

UNION OF INDIA
v.
DR. P. RAJARAM AND OTHERS

OCTOBER 20, 1992

[LALIT MOHAN SHARMA, S. MOHAN AND
N. VENKATACHALA, JJ.]

Civil Services:

Central Health Service Rules, 1982:

Rule 4(10)(ii) and (iii) scope of—Newly created floating/common posts in Super time grade—Selection post—Suitability of candidates—Meaning of—Promotion to such post—Basis of—Not on mere seniority but on merit.

35 posts in super time grade of Central Health Services were sanctioned and proposals were sent to the Union Public Service Commission (UPSC) for convening Departmental Promotion Committee (DPC) meetings for selection of candidates. UPSC approved to amend Rule 4(6) of Central Health Service Rules of 1982. It also approved the method of recruitment, field of selection and principles of seniority to fill up the 35 posts as one time measure in the absence of notified recruitment rules. The Commission also stipulated that these 35 posts were to be treated as common posts to be included in the category of floating posts for the teaching and non-teaching sub-cadres mentioned in Rule 4(6) of Central Health Services Rules, 1982. The eligibility condition stipulated was three years as Professor failing which 17 years of regular service in Group 'A'. The communication of UPSC together with the eligibility list of Professors was circulated and errors/omissions/objections etc. were to be intimated to the Ministry within one month.

The DPC met and selected candidates. Respondent No.1 was assigned 14th rank and Respondent No. 3 was assigned 4th rank. The selected candidates were promoted and appointed.

Respondent No.1 filed an application before the Central Administrative Tribunal claiming that he was senior to respondent No. 3 and other doctors and since the promotion was only on the basis of seniority,

A those doctors should not have been shown above him. The Tribunal gave a finding that promotion to the post of Director/Professor should be made on the basis of seniority and directed that Respondent No. 1 should be posted above the respondents arrayed in the application before it.

B Being aggrieved by the Tribunal's order, Union of India preferred the first of the two appeals. Respondent No. 3 in that appeal has preferred the other appeal.

C On behalf of the appellants/respondent No. 3, it was contended that Rule 4(10)(ii) and (iii) as amended merely prescribed the procedure for preparation of eligibility test; that the procedure has not been prescribed in any other Rule as the posts were created as floating posts; that the posts did not pertain to any particular super speciality or sub-cadre of Professor/Director and so the criteria for preparation of eligibility list had to be prescribed for determining *inter-se* ranking between the sub-cadres; that merely because Rule 4(10)(iii) contained the word 'suitability' it did not supersede, alter or amend the criteria for selection and that the word 'suitability' has to be understood in the light of the guidelines of DPC.

Allowing the appeals, this Court,

E HELD : 1.1. If there is to be an assessment of merit, the principle of selection is involved. On the contrary, if it were merely a seniority-cum-fitness there is no need to associate the Union Public Service Commission as pointed out in the guidelines. All these lead only to one conclusion that these are selection posts. That is dealt with apart from Rule 4, sub-rule(10), clause (iii), and also under paragraph 6.1.2 of the guidelines
F issued by the Government of India. According to the guidelines the Departmental Promotion Committee is to devise its own method and procedure for objective assessments of suitability of candidates. It is noteworthy in paragraph 6.3.1 that the procedure for the preparation of the panel for promotion by the Departmental Promotion Committee is delineated. [51. C, D]
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H 1.2. Paragraph 7 of the guidelines deals with non-selection method and it dispenses with the requirement to make a comparative assessment of the records. In such a case what is required is to categorise the officers as fit or not yet fit for promotion on the basis of assessment of the record of service. Therefore, the word "suitability" in Rule 4(10)(iii) having regard

to the nature of the post and grade could only mean suitability for the purposes of being selected to the said post. [51 G, H; 52-A] A

2. It is a common case between the parties that these 35 floating posts were created by sub-rule 10 of Rule 4 in addition to the authorised strength. If as per the rule, for the post falling under authorised strength the method of selection is adopted it must equally apply to the post created in addition to the authorised strength. A careful reading of Rule 8(4)(ii) reveals that departmental promotion to higher post in the respective special cadres and specialities within the sub-cadre concerned shall be made on the basis of selection on merit. It implies that, should vacancy arise in a particular speciality, this method is to be adopted. In contradistinction to this, under Rule 4(10)(iii) even though one of the floating or common posts may be held by a particular person of a particular speciality, the said post can go to a person not belonging to that speciality. The teaching speciality sub-cadre forms a class within itself since it comprises of 29 specialities. Thus it follows the word "selection" used in Rule 8(4)(ii) is with reference to *inter se* merit of persons belonging to a particular speciality with regard to the vacancy occurring in that speciality. [52 D-H] B C D

3. The first respondent was served with a copy of letter dated 3.11.1988 in which the appellant clearly stated that the 20 posts of Director/Professor of super-time grade are to be filled by selection method viz. merit with regard to seniority. Therefore, the decision of Government of India had been conveyed to the first respondent and he should have immediately voiced his protest. Of course, the failure to protest would not deprive him of a legitimate right if he is entitled to in law. [53 A,B] E F

4. After examination of the character roll of the senior most eligible officers the committee assessed the officers. The first respondent was rated as "very good" while the rating for respondents 2 to 5 was "outstanding". So they go *en bloc* above the first respondent since the first respondent is merely "very good". This is because of the application of clause II of paragraph 6.3.1. of the guidelines. It was on this basis the Departmental Promotion Committee assigned rank No. 14 to the first respondent. Pursuant to this the President of India issued the order of promotion dated 17th January, 1990. Paragraph 3 of the order clearly states that the promotions will be personal to the officers concerned and the posts presently held by them will stand upgraded to the super-time grade in the H G

- A** scale in terms of the Ministry's order dated 15.3.1989. Hence the Tribunal was in error in merely adopting seniority as the basis of promotion and not merit. [53 C-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4507 and 4508 of 1992.

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From the Order dated 20.1.1992 of the Central Administrative Tribunal, Madras in O.A. No. 925 of 1990.

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K.T.S. Tulsi, Addl. Solicitor General, Kapil Sibal, C.V.S., Rao, C. Ramesh and Ranjit Kumar for the Appellant.

P.P. Rao, V. Balachandran, R.P. Oberoi and B.S. Gupta for the Respondents.

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The Judgment of the Court was delivered by

MOHAN J. Leave granted.

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Both these appeals can be dealt with by a common judgment since identical issues are involved. They are directed against the judgment of the Central Administrative Tribunal, Madras dated 23.1.1992. S.L.P. No. 7138/92 is preferred by Union of India while S.L.P. No. 6494/92 is filed by the affected party (Dr. M. Khalilullah).

The parties are referred to as mentioned in S.L.P. No. 7138/92. The facts are as under.

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The President of India sanctioned 35 posts in super-time grade of Central Health Services in the scale of Rs. 5900-200-6700 plus non-practising allowance at the normal rates as admissible to other similar posts. The sanction was upto 29.2.88. The sanction was conveyed by the Under Secretary to the Government of India, Ministry of Health and Welfare, New Delhi on 26.8.1987. After the creation of these posts, proposals were sent to the Union Public Service Commission for convening the meetings of the Departmental Promotion Committee for selection of candidates for promotion. The Union Public Service Commission approved to amend Rule 4(6) of Central Health Service Rules of 1982. It also approved the method of recruitment, field of selection and principles of seniority to fill up these 35 posts as a one time

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measure in the absence of notified recruitment rules. In its communication

dated 29.9.88 the Union Public Service Commission besides referring to the above approvals specifically, stated: **A**

"These 35 posts may be treated as common posts both at present and in future to be included in the category of the floating posts for the Teaching and Non-Teaching sub-cadres mentioned in Rule 4(6) of the CHS Rules of 1982. The eligibility conditions for promotion will be 3 years of regular service as Professor/Specialist Grade I failing which Professors/Specialists Grade I with 17 years of regular service in Group 'A' ". **B**

In the end, the Commission advised that the basis of eligibility and the eligibility list might be circulated to all concerned, their objections invited and settled before the meeting of Departmental Promotion Committee (Health). It also requested that the final eligibility list might be sent to the Union Public Service Commission. On 3.11.88, this decision was conveyed to all the concerned parties stating that it has been decided to fill up the posts by selection method i.e. merit with regard to seniority. The eligibility conditions for promotion will be 3 years of regular service as Professor failing which should be Professors with 17 years of regular service in Group 'A'. **C**

Together with that letter was enclosed the eligibility list of Professors. On the basis of the principles stated in the letter, errors/omissions/objections etc. were to be intimated to the Ministry within one month. **E**

In the eligibility list included, Dr. P. Rajaram, the first respondent, was assigned rank No. 13 while Dr. M. Khalilullah, the third respondent was assigned the rank No. 24. **F**

On 20.9.1989, in accordance with the guidelines dated 10.3.89, the Departmental Promotion Committee met for Selection of officers for the promotion to the super-time grade posts of Director-Professor in the Central Health Service. **G**

It requires to be stated that these posts were extended from time to time. Each extension was for a period of one year. Ultimately by an order dated 2.4.1992, it has been extended for a period of one year up to 28.2.1993. **H**

- A Consequent upon the selection by Union Public Service by an order dated 17.1.1990, the President was pleased to appoint under Rule 4(10) of the Central Health Services Rules, 1982 the officers of Specialist Grade I of the Teaching Specialist sub-cadre of the Central Health Service to supertime grade of the Teaching Specialist sub-cadre of the Central Health Service. They were posted as Director-Professors on an officiating basis in the pay scale of Rs. 5900-6700 plus non-practising allowance @ Rs. 950 p.m. The dates of promotions were indicated against each of the appointee. As far as Dr. Rajaram, the first respondent is concerned, he was assigned rank No. 14 and the date of promotion was as 1.4.1989 while respondent No. 3, Dr. M. Khalilullah was assigned rank No. 4 and the date of promotion was as 1.4.1989. Paragraph 3 of the order specifically states that the above promotions will be personal to the officers concerned and the posts presently held by them will stand upgraded to the supertime grade in the scale of Rs. 5900-6700 plus non-practising allowance @ Rs. 950 p.m. in terms of Ministry's order No. A-11011/5/88-CHS IV, dated 15.3.1989.
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- D This will continue till the upgraded posts are held by the officers being promoted now.

- Aggrieved by the order dated 17.1.1990, the first respondent (Dr. Rajaram) preferred an application No. 925 of 1988 on 6.7.1990. In that application, he had stated that he was senior to Dr. B.S. Rana, Dr. M. Khalilullah, Dr. K.K. Jain and Dr. D.D.S. Kulapathy. They should not have been show above him. The promotion was only on the basis of seniority.
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- In opposition to this, the respondent in the application who has secured a higher rank urged that the Departmental Promotion Committee had ranked Dr. Rajaram at serial No. 14 on the basis of merit. The criterion for promotion is only merit.
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- Before the Tribunal, the scope of Rule 4 sub-rule (10), clause (iii) of Central Health Service Rules, 1982 (hereinafter referred to as 'the Rules') came up for interpretation. The Tribunal, in the impugned judgment, accepted the contention of Dr. Rajaram and held that promotion for the post of Director/Professor should be made on the basis of seniority. Consequently, it directed that he be posted above the respondents who had been named in the application.
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- It is under these circumstances, the present S.L.Ps. have been preferred by Union of India as well as by Dr. Khalilullah.
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Mr. Kapil Sibal, learned counsel appearing for Dr. M. Khalilullah after taking us through the rules submits that rule 4(10) (i) of the Rules deals with 35 newly created floating/common posts in the supertime grade Rs. 5900-6700 in the Teaching and Non-Teaching Specialist sub-cadre. These posts were in addition to the authorised strength of posts in the supertime grade. The authorised strength of both categories of Teaching and Non-Teaching sub-cadres is reflected in Schedule II. Rule 4(10) (ii) stipulates that promotions to these posts are to be made on the basis of common eligibility list to be drawn separately for the Teaching Specialist sub-cadre and the Non-Teaching Specialist sub-cadre. This has to be without reference to any of the specialities in respective sub-cadres.

Rule 4(10) (iii) stipulates that the eligibility list shall be made after the officer concerned has been duly assessed by a Departmental Promotion Committee in regard to the officer's suitability for holding the post with the condition that the said officer should have completed three years of regular service as Professor (Specialist) Grade I. This rule does not stipulate the manner in which the suitability of the said officer is to be assessed by the Departmental Promotion Committee. Schedule IV of the Rules talks of the constitution of the Departmental Promotion Committee. It is clearly stipulated that in each meeting of the Departmental Promotion Committee the Chairman/Member, Union Public Service Commission shall chair the Departmental Promotion Committee. There are also guidelines issued to the Departmental Promotion Committee. The guidelines stipulate that the Departmental Promotion Committees constituted under the respective Service Rules shall judge the suitability of officers for promotion to selection as well as non-selection posts. Here again, the Union Public Service Commission should be associated with Departmental Promotion Committee in respect of Central Civil Services posts belonging to grade 'A' where promotion is based on the principle of selection unless it has been decided by the Government of India not to associate the Union Public Service Commission. The Union Public Service Commission need not be associated in respect of posts belonging to Grade-A if the promotion is based not on the principles of selection but on seniority-cum-fitness. Wherever the Union Public Service Commission is associated with Departmental Promotion Committee, the Chairman or a Member of the Commission will preside over the meeting of Departmental Promotion Committee.

When Schedule IV requires that the Departmental Promotion Com-

- A** mittee (Services) ought to be presided over by the Chairman or Member of the Union Public Service Commission itself suggests that the said posts ought to be filled in by way of selection rather than on the basis of seniority-cum-fitness. Consequently, the word 'suitability' in Rule 4(10)(iii) in the context of nature of posts, its grade, can only mean suitability for the purposes of being selected to the said post. This submission is made on the basis that Rule 4(10) is a complete code in itself.
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- Even if this post falls outside the Schedule II, the basis of promotion cannot be seniority. In terms of Rule 3 of the Rules, the Central Health Service consists of persons appointed to the service under sub-rule (5) of Rule 4 and Rules 7 & 8. It is the contention of the appellant that under Rule 4(3), Government of India is entitled to make temporary additions to or reductions in the strength of 'duty posts' in the various grades as deemed necessary from time to time. Duty posts are defined in Rule 2(e) stating that these are posts with designations specified in Part A of Schedule II whether permanent or temporary. When this definition is read along with Rule 4(1) (ii) and Rule 4(1) (iii), it is clear that temporary additions or reductions in the number of duty posts can take place from time to time. These 35 floating/common posts were created for the first time on August 26, 1987 and administrative orders have thereafter been issued from time to time extending the creation of the said 'duty posts' without amending Schedule II.
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- Certainly, these posts were part of authorised strength at the time of initial constitution of the Service. Rule 8 contemplates that any vacancy arising in any one of the grades referred to in Schedule II shall be filled in, as provided in Rule 8(4) (ii). The difference between Rule 4(10) (iii) and Rule 8(4) (ii) is that whereas in the latter the promotion is to be made with reference to a post in the Teaching Specialist sub-cadre or the Non-Teaching Specialist sub-cadre on account of any vacancy occurring therein, in a particular speciality, in the case of the former, notwithstanding the fact that one of the 35 floating/common posts may be held by a particular person of a particular speciality, the said post can go to a person not belonging to that speciality, since the Teaching Specialist sub-cadre forms a class by itself which comprises 29 specialities. It is in this context, therefore, that the said posts could not be included in Schedule II, since Schedule II conceives of particular posts with reference to particular specialities. It is, therefore, clear that whereas the word 'selection' used in
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Rule 8(4) (ii) is with reference to *inter-se* merit of persons belonging to a particular speciality with reference to a vacancy occurring in a speciality, the word 'suitability' is not with reference to any particular speciality but with reference to the *inter-se* merit of candidates based on their confidential reports and assessed by the Departmental Promotion Committee belonging to any of the 29 specialities, who would be considered most suitable to be promoted, since the concept of seniority-cum-fitness cannot possibly be applied to a common set of posts without reference to any speciality. A B

Thus, it is submitted that to determine the meaning of suitability, the same yard-stick must be adopted. C

In any event, these are highly specialised posts. Hence, it is unthinkable that the promotions to these posts is based on the principle of seniority-cum-fitness and not on the basis of selection. The word 'suitability' will have to be interpreted as seniority-cum-fitness. Otherwise, it would be liable to struck down as unconstitutional being violative of Articles 14 and 16 of the Constitutions. Therefore, it is submitted that the Rule must be so interpreted as not to violate the fundamental rights. The Tribunal had gone wrong in adopting the principle of seniority and its interpretation of Rules cannot be sustained. D

Learned counsel for Union of India, Shri K.T.S. Tulsi, supporting the arguments of Shri Kapil Sibal, urged that the order creating these posts clearly mentioned that the posts are created in the super-time cadre of Central Health Service. Rule 4(10) (ii) and (iii) as amended merely prescribe the procedure for preparation of eligibility list. This procedure is nowhere prescribed in any other Rule. This was because of the fact that the 35 posts were created as floating posts. They did not pertain to any particular super speciality or sub-cadre of Professor/Director. Therefore, criteria for preparation of eligibility list had to be prescribed for determining *inter-se* ranking between the sub-cadre. Merely because Rule 4(10) (iii) contains the word 'suitability', the said Rule does not supersede, alter or amend the criteria for selection. The word 'suitability' will have to be understood in the light of the guidelines of Departmental Promotion Committee. E F G

These 35 posts referred to in Rule 4(10) are an integral part of the cadre. The said posts were not added to Schedule II, forming part of the H

A temporary strength of the cadre. However, on August 10, 1992, the said posts have been added to Schedule II so as to make its intention clear that the promotion is to be governed by all the relevant Rules and not by Rule 4 (10) when read in isolation from the remaining Rules. Thus, it is submitted that the reasoning of the Tribunal is unsupported.

B Mr. P.P. Rao, learned counsel on behalf of Dr. P. Raja Ram would urge as under.

C The initial argument particularly on behalf of the Union of India was that these floating/common posts of super-time grade of Teaching Specialist sub-cadre formed part of authorised strength of the Central Health Service in terms of Rule 4 (10). This was contested by this respondent that Schedule II has not been amended till date so as to include these posts. Instead of frankly admitting the mistake, there was a deliberate attempt to justify the inclusion of these 35 posts as part of Schedule II. This is nothing but misleading the Court. This alone is enough to dismiss the
D Special Leave Petition.

E Even on merits, Rule 4(10) states that the posts are to be filled up by the method of promotion and on the basis of an eligibility list. The note also lays down that the eligibility list shall be prepared with regard to the date of completion of the prescribed qualifying years of service in their respective grades, by the officers. Further clause (iii) of sub-Rule (10) adds the requirements of assessment by a Departmental Promotion Committee in regard to the suitability of each officer for holding the post while considering his case for promotion on the basis of common eligibility list. The words "his suitability" in the said clause (iii) are very significant. They
F postulate assessment of suitability of each candidate in the order in which the names appear in the common eligibility list drawn on the basis of continuous qualifying service rendered by them in the feeder Grade. The scheme of sub-Rule (10) totally rules out selection on the basis of relative merit of all eligible candidates.

G The difference between 'common posts' and 'floating posts' is that while in 'common posts', a Professor on being promoted to one of the 'common posts' moves to that post and vacates the post of Professor previously held by him, while in 'floating posts' the post held by him is upgraded and he continues to work in the same speciality, in the same
H institution.

The guidelines of the Departmental Promotion Committee are not of any assistance. Therefore, no argument can be advanced on this basis. If guidelines were governed, there was no purpose in adding Rule 4(10) (ii) and (iii). The basic distinction between the selection posts and non-selection posts is, whether it is to be filled by a comparative assessment on merit of all eligible candidates or on the basis of continuous length of service. The guidelines say that there is no need to make comparative assessment of records of the officers but it should categorise the officers as fit or non-fit. It is a clear indication that there is no comparative assessment involved. A B

The common eligibility list which talks of Rule 4(10) is nothing but a combined seniority list of officers in different specialities drawn with reference to the date of completion of the prescribed qualifying years of service. C

It is also incorrect to contend that it is a duty post as defined under Rule 2(e). Such an expression as "duty post is absent under Rule 4(10)." D

When these posts had been created in order to release stagnation in addition to authorised strength, presence of Chairman or Member of Union Public Service Commission at the Departmental Promotion Committee does not make a non-selection post as selection post simply because the guidelines say in the case of non-selection posts, Union Public Service Commission need not be associated. The fact that this respondent did not raise any objection to the letter dated 3.11.1988, will not, in any manner, deprive him of his right if the Rules confer such a right. Lastly, it is submitted that if two views are possible, the view taken by the Tribunal should be upheld. Thus, no interference is warranted. E F

We shall now proceed to consider the merits of the above contentions.

35 posts in super-time grade of Central Health Service in the scale of Rs. 5900-200-6700 plus non-practising allowance at the normal rates admissible to similar posts were created. These posts were to last till 29.2.1988. Time and again, they were extended. G

The Rules which were relevant to appreciate the controversy whether the promotion is on the basis of seniority or on the basis of merit may now be seen. H

A In exercise of the power conferred under the proviso to Article 309 of the Constitution, the Rules called Central Health Service Rules, 1982 were framed.

B Rule 3 speaks of the constitution of Central Health Service. This service is to consist of persons appointed to the service under the Rules 4(5), 7 and 8.

C Rule 4 speaks of authorised strength of service. Sub-rule (1) of this Rule states that the authorised strength of duty posts and the deputation posts are as specified in Schedule II. Under sub-rule (3), the Government is empowered to make temporary additions or reductions in the strength of both : (i) the duty posts (ii) deputation posts.

Sub-rule 6 (i) and (ii) may be quoted as follows :

D (6) (i) "The Controlling Authority shall upgrade five posts in the grade of Specialist Grade-I to supertime grade (three posts in the Teaching Specialist Sub-cadre as Director-Professor and two posts in the Non-Teaching Specialist Sub-cadre or Public Health sub-cadre as Specialist (Consultant) and twenty five posts in the grade of Specialist Grade-II in the non-Teaching Specialist Sub-cadre or Public Health Sub-cadre or Associate Professor in the Teaching Specialist Sub-cadre in the grade of Specialist Grade-I without altering the combined authorised strength of posts of the respective sub-cadre from which these posts are temporarily upgraded.

F (6) (ii) The promotions under this sub-rule shall be made on the basis of a common eligibility list covering all officers in the respective sub-cadres without regard to any specialities."

G It requires to be carefully noted that what is talked of is a common eligibility list. In other words, this has only reference to eligibility. This is an aspect which we want to emphasise even in the beginning.

H Then, we come to sub-rule (10) which was introduced on 30.5.1989 which specifically deals with these 35 newly created floating/common posts in the super-time grade of Rs. 5900-6700. These 35 posts are made up of

20 posts in the Teaching Specialist sub-cadre as Director-professor and 15 posts in the Non-Teaching Specialist sub-cadre as Consultant. These posts will be in addition to the authorised strength. It is common ground that these posts were created to release stagnation. Earlier to this amendment, these posts in the Teaching Specialist sub-cadre were alone open to Professors from all specialities. They were :

- (i) Director, G.B. Pant Hospital, New Delhi.
- (ii) Dean, Moulana Azad Medical College, New Delhi.
- (iii) Principal, Lady Harding Medical College, New Delhi.
- (iv) Director, JIPMER, Pondicherry.
- (v) Dean, JIPMER, Pondicherry.
- (vi) Deputy Director General (Medical), D.T.E., DGH, New Delhi.

As could be seen, the promotion posts available were very few and were restricted to certain specific specialities. This led to stagnation. Therefore, the floating posts (20 + 15) were created to be filled in the grade of Professor/Specialist Grade I (Rs. 4500-5700). It was in this background Rule 4(10) was introduced. That lays down :

"There shall be 35 newly created floating/common posts in the supertime grade of Rs. 5900-6700 (Twenty posts in the teaching specialist sub-cadre as Director-Professor and fifteen posts in the Non-Teaching Specialist sub-cadre as Consultant) which will be in addition to the authorised strength of posts in supertime grade of Rs. 5900-6700 in different sub-cadres of Central Health Service."

Further clause (ii) of the above Rule lays down as follows:

"The promotions under this sub-rule shall be made on the basis of a common eligibility list to be drawn separately for Teaching Specialist sub-cadre and Non-Teaching Specialist sub-cadre covering all officers in the respective sub-cadres viz. Teaching and Non-Teaching without regard to any specialities".

- A Here again, it talks of eligibility. In our opinion, eligibility means interlacing of seniority list of different specialities.

Clause (iii) reads as under :

- B "The appointment against such posts shall be made only if the officer concerned has been duly assessed by a Departmental Promotion Committee in regard to his suitability for holding the post and has been working in the grade of Professor/Specialist Grade I on a regular basis for not less than three years, failing which, has been working as a Professor/Specialist Grade I with 17 years of regular service in Group 'A' post".
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The note is also made for our purpose that states :

- D "The eligibility list shall be prepared with reference to the date of completion by the officers of the prescribed qualifying years of service in the respective grades. However, in case of persons who have been appointed on the same date the seniority shall be determined as under :
- E (a) Where the eligible officers were considered by the same D.P.C. the seniority shall be based on the order of merit.
- (b) If there is no order of merit, the seniority shall be on the basis of seniority in the feeder grade.
- F (c) If there is no seniority in the feeder grade or it is not possible to determine the seniority even in the feeder grade, the length of regular service in the feeder grade shall be the guiding factor for determining the seniority.
- (d) If length of service in the feeder grade is also the same, regular service in the next lower grade shall be taken into account, failing which date of birth".
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It may be seen that clause (iii) states that the appointment is to be made only if the officer concerned has been duly assessed by a Departmental Promotion Committee in regard to his suitability for holding the post.

- H Such a consideration will arise only if the concerned officer has been

working in the grade of Professor/Specialist Grade I for a period not less than three years. The alternative qualification is 17 years of regular service in Group 'A' post and the concerned officer has been working as a Professor or Specialist Grade I. A

This clause does not lay down the manner in which the suitability of the officer is to be assessed. However, it is noteworthy that suitability is to be assessed by a Departmental Promotion Committee. As to what is stated can be seen, when we look at Rule 2 which contains definitions. Rule 2(c) says as under : B

"Departmental Promotion Committee means a group 'A' Departmental Promotion Committee specified in Schedule IV for considering the cases of promotion or confirmation in Group 'A' posts of the service. Group 'A' posts are of the scale of Rs. 2200-4000 and above. Schedule III defines the method of recruitment, the field of selection for promotion and the minimum qualifying service in the immediate lower grade or lower grades for appointment or promotion of officers to group 'A' duty posts and deputation posts in the Central Health Service". C
D

In Note 1 of the said Schedule, it is stated thus : E

"Promotion to the post of Associate Professor (non-functional selection grade), Associate Professor, Specialist Grade II (non-functional selection grade), Specialist Grade II (Senior Scale) in non-teaching and public health sub-cadres, Chief Medical Officer (non-functional selection grade) and Senior Medical Officer will be on non-selection basis. All the remaining posts are selection posts". F

When it says all the remaining posts are selection posts, it is obvious that the posts with which we are concerned are selection posts. Schedule IV lays down the composition of Departmental Promotion Committee. With regard to the Teaching Specialist sub-cadre posts, super-time and Specialist Grade I (Professor), the Departmental Promotion Committee shall consist of the following : G

(i) Chairman. Chairman/Member, Union Public Service Commission: H

A (ii) Secretary or his nominee, Ministry of Health and Family Welfare : Member.

(iii) Director General of Health Services or his nominee : Member.

B (iv) One Departmental officer nominated by the Secretary, Ministry of Health and Family Welfare : Member.

When Rule 4 (10) (iii) talks of Departmental Promotion Committee, it is only this Departmental Promotion Committee in accordance with Schedule IV that is thought of.

C There are guidelines issued under the Office Memorandum of Government of India dated April 10, 1989. Under this Office Memorandum, the various instructions have been updated and consolidated. Under these guidelines, the Departmental Promotion Committee so constituted shall judge the suitability of the officers for promotions to selection posts. It has already been seen that these are selection posts as per Schedule II of the Rules. In Paragraph 2.1 with reference to the post in question carrying a scale of Rs. 5900-6700 or equivalent. The minimum status of Officer who should be member of Departmental Promotion Committee is prescribed as Secretary or Additional Secretary to Government of India.

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E Paragraph 2.2 of the guidelines states as follows:

"The Union Public Service Commission (UPSC) should be associated with DPCs in respect of all Central Services/posts belonging to Group 'A' where promotion is based on the principles of selection unless it has been decided by the Government not to associate the UPSC with a Group 'A' DPC. The UPSC need not be associated in respect of posts belonging to Group 'A', if the promotion is based not on the principles of selection but on seniority-cum-fitness".

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G Paragraph 2.4 also stresses the fact that whenever the Union Public Service Commission is associated with the Departmental Promotion Committee the Chairman or a Member of the Commission will preside over the meeting of the Departmental Promotion Committee.

H The contention of Mr. P.P. Rao, learned counsel for the respondents

that the nature of the post or the method of promotion need not be decided with reference to the guidelines is not correct. In Rule 4, sub-rule (10), clause (iii), to which a reference has already been made, the assessment is required to be done by a Departmental Promotion Committee. It is for such a Committee that guidelines have been prescribed. Therefore, we cannot altogether ignore these guidelines.

From the above two paragraphs it is clear that if there is to be an assessment the principle of selection is involved. On the contrary, if it were merely a seniority-cum-fitness there is no need to associate the Union Public Service Commission as pointed out in Paragraph 2.3 of the guidelines. All these lead only to one conclusion that these are selection posts. Having arrived at this conclusion then the question would be what exactly is the meaning of the word "suitability". That is dealt with apart from Rule 4, sub-rule (10), clause (iii), also under guidelines in Paragraph 6.1.2. The Departmental Promotion Committee is to devise its own method and procedure for objective assessment of suitability of candidates. It is noteworthy in Paragraph 6.3.1 that the procedure for the preparation of the panel for promotion by the Departmental Promotion Committee is delineated. Clause (ii) is very important and we extract the same :

"In respect of all posts which are in the level of Rs. 3700-5000 and above, the benchmark grade should be 'very good'. *However officers who are graded as 'Outstanding' would rank en bloc senior to those who are graded as 'Very Good'* and placed in the select panel according upto the number of vacancies, officers with same grading maintaining their *inter se* seniority in the feeder post." (Emphasis supplied)

In contradistinction to this when we look at paragraph 7 of the guidelines, which deals with non-selection method, that dispenses with the requirement to make a comparative assessment of the records. In such a case what is required is to categorise the officers as fit or not yet fit for promotion on the basis of the assessment of the record of service. In so far as we are concerned with selection this paragraph does not have any application whatever. *Thus, therefore, the word "suitability" in Rule 4(10)(iii) having regard to the nature of the post and grade, could only mean suitability*

A *for the purposes of being selected to the said post. (Emphasis supplied)*

B Further, the expression "suitability" in the said clause does not, in any manner, supersede alter or amend the criteria of selection prescribed in the remaining rules as is applicable to super-time grade post. When the expression "suitability" is construed harmoniously with other rules, the process of selection is inescapable as rightly contended by Mr. K.T.S. Tulsi, learned Additional Solicitor General.

C The argument of Mr. Rao that if these posts are by the method of selection, clauses (ii) and (iii) and a note thereunder are wholly unnecessary in Rule 4 (10), overlooks the fact that these clauses deal only with eligibility.

D It is a common case between the parties that these 35 floating posts were created by sub-rule (10) of the Rule 4 in addition to the authorised strength. If as per the rule, for the post falling under authorised strength the method of selection is adopted for the authorised strength it must equally apply to the post created in addition to the authorised strength. Though a good deal of controversy arose during the course of the arguments whether these posts had been included in Schedule II or not, it was E vehemently commented upon by Mr. P.P. Rao, learned counsel, that an inaccurate statement was made by Union of India that controversy pales into insignificance because of the Gazette Notification dated 10th of August, 1992 including these 35 newly floating/common posts in Schedule II. Therefore, if these posts form part of the authorised strength as to what F would be the bearing of Rule 8(4) (ii), requires to be considered. A careful reading of Rule 8(4)(ii) reveals that departmental promotion to higher post in the respective special cadres and specialities within the sub-cadre concerned shall be made on the basis of selection on merit. It implies that, should vacancy arise in a particular speciality, this method is to be adopted. In contradistinction to this, under Rule 4(10)(iii) even though one of the G floating or common posts may be held by a particular person of a particular speciality, the said post can go to a person not belonging to that speciality. The teaching, speciality sub-cadre, forms a class within itself since it comprises of 29 specialities. Thus it follows the word "selection" used in Rule 8(4)(ii) with reference, to *inter se* merit of persons belonging to a H particular speciality with regard to the vacancy occurring in that speciality.

Lastly, we may refer to one important fact. The first respondent (Dr. Raja Ram) was served with a copy of letter dated 3.11.1988. That clearly states that the 20 posts of Director Professor of super-time grade are to be filled up by selection method, merit with regard to seniority. Therefore, the decision of Government of India had been conveyed to the first respondent. The first respondent when he was put on notice should have immediately voiced his protest. Of course, the failure to protest would not deprive him of a legitimate right if he is entitled to in law. However, it is one of the points to be borne in mind.

The Departmental Promotion Committee met on 20th September, 1989 and the minutes have been placed before us. After examination of the character rolls of the senior most eligible officers the committee assessed the officers as given in Annexure I. The first respondent, Dr. Raja Ram was rated as "Very good" while the rating for the other doctors is as follows:

- | | | | |
|-------------------------|------------------|---|-------------|
| 1. Dr. B.S. Rana | (2nd respondent) | : | Outstanding |
| 2. Dr. M. Khalilullah | (3rd respondent) | : | Outstanding |
| 3. Dr. K.K. Jain | (4th respondent) | : | Outstanding |
| 4. Dr. D.D.S. Kulapathy | (5th respondent) | : | Outstanding |

Where respondents 2 to 5 are rated outstanding, they go '*en bloc*' above the first respondent since the first respondent is merely "very good". This is because of the application of clause II of paragraph 6.3.1 of the guidelines quoted above. It was on this basis the Departmental Promotion Committee assigned rank No. 14 to the first respondent, Dr. Raja Ram. Pursuant to this, the President of India issued the impugned order of promotion dated 17th of January, 1990. Paragraph 3 of the order, which we have quoted above, clearly states that the promotions will be personal to the officers concerned and the posts presently held by them will stand upgraded to the super-time grade in the scale of Rs. 5900-6700 plus non-practising allowance at Rs. 950 per mensem in terms of the Ministry's order dated 15.3.89.

Above all these, we cannot lose sight of the fact that for posts of this character in super-time grade carrying high salary, promotion could not be accorded merely on the basis of seniority. In our considered view, it should be on merit.

A For the foregoing reasons, we are clearly of the opinion that the Tribunal had erred in merely adopting seniority as the basis of promotion and not merit.

It is needless for us to consider whether these are duty posts since we have taken the view that these posts fall within Schedule II of the Rules.

B

In the result, we set aside the impugned judgment of the Tribunal and allow these appeals without costs. The reason why we are not awarding costs in favour of the appellants is because of a specific objection by Mr. P.P. Rao that these posts have not been included in Schedule II by amending the said Schedule. In respect of this, the Union of India persisted in the argument that they had been included in Schedule II. Of course after the Gazette Notification dated 10.9.92 the position may be different. But that does not mean that the earlier incorrect statements by the Union of India could be overlooked.

C

G.N.

Appeals allowed.