the constitution of the service was deemed to be effective from September 9, 1966.

Rule 2(c) defines category to mean a group of posts specified in column 2 of the table under Rule 4. Rule 4 provides for classification categories and scales of pay. Rule 5 of Rules 1966 provides for authorised strength of the service. Rule 8 prescribes the manner in which future vacancies, after appointments have been made to the Service under Rule 7 and 7A shall be filled in Supertime Grade II.

45

The authorised strength of the various categories of the service on the date of commencement of 1966 Rules shall be as specified in the First Schedule. The vertical promotional channel is from Specialists' grade and General Duty officers Grade I to supertime Grade II and from thereon to Supertime Grade I. On the date of initial constitution of service there were 275 permanent and 102 temporary, in all 377 posts in Specialists' grade. Out of this strength of posts in specialists' grade 28 posts were upgraded to supertime Grade II, 19 being classified as unspecified specialists' posts and 9 unspecified posts.

The Central Government converted one post from amongst the 19 unspecified specialists' grade posts in Supertime Grade II in Ophthalmology speciality in Willingdon Hospital and transferred one Dr. B. S. Jain, respondent 3, who was then working as Chief ophthalmologist-cum-Associate Professor of Ophthalmology, Himachal Pradesh Medical College, Simla, and offered the vacancy to in Supertime Grade II caused by the transfer of respondent 3 to appellant who was next in seniority by way of promotion on ad hoc basis as per Memorandum dated December 7, 1970. As the appellant was prepared to accept only if the posting was at Delhi and not in Simla, one Dr. G. C. Sood was promoted to supertime Grade II post and was appointed at Simla.

The appellant, thereafter filed a writ petition praying for Mandamus that he may be deemed to have been promoted from February 18, 1971, the date when Dr. Jain was posted at Willingdon Hospital. The appellant also questioned the promotions of respondents 4 to 24 to supertime grade II on various dates after February 18, 1971 and before July 17, 1978 when he was actually promoted on a certain interpretation of Rule 8(3) of the Central Health Service Rules 1963. The High Court dismissed the writ petition. A Letters Patent Appeal was partly allowed. Hence the appeal by special leave.

The appellant contended that: (a) the promotions of Respondents 4 to 24 are in contravention of Rule 8 of 1966 Rules; and (b) when a post in Ophthalmology at Willingdon Hospital was created on February 1, 1971, by conversion of one post from amongst unspecified specialists' grade posts in supertime Grade II, the post could only have been filled in by promotion from amongst those holding the post in specialists' grade in Ophthalmology speciality and he being the senior most and otherwise qualified, he should have been promoted from that date; (c) filling in the post at Willingdon Hospital by transfer of respondent 3 was in

violation of the statutory rule and hence invalid; (d) the offer of the post to him at Simla was an eye wash and malafide as he lacked teaching experience and the post is a teaching post; (e) "service in that category" means service in that category which was constituted under the 1966 amendment Rules and (f) rule 8(3) does not permit inter se transfers in posts which are in the same category.

Dismissing the appeal, the Court

^

HELD : 1. Unlike other professions, medical profession has developed branchwise expert specialised knowledge referable generally to number of parts in which human anatomy is divisible. General medicine and general-surgery are two broad genus but under each one of them there are numerous specialities and there is intensive study and research in speciality for being qualified for the speciality. Being an expert in any one speciality simultaneously results in being

46

excluded from other specialities even though the specialities may be species of a genus like general medicine or general surgery. Again, in each speciality there will be a post of a Lecturer, an Assistant Professor, an Associate Professor and a Professor with a vertical movement by way of promotion. In a nonteaching hospital there will be posts like Junior Surgeon, Senior Surgeon, Head of the Department and so on. In a profession so compartmentalised speciality wise ex hypothesi it is difficult to provide for promotional avenue by way of a general seniority list integrating different specialities categorywise, cadrewise or gradewise. If such a general seniority list including persons belonging to different specialities albeit in the same grade is drawn up for purposes of promotion it might lead to a startling result because the need may be of a promotional post in a speciality and the man at top of the seniority list may not belong to that speciality and the man at top of the seniority list may not belong to that speciality but may belong to a different speciality and if any promotion was to be given to him to a post in a speciality for which he is neither qualified nor eligible it would be impossible to give vertical promotions by referring to such general seniority list. If the promotion is to a post generally called administrative post in a hospital a general seniority list including experts belonging to different specialities may be helpful but when promotions are to be given to posts in different specialities a general seniority list is not only unhelpful but may really impede the process of promotion. Again, demands of different specialities for additional strength may differ from hospital to hospital, from area to area and even from time to time. In order to meet such unforeseen eventualities the rules provide for an addition to the strength of supertime grade II by keeping 19 posts designated as unspecified Specialists' grade, posts and 9 unspecified posts in a pool. Whenever a demand came for providing a higher post in supertime grade II in any particular speciality ordinarily where the strength of the service is prescribed a post will have to be created which any one familiar with bureaucratic juggornot would immediately realise how time consuming it is. Anticipating such a situation and to meet with the demands of specialities within a reasonable time it was provided that there would be a pool of 19 unspecified specialists' posts in supertime grade II and 9 unspecified posts also in supertime grade II. This would facilitate conversion from the pool of unspecified Specialists' posts of an unspecified

Specialists' post to a specified specialist post in a speciality where a need has been felt. Once the need is felt and a post is converted from an unspecified post to a specified post in supertime grade II it becomes an addition to the strength of that speciality and the post can be filled in, in accordance with the relevant rule. But it is implicit in this arrangement that the person to be appointed to such a post would be one who is eligible to be appointed to that speciality and not some one who is on top of the general seniority list in Specialists' grade or general duty officers' grade from which promotion is to be made. If promotion has to be made from a general seniority list which includes all Specialists in the Specialists' grade the one at the top may be Cardiologist and the post may be converted into Anaesthesiology. Certainly a Cardiologist cannot be appointed as an Anaesthetic. Therefore when a post from amongst unspecified Specialists' posts is converted to a specified post which means specified in the speciality in which a need has been felt from amongst those in the Specialists' grade belonging to that speciality and in order of their inter se seniority a promotion could be given. [54 FH, 55A-H 56A-B]

Union of India and Ors. v. D. B. Kohli and Anr., [1973] 3 S.C.R. 117; followed.

47

2. Merely because all 28 posts were deducted from the strength of posts in Specialists' grade it could not be said that all 28 posts would be available for promotion to those belonging to Specialists' grade only. The language employed in rule 5 also points in this direction. All the 28 posts need not necessarily be filled in by promotion from amongst those who belong to Specialists grade only. Hence with the division of 28 posts in two different designations and dividing the 28 posts in two different nomenclatures. 28 posts are made up of 19 posts designated as unspecified Specialists posts and 9 unspecified posts. Undoubtedly 19 posts which were designated as unspecified Specialists' post must be filled in from amongst those belonging to the Specialists' grade but that itself also shows that the remaining 9 unspecified posts can be filled in from amongst those who may be promoted from General Duty Officers grade I because General Duty Officers grade I are also promotable to supertime grade II. The nomenclature unspecified Specialists' post and unspecified post provides an effective answer and indicates that while in the case of the former promotion must be given from Specialists in respect of the latter General Duty officers Grade I would equally be eligible for promotion. [56 D-H]

3. To interpret that 19 unspecified Specialists' posts could only be filled in by promotion would run counter to the express provision contained in Rule 8(3) which is statutory. Rule 8 of the Central Health Service Rules, provides for future maintenance of the service. Rule 8(3) provides for 50% of the vacancies in supertime grade II to be filled in by promotion of General Duty Officers Grade I and Specialists' grade officers in the ratio of 2 : 3 and the remaining 50% of the vacancies to be filled in by direct recruitment in the manner specified in the second schedule. Now, once an unspecified Specialists' grade post in supertime grade II is converted and made a specified post in a speciality it is an addition to the strength of the speciality and the filling in of such post shall be governed by rule 8(3). Undoubtedly if it is to be filled in by promotion, that would only be from amongst those belonging to Specialists' grade officers as the converted post was

unspecified Specialists' post. But to say that it can be filled in only by promotion is to ignore the mandate of statutory rule 8(3) which provides for filling in posts in supertime grade II by either promotion or nomination in the ratio therein prescribed. Once there is a post in supertime grade II which is to be filled in subsequent to the initial constitution of the service, rule 8(3) will be attracted in all its rigour. [57 B-E]

Further Rule 8(3) provides for filling in posts in supertime grade II by promotion as well as by direct recruitment in the ratio of 1 : 1. On a true interpretation of the 1966 Rules in general and rule 8(3) in particular it could not be gainsaid that whenever an unspecified Specialists' post is converted into a specified post and assigned to a speciality it can be filled in either by promotion or by direct recruitment as the situation warrants according to the rule and as determined by the quota rule. [57 E-G]

No argument can be founded or any relief can be claimed merely on a stand taken by the Union of India in their counter-affidavit in an earlier writ petition, unless estoppel is claimed or urged. Even if such be the stand of the Central Government it will have to be negatived and was in fact negatived in the case of Dr. B. S. Jain. [58C-D]

Union of India v. Bhim Singh, [1971] 2 SLR p. 111 @ 124; P. C. Sethi and Ors. v. Union of India and Ors. [1975] 3 S.C.R. 201 at 210; J. K. Steel Ltd. v. 48

Union of India, [1969] 2 S.C.R. 481 @ 498; Commissioner of Income Tax v. K. Srinivasan and K. Gopalan [1953] S.C.R. 486; applied.

4. When a post is created it is an addition to the strength of that particular category and the additional strength has to be filled in the manner prescribed in the rule and that no sanctity attaches to the place where the post is created but the sanctity attaches to the number of posts and the manner of filling them. [59 B-C]

Transfers in posts which are in the same grade or are considered equivalent can be effected on administrative exigencies. Once a new post is created and it is an increase in the strength of the cadre in which the post is created, every one in that cadre is eligible to fill in that post and transfer is permissible. There is no violation of Rule 8(3) and transfer of Dr. B. S. Jain was valid. [59 E-F]

E. P. Royappa v. State of Tamil Nadu and Anr., [1974] 2 S.C.R. 348 at 363.

5. If an employee eligible for promotion is offered a higher post by way of promotion, his refusal to accept the same would enable the employer, the Central Government in this case, to fill in the post by offering it to a junior to the Government servant refusing to accept the post and in so acting there will be no violation of Art, 16. Further, the Government servant who refuses to accept the promotional post offered to him for his own reason cannot then be heard to complain that he must be given promotional post from the date on which the avenue for promotion opened to him. [60 B-C]

Undoubtedly, it may be that under the Medical Council Regulations *stricto sensu*, the appellant may not be qualified for the post of Associate Professor because he did not possess the requisite teaching experience. But an ad hoc arrangement could have been made and it was open to the Central Government, if the appellant had accepted the post, to move the Medical Council of India to permit the Central Government to appoint the appellant at Simla. Some way could

have been found but the door was bolted by the appellant himself deciding the offer for reasons other than his qualification which he may have found compelling. The offer made to him by the Government was not eye wash or make believe. His refusal to accept the offer of promotion would postpone his promotion. Further, since his refusal to accept the promotion at Simla and till July 1978, the appellant was never superseded by any one junior to him in his speciality it is difficult to entertain the contention that in refusing promotion to him when some posts were converted from unspecified Specialists' posts into different specialities and were filled in by those who were qualified to be promoted in the respective speciality in which the post was created he could be said to have been superseded in violation of Art. 16. [62 D-H]

6. Remote chances of promotion could hardly be said to be condition of service which if impaired would be violative of Art. 16. Even assuming that a remote chance of promotion in adversely affected would give a cause of action, in view of appellants' impending retirement on superannuation the argument would be of no avail to him. [63 F-G]

7. The word 'category' used in Rule 8(3) has to be understood to mean the post included in that category and consequently service in that category would mean service in a post included in that category. [66 B-C]

49

It is a well recognised canon of construction that the construction which makes the Rule otiose or unworkable should be avoided where two constructions are possible and the Court should lean in favour of the construction which would make the rule workable and further the purpose for which the rule is intended. While prescribing experience qualification in 1966 Amendment Rules, the framers of the Rules could not have intended to ignore wholly the past service. A Specialist who was in category 'C' was included in category II with the designation Specialists' grade officer. Similarly, General Duty Officer grade I in category 'D' acquired the same nomenclature General Duty Officer grade I in category III. There was an upward revision of pay scales of both the categories. The change in designation should not be understood to mean that the service rendered as specialist or as General Duty Officer is wholly wiped out for any future promotion. Even after change of designation the duties never underwent any change. Same duty was performed a day prior to September 9, 1966 and the day thereafter by both the categories in the respective posts. Further this change was with a purpose in as much as when certain qualifying service is prescribed for being eligible for promotion in a category the emphasis is on service rendered in a post irrespective of the grade. A Specialists' grade officer belonging to category II was a Specialists' grade officer in category C. He was even then eligible for promotion to supertime grade II. It was never intended that a Specialists grade officer belonging to category 'C' under 1963 Rules who had put in more than 8 years of service but who was not promoted prior to September 9, 1966, the date of initial constitution of service, or on the date of initial constitution of service, would be ineligible for promotion for a period of 8 years simply because the designation of the category changed. It was never intended that there should be a complete hiatus for a period of 8 years in promoting Specialists' grade officers to supertime grade II and for a period of 10 years in case of General Duty Officers grade I. There is no warrant for such an inference from the Rules. [65 A-H, 66 A-C]

8. The contention that executive instruction cannot run counter to the statutory rule is untenable in the facts of this case. Service rendered in equivalent post prior to the date of initial constitution of service could be taken into account in calculating qualifying service for next promotion. [66 E-F]

9. The need for the post or the requirements of the hospital or the need for an ad hoc or additional appointment is a matter which the Government is competent to decide and in the absence of requisite material the Court cannot interpose its own decision on the necessity of creation or abolition of posts. Whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity. The Government is a better judge of the interests of the general public for whose service the hospital are set up. And whether a hospital catering to the needs of general public providing medical relief in different specialities has need for a particular post in a particular speciality would be better judged by the Government running the hospital. If Government is a better judge it must have the power to create or abolish the posts depending upon the needs of the hospital and the requirements of general public. [67 C-E]

Creation and abolition of posts is a matter of Government policy and every sovereign Government has this power in the interest and necessity of internal administration. The creation or abolition of post is dictated by police decision,

50
exigencies of circumstances and administrative necessity. The creation, the continuance and the abolition of post are all decided by the Government in the interest of administration and general public. The Court would be the last competent in the face of scanty material to decide whether the Government acted honestly in creating a post or refusing to create a post or its decision suffers from mala fide, legal or factual. In this background it is difficult to entertain the contention of the appellant that posts were created to accommodate some specific individuals ignoring the requirements of the hospital or the interests of the general public at large. [67 F-H]

M. Ramanatha Pillai v. State of Kerala and Anr., [1947] 1 S.C.R. 515 at 520; followed.

10. No adverse inference could be drawn against a party unless they appear before the Court and they are served with necessary papers. [68 C-D]

In the present case, Respondents 9 and 23 had not appeared in the High Court and there is no evidence that the subsequent affidavit of the appellant was served on them. It may be that the Government may not be interested in either denying or admitting this averment which directly and adversely affects respondents 9 and 23. However, in view of the fact that they were selected by the Departmental Promotion Committee and the promotion was approved by the U.P.S.C. it is difficult to entertain the contention at the hand of the appellant who is not in any way going to be benefited by the invalidation of their promotion. [68 B, D, E]

11. Once the challenge on merits fails in a case, the second string to the bow need not be examined. The appellant here, is least competent to challenge the promotions of Respondents 4 to 24. [69 B-C]

Chitra Ghosh and Anr. v. Union of India and Ors. [1970] 1 S.C.R. 413 @ 420.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2057 of 1979.

Appeal by Special Leave from the Judgment and Order dated 11-1-1979 of the Delhi High Court in L.P.A. No. 46/73.

S.R. Srivastava for the Appellant and Dr. N.C. Shinghal (in person)

P.P. Rao, and Miss A. Subhashini for Respondents 1 & 2.

B.R. Aggarwal for Respondent No. 15.

The Judgment of the Court was delivered by

DESAI, J.-A highly qualified ophthalmic surgeon feeling aggrieved that he has not been justly treated in the matter of promotion to a post in Supertime Grade II seeks redress of his grievance praying for a mandamus that he may be deemed to have been promoted from February 18, 1971, failing which more out of frustration and less by any justification he seeks quashing of the promotion of respondents 4 to 24 though convinced that even if the Court were to accede to his request he is in no way likely to be benefited by this bizarre exercise.

51

First to the fact situation. The Union of India has framed Central Government Health Scheme and in implementation thereof has set up various institutions for medical relief and medical education. A Central Health Service became a necessity for effectively implementing the scheme. With a view to constituting the Service, Central Health Service Rules 1963 ('1963 Rules' for short), were framed and brought into operation on May 15, 1963. The Rules envisaged categorisation of personnel manning the Service into five different categories, to wit, category 'A' supertime scale Rs. 1600-2000, category 'B' supertime scale Rs. 1300-1600, category 'C' senior scale Rs. 675-1300, category 'D' junior scale Rs. 425-950 and category 'E' class II scale Rs. 325-800. On account of various imponderables the Service could not be constituted and 1963 Rules were amended by Central Health Service (Amendment) Rules, 1966, ('1966 Rules' for short). Initial constitution of Service was to be on and from September, 9, 1966. 1966 Rules contemplated again the division of Service into four categories, namely, category I comprising supertime grade I Rs. 1800-2250; supertime grade II Rs. 1300-1800; category II consists of Specialists' grade Rs. 600-1300; category III includes General Duty Officers grade I Rs. 450-1250; and category IV comprises General Duty Officers grade II Rs. 350-900. 1966 Rules provided the method of initial constitution of the Service. Rules 7A(1) and 7A(2) provided for absorbing departmental candidates holding posts in categories 'A' and 'B' under 1963 Rules in posts in supertime grade I and supertime grade II respectively of reorganised Service under the 1966 Rules. Those in service on September 9, 1966, and holding post in categories 'C', 'D' and 'E' were absorbed either in the Specialists' grade or General Duty Officers, grade as the case may be. For the purposes of constitution and absorption of departmental candidates on the date of initial constitution of reorganised service a Selection Committee was set up and absorption was made in accordance with the recommendations of the Committee. This process of absorption was over in March 1967, but the constitution of the Service was deemed to be effective from September 9, 1966. There were some promotions to supertime grade II up to 1971 but as they are not the subject-matter of dispute in this appeal they may be

ignored. There was also direct recruitment to the Service between 1966 and 1971.

Between February 1971 to July 17, 1978, when the appellant came to be promoted to supertime grade II, respondents 4 to 24 were promoted on different dates to supertime grade II. The promotion of respondents 4 to 24 is challenged by the appellant on diverse grounds

52

but the principal contention is that their promotions are in contravention of rule 8 of 1966 Rules. Rule 8 provides for future maintenance of the Service. Relevant for the present appeal is rule 8(3) which provides for recruitment to supertime grade II both by promotion and nomination by direct recruitment. As the appellant claims promotion to supertime grade II from February 18, 1971, and simultaneously questions promotion of respondents 4 to 24 to supertime grade II on various dates after February 18, 1971, and before July 17, 1978, when he was actually promoted, on a certain interpretation of the relevant rule, it may be here extracted:

xx xx xx

"8. Future maintenance of the service-After appointments have been made to the Service under rule 7 and rule 7A, future vacancies shall be filled in the following manner, namely:-

xx xx xx

(3) Supertime Grade I-

(a) Fifty percent of the vacancies in Supertime Grade II shall be filled by promotion of:

(i) General Duty officers, Grade I, with not less than ten years of service in that category; or

(ii) Specialists' Grade officers with not less than eight years of service in that category;

in the ratio of 2:3 on the recommendation of a Departmental Promotion Committee on the basis of merit and seniority of the officer's concerned;

Provided that no person shall be eligible for appointment to any such post unless he possesses the qualifications and experience requisite for appointment to such post.

Provided that where the case of an officer appointed to any post in the grade of General Duty Officer, Grade I or the Specialists' Grade, as the case may be, is considered for the purposes of promotion to any posts in Supertime Grade II under this sub-rule, the cases of all persons senior to such officer in the grades of General Duty Officer, Grade I or Specialists' Grade, as the case may be, shall also be considered, notwithstanding that they may not have rendered 10 years or 8 years of service, respectively, in those grades".

To appreciate the contention of the appellant as to how he claims promotion to supertime grade II on February 8, 1971, it may be noted

53

that effective from that date the Central Government converted one post from amongst unspecified specialists' Grade posts in supertime Grade II in Ophthalmology Speciality at Willingdon Hospital and transferred Dr. B.S. Jain, respondent 3, who was then working as Chief Ophthalmologist-cum-Associate Professor of Ophthalmology,

Himachal Pradesh Medical College, Simla, and offered the vacancy in super-time grade II caused by the transfer of respondent 3, to appellant who was next in seniority by way of promotion on ad hoc basis as per memorandum dated December 7, 1970. Appellant responded to this offer as per his letter dated December 9, 1970, wherein after putting forward various personal inconveniences and a possible loss in emoluments even on promotion, he concluded his response to the offer as under:

"In view of my personal problems and in the public interest I most humbly request that this promotion may kindly be granted to me while in Delhi."

Thereafter the Government offered the post to Dr. Radha Natarajan but she declined the offer. Subsequently the Government offered the post to Dr. M.C. Sharma who accepted the same but he was not appointed and ultimately Dr. G.C. Sood was promoted to supertime grade II post and was appointed at Simla.

Appellant contends that when a post in Ophthalmology at Willingdon Hospital was created on February 1, 1971, by conversion of one post from amongst unspecified Specialists' grade posts in supertime grade II that post could only have been filled in by promotion from amongst those holding the post in Specialists' grade in ophthalmology speciality and he being the seniormost and otherwise qualified, he should have been promoted from that date. Simultaneously he contends that filling in the post so created in supertime grade II at Willingdon Hospital by transfer of respondent 3 Dr. B.S. Jain was in violation of the statutory rule and hence invalid. He also contends that as he was not qualified to hold the post of Chief Ophthalmologist cum-Associate Professor of Ophthalmology, Himachal Pradesh Medical College, Simla, because it was a teaching post and he lacked teaching experience which was an essential qualification, the offer of that post to him was merely an eye wash and he could not have accepted the same. It is necessary to examine three different limbs of the submission separately.

Rule 5 of 1966 Rules provides for authorised strength of the Service. The authorised strength of the various categories of the service on the date of commencement of 1966 Rules shall be as specified in the first schedule. Part A of the first schedule deals with supertime

54
grade I and Part B deals with supertime grade II. Part C deals with Specialists' grade. The vertical promotional channel is from specialists' grade and General Duty Officers Grade I to supertime grade II and from thereon to supertime grade I. On the date of initial constitution of Service there were 275 permanent and 102 temporary, in all 377 posts in specialists' grade. Out of this strength of posts in specialists' grade, 28 posts were upgraded to supertime grade II, 19 being classified as unspecified specialists' posts and 9 unspecified posts. To that extent the permanent strength of posts in specialists' grade was reduced by 28 so as to leave it at 247. There is no dispute that 19 unspecified Specialists' posts and 9 unspecified posts were upgraded to supertime grade II. The controversy is how these posts were to be filled in. Appellant contends that as these 28 posts were in Specialists' grade and the strength of Specialists' grade posts was reduced by 28, whenever any post out of these 28 posts added to supertime grade II is required to be filled in, it can only be filled in by promotion from amongst those originally belonging to specialists' grade, i.e. category 'C' under 1963 Rules. Simultaneously he contends that as these unspecified

specialists' grade posts and unspecified posts, 28 in number, can be filled in from those belonging to specialists' grade, ipso facto they can only be filled in by promotion and not either by direct nomination or by transfer. In support of this submission reliance is also placed on an affidavit filed on behalf of Union of India in a petition filed by Dr. B.S. Jain wherein it was in terms stated that these 28 posts could only be filled in by promotion and in no other manner.

The *raison d'être* for upgrading the 28 posts from specialists' grade to supertime grade II yet dividing them in two separate categories each having its own nomenclature, viz., 19 posts designated as unspecified Specialists' grade posts and 9 designated as unspecified posts is not difficult to discern.

Unlike other professions, medical profession has developed branchwise expert specialised knowledge referable generally to number of parts in which human anatomy is divisible. General medicine and general surgery are two broad genus but under each one of them there are numerous specialities and there is intensive study and research in speciality for being qualified for the speciality. Being an expert in any one speciality simultaneously results in being excluded from other specialities even though the specialities may be species of a genus like general medicine or general surgery. Again, in each speciality there will be a post of a Lecturer, an Assistant Professor, an Associate Professor and a Professor with a vertical movement by way of promotion. In a non-teaching hospital there will be posts like Junior Surgeon,

55

Senior Surgeon, Head of the Department and so on. In a profession so compartmentalised specialitywise, *ex hypothesi* it is difficult to provide for promotional avenue by way of a general seniority list integrating different specialities categorywise, cadrewise or gradewise. If such a general seniority list including persons belonging to different specialities albeit in the same grade is drawn up for purposes of promotion it might lead to a startling result because the need may be of a promotional post in a speciality and the man at top of the seniority list may not belong to that speciality but may belong to a different speciality and if any promotion was to be given to him to a post in a speciality for which he is neither qualified nor eligible it would be impossible to give vertical promotions by referring to such general seniority list. If the promotion is to a post generally called administrative post in a hospital a general seniority list including experts belonging to different specialities may be helpful but when promotions are to be given to posts in different specialities a general seniority list is not only unhelpful but may really impede the process of promotion. Again, demands of different specialities for additional strength may differ from hospital to hospital, from area to area and even from time to time. In order to meet such unforeseen eventualities the rules provide for an addition to the strength of supertime grade II by keeping 19 posts designated as unspecified Specialists' grade posts and 9 unspecified posts in a pool. Whenever a demand came for providing a higher post in supertime grade II in any particular speciality ordinarily where the strength of the service is prescribed a post will have to be created which any one familiar with bureaucratic jagornot would immediately realise how time consuming it is. Anticipating such a situation and to meet with the demands of

specialities within a reasonable time it was provided that there would be a pool of 19 unspecified Specialists' posts in supertime grade II and 9 unspecified posts also in supertime grade II. This would facilitate conversion from the pool of unspecified Specialists' posts of an unspecified Specialists' post to a specified Specialist post in a speciality where a need has been felt. Once the need is felt and a post is converted from an unspecified post to a specified post in supertime grade II it becomes an addition to the strength of that speciality and the post can be filled in, in accordance with the relevant rule. But it is implicit in this arrangement that the person to be appointed to such a post would be one who is eligible to be appointed to that speciality and not some one who is on top of the general seniority list in Specialists' grade or general duty officers' grade from which promotion is to be made. If promotion has to be made from a general seniority list which includes all Specialists in the Specialists' grade the one at the top may be a Cardiologist and the post may be converted into Anesthesiology and it

56

does not require long persuasive argument to hold that a Cardiologist cannot be appointed as an Anaesthetic. It is, therefore, crystal clear that when a post from amongst unspecified Specialists' posts is converted to a specified post which means specified in the speciality in which a need has been felt from amongst those in the specialists' grade belonging to that speciality and in order of their inter se seniority a promotion could be given. This position is inescapable and it is difficult to comprehend a position contrary to this. In fact, this situation has been expressly recognised by this Court in *Union of India & Ors. v. S. B. Kohli & Another*, wherein it was held that for being appointed as a Professor in a particular speciality in that case Orthopaedics, the condition that a person must have a post-graduate degree in Orthopaedics would not result in any classification without reference to the objectives sought to be achieved and this would not result in any discrimination nor would it be violative of Article 16.

In passing a contention of the appellant that all 28 posts which were deducted from the strength of permanent posts in Specialists' grade and added to supertime grade II must on that account alone be filled in by promotion from those belonging to the specialists' grade only may be examined. There is no merit in this contention. If there was any substance in this contention there was no reason to provide for two different designations and divide the 28 posts in two different nomenclatures. 28 posts are made up of 19 posts designated as unspecified Specialists' posts and 9 unspecified posts. Undoubtedly 19 posts which were designated as unspecified Specialists' post must be filled in from amongst those belonging to the Specialists' grade but that itself also shows that the remaining 9 unspecified posts can be filled in from amongst those who may be promoted from 'General Duty Officers grade- I because General Duty Officers grade-I are also promotable to supertime grade-II. The nomenclature unspecified Specialists' post and unspecified post provides an effective answer and indicates that while in the case of the former promotion must be given from Specialists in respect of the latter General Duty Officers Grade-I would be eligible for promotion. Merely because all 28 posts were deducted from the strength of posts in Specialists' grade it could not be said that all 28 posts would be available for promotion to those belonging to Specialists' grade only. The language

employed in rule 5 also points in this direction. There is, therefore, no substance in the contention that all 28 posts must be filled in by promotion from amongst those who belong to Specialists' grade only.

57

The last limb of the argument is that the 19 unspecified Specialists' posts in supertime grade II can only be filled in by promotion and not in any other manner and particularly not by transfer. The provocation for this submission is posting of Dr. B. S. Jain in supertime grade II post created at Willingdon Hospital in February 1971. Undoubtedly one unspecified Specialists' grade post was converted and was designated as specified post in supertime grade II in Ophthalmology speciality at Willingdon Hospital in February 1971. Appellant says that once an unspecified Specialists' grade post was converted into a specified post and that as it was assigned to Ophthalmology speciality, he being the seniormost Ophthalmologist and qualified for the post, that post could only be filled in by promotion and he should have been promoted and the posting of Dr. B. S. Jain by transfer to that post was illegal and invalid. Rule 8 provides for future maintenance of the Service. Rule 8(3) provides for 50% of the vacancies in supertime grade II to be filled in by promotion of General Duty Officers Grade I and Specialists' grade officers in the ratio of 2:3 and the remaining 50% of the vacancies to be filled in by direct recruitment in the manner specified in the second schedule. Now, once an unspecified specialists' grade post in supertime grade II is converted and made a specified post in a speciality it is an addition to the strength of the speciality and the filling in of such post shall be governed by rule 8 (3). Undoubtedly if it is to be filled in by promotion, that would only be from amongst those belonging to Specialists' grade officers as the converted post was unspecified Specialists' post. But to say that it can be filled in only by promotion is to ignore the mandate of statutory rule 8(3) which provides for filling in posts in supertime grade II by either promotion or nomination in the ratio therein prescribed. Once there is a post in supertime grade II which is to be filled in subsequent to the initial constitution of the Service, rule 8 (3) will be attracted in all its rigour. And it should not be overlooked that rule 8 (3) provides for filling in of posts in supertime grade II by promotion as well as by direct recruitment in the ratio of 1:1. On a true interpretation of the 1966 Rules in general and rule 8 (3) in particular it could not be, gainsaid that whenever an unspecified Specialists' post is converted into a specified post and assigned to a speciality it can be filled in either by promotion or by direct recruitment as the situation warrants according to the rule and as determined by the quota rule. But it was very strenuously contended that the Central Government in implementing the rule has understood and in fact implemented the rule to this effect that whenever an unspecified Specialist's post is converted as a specified post and assigned to a speciality it can only be filled in by promotion. Reliance was placed upon an affidavit made on behalf of the Central Government in a writ

58

petition filed by Dr. B. S. Jain in Delhi High Court. In the counter-affidavit on behalf of the Central Government a stand was taken that the 19 unspecified Specialists' posts were meant only for promoting category 'C' clinical Specialists to supertime grade II. In Union of India v. Bhim Singh & Ors., the Court refers to the stand taken on behalf

of the Union of India in that case as under:

"Learned counsel for the appellant (Union of India) submits that these posts were included in supertime grade II not with reference to the actual number of officers who had completed 8 years of service or more on a particular date but only with a view to providing opportunities of promotion to the former Category 'C' officers holding clinical Specialist posts".

It does appear that such a stand was taken on behalf of the Union of India but simultaneously it may be noted that the Court has not accepted the stand. And it would be too late in the day to say that on such a stand of the Union of India, if it runs counter to the rule explicit in meaning, any argument can be founded or any relief can be claimed unless estoppel is urged. And no such estoppel is claimed In P. C. Sethi & Ors. v. Union of India & Ors., the petitioners urged that the view put forward on their behalf had been admitted by the Government in its affidavit filed in connection with certain earlier proceedings of similar nature and other admissions in Parliament on behalf of the Government. Negating this contention this Court held that such admissions, if any, which are mere expression of opinion limited to the context and not specific assurances, are not binding on the Government to create and estoppel. Similar view was also expressed in J. K. Steel Ltd. v. Union of India where following the earlier decision of this Court in Commissioner of Income tax, Madras v. K. Srinivasan and K. Gopalan, it was observed that the interpretation placed by the Department on various sub-sections in the instructions issued by the Department cannot be considered to be proper guide in a matter wherein the construction of a statute is involved. Therefore, it cannot be said that 19 unspecified Specialists' posts could only be filled in by promotion and such an interpretation or stand would run counter to the express provision contained in rule 8(3) which is statutory. Even if such be the stand of the Central Government it will have to be negated and was in fact negated in the case of Dr. B. S. Jain.

59

Incidentally it would be incongruous to hold that when a post is created in a certain grade, category or cadre and it is to be filled in, some one who is already in that grade, category or cadre cannot be transferred to that post and the post so vacated by him can be filled in, in the manner prescribed. Even if there was some substance, though there is none, in the contention on behalf of the appellant that whenever unspecified Specialists' post is converted into a specified post it can only be filled in by promotion yet when some one who is already in that grade is transferred to the newly created post and the post vacated by such transferred employee is offered by way of promotion which in fact was done in this case there is any violation of the rule. As pointed out earlier, when a post is created it is an addition to the strength of that particular category and the additional strength has to be filled in the manner prescribed in the rule and that no sanctity attached to the place where the post is created but the sanctity attaches to the number of posts and the manner of filling them. Now, Dr. B. S. Jain was already holding the post in supertime grade II at Simla when a post in supertime grade II in Ophthalmology was created at Willingdon Hospital from amongst unspecified Specialists' posts. Even if this additional post has to be filled in by promotion as contended by the appellant, it is not open to him to urge

that the post at Willingdon Hospital alone must have been filled in by Promotion. Dr. B. S. Jain was transferred to the post created at Willingdon Hospital and the post vacated by him which was in supertime grade II was offered to the appellant as and by way of promotion. Therefore, even if the contention of appellant is to be accepted, there is no violation of rule 8(3). Equally it is also not correct to contend that Dr. B. S. Jain could not have been transferred to the post created at Willingdon Hospital. Transfers in posts which are in the same grade or are considered equivalent can be affected on administrative exigencies. Once a new post is created and it is an increase in the strength of the Cadre in which the post is created, every one in that cadre is eligible to fill in that post and transfer is permissible. Transfer of Dr. B. S. Jain is, therefore, beyond question. In E. P. Royappa v. State of Tamil Nadu & Anr., it is observed that the services of cadre officers are utilised in different posts of equal status and responsibility because of exigencies of administration and employing the best available talent in suitable post. There is no hostile discrimination in transfer from one post to other when the posts are of equal status and responsibility. Therefore, it is futile to urge that filling in the post created at Willingdon Hospital in supertime grade II by transfer of Dr. B. S. Jain, a person already promoted to supertime grade II was invalid

60

in as much as the post was not filled in by promotion or direct recruitment but by transfer.

The next contention is that the refusal of the appellant to accept the post at Simla offered to him will not debar him from promotion because the appellant was not qualified for the post at Simla. If an employee eligible for promotion is offered a higher post by way of promotion, his refusal to accept the same would enable the employer, the Central Government in this case, to fill in the post by offering it to a junior to the Government servant refusing to accept the post and in so acting there will be no violation of Art. 16. Further, the Government servant who refuses to accept the promotional post offered to him for his own reasons cannot then be heard to complain that he must be given promotional post from the date on which the avenue for promotion opened to him. Appellant being conscious of this position tried to circumvent it by saying that the Post at Simla offered to him by way of promotion in super time grade II was a teaching post for which he was not qualified and, therefore, his refusal to accept the same cannot come in his way from claiming promotion from the very date on which he refused to accept the promotion to a post for which he was not qualified. Appellant went so far as to suggest that the Government action in offering him the post at Simla was actuated by malice in that while making a show of offering him a promotional post it so deliberately acted as would impel the appellant to refuse the same. Says the appellant that one post from the pool of unspecified specialists, posts was converted to a specified post in Ophthalmology and was sanctioned at Willingdon Hospital which is not a teaching hospital and, therefore, the appellant was fully qualified for being promoted to that post. Instead of acting in this straight forward manner the Government transferred Dr. B. S. Jain from Simla to the post newly created at Willingdon Hospital and purported to offer the Simla post to the appellant for which appellant was not qualified and thus deliberately thwarted the promotional opportunity of the appellant and that this smacks of malice.

To substantiate this submission the appellant points out that the designation of the post at Simla was Chief Ophthalmologist-cum-Associate Professor of Ophthalmology, Himachal Pradesh Medical College, Simla. This according to the appellate was a teaching post and the qualification prescribed by the regulation framed by the Medical Council of India requires as an essential qualification a teaching experience as Reader or Assistant Professor in Ophthalmology for five years in a Medical College after requisite post-graduate qualification. It was further stated that the appellant had no teaching qualification though he started teaching at the Safdarjang Hospital when he was recognised as a post-graduate teacher in Ophthalmology but

61

his teaching experience extended to barely two weeks. It was also said that essential teaching experience prescribed by the Medical Council of India under its regulation is not relaxable and that, therefore, appellant was not qualified for the post of Associate-Professor which was offered to him. In S.B. Kohli's case (Supra) this Court did observe that a discretion to relax teaching experience qualification is conferred only on the U.P.S.C. in cases of direct recruitment and not to the Departmental Promotion Committee in case of promotion. That being the intent of the law it is to be given effect to. This observation is in a slightly different context but one may safely proceed on the assumption that essential teaching qualification for the post of an Associate Professor prescribed by Medical Council of India is not relaxable. Therefore it can be said with some justification that the appellant who did not have the requisite teaching experience was not qualified for the post of Associate Professor. But this want of qualification impelling refusal to accept promotion appears to be an afterthought on his part. When the promotional post was offered to him as per letter dated December 7, 1970, appellant did not reply by saying that he was not qualified for the post. In his reply dated December 9, 1970, to the offer made by the Government appellant pointed out that he was involved in some litigation with regard to his house and that his stand for eviction would be weakened by his transfer. He then proceeded to point out that he was suffering from chronic bronchitis and that the climate at Simla may not suit him. He also pointed out the adverse effect of climate on the health of his wife. He then proceeded to point out that apart from his personal problems he was engaged in the Safdarjang Hospital for teaching of post-graduate students and, therefore, he requested the Government "the post of Chief Ophthalmologist-cum-Associate Professor of Ophthalmology may kindly be bestowed on me at Safdarjang Hospital where there is essential need for such a post". Could this be the stand of a person offered a promotional post honestly believing that he was not qualified for the same? The post offered to him was of Chief Ophthalmologist-cum-Associate Professor. Appellant believes and now says that he was not qualified for the same if the post was at Simla but if the same post was created at Delhi with the same designation with the same responsibility for teaching and that too at the post-graduate level he considered himself to be fully qualified for the same and requested the Government to bestow that post on him. He then proceeds to point out his merits and puts forth his disinclination for being promoted to the post at Simla. In the face of his bold statement that he is prepared to be appointed as Chief Ophthalmologist continuing to do teaching work at the post-graduate level at the Safdarjang Hospital,

he now wants to assert that he was not qualified for the post. This convenient after

62

thought cannot decry the fact that the appellant declined to accept the post at Simla not because he believed he was not qualified for the post but because he was not inclined to leave Delhi, may be for reasons which may be true and compelling for him. This becomes explicit from a further averment in paragraph 7 of his reply wherein he pointed out to the Central Government that even though he was selected by the U.P. Government for the post of Chief Medical officer, Gandhi Memorial Eye Hospital, Aligarh, on a fabulous salary of Rs. 3,000/- p.m. and which offer was transmitted to him through the Government so as to enable the Government to release him and although the Government was considering his release on deputation for the post but he himself declined the offer because of domestic problems. There is thus no room for doubt that the appellant considers himself qualified for any post in Delhi and was under no circumstances willing to leave Delhi and his disinclination to accept any post at Simla stemmed not from his honest belief that he was not qualified for the post but because he was not inclined to leave Delhi. Undoubtedly it may be that under the regulation stricto sensu he may not be qualified for the post of Associate Professor because he did not possess the requisite teaching experience. But an ad hoc arrangement could have been made and it was open to the central Government, if the appellant had accepted the post, to move the Medical Council of India to permit the Central Government to appoint the appellant at Simla. Some way could have been found but the door was bolted by the appellant himself declining the offer for reasons other than his qualification which he may have found compelling. In this background it is difficult to accept the submission of the appellant that the offer made by the Government was an eye wash or a make-believe and, therefore, his refusal to accept the offer of promotion would not postpone his promotion.

Incidentally it would be advantageous to take note of the fact at this stage that the appellant was promoted to supertime grade II on July 17, 1978 and between February 1971 when he declined to accept promotion and July 1978 when he was in fact promoted, no one junior to him in the speciality to which he belongs was ever promoted overriding his claim to supertime grade II. Therefore, if since his refusal to accept promotion at Simla appellant was never superseded by any one junior to him in his speciality it is difficult to entertain the contention that in refusing promotion to him when some posts were converted from unspecified Specialists' posts into different specialities and were filled in by those who were qualified to be promoted in the respective speciality in which the post was created he could be said to have been superseded in violation of Art. 16. And in this view of the matter nothing more need be examined but as certain other contentions were advanced

63

which even if accepted would not in any case benefit the appellant, it appears to us an exercise in futility but we would rather dispose them of than gloss over them.

In the High Court appellant canvassed twofold contention that between 1966 and 1971, i.e. after the initial constitution of service and before the proposal offering promotion to the appellant at Simla was made 25 promotions were given to supertime grade II to persons who were ineligible for the same and secondly after February

1971 and before July 1978 when he was actually promoted to supertime grade II, 29 promotions were given to supertime grade II some of whom are respondents 4 to 24 and that their promotion was in contravention of rule 8(3) of the Rules and, therefore, invalid. Before this Court the first limb of the argument, namely, invalidating promotions between 1966 and 1971 to supertime grade II was not canvassed. It was the second limb of the argument that was pressed into service. None of those who were promoted between February 1971 and July 1978 belonged to the speciality to which appellant belongs. Each of them belonged to a different speciality and admittedly appellant was not qualified for being promoted to any supertime grade II post in the speciality in which each one of them was promoted. When this aspect became clear a question was posed to the appellant how he would be benefited even if his contention were to prevail that none of them was eligible for promotion to supertime grade II and, therefore, the promotion of each of them deserved to be quashed. The answer was that there is a common seniority list of persons belonging to supertime grade II and promotion to supertime grade I is by seniority and that promotion of respondents 4 to 24, if quashed, would push the appellant higher up in seniority above them and would enhance his chances of promotion to supertime grade I. Remote chances of promotion could hardly be said to be condition of service which if impaired would be violative of Art. 16. Even assuming that a remote chance of promotion if adversely affected would give a cause of action, it was made clear that the appellant is retiring on superannuation in the last quarter of this year and that even if he is assigned a deemed date of promotion somewhere in February 1971 yet there are number of persons above him in supertime grade II who were promoted between 1966 and 1971 and appellant has not even a remote chance of promotion. Appellant at that stage reacted by saying that even if it be true, yet the promotions of respondents 4 to 24 ought to be quashed because when he with respondents 4 to 24 and others belonging to supertime grade II attend a meeting convened to discuss some administrative matter or for holding charge of higher post temporarily vacant they claim seniority over him and his dignity is impaired. This calls for no comment save 64

and except saying that the approach appears to be more emotional rather than realistic. However, the contention may be examined on merit.

Promotion of respondents 4 to 24 was questioned on the ground that each of them was ineligible for promotion to supertime grade II on the date on which each of them was promoted in view of the provision contained in rule 8(3). Rule 8(3) has been extracted herein before. The contention is that since the initial constitution of service on September 9, 1966, any future promotion to supertime grade II from departmental candidates could be from amongst those who qualify for the same as provided for in rule 8(3). Apart from academic qualification, the experience qualification prescribed is that, the General Duty Officers grade I and Specialists' grade officers should have put in 10 years and 8 years of service respectively in that category. Appellant contents that service in the category means service in that category which was constituted under the 1966 amendment rules. Rule 2(c) defines category to mean a group of posts specified in column 2 of the table under rule 4. Rule 4 provides for classification, categories and scales of pay. It provides that there shall be four categories in the service and each category shall consist of the grade

specified in column 2 of the table appended to the rule. The four categories are: first category which includes supertime grade I and supertime grade II posts. Category two is Specialists' grade posts, category three comprises General Duty officers, grade I and category four includes General Duty Officers grade II. It was contended that the service to be rendered for the qualifying period must be in the category and, therefore, a general Duty Officer grade I can only become eligible for promotion after he renders 10 years of service in that category which came into existence on September 9, 1966, and this would apply mutatis mutandis to the Specialists' grade officers who must put in 8 years of service in the category which came into existence on September 9, 1966. If this contention were to prevail, apart from anything else, appellant himself would not have been qualified for promotion to supertime grade II in February 1971 from which date he claims as being eligible for promotion to supertime grade II because he had not put in 8 years of service in the category of specialists' grade officers formed on September 9, 1966. That apart, it is impossible to overlook the history of the Service. The rules were initially framed in 1963. At that time the service was sought to be classified in 5 categories styled category 'A' to category 'E'. Expression 'category' in 1963 Rules was defined to mean a group of posts carrying the same scale of pay. Another salient feature of which notice should be taken is that save and except upward revision in scale, category I under the 1966 amendment Rules includes cate-

65
gories 'A' and 'B' under 1963 Rules. Category 'C' has been designated as Specialists' grade, i.e. category II under the 1966 Rules. Category 'D' is equated with General Duty Officers grade I styled category III and category 'E' is equated with General Duty officers grade II, i.e. category IV. Expression 'service in the category' has to be understood in this historical background. It is difficult to entertain the contention that the past service of Specialists' category 'C' officers got wholly wiped out merely because the nomenclature of category 'C' Specialists officers was changed to Specialists' grade officers replacing the expression 'category C' by category II. And that would apply mutatis mutandis to General Duty Officers grade I and grade II. The change in the definition of the expression 'category' appears to be instructive in that by the change service in the post is emphasised and the question of the grade of pay is relegated into background. And this change appears to be with a purpose inasmuch as when certain qualifying service is prescribed for being eligible for promotion in a category the emphasis is on service rendered in a post irrespective of the grade. A specialists' grade officer belonging to category II was a specialists' grade officer in category C. He was even then eligible for promotion to supertime grade II. Was it ever intended that a Specialists' grade officer belonging to category 'C' under 1963 Rules who had put in more than 8 years of service but who was not promoted prior to September 9, 1966, the date of initial constitution of service, or on the date of initial constitution of service, would be ineligible for promotion for a period of 8 years simply because the designation of the category changed? Was it intended that there should be a complete hiatus for a period of 8 years in promoting Specialists' grade officers to supertime grade II and for a period of 10 years in case of General Duty Officers grade I. There is no warrant for such an inference from the Rules. Such an intention cannot be

attributed to the framers of the Rules nor is it possible to accept the submission of the appellant that the posts could have been filled in by direct recruitment because where candidates eligible for promotion were not available it was open to resort to direct recruitment as provided in the Rules. It is a well recognised canon of construction that the construction which makes the Rules otiose or unworkable should be avoided where two constructions are possible and the Court should lean in favour of the construction which would make the rule workable and further the purpose for which the rule is intended. While prescribing experience qualification in 1966 Amendment Rules, the framers of the Rules could not have intended to ignore wholly the past service. A specialist who was in category 'C' was included in category II with the designation specialists' grade officer. Similarly, General Duty Officer grade I in category 'D' acquired the same nomenclature General Duty Officer grade I in cate-
66

gory III. There was an upward revision of pay scales of both the categories. Should the change in designation be understood to mean that the past service rendered as Specialist or as General Duty Officer is wholly wiped out for any future promotion? Even after change of designation it is not suggested that the duties underwent any change. Same duty was performed a day prior to September 9, 1966, and the day thereafter by both the categories in the respective posts. In this background the High Court was right in holding that the word 'category' used in rule 8(3)(a) has to be understood to mean the post included in that category and consequently service in that category would mean service in a post included in that category.

The appellant contended that this construction would run counter to the posting of former categories 'D' and 'E' officers on probation on September 9, 1966, in specialists' grade and General Duty Officers grade I. In this connection it must be recalled that on initial constitution of Service some persons who were in the category of General Duty Officers were absorbed and appointed in Specialists' grade and vice versa was true of some persons. It is equally true that Officers belonging to categories 'D' and 'E' were considered in a category lower to category 'C'. It is equally possible, therefore, that on September 9, 1966, i.e. the date of initial constitution of Service some of the officers belonging to categories 'D' and 'E' who were absorbed in categories II and III respectively may have been put on probation but for qualifying service for upward promotion service rendered as probationer is not to be ignored. Viewed from either angle it is crystal clear that service rendered in equivalent post prior to the date of initial constitution of Service could be taken into account in calculating qualifying service for next promotion. This was the stand taken by the Government in the affidavit filed in Civil Writ No. 1155/71 filed by Dr. Chandra Mohan in the High Court of Delhi and that appears to be consistent with the construction of rule 8(3). The contention, therefore, that executive instruction cannot run counter to the statutory rule must be rejected as untenable in the facts of this case.

It was next contended that the Government was guilty of legal malice in that in February 1971 on a need being felt, a post in supertime grade II in Ophthalmology speciality was sanctioned at Willingdon Hospital and filled in by transfer of Dr. B.S. Jain overlooking and ignoring the rightful claim of appellant and on transfer of Dr. B.S. Jain on March 7,

1972, to Safdarjang Hospital, the post was also transferred to Safdarjang Hospital. In this connection appellant also pointed out that there is material on record to show that the Superintendent of Willingdon Hospital felt an acute need for a post in super-

67

time grade II in Ophthalmology speciality and yet it was not created while on the other hand in order to accommodate some favourites like respondents, 4, 5, 8, 9, 12, 13 and 15 some posts in different specialities where they could be accommodated were created without the need for the same. There is evidence to the effect that appellant had sent a proposal duly recommended by Medical Superintendent of Safdarjang Hospital to the authorities for creating a supertime grade II post in Eye Department in May 1971 as per letter dated May 3, 1971. There is also material to show that some ad hoc appointments were made in supertime grade II. It is, however, not possible to strike down those appointments on the ground that some posts were created in supertime grade II though not needed wherein some of the respondents were promoted or that there was no justification for creation of posts or for making ad hoc appointments. It should be distinctly understood that not a single post was created in Ophthalmology speciality to which appellant could have been appointed. The need for the post of the requirements of the hospital, or the need for an ad hoc or additional appointment is a matter which the Government is competent to decide and in the absence of requisite material the Court cannot interpose its own decision on the necessity of creation or abolition of posts. Whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity. The Government is a better Judge of the interests of the general public for whose service the hospitals are set up. And whether a hospital catering to the needs of general public providing medical relief in different specialities has need for a particular post in a particular speciality would be better judged by the Government running the hospital. If Government is a better judge it must have the power to create or abolish the posts depending upon the needs of the hospital and the requirements of general public. Creation and abolition of posts is a matter of Government policy and every sovereign Government has this power in the interest and necessity of internal administration. The creation or abolition of post is dictated by policy decision, exigencies of circumstances and administrative necessity. The creation, the continuance and the abolition of post are all decided by the Government in the interest of administration and general public (see M. Ramanatha Pillai v. The State of Kerala and Anr). The Court would be the least competent in the face of scanty material to decide whether the Government acted honestly in creating a post or refusing to create a post or its decision suffers from malafide, legal or factual. In this background it is difficult to entertain the contention of the appellant that posts were created to accommodate some specific individuals ignoring the requirements of the hospital or the interests of the general public at large.

68

It was next contended that respondent 9, Dr. K.P. Mathur and respondent 23, Dr. A. R. Majumdar should have been considered ineligible for promotion because both of them were adversely commented upon by the Madras High Court as being negligent in discharge of duties and the Government had to pay a sum of Rs. 10,000/- as compensation by way of damages for their negligence. He sought inspection of some

files to substantiate this allegation. Unfortunately though respondents 9 and 23 were made parties they did not appear to controvert this fact. But it appears from the record that they were promoted after they were selected by the Departmental Promotion Committee and the promotion was approved by U.P.S.C. Appellant contended that this averment on his part has remained uncontroverted and it must be taken as having been admitted and proved. It may be mentioned that in the petition filed by the appellant in the Delhi High Court this allegation was not specifically averred. In a subsequent affidavit filed by him this allegation was put forth. If respondents 9 and 23 had not appeared in the High Court the appellant should have shown that this subsequent affidavit was served upon them, and in that event alone some adverse inference may be drawn against them. It may be that the Government may not be interested in either denying or admitting this averment which directly and adversely affects respondents 9 and 23. However, in view of the fact that they were selected by the Departmental Promotion Committee and the promotion was approved by the U.P.S.C. it is difficult to entertain the contention at the hand of the appellant who is not in any way going to be benefited by the invalidation of their promotion.

It was incidentally urged that promotions given to respondents 9,12,13 and 15 must be set aside because they belonged to former category 'D' and were given promotions against 19 unspecified posts in contravention of the affidavit of the Government. As stated earlier, there were some specialists in category 'D' also. At the time of initial constitution of service those who qualified for being appointed General Duty Officers from category 'D' were absorbed in category III and those who were eligible for being absorbed in Specialists' grade were so absorbed. After absorption they belonged to the respective category. Thereafter on conversion of posts from the pool of 19 unspecified specialists' posts they were promoted as being found qualified for the same and for the post to which each one of them was promoted appellant was not qualified and, therefore, the contention that the promotion of the aforementioned four respondents should be set aside has no merit in it.

Having examined the challenge to the promotion of respondents 4 to 24 on merits, it must be made clear that the appellant is least

69

qualified to question their promotions. Each one of them was promoted to a post in supertime grade II in a speciality other than ophthalmology and appellant admittedly was not qualified for any of these posts. Even if their promotions are struck down appellant will not get any post vacated by them. Incidentally High Court also upheld their promotions observing that by the time the petition was heard each one of them had requisite service qualification and, therefore, the promotions could not be struck down. Once the challenge on merits fails the second string to the bow need not be examined. Having said all this, appellant is least competent to challenge their promotions. In a slightly comparable situation this Court in *Chitra Ghosh and Anr. v. Union of India and Ors.* observed as under:

"The other question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nominations made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not

compete for the reserved seats and have no locus standi in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded."

It was last urged that the High Court has set aside the promotion of respondent 18, Dr. P. C. Sen who was promoted in 1971 and, therefore, there was an opening in supertime grade II in September 1971 and appellant should be considered eligible for promotion to the post from that date and that this Court should consider appellant's eligibility for promotion from September 1971 and if found eligible, should grant the same. Dr. P.C. Sen was General Duty Officer grade I and he was posted as Director of Health Services, Manipur. Appellant contends that he was in Specialists' grade and was senior to Dr. Sen and was not unqualified for the post of Director of Health Services, Manipur, but the post was not offered to him and, therefore, he must be considered eligible for promotion from the date on which Dr. P.C. Sen was promoted. The High Court in L.P.A. 46/74 filed by the appellant has set aside the promotion of Dr. P.C. Sen as also of Dr. Jasbir Kaur but the High Court has not thought fit to direct the Government by a mandamus to consider eligibility of the appellant for the post of Director of Health Services, Manipur. There is no material before us whether the appellant was qualified for the post. If he was eligible it would be for the Government to consider how it should deal with the post. We

70

are, however, surprised that the appellant who was not prepared to go to Simla in February 1971 would have been willing to go to Manipur in September 1971. In our opinion it would be giving him an unfair advantage now by giving a technical benefit of a situation whereby promotion of Dr. Sen has been invalidated by the High Court. Neither Dr. Sen nor the Government have preferred appeal against the judgment by which the promotions of Dr. P.C. Sen and Dr. Jasbir Kaur were invalidated by the High Court. But the matter must remain at that stage and there is no justification for giving a direction that the appellant should be considered for the post which is deemed to have fallen vacant in September 1971 on the invalidation of promotion of Dr. P.C. Sen. In this connection it may be pointed out that some time after the hearing was over in this Court learned counsel for the appellant has circulated a letter that the High Court has set aside the promotion of respondent 7, Dr. Ramesh Prasad Singh as also of respondent 21, Dr. Brij Gopal Misra. It is undoubtedly true that the learned single Judge who heard the petition initially had set aside the promotion of Dr. Brij Gopal Misra to the post of Regional Deputy Director, N.M.E.P., Hyderabad. But neither from the judgment of the learned single Judge nor from the judgment of the Division Bench it is possible to ascertain that the promotion of Dr. Ramesh Prasad Singh has been invalidated. No direction in that behalf can be given.

Before we conclude it may be pointed out that on the conclusion of hearing of this appeal in order to heal the wound caused by impaired dignity of the appellant as herein before mentioned, a suggestion was made to the Government to see if the present appellant could be accommodated in some way where he may not feel the humiliation which he claims he suffers. Mr. P. Parameswara Rao, learned counsel for the Government promised to discuss the matter with the

Government and ultimately on March 7. 1980, the Central Government offered the post of Director and Head of the Department for a programme concerned with vision impairment and amelioration thereof. In that post the appellant would be the Head of the Department and would continue to be in supertime grade II. This offer did not appeal to the appellant and the matter was left at that.

There is no substance in any of the contentions urged on behalf of the appellant and, therefore, this appeal fails and it is dismissed with no order as to costs.

V.D.

Appeal dismissed.

71

JUDIS