

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

Case no:

Date of decision: 31.03.2018

1. SWP no.1613/2013 with MP nos. 2350/2013 & 02/2017;
2. SWP no.1820/2013 with CMA nos. 2657/2013 & 3052/2013;
3. SWP no.D-1071/2014, CMA no.D-1415/2014;
4. SWP no.1216/2015 with MP no.01/2015; and
5. SWP no.1933/2016 with MP no.01/2016.

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| 1. | Dr.Vijant Singh Chandail | v. | State of J&K &ors. |
| 2. | Dr.Vijant Singh Chandail | v. | State of J&K &ors. |
| 3. | Dr.Vijant Singh Chandail | v. | State of J&K &ors. |
| 4. | Dr.Shoket M. Chowdry | v. | State of J&K &ors. |
| 5. | Dr.Shoket M. Chowdry | v. | State of J&K &ors. |
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Coram:

Hon'ble Mr. Justice Ali Mohammad Magrey, Judge

Appearance:

For Petitioner(s): Mr. M. K. Bhardwaj, Sr. Advocate, with Mr. Ajay Abrol, Advocate, in SWP nos.1613/2013 1820/2013 and D-1071/2014; and
M/s M. A. Bhat and Munish Chopra, Advocates, in SWP nos.1216/2015 and 1933/2016;

For Respondent(s): Mr. Sanjeev Padha, GA, for the official respondents;
M/s M. A. Bhat and Munish Chopra, Advocates, for the private respondent in SWP nos.1613/2013 1820/2013 and D-1071/2014; and
Mr. M. K. Bhardwaj, Sr. Advocate, with Mr. Ajay Abrol, Advocate, for private respondent in SWP nos.1216/2015 and 1933/2016.

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| i) Whether approved for law journal: | YES |
| ii) whether approved for press/electronic media: | YES |
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1. The facts of the matter involved in these five clubbed writ petitions are somewhat intertwined. I shall first give a brief resume of the

background and then narrate the facts attendant to each of these writ partitions. The core issue involved would be culled out thereafter.

2. Way back in the year 2000, a post of Lecturer in the Scheduled Tribe (ST) category in the discipline of Medicine is stated to have been available in the Health and Medical Education Department of the State. The said post is stated to have been utilized and filled up by a general category candidate. Dr.Shoket M. Chowdry, the private respondent in first three of the present five writ petitions and the petitioner in the two of the last of them (hereinafter, for brevity and convenience, referred to as the private respondent), had got admission to MD Course in Medicine at PGI Chandigarh in January, 2000. He states to have undergone the MD course from January 2000 to December 2002. Obviously, therefore, any attempt on the part or on behalf of the private respondent to derive any advantage from such action of the Government or claim deprivation on that count would naturally be untenable and inconsequential as, according to his own stand, he became eligible for the post of Lecturer in the year 2005. Thereafter, one more Lecturer's post of the ST reserved category in the department of Medicine became available in Medical College, Jammu. It was referred to the Jammu and Kashmir Public Service Commission (for short, the PSC) for selection of a suitable candidate under general category. The PSC advertised the post by notification no.07-PSC of 2007 dated 04.07.2007.

3. The private respondent, Dr.Dr.Shoket M. Chowdry, challenged the aforesaid notification in writ petition, SWP no.1372/2007. On 14.08.2007, the learned Writ Court passed an interim direction therein directing the PSC to accept his application form for the post and to allow

him to participate in the selection process, but the result be not declared till the disposal of the writ petition. Subsequently, on 12.12.2007, the learned Writ Court disposed of the writ petition at the instance of the private respondent, quashing the advertisement notification no.07/2007 dated 04.07.2007 *qua* the post of Lecturer in the stream of Medicine, with direction to the PSC to issue fresh advertisement notification within fifteen days from the date of receipt of the copy of that order, treating the vacancy reserved for ST category. However, such fresh advertisement notification was not issued, at least, within the time stipulated by the Court.

4. In 2008, the Public Service Commission issued notification no.13-PSC of 2008 dated 31.12.2008, notifying two posts – one each in RBA and SC categories. This seems to have aggrieved and awakened the private respondent, Dr. Shoket M. Chowdry, who filed a contempt petition for non-compliance of the Court order dated 04.07.2007 passed in his writ petition, SWP no.1372/2007. Subsequent thereto, the Government, in implementation of the aforesaid judgment of the Court dated 12.12.2007, in terms of their communication dated 01.04.2009, referred one post of Lecturer under ST category to the PSC. The Government, thereafter, referred two more posts of Lecturers under general category in the stream to the PSC on 17.04.2009. The PSC advertised the above three posts – two in general category and one under ST category – by notification no.14-PSC of 2009 dated 17.07.2009.

5. After conclusion of the selection process, the Government issued order no.569-HME f 2009 dated 24.12.2009 appointing three Doctors named therein as Lecturers in the discipline of Medicine in Government

Medical College, Jammu. The petitioner in first three of the five of these writ petitions, Dr.Vijant Singh Chandail (hereinafter referred to as the petitioner), figured as the first candidate in the order as a general category candidate and the private respondent,Dr.Shoket M. Chowdry, figured as the last candidate as a ST category candidate. Both were appointed pursuant to advertisement notice no.14-PSC of 2009 dated 17.07.2009.

6. The aforesaid Government order stipulated that the appointees shall join the Department within a period of 21 days from the date of issue of the order failing which their appointments shall stand cancelled without any further notice. Whereas the petitioner,Dr.Vijant Singh Chandail, joined his post within the stipulated time, the private respondent,Dr.Shoket M. Chowdry, was granted extension in joining time, as he was undergoing DM at PGI and, therefore, submitted his joining report against the post of Lecturer only on 01.01.2011.

7. Now, I proceed to state hereunder the facts and the case set up by the petitioners in each of these writ petitions.

SWP no.1613/2013

8. This petition has been filed by the petitioner, Dr.Vijant Singh Chandail, challenging the Government order no.415-HME of 2013 dated 22.07.2013 to the extent the Government thereby accorded sanction to the placement of the private respondent on the higher post of Assistant Professor in the discipline of Medicine in Government Medical College, Jammu,in his own pay and grade for a period of six months. It is averred by the petitioner,Dr.Vijant Singh Chandail, that in the selection process

that was conducted by the PSC in 2009, he had secured more merit than the private respondent, i.e., 77 points secured by him as against 72 points secured by the private respondent; therefore, figured at serial no.1 of the select list, and that he was entitled to a higher position in the seniority list and, in fact, figured at serial no.3 of the seniority list of the Lecturers in the discipline of Medicine, Government Medical College, Jammu, issued by the Government in April, 2013; whereas the private respondent figured at serial no.5 therein.

9. It is further stated that on 01.07.2013, respondent no.1 addressed communication no.ME-Gaz-132/2011 to the Principal, Government Medical College, Jammu, requiring him to furnish work, conduct and integrity certificate of the three Doctors named therein, which included the private respondent herein “for their elevation to the higher posts”. The petitioner’s name did not figure therein. Since the communication clearly stated that this information etc. was required for elevation of the Doctors named therein to higher posts, the petitioner filed a writ petition, SWP no.1459/2013, challenging the communication in question. That writ petition was disposed of by the Court by order dated 09.07.2013 with a direction to the respondents to consider the case of the petitioner for his promotion as Assistant Professor, Medicine, on the basis of his merit and seniority as reflected in Government order no.569-HME of 2009 dated 24.12.2009 and in strict adherence to J&K Civil Service (Classification, Control and Appeal) Rules, 1956 as also the Jammu and Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979.

10. The case of the petitioner is that, notwithstanding the above Court direction and ignoring his superior right and claim to placement on a higher post on the basis of his merit and seniority, the Government by order no.415-HME of 2013 dated 22.07.2013 placed the private respondent on the higher post of Assistant Professor in his own pay and grade for a period of six months or till such time the posts were filled up on regular basis on the recommendation of the PSC, whichever would be earlier. It is against this order that the petitioner has filed the aforesaid writ petition, SWP no.1613/2013, on, *inter alia*, the grounds of the same tantamounting to his supersession and being illegal, discriminatory, violative of the relevant rules and petitioner's right to equality before law and, therefore, being unconstitutional.

11. In his response to the aforesaid writ petition, the private respondent, *inter alia*, stated that the Government by order no.367-HME of 2013 dated 26.06.2013 had given notional effect to his appointment as Lecturer from July, 2007 and that his seniority was re-fixed therein. He stated that neither the said Government order nor the assignment and accord of new seniority position to him had been challenged. The private respondent stated that the petitioner had suppressed these material facts, and that the aforesaid order dated 26.06.2013 had been issued by the Government in compliance to the judgment of the Court dated 10.05.2013 passed in his writ petition, SWP no.1582/2011, titled *Dr.ShoketMahmoodChowdry v State of J&K &ors.*

12. Respondents 1 and 2 in their joint objections filed in response to the writ petition took a similar stand that the private respondent challenged the final seniority lists dated 18.10.2010 and 23.03.2011 by

writ petition, SWP no.1582/2011, and that the same was disposed of by the Court vide judgment dated 10.05.2013, and that in light of the directions passed by the Hon'ble Court, the Government in terms of order dated 26.06.2013 accorded notional benefit to his appointment retrospectively as Lecturer in the discipline of Medicine, Government Medical College, Jammu, with effect from 04.07.2007.

13. I would refer to the judgment of the Court in aforesaid writ petition, SWP no.1582/2011, and the developments that had taken place during its pendency a bit latter. At this stage, I would refer to the cause and facts of the petitioner's second writ petition.

14. It may be mentioned here that, while dealing with the question of interim stay in SWP no.1613/2013, filed by the petitioner, the Court, by order dated 16.08.2013, recorded a *prima facie* finding that "experience must be actually gained on actual appointment as a Lecturer and that notional experience is certainly outside the purview and spirit of Medical Education Rules (referred to in that order) which prescribed the necessary eligibility conditions for promotion to the post of Assistant Professor. Recording thus, the Court, while admitting the writ petition to hearing, stayed the order impugned in the writ petition. However, on appeal by the private respondent, impleaded as such therein, a Division Bench of the Court vide order dated 16.09.2013 passed in LPASW no.147/2013 reversed the said order on the limited ground that the order passed by the learned Writ Court affected the merits of the controversy between the parties in the case, and that it has virtually granted the principal relief sought in the writ petition.

SWP no.1820/2013:

15. It may be reiterated here that the petitioner had filed his aforesaid first writ petition, SWP no.1613/2013, on 25.07.2013. After the respondents therein filed their reply/objections thereto disclosing the accord of notional benefit to the appointment of respondent no.3 with effect from 04.07.2007, the petitioner filed his second writ petition, SWP no.1820/2013, challenging the said Government order no.367-HME of 2013 dated 26.06.2013 on numerous grounds taken therein, including on the ground that the Rules do not provide for antedating an appointment and appointing a person from a date anterior to the date of advertisement of the vacancy.

16. The private respondent in his reply/objections to the writ petition, while reiterating the stand taken by him in his reply/objections to the petitioner's first writ petition, narrated hereinabove, has averred that because appointment was denied to him in reference to the advertisement notification issued in the year 2007 which ought to have notified the ST category vacancy, he filed writ petition no.1582/2011 challenging the seniority lists dated 18.10.2010 and 23.03.2011, and that the same was decided by the Court on 10.05.2013 directing the respondents to consider his case for his claim for proper fixation of his seniority by giving him the benefit of appointment and seniority with effect from 2007. This statement made by the private respondent calls for a look at the order/judgment of the Court dated 18.10.2010 and what had occurred during the pendency of this writ petition. In his objections, the private respondent has further averred that the notional effect of

appointment was given to him in consonance with the directions as contained in judgment dated 10.05.2013.

17. When the above writ petition, SWP no.1582/2011, had been filed by the private respondent, the Court had passed an interim direction therein on 15.10.2011 to the following effect:

“... This CMP is disposed of by providing that the respondents shall consider the case of the petitioner in the light of the averments contained in the CMP read with the writ petition and make a decision within a period of four weeks strictly in accordance with the rules occupying the field.”

When the writ petition had again come up for consideration, the Court had passed the following order:

“Respondents have not filed the compliance report in terms of order dated 15.10.2011. They are directed to file the same within four weeks, in default respondent no.2 to appear in person on a date to be fixed by the Registry immediately after four weeks.”

In consequence of the aforesaid two interim orders, the Government considered the case of the petitioner and passed order no.627-HME of 2012 dated 16.10.2012. The crux of the claim of the petitioner was recorded therein in the following terms:

“Whereas, the contention of the petitioner is that the post of Lecturer in the discipline of Medicine, GMC, Jammu, under ST category was available in the year 2007 which was not advertised even despite the court direction. It was only after initiating the contempt proceedings the post was advertised in the year 2009 and therefore he be treated to have been selected under the notification whereby the post was advertised in other category.”

The claim of the private respondent was examined, considered and rejected by the Government in the following words:

“Whereas, the claim of the petitioner was examined and considered pursuant to directions of the Hon’ble High Court mentioned above and it was found that the order of the Hon’ble High Court whereby the post of Lecturer in Medicine in Government Medical College, Jammu was directed to be advertised under ST category stands complied with by advertising the post under ST category against which the petitioner was appointed as Lecturer on the recommendations of the J&K Public Service Commission and that the seniority of the petitioner cannot be anti dated and nor can be deemed to have been appointed prior to the date on which he stands appointed as the law is established that appointment cannot be made retrospectively.

Now, therefore, in view of the position explained hereinabove, the claim of the petitioner to treat him to have been appointed under notification of the year 2007 having been found devoid of any merit is hereby disallowed.

By order of the Government of Jammu and Kashmir.”

It is seen that neither the petitioner, nor any other Lecturer senior to him in the discipline had been impleaded by the private respondent as respondent in his aforesaid writ petition, SWP no.1582/2011. It does not transpire from the record whether the private respondent challenged the aforesaid Government order no.627-HME of 2012 dated 16.10.2012 either by amending his aforesaid writ petition or by a separate writ petition.

18. Be that as it may, the writ petition, SWP no.1582/2011, was, thereafter, disposed of by the learned Writ Court by order dated 10.05.2013 with a direction to the respondents to consider and decide the case of the petitioner afresh while taking into consideration the battle

he had been fighting before the courts of law and the time taken by the respondents in redressing his grievance. The Court directed that the needful be done within a period of one month from the date copy of the judgment was acknowledged by them. The operative portion of the judgment is quoted hereunder:

“12. Taking into consideration the nature of the controversy coupled with the submissions made at the Bar by the counsel for the parties, this writ petition is disposed of with the direction to respondents to consider and decide the case of the petitioner afresh while taking into consideration the battle he has been fighting before the courts of law and the time taken by the respondents in redressing his grievances. The needful be done within a period of one month from the date copy of the judgment is acknowledged by them.”

It becomes axiomatic from a plain reading of the aforesaid order of the Court that no issue was decided, no question was determined and matter resolved by the Court and no positive direction was made in the order of the Court except that the respondents were required to consider the case of the petitioner. Yet citing the observations made by the Court, the Government issued order no.367-HME of 2013 dated 26.06.2013 to the following effect:

“Whereas pursuant to the above judgment, the case of the petitioner has been re-examined in the Department in the background given above and it is hereby ordered that Dr.ShoketMahmoodChowdry is deemed to be appointed Lecturer in the discipline of Medicine, Government Medical College, Jammu, notionally with effect from 4th July 2007 (the date of notification by PSC) without any monetary benefit and shall figure in the seniority list below Dr. Anil Dhar, Lecturer, Medicine, Government Medical College, Jammu and above,Dr.Fayaz Ahmad Wani, Lecturer Medicine, GMC, Jammu.”

It would be relevant to mention here that aforesaid Dr. Anil Dhar was figuring at serial no.1 of the seniority list, Dr.Fayaz Ahmad Wani at serial no.2 and petitioner herein at serial no.3; whereas Dr.ShoketMahmoodChowdry was figuring at serial no.5 thereof. Obviously, as becomes plain from a bare reading of the Court order, there was no such direction issued by the Court. The statements made by the private respondent that the Court directed the respondents to consider his case for his claim for proper fixation of his seniority by giving him the benefit of appointment and seniority with effect from 2007, or that notional effect of appointment was given to him in consonance with the directions as contained in judgment dated 10.05.2013 are not borne out by the judgment.

19. It is the aforesaid Government order no.367-HME of 2013 dated 26.06.2013 which the petitioner has challenged in his second writ petition, on the grounds taken therein.

20. When the above writ petition, SWP no.1820/2013, came up before the Court on 02.09.2013, the Court passed an interim direction to the effect that the order impugned in the petition shall not be made basis for any promotion. That order was, however, modified later on the application of the private respondent, providing that the order shall not come in the way of applicant-private respondent for promotion. Against that order, the petitioner filed a Letters Patent Appeal, LPA no.173/2013, which was disposed of by the Division Bench by order dated 14.11.2013, with consent of the learned counsel for both the sides that the candidature of the appellant as well as the respondent shall be considered by the DPC/PSC, but in accordance with the rules governing

the field. It was directed that the result shall not be declared till the matter was considered by the learned Writ Court and the writ petition was directed to be listed in the first week of December, 2013.

SWP no.D-1071/2014:

21. The writ petition, SWP no.1820/2013, however, remained pending. The official respondents also did not act upon the above direction of the Division Bench. On the other hand, the Government issued order no.22-HME of 2014 dated 23.4.2014, purporting it to be in the interest of administration and patient care, accorded sanction to the segregation of the service of Dr. ShoketMahmoodChowdry, showing him as Assistant Professor (OPG) from his parent cadre, viz. Medicine to Gastroenterology, Government Medical College, Jammu; and transfer of his lien from Medicine to Gastroenterology for seniority/promotion purposes.

22. The petitioner has challenged the aforesaid order in the instant writ petition, being his third one in sequence. It is averred by him that he is a Doctorate of Medicine in Gastroenterology and is fully qualified and eligible to hold and man the post of Assistant Professor in Gastroenterology, and that by all means he has a superior claim to be appointed on the post, being senior to the private respondent and more meritorious than him. It is further averred by him that he has been illegally and arbitrarily denied consideration for his appointment / adjustment as Assistant Professor in the Gastroenterology Department. Reiterating his stand in the earlier two writ petitions, his case is that the respondents have been adamant to confer undue and illegal advantages

and benefits on the private respondent grossly violating his constitutional and legal rights.

23. Respondents 1 and 2 in their objections/reply to the aforesaid writ petition, among other things, have averred that the Department submitted a proposal to the DPC/PSC to consider promotion of both, the petitioner and the private respondent, to the post of Assistant Professor and that after the recommendations of the PSC were received, claim of the petitioner would be considered strictly as per the Division Bench order dated 27.09.2013 passed in LPA(WP) no.173/2013. It has further been stated in para 8 of the reply that a proposal was received from the Principal Government Medical College, Jammu, in terms of his communication dated 25.03.2014 for segregating the services of Dr. ShoketMahmoodChoudhary, I/c Assistant Professor (Medicine) from the Department of Medicine, Government Medical College, Jammu, to the Gastroenterology Department Super Speciality Hospital, Jammu, only in the interest of the patient care and for smooth functioning of Super Speciality Hospital. The said proposal was examined and it was found that Dr. ShoketMahmoodChoudhary was possessing the qualification and specialization for the post, besides being senior in terms of his appointment as Lecturer in the discipline of Medicine and, therefore, his services were segregated from the Department and he was shifted to the Department of Gastroenterology Super Speciality Hospital, Jammu as I/C Assistant Professor along with lien.

24. The private respondent, while contesting the claim of the petitioner, in para 6 of his objections has stated that no special benefit has been given to him after his transfer from the Department of

Medicine, Government Medical College, Jammu, to Gastroenterology in Super Speciality as after his transfer he enjoys the same status in GMC as Super Speciality and as such the petitioner cannot have any grievance. In the same breath, atpara 5 of his objections, he has averred as under:

“5. That after the cadre of the answering respondent has been shifted from the Department of Medicine, Government Medical College, Jammu, to Gastroenterology Super Speciality, the whole of the controversy seems to have been resolved as now they i.e., the petitioner and the answering respondent have their own promotional avenues and there will be no overlapping of the claims of the petitioner and the answering respondent. Super Speciality Hospital has got its own service rules and own cadre with the scope of appointment by way of transfer also and as such the answering respondent having been shifted to Super Speciality is deemed to have been appointed in the cadre of Super Speciality Hospital.”

Reiterating the background in which he was given notional benefit to his appointment as Lecturer from the date of issue of notification no.7-PSC of 2007 dated 04.07.2007, when he was, admittedly, appointed by Government order dated 24.12.2009 and he actually joined the post of Lecturer on 01.01.2011, i.e., after one year and six days from the date of the order of appointment.

SWP no.1216/2015:

25. It appears that at long last the Government awakened to its action of ante-dating the appointment of private respondent no.3 and passed a detailed order no.139-HME of 2015 dated 22.04.2015, the operative portion of which is extracted below:

“Whereas, it is settled law that the appointment of civil servant takes effect from the date of issuance of order or from

such prospective date as the order might indicate. Appointment cannot be given retrospective effect because such action may adversely affect seniority of persons appointed; and

Whereas, Rule 24 of the Jammu and Kashmir Civil Services (Classification Control and Appeal) Rules 1956 which provides the principle for determining seniority of a Government servant is reproduced as under:

...

Whereas, in view of rule position, the seniority of Dr.ShowkatMehmoodChowdhary has to be determined from the date of his first appointment in the cadre.

Now, therefore, Govt. Order no.367-HME of 2013 dated 26.6.2013 is revoked ab-initio and the seniority of Lecturers in the discipline of Medicine, Govt. Medical College, Jammu, issued vide Government order no.265-HME of 2013 dated 16.04.2013 is restored.

Consequent upon above, Govt order no.415-HME of 2013 dated 22.07.2013 relating to placement of Dr.ShowkatMehmoodChowdhary as incharge Assistant Professor Medicine and Govt order no.220-HME of 2014 dated 23.04.2014 relating to segregation of the services and transfer of lien of Dr.ShowkatMehmoodChowdhary from Medicine to Gastroenterology Super Speciality Hospital Jammu are also revoked ab initio.

Pursuant to above, Dr.ShowkatMehmoodChowdhary, Lecturer Medicine is directed to report (to) Medicine Department, Govt. Medical College Jammu for further duties.

By order of the Government of Jammu and Kashmir.”

26. Notwithstanding the stance of the private respondent as quoted above, that no special benefit has been given to him by his transfer from the Department of Medicine, Government Medical College, Jammu, to Gastroenterology in Super Speciality, and that, even after his transfer, he enjoyed the same status in GMC as in Super Speciality and, as such the

petitioner cannot have any grievance, he filed writ petition, SWP no.1216/2015, challenging the aforesaid Government order no.139-HME of 2015 dated 22.04.2015 and prayed for a mandamus to the following effect:

“Mandamus, commanding the respondents to allow the petitioner to perform his duties as Head of Unit of Gastroenterology, Super Speciality Hospital, GMC, Jammu, and not to disturb the seniority of the petitioner till the final disposal of this writ petition.”

Apart from narrating the off-repeated previous history, set out above, the private respondent in his aforesaid writ petition has stated that he established the Department of Gastroenterology in Super Speciality Hospital and has been running it as its Head.

27. It is curious to note that in this writ petition, SWP no.1216/2015, the private respondent impleaded the petitioner, Dr.Vijant Singh Chandail, as respondent no.3. Be that as it may, in response to this petition, on behalf of the State respondent no.1, it has been stated that in compliance to the Court order, one post of Lecturer under ST category was referred to PSC vide communication no.ME/Legal/54 dated 01.04.2009; the PSC issued the selection list on 26.11.2009 wherein the petitioner figured under ST category at serial no.1 and, among others, he was appointed as Lecturer in Government Medical College, Jammu, in terms of Government order no.569-HME of 2009 dated 24.12.2009; and that the final seniority list of the faculty members of Government Medical College, Jammu, which included the Faculty members of Medicine, as it stood on 31.12.2010, was issued vide Government order no.199-HME of 2011 dated 23.03.2011 wherein the petitioner figured at

serial no.7 below Dr. Vijant Singh Chandail. It is further stated that by Government order no.367-HME of 2013 dated 26.06.2013 sanction was accorded for ante dating the appointment of the petitioner on notional basis from 04.07.2007. However, on re-consideration of the case in the department, it was found that the petitioner had been appointed pursuant to advertisement notice no.14-PSC of 2009 dated 17.07.2009 which advertised ST vacancy; therefore, there was need to rectify the wrong.

28. The petitioner, Dr. Vijant Singh Chandail, impleaded as respondent no.3 in the petition, in response, giving his narration of the matter, as he has detailed in his aforesaid three writ petitions, has stated that ante dating the appointment and giving seniority from an earlier date when the petitioner was not borne in service is not permitted by Rules and is also totally in contravention of the law on the subject.

29. When this writ petition came up for consideration before the Court on 28.04.2015, it appears from the order passed by the Court that the respondents being on caveat, the learned counsel for the parties argued the matter on the subject of interim relief, and the Court passed an order to the effect that “till next date of hearing before the Bench, *status quo* as it exists today shall be maintained”. The private respondent, i.e., the writ petitioner in the petition, felt aggrieved by the aforesaid order of the Court and challenged the same in LPASW no.40/2015. Before the learned Division Bench, he took the stand that the order impugned in the writ petition, i.e., Government order no.139-HME of 2015 dated 22.04.2015, did not only reduce him in rank but changed his seniority in

the cadre of Lecturer and the respondents were, therefore, required to give a hearing to him before passing the said order.

30. The aforesaid LPA was decided by the learned Division Bench by order dated 07.05.2015 in the following words:

“14. ...We are only concerned with import of writ court order questioned in the Letters Patent Appeal in the background of the grounds urged in the appeal including the ground that the impugned order may be taken to be one declining ad interim relief to the petitioner.

15. For the reasons discussed we are of the opinion that the respondents in terms of the writ court order dated 28.04.2015 are required not to act upon and implement the government order No.139-HME of 2015 dated 22.04.2015 till the matter comes up before the writ court and is modified, altered or extended. We order accordingly.

16. The parties, as the impugned order and the record available on the file would reveal, are entangled in litigation over question of seniority and allied matters in addition to the SWP No.1216/2014. Let all the matters i.e. SWPs No.1613/2013, 1820/2013 & SWP No.D-1071/2014 be listed before learned Single Judge alongside SWP No.1216/2014 on 21.05.2015. The parties in the meantime shall file pleadings in all the petitions with copies to the opposite side.

17. Learned writ court is requested to make an effort to dispose of all the petitions preferably within a period of four weeks thereafter, so that the question of inter se seniority between appellant and respondent no.3 gets settled once for all and the parties, who are specialists in their respective disciplines, teach the medical students, serve the patients admitted in Government Medical College, Jammu instead of making repeated rounds of law courts.”

SWP no.1933/2016

31. While the aforesaid matters remained pending before the Court, Dr.Shoket M. Chowdry, filed another writ petition, SWP no.1933/2016, challenging the PSC advertisement no.03 of 2016 dated 19.02.2016, to the extent it notified the post of Lecturer in Medical Gastroenterology Department for selection in the Open Merit category, on the ground that there is no such post of Lecturer vacant in the Medical Gastroenterology Department in Government Medical College, Jammu, as the said post is held by him in substantive capacity, discharging the job of Assistant Professor in his own pay and grade, and that he has been waiting for his confirmation on the post of Assistant Professor for the last more than 3 years.

32. When the aforesaid writ petition came up for consideration on 16.09.2016, this Court, in order to preserve the *lis*, passed an interim direction against changing the status of the petitioner as Assistant Professor in Medical Gastroenterology Department and to consider the case of the petitioner for regularization as Assistant Professor in Medical Gastroenterology Department.

33. These matters have ultimately come up before this Court for hearing. I heard learned counsel for the parties, perused the relevant record placed on these writ petitions by the parties and have considered the matter.

34. Having gone through all these writ petitions and the documents placed on them, I am constrained to observe, at the very outset, that the two Doctors have been litigating in the Court for the last eight years and the whole mess has been created by the surreptitious conduct of certain persons in the Government in the Health and Medical Education

Department. Someone there, under a well planned design to tamper with normal course of things, has been instrumental in throwing the established law and Rules to winds, which has not only given rise to severe multiplicity of litigation between two persons belonging to a noble profession, but has also, in some sense and way, unsettled things settled long before by established law, and left serious repercussions thus far on the service career and functioning of the concerned Doctors. Consequently, it must have also impacted the students and patient care in Government Medical College Hospital and/or the Super Speciality Hospital, Jammu. What is curious enough is that the Government is not even ashamed of its outright unfairness exhibited by it by its double standards at two different stages of the litigation – one while defending its action of conferring an undue advantage, unknown to law, on one of the Doctors and then defending its action when such undue advantage was reversed by it. It is disgusting that the Government in the Health and Medical Education Department has stooped so low as to manipulate things without any basis.

35. Having narrated the history and facts of the litigation and the respective cases of the two Doctors, I think the result of this whole lot of litigation hinges on the determination of a single question which constitutes the core issue underlying the machination galore in these writ petitions, and that core issue is: “whether a Lecturer belonging to ST category, or, for that matter, any category, appointed in the Medical Education Department on direct recruitment basis against the said category post pursuant to a specified advertisement notification, can claim, or be granted, notional benefit to his appointment from a retrospective date of the issue of a previous notification, which in reality

did not advertise the post in question and, therefore, was quashed by the Court in the claimant's writ petition with direction to the PSC to issue a fresh advertisement notice, notifying the post in question, pursuant to which the claimant was later appointed against the said post along with other competing candidate belonging to open merit category? To put it in other words, the fundamental question is whether an appointment can be anti dated, notionally or otherwise, from a date anterior to the date of appointment? There are a few ancillary issues involved as well, but they are connected to and hinge on the above said main question.

36. The learned counsel for the private respondent, Dr. Shoket M. Chowdry, submitted written arguments as well. According to him, the moot question relates to the seniority of Dr. Shoket M. Chowdry. Before advertizing to the argument sought to be put across, I deem it appropriate to reiterate that, according to the private respondent, the ST vacancy of the post of Lecturer had accrued in 1998. The said vacancy was utilized in the year 2000 by appointing a candidate from general category. Since the ST vacancy had been usurped in 2000, this reserved category post had to be carried forward and filled in when a vacancy would accrue in the general category. Thereafter, a vacancy in the general category cropped up in 2007. According to the private respondent, this vacancy ought to have been notified for candidates belonging to the ST reserved category, but that was not done; instead, it was notified as a general category vacancy. He challenged the advertisement notice in his writ petition, SWP no.1372/2007, which was allowed by judgment dated 12.12.2007 quashing the Notification no.07-PSC of 2007 dated 04.07.2007 qua the post of Lecturer in the stream of Medicine advertised as item no.8 by virtue of the said notification, with direction to the

respondents to issue a fresh notification treating the vacancy of Lecturer in Medicine reserved for Scheduled Tribe category within a period of fifteen days from the date of receipt of copy of the order. The post was, thereafter, actually advertised by the PSC in terms of notification no.14-PSC of 2009 dated 17.07.2009 alongwith two general category vacancies, and the appointments were made in terms of Government order no.569-HME of 2009 dated 24.12.2009.

37. There is no dispute that the private respondent obtained a lesser merit than the general category candidates and was, therefore, appointed against the ST reserved category post, figuring below the two general category candidates; whereas the petitioner, Dr. Vijant Singh Chandail, figured therein at serial no.1.

38. The sum and substance of the submission of the learned counsel for the private respondent is that when the general category vacancy occurred and the Government intended to refer it to the PSC for making selection, it was bound to refer it as an ST category post and to require the PSC to notify it as such, but it did not do so; instead the Government referred the vacancy as general category vacancy and, consequently, the PSC notified it so in terms of advertisement notification no.07-PSC of 2007 dated 04.07.2007, which was quashed by the Court. According to him, therefore, his appointment, though made pursuant to the notification dated 24.12.2009, ought to relate back, notionally, to the date it was required to be notified i.e., the date of issue of notification no.07-PSC of 2007, i.e., 04.07.2007. In this connection, he sought to derive support from the judgment of the Supreme Court in ***Sanjay Dhar v. J&K Public Service Commission***, (2000) 8 SCC

182. The learned counsel also sought to import the quota and rota rule and, in that connection, cited and relied upon the judgments of the Supreme Court in **Arvinder Singh Bains v. State of Punjab**, (2006) 6 SCC 673, and **Mervyn Coutindo v Collector of Customs**, (1966) 3 SCR 600, with specific reference to pages 604 and 605.

39. There is no doubt that the matter concerning notification no.07-PSC of 2007 dated 04.07.2007 issued by the PSC, in so far as the advertisement of vacancy in the stream of Medicine, Government Medical College, Jammu, was concerned, stands closed by virtue of the judgment of the Court dated 12.12.2007 passed in SWP no.1372/2007 titled **Dr. Showket Mehmood Choudhary v. the Chief Secretary**. In fact, therein the Deputy Advocate General had made a statement before the Court that the Government had considered the case and intimated to the PSC that the vacancy advertised was to be filled up from amongst the candidates belonging to the reserved category of Scheduled Tribe. The question whether the appointment of the petitioner could relate back to the date of the quashed advertisement notice or, for that matter, to the date of even the fresh advertisement notice ultimately issued in 2009 has to be determined in context of the Rules governing the Service read with the relevant Reservation Rules. Before coming to the Rules, let the facts of case in **Sanjay Dhar v. J&K Public Service Commission** (supra) and the ratio laid down therein, vehemently relied upon by the learned counsel for the private respondent, be noted.

40. In **Sanjay Dhar v. J&K Public Service Commission** (supra), the application form of the appellant before the Supreme Court, namely, Sanjay Dhar, for the post of Munsiff was rejected by the PSC on the

ground of non-production of a valid actual practice certificate as required by Rule 9 of the J&K Civil Service (Judicial) Recruitment Rules, 1967. He filed a writ petition and participated in the examination under the interim orders of the Court. Thereafter, on the orders of the Court dated 21.09.1994, his result of the examination was declared and he was shown to have qualified the written examination, entitling him to participate in the interview. He appeared in the interview under the orders of the Court whereby it was also ordered that if he fell within the zone of consideration for appointment, the High Court should carry the recommendation of the PSC to its logical conclusion by issuing appropriate orders and if the appellant was appointed as Munsiff, his appointment should remain subject to ultimate outcome of the petition.

41. The PSC challenged the aforesaid order dated 21.09.1994 in LPA.

42. Sanjay Dhar filed another writ petition, seeking a direction to the PSC and the State to make available a certified copy of the list of selected candidates forwarded by the PSC to the Law Department.

43. The LPA Bench took up both the LPA and the second writ petition filed by Sanjay Dhar for analogous hearing and, by order dated 09.02.1995, stayed the interim order dated 21.09.1994 passed by the learned Single Judge, but directed that one post of Munsiff in the Open Merit category be kept reserved till disposal of the appeal.

44. In between, some candidates other than the appellant had laid a challenge to the process of selection in question by filing a writ petition before the Supreme Court. That writ petition, *Madanlal v. State of J&K*, was decided by the Supreme Court by order dated 06.02.1995 with

direction that 11 persons be appointed out of which 2 shall be reserved for Schedule Caste and Schedule Tribe candidates and the remaining 9 shall be available to the general category candidates. The merit list of the successful candidates had been produced before the Supreme Court as annexure-C wherein the name and particulars of the candidate who had secured the 3rd rank had not been disclosed. Meanwhile, the State Government on the recommendation of the PSC made appointments of the selected candidates, barring the appellant, in terms of order dated 06.03.1995.

45. While, the matter in issue remained pending before the Division Bench, the PSC issued another advertisement notifying fresh vacancies of Munsiff. The appellant responded thereto, participated in the selection process, got selected and was appointed as Munsiff. This development was brought to the notice of the Division Bench in the pending LPA and the writ petition, by an application making a prayer to suitably modify the relief for giving him the benefit of notional seniority with right to be considered for next promotion. The application was allowed by the Division Bench taking on record the subsequent events with the supporting documents. However, thereafter, the Division Bench, by order dated 15.04.1999, allowed the LPA filed by the PSC and set aside the order of the learned Single Judge dated 21.09.1994. The appellant filed an SLP against that order of the Division Bench before the Supreme Court. Therein, the appellant submitted the copy of the merit list that had been produced by the respondents before the Supreme Court as annexure-C in the writ petition titled *Madanlal v. State of J&K*. As mentioned above, though therein the name and particulars of the candidate who had obtained the 3rd position in order of merit had not

been disclosed, the appellant Sanjay Dhar filed an affidavit that it was he who secured the 3rd position but his name and particulars were withheld for reason of the matter being subjudice. This statement made by the appellant before the Supreme Court was not refuted by the respondents and/or the Advocate General appearing on behalf of the State respondents.

46. So far as the basic issue concerning the validity of the certificate of Bar practice of the appellant was concerned, the Supreme Court held that the J&K PSC was not justified in rejecting the certificate issued by the Registrar, High Court of Delhi and counter-signed by the District and Sessions Judge, Delhi, treating it as not satisfying the requirement of Rule 9. The Supreme Court also found and recorded that it was beyond the pale of any controversy that the appellant was selected and in the select list prepared by the PSC in the year 1993 his name figured at serial no.3. It was in the context of the above facts that the Supreme Court directed that the appellant, who had been appointed pursuant to the subsequent selection process, shall be deemed to have been appointed alongwith other appointees under the appointment order dated 06.03.1995 and assigned a place of seniority consistently with his placement in the order of merit in the select list prepared by the PSC *vis-a-vis* that selection process.

47. Thus, as seen above, the facts attendant in ***Sanjay Dhar v. J&K Public Service Commission*** (supra) are wholly and entirely different and distinguishable from the facts of the present case. There is not even a speck of similarity in the facts of the two cases. This removes the earth underneath the edifice of the case of the private respondent. In the instant case, the post was advertised as a general category post and the

petitioner, being aggrieved thereof, challenged the advertisement notice in his writ petition; nonetheless, he got an opportunity to compete for the post when he prayed for directing the PSC to accept his application form under ST category for the said post and the Court, at his instance, passed an interim direction, citing proviso (2) of SRO 294 of 2005, namely, the J&K Reservation Rules, 2005, directing the PSC to accept his application form for the post and to allow him to participate in the selection process, but the result be not declared till the disposal of the writ petition. The contents of the operative part of that Court order, as quoted in one of the Government orders, viz., Government order no.367-HME of 2013 dated 26.06.2013, are quoted hereunder:

“After considering the facts and circumstances of the case and taking into consideration proviso (2) of SRO 294 of 2005 referred to above, respondent 2 is directed to accept the application form of the petitioner for the post of lecturer in the stream of medicine. He may also be allowed to participate in the selection process but result of the selection shall not be declared till disposal of the writ petition...”

48. It is curious to notice that despite he having gotten such a leading and advantageous opportunity by virtue of the aforesaid interim order of the Court, at the final hearing stage of the petition, instead of seeking a direction from the Court to direct the respondents to complete the process of selection in consonance with the interim direction passed by the Court and to declare his results accordingly, the private respondent, being the petitioner in that writ petition, appears to have persuaded the Court to quash the advertisement notice. The inference is galore – that he must have sensed his inevitable failure in the selection process to make the grade even as a ST category candidate. This is one aspect of the

matter, wholly differentiating it from the facts of the case in ***Sanjay Dhar v. J&K Public Service Commission*** (supra).

49. Be that as it may, as said above, the learned Writ Court, at the instance of the petitioner(private respondent), by order dated 12.12.2007, quashed the advertisement notification no.07/2007 dated 04.07.2007 qua the post in question with direction to the PSC to issue fresh advertisement notification within fifteen days from the date of receipt of the copy of that order, treating the vacancy reserved for ST category. So the selection process *vis-à-vis* the post had aborted at the instance of the private respondent by virtue of the Court order. It is the trite law that when something is quashed, it is to be treated as non-est in the eyes of law, meaning thereby as if it did not exist at *allab initio*. When the advertisement notice qua the post was quashed, that in law connotes it did not exist *ab initio*. Therefore, the private respondent could neither claim nor could be accorded notional effect to his appointment from the date of issue of such Advertisement notice or the date from which appointments against other posts pursuant to such Advertisement notice had been made. This is apart from the cardinal principle of law that appointments cannot be given retrospective effect. Consequently, the Government order no.367-HME of 2013 dated 26.06.2013, does not withstand the scrutiny of law and is wholly illegal, not supported by any law or rule, apart from having been issued surreptitiously, objected at unlawfully giving him an edge over the petitioner who, admittedly, had secured higher merit than the private respondent in the selection process and, therefore, stood higher in seniority to him.

50. Furthermore, the petitioner having, apparently, failed to make the grade in the selection process or having sensed his failure therein after having succeeded in obtaining the interim orders of the Court to accept his application form and to allow him to participate in the selection process, he could not turn around and claim seniority notionally or otherwise from the date of the advertisement notice, or from the date other candidates pursuant to such notification were appointed, or be granted any such notional seniority or seek parity with the case of the appellant in ***Sanjay Dhar v. J&K Public Service Commission***(supra). Learned counsel for the said petitioner also sought to invoke with great vehemence the judgment of the Court in SWP no.1582/2011 titled Shoket M. Chowdry v State of J&K. I have minutely gone through that judgment. There is nothing in that judgment, except a direction to the respondents to consider his case afresh. Obviously, such reconsideration could not be dehorse the settled law or the rules having bearing on the matter. It becomes rather axiomatic that the Court direction in question, which did not resolve or settle any issue, had been used as a garb to throw all norms, rules and settled principles and law to winds. Looking at the Government order from any angle, it is wholly illegal and unsupported by any law.

51. Now, the question arises whether on the basis of such an illegal Government order, the private respondent could claim, be entitled to or be granted any advantage or benefit, especially seniority, over and above, and ignoring the candidate who had admittedly secured more merit in the selection process than him? Let the Rule position concerning the Service in question be referred to.

52. The Service, in reference to which the above question has arisen, is governed by the Jammu and Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979 (for short, 1979 Rules). The Definition clause (g) under Rule 2 of the 1979 Rules provides that words and expressions used in the rules but not defined, shall have the meaning as assigned to them in the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956. Rules 10 and 11 of the 1979 Rules provide for seniority and reservation of appointment. These two Rules are quoted hereunder:

“10. Seniority

- (1) Seniority of members of the Service shall be regulated under the provisions of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956.
- (2) (2) The Administrative Department in the Civil Secretariat shall maintain an up to date seniority list of the Service.

11. Reservation of appointment

- (1) While making appointments either by promotion, by selection or by direct recruitment, reservation shall be made in accordance with the rules and orders issued from time to time for the members of the Scheduled Castes or any other category or class of permanent residents of the State for whom such reservation may be made under the orders of the Government.
- (2) If a sufficient number of candidates belonging to the classes for whom reservation has been made, are not available for filling up all or any of the vacancy reserved for them during a recruitment period, reservation for the posts not so filled shall lapse and the posts shall be filled up as if no reservation therefor had been made.”

As seen above, in terms of Rule 10 of the 1979 Rules, quoted above, seniority of members of the Service has to be regulated under the provisions of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 (for short CCA Rules). The provision of the CCA Rules, governing the seniority, is Rule 24 thereof. In so far as relevant here, it is extracted below:

“24. Seniority

- (1) The seniority of a person who is subject to these rules has reference to the Service, Class, Category or Grade with reference to which the question has arisen. Such seniority shall be determined by the date of his first appointment to such Service, Class, Category or the Grade, as the case may be.”

There is an interpretation clause and a proviso appended to the aforesaid Rule to the following effect:

“Interpretation.— The words ‘date of first appointment’ occurring in the above rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and or tests.

Provided that the *inter se* seniority of two or more persons appointed to the same service, class, category or grade simultaneously will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined:—

- (a) ...
- (b) In the case of those recruited direct except those who do not join their duties when vacancies are offered to them according to the positions attained by and assigned to them in order of merit at the time of competitive examination on the basis of merit, ability and physical

fitness etc., in case no such examination is held for the purpose of making selection;

(c) ...”

(Underlining & emphasis supplied)

So, Rule 24 of the CCA Rules provides that seniority has to be determined by the date of first appointment to the Service, and that *inter se* seniority of two or more persons appointed by direct recruitment to the same service, class, category or grade simultaneously will be determined according to the positions attained by and assigned to them in order of merit at the time of competitive examination. In the instant case, both the Doctors herein were appointed pursuant to one and the same selection process and by one and the same Government order dated 24.12.2009. It is not in dispute that the petitioner, Dr.Shoket M. Chowdry, stood below Dr.Vijant Singh Chandial in order of merit. Naturally, therefore, in terms of Rule 24 of the CCA Rules, their *inter se* seniority could, and has, to be determined only according to the positions attained by and assigned to them in order of merit. The Rule does not envisage fixing of seniority from any date prior to the date of appointment. Consequently, the petitioner would stand senior to the private respondent.

53. The Reservation Rules do not alter the aforesaid Rule position on seniority. In this connection, Rule 31 of the Jammu and Kashmir Reservation Rules, 2005 may be referred to. It provides as under:

“31 Seniority

As hitherto, the rosters prescribed for direct recruitment/promotion shall only be an aid to determine the entitlement of different categories with regard to the quota

reserved for them and these are not for determination of seniority:

Provided that the inter se seniority of the category candidates vis-à-vis general category candidates on their appointment by direct recruitment shall be determined strictly in accordance with the order of the merit in the Select List prepared by the Selection Authority in accordance with Rule 7 of these Rules and rule 24(b) of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956:

Provided also that the inter se seniority of the category candidates vis-à-vis general category candidates in appointment by promotion shall be determined by order of the select list as per rule 11 of those rules in accordance with the merit / seniority in the feeding cadre and Rule 24(a) of Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 where seniority is the basis for promotion. However, in respect of selection posts, the seniority on promotion shall be determined on the basis of the order of merit prepared by the Selection Authority.”

As is seen from a plain reading of Rule 31 of the Reservation Rules, it clearly prescribes that the *inter se* seniority of the category candidates *vis-à-vis* general category candidates, on their appointment by direct recruitment, shall be determined strictly in accordance with the order of their merit in the Select List prepared by the Selection Authority in accordance with Rule 7 of the Rules and Rule 24(b) of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956. The expression “strictly in accordance with the order of the merit in the Select List” used in the Rule does not admit of any relaxation or deviation, and lays down inflexible compliance of and adherence thereto.

54. I may also observed here that Rule 31 of the Reservation Rules, as quoted above, makes reference to Rule 7 thereof and Rule 24(b) of the CCA Rules. Rule 24(b) of the CCA Rules has already been quoted and

explained above. Insofar as Rule 7 of the Reservation Rules is concerned, it provides for the method of preparation of the Select List. It says that the selection authority shall draw up, in order of merit, a consolidated list of all the eligible candidates irrespective of class to which they belong, and that the list shall show classification of the candidates category-wise. The selection authority shall then prepare from out of the said first list, a second list containing the names of candidates equal in number to the total number of un-reserved vacancies to be filled up, arranging them in order of merit, commencing with the first name in the first list. If there are no reserved vacancies, then the second list shall constitute the select list subject only to the provisions providing for horizontal reservation. When there are reserved vacancies as well, the selection authority shall next prepare from out of the portion of the first list remaining after excluding the portion corresponding to the second list viz, general category candidates, a third list containing the names separately of as many candidates from each of the categories, as the number of vacancies respectively reserved for them, arranging the candidates from each category in order of *inter se* merit. This shall be called the third list. The said third list added to the aforesaid second list shall in such a case constitute the select list. Obviously, the select list thus provided for to be formulated would again be in order of merit, in that the third list has to be added to the second list. It is to be borne in mind that reservation is no bar to selection and appointment against un-reserved post; provided that a candidate belonging to a reserved category attains such merit in a selection process. If a candidate is appointed against a reserved vacancy, he will, naturally, stand in the third list and,

therefore, lower in merit than the last candidate selected/appointed in the general category.

55. In light of the above Rule position, there remains no question for any reserved category candidate, whose name figures in the third list (reserved category list), to claim his seniority over and above any of the candidates figuring in the second list (open merit category candidates). This mandatory arrangement of the merit list and the consequential seniority prescribed by the Rules cannot be altered or deviated from by the Government in any manner, whatsoever, muchless by any machination. Consequently, the private respondent, having been selected and appointed against reserved category, could not have been later brought, by any devised methodology, over the head of the petitioner or placed incharge of a higher post over and above the petitioner

56. So far as the attempt of the learned counsel to import the rota quota rule to reservations on the basis of roster points prescribed by Rule 5 of the Reservation Rules is concerned, the argument put forth is wholly misconceived. Rule 31 of the Reservation Rules clearly and unambiguously prescribes that the rosters prescribed shall only be an aid to determine the entitlement of different categories with regard to the quota reserved for them and these are not for determination of seniority. Of course, the Rule 7(4) provides that if in the case of any category the number of candidates belonging to such category fall short of the number of vacancies reserved for it, the remaining reserved vacancies for such category shall be treated as backlog and the procedure as provided under Section 5 of the Reservation Act, 2004 (for short, the Reservation

Act) shall be followed. Section 5 of the Reservation Act is extracted below:

“5. Vacancies to be carried forward

- (1) Subject to the provisions hereinafter contained, if a sufficient number of candidates is not available from any reserved category during a recruitment process, the posts shall remain vacant and shall be carried forward to the next recruitment process.

...

...

- (2) ...
- (3) In subsequent year, when recruitment is made for reserved vacancies, the backlog vacancies shall also be notified;

Provided that the total number of reserved vacancies including backlog vacancies shall not exceed the percentage reserved for such categories.

- (4) The reserved vacancies remaining unfilled for a period exceeding three years shall be treated as de-reserved.”

The aforesaid provision of the Reservation Act lays down that the unfilled vacancy of a reserved category during a recruitment process shall remain vacant and shall be carried forward to the next recruitment process and that in the subsequent year, when recruitment is made for reserved vacancy, the backlog vacancy shall also be notified; provided that the total number of reserved vacancies including backlog vacancies shall not exceed the percentage reserved for such categories. Rules do not absolve selection against any such carried forward or backlog vacancy of the rigour and mandate of Rules 5, 7, 31 of the Reservation Rules or Rule 24 of the CCA Rules, in that such vacancies would again be subject to the same procedure for determination of merit and seniority.

7. The learned counsel also cited and relied upon the judgments of the Supreme Court in **Arvinder Singh Bains v. State of Punjab**, (2006) 6 SCC 673 and **Mervyn Coutindo v Collector of Customs**, (1966) 3 SCR 600, for the proposition that rota and quota must necessarily be reflected in the seniority list and any seniority list prepared in violation of rota and quota is bound to be neglected. I have gone through these judgments and notice that in both these cases the question related to seniority of officers appointed to a certain cadre / post by direct recruitment and by promotion in the ratio prescribed by Rules between direct recruits and promotees. Therein the Rules provided for rotation of vacancies. That is not the position here. The judgments are distinguishable on facts.

58. The learned counsel next took up the ground of eligibility of Dr. Shoket M. Chowdry for appointment as Assistant Professor in context of the MCI Rules and in that connection referred to certain judgments. I am not going into that question, for, that question would arise only if the notional effect given to his appointment and, consequently, the seniority from 04.07.2007 as Lecturer is held to be lawful; otherwise not. At this stage, It may be observed here that the private respondent, Dr. Shoket M. Chowdry, is forgetting his stand taken in para 6 of his reply/response to the petitioner's third writ petition, SWP no.D-1071/2014, that no special benefit has been given to him after his transfer from the Department of Medicine, Government Medical College, Jammu to Gastroenterology in Super Speciality as after his transfer he enjoys the same status in GMC as Super Speciality and as such the petitioner cannot have any grievance. Obviously, he is now trying to seek an advantage over the petitioner, which he cannot do unless the Rules would support his claim and sustain

the Government order no.367-HME of 2013 dated 26.06.2013, giving notional effect to his appointment as Lecturer from July, 2007 and re-fixation of his seniority in that cadre.

59. The learned counsel has also sought to argue that the private respondent's lien had been shifted to the Super Speciality Hospital and that he had attained right to maintain it, hold the post of Lecturer and to the progression in Service there and, in any case, his lien against the post cannot be terminated by the Court. It may be mentioned here that whatever the claims of the petitioner, their sheet anchor is the Government order no.367-HME of 2013 dated 26.06.2013. Once the said Government fails the test of scrutiny of law, everything sprouting and arising therefrom will and has to fall to the ground, vanish and disappear as inconsequential. The learned counsel cited certain judgments to contend that lien cannot be terminated. I, again, need not refer to the judgments cited by the learned counsel in this regard, for, that is not the point in issue herein.

60. The learned counsel has also taken the argument that since the petitioner had filed writ petition, SWP no.1459/2013, which was disposed of by the Court on 09.07.2013, directing the respondents to consider the claims of the petitioner strictly on the basis of merit and in terms of recruitment rules, the present writ petitions filed by him for the same relief are hit by the principle of *res judicata*. It is true that such a direction was issued in the writ petition, but nothing prevented the petitioner from challenging the order that was subsequently passed by the Government, in violation of the relevant rules and ignoring the court direction. The subsequent events gave a fresh cause to the petitioner;

therefore, the principal invoked is not attracted in the facts and circumstances of the case.

61. In light of all what has been narrated and discussed above, the Government order no.367-HME of 2013 dated 26.06.2013 whereby the private respondent was given notional effect to his appointment as Lecturer from 04.07.2007 and, consequently, his seniority was re-fixed over and above the petitioner is held to be illegal, violative of the relevant Rules and rights of the petitioner and, consequently, it cannot be sustained in law. In sequel thereto and as a necessary corollary, Government order no.415-HME of 2013 dated 22.07.2013 to the extent the Government thereby accorded sanction to the placement of the private respondent on the higher post of Assistant Professor in the discipline of Medicine in Government Medical College, Jammu, in his own pay and grade, based on such antedated notional effect to his appointment and re-fixed seniority, suffers from the same vice and is held to be equally not sustainable in law.

62. Coming to Government order no.22-HME of 2014 dated 23.4.2014 whereby sanction was accorded to the segregation of the private respondent, showing him as Assistant Professor (OPG) from the Department of Medicine to Gastroenterology, Government, Medical College, Jammu, and transfer of his lien from the Department of Medicine to Gastroenterology for seniority and promotion purposes. By using the expression “for seniority/promotion purposes”, the order itself makes it manifest that it was objected at surreptitiously creating an exclusive avenue of promotion for the private respondent and to defeat the lawful claims of the petitioner to right to consideration for such

promotions. In fact, this move had commenced with the representation of the private respondent dated 19.02.2014, which had been endorsed by the Minister for Health and Medical Education, Jammu and Kashmir Government. This is borne out by communication no.GMC-J/P&S/106/2013-14/1739 dated 25.03.2014, written by the Principal Government Medical College, Jammu, to the Commissioner/Secretary to Government, Health and Medical Education Department, a copy whereof forms annexure 'K' to the petitioner's third writ petition. In consequence thereof, the Under Secretary to Government, Health and Medical Education Department, vide his communication no.ME/GAZ/95/2011-1 dated 01.04.2014, requested the Principal, Government Medical College, Jammu, to intimate the qualification of the private respondent and to furnish his specific recommendations in the matter. The Principal in turn, vide his communication no.GMC-J/P&S/106/2014-15/48 dated 02.04.2014 intimated that the qualification of the private respondent "I/C Assistant Professor Medicine is MD Medicine and DM Gastroenterology (POGI Chandigarh" and recommended that necessary orders may be issued. The question is if the Government or the Principal, Government Medical College, Jammu, intended to create a separate Department for Gastroenterology, why did not they consider the petitioner who, but for the fall out of the illegal Government order no.367-HME of 2013 dated 26.06.2013, was equally possessing the requisite qualification and, in fact, was more meritorious than the private respondent and senior to him. Obviously, such a course adopted by the respondents was and continues to be violative of Articles 14 and 16 guaranteeing right to consideration in public appointments and equal opportunity and protection of law. This Government order equally

cannot be sustained. Consequently, the private respondent cannot derive any advantage out of the said Government order.

63. Now, comes the important feature of the whole case, which is that the Government, having at long last realised the illegality committed, by order no.139-HME of 2015 dated 22.04.2015 revoked *ab initio* the Government order no.367-HME of 2013 dated 26.6.2013 and restored the seniority of Lecturers in the discipline of Medicine, Govt. Medical College, Jammu, issued vide Government order no.265-HME of 2013 dated 16.04.2013. Consequent thereto, the Government also ordered revocation *ab initio* of Govt order no.415-HME of 2013 dated 22.07.2013 relating to placement of Dr.ShowkatMehmoodChowdhary as incharge Assistant Professor Medicine and Govt order no.220-HME of 2014 dated 23.04.2014 relating to segregation of the services and transfer of lien of the private respondent, Dr.ShowkatMehmoodChowdhary, from Medicine to Gastroenterology Super Speciality Hospital Jammu. Furthermore, pursuant to the above, the private respondent, Dr.ShowkatMehmoodChowdhary, Lecturer Medicine stands directed to report to Department of Medicine, Govt. Medical College Jammu for further duties. The aforesaid Government order no.139-HME of 2015 dated 22.04.2015, however, could not be given effect to in view of the Division Bench order dated 07.05.2015 passed in LPASW no.40/2015 filed by the private respondent, to the effect “that the respondents in terms of the writ Court order dated 28.04.2015 (interim order passed in the private respondent’s writ petition, SWP no.1216/2015) are required not to act upon and implement the government order No.139-HME of 2015 dated 22.04.2015 till the matter comes up before the writ court and

is modified, altered or extended.” Obviously, in essence the Division Bench ordered the stay of the said Government order till the matter was finally decided.

64. Now that I have come to definite conclusions about the Government orders revoked by the said Government order no.139-HME of 2015 dated 22.04.2015, I am of the considered opinion that challenge to the said government order on behalf of the private respondent cannot be sustained, for, the Government orders revoked thereby have otherwise been held to be illegal. However, in view of the said Government order no.139-HME of 2015 dated 22.04.2015, the Court need not quash the Government orders which stand revoked by it.

65. In view of all what has been said above, the question involved and raised in para 35 of this judgment has to be in negative. Accordingly, the writ petitions, SWP nos.1613/2013, SWP no.1820/2013, SWP no.D-1071/2014 filed by the petitioner are allowed to the extent indicated above; and SWP no.1216/2015 and SWP no.1933/2016 filed by the private respondent, Shoket M. Chowdry, are dismissed. The Government is left free to give effect to its order no.139-HME of 2015 dated 22.04.2015.

66. All CMPS/MPs and the interim directions passed therein and subsisting shall abide by the aforesaid judgment.

67. Mr. Bharddwaj learned counsel for the petitioner had submitted that the petitioner has been placed as incharge Assistant Professor

Medicine but seeks his regularization against the post from 2013. Since the Government has been left free to give effect to its order no.139-HME of 2015 dated 22.04.2015, consequently the position of private respondent as Assistant Professor may get changed, but in order to protect the interests of students and patients it shall be appropriate to direct the Principal Secretary to Government Health and Medical Education Department to maintain the present position of petitioner and private respondent in Medicine/Gastroenterology. This arrangement shall remain in force pending filling up of the available posts of Assistant Professors in Medicine/Gastroenterology by considering all eligible Lecturers including the petitioner and private respondent in accordance with rules. Consideration shall be accorded in favour of the petitioner and private respondent from the date posts were vacant subject to fulfilment of their eligibility.

68. While parting with the files, it may be mentioned here that the name of respondent no.3 in the first of the three of these five writ petitions and petitioner in the last two of them has been wrongly spelled sometimes as Dr. Shoket M. Chowdry and sometimes Shoket Mahmood Chowdhry, instead of Showkat Mehmood Chowdhary, as originally occurs in his appointment order dated 24.12.2009. This is recorded herein only for purpose of clarification to obviate any confusion in future.

69. Registry to keep photo copy of the judgment on each of the file.

(Ali Mohammad Magrey)
Judge

Jammu,
31.03.2018
Syed Ayaz, Secretary.