STATE OF PUNJAB

v.

DR. R.N. BHATNAGAR AND ANR.

DECEMBER 18, 1998

[S.B. MAJMUDAR AND M. JAGANNADHA RAO, JJ.]

Service Law:

Punjab Medical College Education Service (Class I) Rules, 1978:

Rule 9(i)(d)—Promotion—Quota-rota rule—Vacancies—Filling up of—By promotees and direct recruits—In the ratio of 3:1—Application of—Held: Rule 9 deals with reservation of appointment from two sources i.e., departmental promotees and direct recruits—Hence, Art. 16(1) and not Art. 16(4) applicable—Constitution of India, 1950, Arts. 16(1) and 16(4).

Rule 9—'Post'—Meaning of—Does not refer to total posts in the cadre but refers to vacancies—Once recruitment is made from two sources i.e., departmental promotees and direct recruitment, the candidates get fused and their birthmarks obliterated—Discrimination in further promotion not permitted.

Rule 3 proviso and Rule 9—Promotion—Quota-rota rule—Vacancies—Filling up of—By promotees and direct recruits—In the ratio of 3:1—Cadre consisted of 5 posts—First three vacancies filled up by promotees, 4th by direct recruits and 5th, 6th, and 7th by promotees—Thereafter, 8th roster point was to be filled up by direct recruit but as this took more time, departmental promotee was promoted—validity of—Held: Such departmental promotee could fill in only the 9th vacancy earmarked for promotees and not the 8th vacancy earmarked for direct recruits which is to be carried forward—Therefore, when a direct recruit is appointed qua roster point 8, though he was treated as junior to the said promotee, he could be said to be appointed on roster point 8 which was carried forward—Hence, counting 9th roster point as starting point for a fresh cycle for 3 promotees, the 16th point must go to a direct recruit.

Rule 3 proviso—Date of commencement—28-7-1978—Recruitment of Professors—Under erstwhile executive instructions—Deeming fiction under—

A *Applicability—Conditions and effect of—Cadre of Professors consisted of 5 posts—But only 4 posts were actually occupied since the second incumbent had retired prior to the coming into force of the proviso to R.3—Out of the said 4 posts, 3 were occupied by promotees and the 4th by a direct recruit—Held: The incumbents of all posts in the cadre actually holding the posts on the said date would remain in the cadre irrespective of their source of* B *recruitment—Fifth incumbent not covered by proviso to R.3—Therefore, fresh rotational cycle will start with the fifth incumbency since the earlier rotational cycle envisaged under R.9 is complete—Consequently, roster point 16 has to be filled up by a promotee.*

C *Statute Law:*

Deeming fiction—Extension of—By analogy—Held: Cannot be extended to cover any other field not meant to be covered.

Practice and Procedure:

D

New plea—Raising of—For the first time before Supreme Court—Held: Can be raised if it is a pure question of law not involving disputed question of fact.

Words and Phrases:

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"Post"—Meaning of—In the context of R.9 of the Punjab Medical College Education Service (Class I) Rules, 1978.

The respondent, an Assistant Professor in the Department of Ophthalmology in Government Medical College, was a promotee from the F **post of Senior Lecturer. The question arose as to how the vacancy in the post of Professor of Ophthalmology was to be filled in on the retirement of the then incumbent. The relevant rule governing such posts is Rule 9(i)(d) of the Punjab Medical College Education Service (Class-I) Rules, 1978. The said rule reads as under:**

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"(9) Method of Appointment:

(d) In the case of Professors:

(i) 75 percent posts by promotion from amongst the Additional Professors, or, where Additional Professors are not available, from H **amongst the Associate Professors, or where Associate Professors**

are not available, from amongst the Assistant Professors, or by transfer of official already in the service of the Government of India, or the State Government;

(ii) 25 percent posts by direct recruitment;"

According to the appellant-State, as there were five posts in the cadre of Professors of Ophthalmology in the said College, on the basis of the aforesaid quota rule governing the recruitment in question, every three vacancies of Professors in the said cadre had to be filled in by departmental promotees while the fourth vacancy would be filled in by direct recruitment and thereafter succeeding vacancies to be filled in by promotees and direct recruits in the successive cycles of 3:1. The case of the appellant-State was that in the cadre of Professors of Ophthalmology in the said College, right from the beginning when the erstwhile executive instructions on the same lines operated till the date of the falling of the vacancy in question, there were in all 15 Professors including the said Dr. R, who retired, as aforesaid and, therefore, on his retirement the 16th vacancy arose. As per the appellant-State, on the operation of the quota rule and the roster cycles of 3:1, the 16th vacancy would be available to a direct recruit as under:

1st vacancy to promotee, 2nd vacancy to promotee, 3rd vacancy to promotee, 4th to direct recruit, 5th, 6th and 7th to promotees, 8th to direct recruit, 9th, 10th and 11th to promotees, 12th to direct recruit, 13th, 14th and 15th to promotees and the 16th to direct recruit.

Consequently, the said vacancy was advertised for being filled up by direct recruitment. That brought the respondent to the High Court by way of a writ petition. His contention in the writ petition was that in the light of the Constitution Bench judgment of this Court in *R.K. Sabharwal's* case, as there were total five posts in the cadre of Professors of Ophthalmology 75% thereof, namely, 3.75 posts had to be reserved for promotees and 1.25% of the remaining posts had to be reserved for direct recruits. Rounding up these figures by taking digits upto .50 as nil and beyond .50 as 1, four posts in the said cadre had to be filled in at a given point of time by promotees and one post had to be filled in by direct recruitment and as at the time when the vacancy arose, there was already one direct recruit holding the post of Professor, the vacancy in question had to go to the departmental promotee as he was the senior most Assistant Professor in the Department of Ophthalmology. His claim to be promoted to the said post should have been processed in accordance with law and the said post should not have been

A advertised for direct recruitment. The Division Bench of the High Court accepted this contention of the respondent. Hence this appeal.

On behalf of the appellant, it was contended that the decision in *R.K. Sabharwal's* case pertained to a scheme of reservation for Scheduled Caste and Scheduled Tribe persons under Article 16(4) of the Constitution and had B nothing to do with the present scheme of the rule regulating the recruitment from two sources under Article 16(1) of the Constitution; and that a new plea regarding the applicability of the proviso to Rule 3 should not be permitted to be raised for the first time before this Court.

On behalf of the respondent, it was alternatively contended that in view C of the proviso to Rule 3 of the statutory rules, the cycle of 3:1 would operate in connection with all future vacancies that fell in the cadre w.e.f. 28-7-1978 and earlier cycle had to be ignored. It was also contended that even in the working of the cycle in the cadre in question the 16th vacancy (which would become the 11th vacancy if reckoned from a roster commencing from 28-7- D 1978) would go to a promotee and not to a direct recruit.

Dismissing the appeal, this Court

HELD: 1.1. As per Article 16(4) of the Constitution which carves out a separate field for itself from the general sweep of Article 16(1) which E guarantees equality of opportunity in matters of appointments in Government services to all citizens of India, the reservation for these categories of employment has to be achieved by earmarking requisite percentage of posts for the reserved category of candidates and by pitchforking these posts on roster points on requisite points roster and when such a roster takes a full cycle, posts earmarked on reserved point will enable the requisite reserved F category of candidates to fill up these posts. After that is done, the roster would be treated to have achieved its purpose. Whenever a reserved candidate vacated a reserved post, the said post was liable to the filled in only by a candidate belonging to the reserved category. If after the roster is first operated and thereafter it is again operated on future vacancies also, a G situation may arise wherein a cadre may get reserved category exceeding permitted quota of reservation. [706-F-H]

1.2. So far as Rule 9 of the Punjab Medical College Education Service (Class-I) Rules, 1978 is concerned it has nothing to do with reservation of posts in the cadre of Professors. It is not a rule of reservation envisaged for H a specified category of persons as permitted by Article (16)4 of the

Constitution. On the contrary, it is a rule of recruitment from two different sources, namely, in case of Professor's cadre 75% of posts has to be filled in by promotion while 25% by direct recruitment. These two sources of recruitment permit departmental promotees and direct recruits from the open market to get absorbed in the cadre. They merely serve as two entry points for the cadre. Rule 9 deals with reservation of appointment to the post of Professor and does not deal with reservation of posts of Professor for any special class or category of candidates. It is well settled that once recruitment is made from two sources, i.e., departmental promotees and direct recruitment from open market and once the concerned candidates enter into any cadre through entry point reserved for them they get fused and blended into one single cadre and their birthmarks get obliterated. This would be in consonance with the thrust of Article 16(1) of the Constitution of India. No question of exception to the said general thrust of the constitutional provision would survive as Article 16(4) would be out of picture in such a case. Consequently, the decision rendered by the Constitution Bench in *R.K. Sabharwal's* case in connection with Article 16(4) and the operation of roster for achieving the reservation of posts for STs, STs and BCs as per the scheme of reservation cannot be pressed in service for the present scheme of Rule 9(1) is not as per Article 16(4) but is governed by the general sweep of Article 16(1).

[707-A-D; 708-D-E]

R.K. Sabharwal v. *State of Punjab,* [1995] 2 SCC 745, held inapplicable.

1.2. When under the recruitment Rule 9 in question there is no reservation of any given category of candidates like SCs, STs or BCs to the posts in the cadre of Professors, appointments to the posts in the cadre have to be made in the light of the percentage of vacancies in the posts to be filled in by promotees or direct recruits. The quota of percentage of departmental promotees and direct recruits has to be worked out on the basis of the roster points taking into consideration vacancies that fall due at a given point of time. As the roster for 3 promotees and one direct recruit moves forward, there is no question of filling up the vacancy created by the retirement of a direct recruit by a direct recruit or the vacancy created by a promotee. Irrespective of the identity of the person retiring , the post is to be filled by the onward motion of 3 promotees and one direct recruit. Whenever in the cadre of Professors of Ophthalmology vacancies arise for being filled in at any given point of time, those vacancies in the posts have to be filled in by operating the roster in such a way that available vacancies get filled up by allotting 75% of them to departmental promotees and 25% to direct recruits.

[711-D-F; 712-A-B]

A 2.1. Though the word "Post" is used in Rule 9 of the rules it cannot be said that it must necessarily refer to total posts in the cadre and not to vacancies. It is obvious that recruitment to fill up the vacancies as may be existing from time to time in the cadre is controlled by the quota or percentage of posts earmarked for promotees as compared to direct recruits. For working out the rule of recruitment envisaging appointments from two sources of B promotees and direct recruits, vacancies in the cadre of Professors have to be kept in view and not the posts themselves. Rule 9 laying down quota and rota for monitoring recruitment from two sources of departmental promotees and direct recruits can work uniformly in all the departments for recruitment of Professors where the posts of Professor in the concerned cadres of C departments may consist of a solitary or two posts or more than two posts or may be five posts, as in the present case. This would result in a harmonious operation of Rule 4 and Rule 9 and no part of Rule 9 will be rendered otiose or truncated in such a case. [713-C-E; 715-A-B]

2.2. As the percentage for recruitment of Professors from departmental D candidates was 75% and 25% of the appointments to posts were reserved for direct recruits, the first three vacancies in the cadre would go to promotees and the fourth vacancy would go to a direct recruit; similarly 5th, 6th and 7th were to be filled in by departmental candidates and the 8th vacancy would go to a direct recruit, 9th 10th and 11th would go to departmental promotees and the 12th vacancy would go to a direct recruit, 13th, 14th and 15th E vacancies would go to departmental promotees. Therefore, the disputed 16th vacancy would necessarily go to a direct recruit. That is how the roster points were worked out by the appellant for regulating the recruitment from two sources i.e. promotees and direct recruits. The reasoning adopted by the High Court in connection with the working of the aforesaid Rule falls foul F on the touchstone of Article 16(1) read with statutory scheme as envisaged by these rules. [713-A-C; 715-B-C]

Paramjit Singh v. *Ram Rakha,* [1975] 3 SCC 478,

State of Kashmir v. *Triloki Nath Khosa,* [1974] 1 SCR 771 and *Roshan Lal Tandon* v. *Union of India,* [1968] 1 SCR 185, relied on.

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R.K. Sabharwal v. *State of Punjab,* [1995] 2 SCC 745 and *Post Graduate Institute of Medical Education & Research, Chandigarh* v. *Faculty Association,* [1998] 4 SCC 1, held inapplicable.

3.1. There were five posts in the cadre of Professor of Ophthalmology. H The first three vacancies would go to promotees, the fourth would go to a

direct recruit and the 5th, 6th and 7th posts would go to the promotees, Thereafter, the 8th roster point was to be filled in by a direct recruit but as this took more time a departmental promotee was promoted. Such a promotee could fill in only the 9th vacancy, which was earmarked for a departmental promotee, and not the 8th vacancy earmarked for a direct recruit. The 8th vacancy was, therefore, carried forward and when a direct recruit came to be appointed qua roster point No. 8 though he was treated as junior to the said departmental promotee, he could be said to be appointed on the roster point No. 8 which was carried forward. Consequently, the 9th roster point got exhausted by the said departmental promotee and counting 9th point as starting point for a fresh cycle for 3 promotees the 16th point must go to a direct recruit. [717-F-H; 718-A-E] A B C

3.2. If the proviso to Rule 3 were to operate, the following conditions are to be satisfied before the deeming fiction laid down therein could give signals in favour of incumbents in the cadre of Professors recruited earlier under the erstwhile executive instructions for recruitment. D

(i) The persons concerned must be holding post specified in Appendix 'B'.

(ii) They must be holding posts immediately before the commencement of the Rules i.e. before 28-7-1978, meaning thereby they must be working as Professors when the statutory rules came into force. E

(iii) If the aforesaid two conditions were satisfied then such existing incumbents to the posts in the cadre of professors would be deemed to have been appointed in service in accordance with the provisions of the rules meaning thereby, they will not be treated to be outside the cadre of Professors as envisaged by the statutory rules i.e., not ex-cadre employees and their existing incumbency will be protected though actually when they were recruited, Rule 9 was not in the picture and is not the case of any one that Rule 9 has any retrospective effect. [720-C-G] F G

3.3. If the aforesaid three conditions are satisfied the deeming fiction with reference to these incumbents holding posts of Professors in the cadre on 28-7-1978 will operate and treat them to have been appointed regularly with a view to protect their rank, grade and scale laid down in Appendix 'B' to the rules or the grade and pay scale for which they duly exercised their option earlier. The deeming fiction created by the proviso has a limited effect. H

A It only regulates the incumbency of the holders of the post of Professors in the cadre on the appointed day when the statutory rules operated and, therefore, regularisation will be deemed to be under the new rules for the purpose of protecting their rank, grade and scale of pay. The deeming fiction has been created by the proviso for this limited purpose only. This deeming fiction cannot be extended by analogy to cover any other field not meant to B be covered by its sweep. If the aforesaid four conditions envisaged by the proviso were satisfied then the incumbents of all posts in the cadre who were actually holding such posts when the statutory rules applied would remain in the cadre irrespective of the source of their earlier recruitment and nothing more. How they came into service earlier when executive instructions C held the field is a consideration, which is foreign to the express wordings of the proviso. It is also obvious that the earlier method of recruiting these persons cannot be said to have any role to play while constituting the statutory service, namely, Punjab Medical Education Service (Class-I) which had to be constituted as per Rule 9 read with Rule 3 first part with effect from 28-7-1978 and in undertaking that exercise the proviso would remain out of D picture. [720-G-H; 721-A-B; G-H; 722-A]

4. In the present case, when the statutory rules came into force on 28-7-1978, in the cadre of Professors consisting of five posts only four were actually occupied as the second incumbent had retired before the Rules came E into force and was no longer available to be covered by the sweep of the proviso to Rule 3, as he was not a person holding the post of the Professor immediately before the commencement of the rules. Thus, out of the five posts in the cadre, three were filled in by departmental promotes and one was filled in by a direct recruit. The rotational cycle, which was earlier envisaged by the executive instructions, was on the same lines as the statutory rotational F cycle envisaged by Rule 9. Therefore, the 5th incumbency would naturally have to be subjected to a new cycle of rotation as per Rule 9(i)(d) of the rules meaning thereby the 1st, 2nd and 3rd vacancies after the rules came into force would go to the promotees and the 4th would go to a direct recruit. After the 5th incumbency at roster point No. 5, the 6th, 7th and 8th points would become roster points nos. 1, 2, 3 and would be available for filling up G by promotion, when cycle of rotation under Rule 9 will operate for the first time. Then roster point No. 9 would operate as point No. 4 for direct recruit. Roster points 10,11,12 would operate as roster points 5, 6 and 7 for promotees; roster point 13 occupied by the 12th incumbent will be treated as roster point No. 8 for direct recruit and roster point Nos. 14 and 15 will in effect become H roster point Nos. 9 and 10 available to promotees. Therefore, the last vacancy

of roster point shown at serial No. 16 in substance will become roster point No. 11 available to a promotee and only thereafter the next future vacancy at point no. 17, which in substance, would be point no. 12 in the cycle envisaged by Rule 9(i)(d) would only go to a direct recruit. Uptill now that vacancy has not arisen in the cadre. The disputed point at serial no. 16, which in substance falls at roster point no. 11, therefore, goes to a promotee. Consequently, on this alternative point, the conclusion is inevitable that the disputed point no. 16 which in substance is point No. 11 when considered in the light of new cycle of rotation as per Rule 9(i)(d) as discussed earlier would be a vacancy point available to be filled in by a departmental promotee.

[722-G-H; 723-A-H; 724-A-B]

5. A pure question of law not involving disputed question of fact can be raised even for the first time before this Court.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6446 of 1998.

From the Judgment and Order dated 20.8.97 of the Punjab and Haryana High Court in C.W.P. No. 5893 of 1997.

H.K. Puri and R.S. Sodhi for the Appellants.

P.S. Patwalia and Manoj Swarup for the Respondent.

P.P. Rao, G.K. Bansal, Sanjay Bansal, Jamshed Bey and Ajay Talesara for the Respondent No. 2.

The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. Leave granted.

By consent of learned counsel for the parties, we have heard this appeal finally and the same is being disposed of by this judgment. The short question involved in this appeal is as to how the quota and rota for recruiting Professors in the Department of Ophthalmology in the medical college belonging to the appellant-State of Punjab is to be operated. The relevant factual matrix for deciding this controversy may be noted at the outset.

Background facts :

The respondent, at the relevant time when this controversy arose, was working as an Assistant Professor in the Department of Ophthalmology in the Government Medical College, Patiala. He was a promotee with effect from 20th

A June, 1984. Earlier he was working as Senior Lecturer from 6.8.1981. The question arose as to how the vacancy in the post of Professor of Ophthalmology was to be filled in on the retirement of one Dr. Shiv Inder Singh Rudra, Professor of Ophthalmology, with effect from 31.10.1996. The relevant rule governing such posts is Rule 9(i)(d) of the Punjab Medical College Education Service (Class-I) Rules, 1978 (hereinafter referred to as the B Rules'). The said rule reads as under :

> "(9) Method of Appointment :
>
> (d) In the case of Professors :
>
> C (i) 75 percent posts by promotion from amongst the Additional Professors, or, where Additional Professors are not available, from amongst the Associate Professors, or, where Associate Professors are not available, from amongst the Assistant Professors, or by transfer of official already in the service of the Government of India, or the State Government;
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> D (ii) 25 percent posts by direct recruitment;"

According to the appellant-State, as there were five posts in the cadre of Professors of Ophthalmology in the said college, on the basis of the aforesaid quota rule governing the recruitment in question, every three E vacancies of Professors in the said cadre had to be filled in by departmental promotees while the fourth vacancy would be filled in by direct recruitment and thereafter succeeding vacancies to be filled in by promotees and direct recruits in the successive cycles of 3:1. The case of the appellant-State is that in the cadre of Professors of Ophthalmology in the said college, right from F the beginning when the erstwhile executive instructions on the same lines operated till the date of the falling of the vacancy in question, there were in all 15 Professors including Dr. S.S. Rudra, who retired, as aforesaid, and, therefore, on his retirement the 16th vacancy arose. As per the appellant-State, on the operation of the quota rule and the roster cycles of 3:1, the 16th vacancy would be available to a direct recruit as under :

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> 1st vacancy to promotee, 2nd vacancy to promotee, 3rd vacancy to promotee, 4th to direct recruit, 5th, 6th and 7th to promotees, 8th to direct recruit, 9th, 10th and 11th to promotees, 12th to direct recruit; 13th, 14th and 15th to promotees and the 16th to direct recruit.

H Consequently, the said vacancy was advertised for being filled up by direct

recruitment. That brought the respondent to the High Court by way of writ petition. His contention in the writ petition was that in the light of the Constitution Bench judgment of this Court in *R.K. Sabharwal and Ors.* v. *State of Punjab and Ors.*, [1995] 2 SCC 745, as there were total five posts in the cadre of Professors of Ophthalmology 75% thereof, namely, 3.75 posts had to be reserved for promotees and 1.25% of the remaining posts had to be reserved for direct recruits. Rounding up these figures by taking digits upto .50 as nil and beyond .50 as 1, four posts in the said cadre had to be filled in at a given point of time by promotees and one post had to be filled in by direct recruitment and as at the time when the vacancy arose by retirement of Dr. S.S. Rudra, there was already one direct recruit holding the post of Professor, the vacancy in question had to go to the departmental promotee as he was the senior most Assistant Professor in the Department of Ophthalmology. His claim to be promoted to the said post should have been processed in accordance with law and the said post should not have been advertised for direct recruitment. This contention of the respondent was accepted by the Division Bench of the High Court by its impugned judgment dated 20th August, 1997. The High Court noted that as Dr. S.S. Shergill is already working as a Professor in the Department of Ophtalmology as a direct recruit the vacancy in the post in question must go to a promotee as there were only three promotee Professors occupying the posts of Professor in the department at the relevant time. Thus, there was a clear vacancy of 1 post for promotee in the said cadre of 5 posts of Professor. The fifth post, therefore, had necessarily to be filled in by promotion. The writ petition filed by the respondent was, therefore, allowed and the advertisement dated May 10, 1997 issued by the appellant-State for filling up the post of Professor in the Department of Ophthalmology by direct recruitment was quashed and set aside. The appellant-State and its authorities were directed to fill up the post by considering the eligible persons by way of promotion.

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It is now time for us to note the main contentions canvassed by learned counsel for the appellant-State of Punjab Shri H.K. Puri and also by learned senior counsel Shri P.P. Rao for the intervenor who is a prospective direct recruit candidate for the said post on the one hand and the rival contentions canvassed by learned counsel for the respondent original writ petitioner on the other.

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Rival Contentions :

Learned counsel Shri H.K. Puri for the appellant and learned Senior

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A Counsel Shri P.P. Rao, for the intervenor, submitted that the High Court had misinterpreted the ratio of the Constitution Bench judgment in the case of *R.K. Sabharwal and Ors.* (supra). That the said decision pertained to a scheme of reservation for Scheduled Caste and Scheduled Tribe persons under Article 16(4) of the Constitution and had nothing to do with the present scheme of the rule regulating the recruitment from two sources under Article B 16(1) of the Constitution. It was next contended that under latter scheme, the State authorities consistently followed the regulation of recruitment by ratio 3:1 i.e. three promotees and one direct recruit in case of all future vacancies in the cadre of Professors. That earlier by executive instructions and later by the statutory rule this was consistently followed. Non-following the said C practice would result in anomalies, which were tried to be demonstrated by them. Reliance was placed also on a Division Bench Judgment of this Court in the case of *Paramjit Singh and Ors* v. *Ram Rakha and Ors.*, [1975] 3 SCC 478 as further clarified in the very same case in [1982] 3 SCC 191 for supporting their contention.

D Shri Patwalia, learned counsel for the respondent, on the other hand, submitted that the ratio of the decision in *R.K. Sabharwal's* case (supra) was rightly applied by the High Court. It was also submitted in the alternative by him that even if the submission of learned counsel for the appellant and learned senior counsel for the intervenor is right even then in view of the E proviso to Rule 3 of the statutory rules, the cycle of 3:1 would operate in connection with all future vacancies that fell in the cadre w.e.f. 28.7.1978 and earlier cycle had to be ignored. It was also contended that even in the working of the cycle in the cadre in question the 16th vacancy (which would become the 11th vacancy if reckoned from a roster commencing from 28.7.78) would go to promotee and not to direct recruit. Both learned counsel for the appellant F and learned counsel for the intervenor submitted that this new contention regarding the applicability of the proviso to Rule 3 should not be permitted to be raised for the first time in these proceedings. Therefore, once it is held that the High Court had wrongly applied the ratio of the decision in *R.K. Subharwal's* case (supra) the appeal is required to be allowed.

G In the light of the aforesaid rival contentions, the following points arise for our determination :

(i) Whether the interpretation of Rule 9(i)(d), which appealed to the High Court, is a correct one;

H (ii) Even if the roster operates on vacancies in such a way that from

the very inception of the roster, vacancies on first three roster points will go to promotees and the vacancy on the fourth roster point will go to a direct recruit and similarly, in future for further vacancies, whether the disputed 16th vacancy should go to a direct recruit or a promotee; A

(iii) If the answer to the first point is in negative, whether the ultimate decision of the High Court can be sustained on the conjoint reading of Rule 3 and Rule 9 (i) (d) of the statutory rules as submitted by learned counsel for the respondent; and B

(iv) What final order? C

We shall deal with the aforesaid points in the same sequence in which they are noted herein-above.

Point No. 1:

So far as the first point is concerned, the High Court, in the impugned judgment, has heavily relied upon the Constitution Bench decision of this Court in the case of *R.K. Sabharwal & Ors.* (supra). Now it has to be kept in view that the Constitution Bench of this Court in the aforesaid decision was concerned with entirely a different question, namely, as to how the roster indicating reserved points in connection with reservation of posts in a cadre to be filled in by Scheduled Caste (for short 'SC'), Scheduled Tribe (for short 'ST') and Backward Class (for short 'BC') candidates could be operated. Paragraph 4 of the Report lays down that "when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts." In this connection, reliance was placed by the Constitution Bench on Article 16(4) of the Constitution of India which permits the State Govt. to make any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, was not adequately represented in the services under the State. In the light of the aforesaid scheme of the Constitution, the Bench had to consider whether reservation of posts for SCs, STs and BCs when sought to be secured by way of operation of roster could permit the operation of the roster *qua* the posts or vacancies in the cadre. It was noted in this connection that if the roster operated on vacancies then it may happen that at a given point D E F G H

A of time the percentage of reservation of posts for SCs, STs and BCs may exceed the permissible percentage of reservation. In paragraph 5 of the Report, it was observed that reservations provided under the impugned Government instructions permitted 16% of the posts to be reserved for members of SCs and BCs and it could be achieved by the roster to be maintained in each B department. The roster had to be implemented in the form of running account from year to year. In connection with "16% of the posts..." to be reserved for members of SCs and BCs in promotional posts, it was held as under:-

> ".....when recruitment to a cadre starts then 14 posts earmarked in the 100 points roster are to be filled from amongst the members of Scheduled C Castes.....When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate D the roster. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive."

E The aforesaid observations, which were heavily relied on by the High Court, and are also relied upon by the respondent's (writ petitioner's) counsel before us, cannot be of any assistance to the appellant-State on the facts of the present case. The result is obvious. As per Article 16(4) which carves out a separate field for itself from the general sweep of Article 16(1) which guarantees equality of opportunity in matters of appointments in Govt. services to all F citizens of India, the reservation for these categories in employment has to be achieved by earmarking requisite percentage of posts for the reserved category of candidates and by pitchforking these posts on roster points on requisite points roster and when such a roster takes a full cycle, posts earmarked on reserved points will enable the requisite reserved category of G candidates to fill up these posts. After that is done, the roster would be treated to have achieved its purpose. Whenever a reserved candidate vacated a reserved post, the said post was liable to be filled only by a candidate belonging to the reserved category If after the roster is first operated and thereafter it is again operated on future vacancies also, a situation may arise wherein a cadre may get reserved category exceeding permitted *quota* of H reservation. It is to avoid this contingency that the Constitution Bench laid

down in the aforesaid decision as indicated therein. So far as Rule 9 of the Rules in the present case is concerned, it has nothing to do with reservation of posts in the cadre of Professors. It is not a rule of reservation envisaged for a specified category of persons as permitted by Article 16(4) of the Constitution. On the contrary, it is a rule of recruitment from two different sources, namely, in case of Professor's cadre 75% of posts had to be filled in by promotion while 25% by direct recruitment. These two sources of recruitment permit departmental promotees and direct recruits from the open market to get absorbed in the cadre. They merely serve as two entry points for the cadre. Rule 9 deals with reservation of appointment to the posts of Professor and does not deal with reservation of posts of Professor for any special class or category of candidates. It is well settled that once recruitment is made from two sources i.e. departmental promotees and direct recruitment from open market and once the concerned candidates enter into any cadre through entry point reserved for them, they get fused and blended into one single cadre and their birth marks get obliterated. In this connection, we may usefully refer to a Constitution Bench decision of this Court in *State of Jammu & Kashmir* v. *Triloki Nath Khosa,* [1974] 1 SCR 771. Chandrachud, J. (as he then was) speaking for the Constitution Bench while dealing with recruitment to a cadre from two sources, namely, direct recruits and promotees in the light of an earlier judgment of this Court in *Roshan Lal Tandon* v. *Union of India,* [1968] 1 SCR 185 made the following pertinent observations :

> "The key words of the judgment are: "the recruits from both the *sources* to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one *source* as against the recruits from the other *source* in the matter of promotion to Grade C". (emphasis supplied). By this was meant that in the matter of promotional opportunities to Grade 'C'," no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn. That is to say, if apprentice Train Examiners who were recruited directly to Grade 'D' as Train Examiners formed one common class with skilled artisans who were promoted to Grade 'D' as Train Examiners, no favoured treatment could be given to the former merely because they were directly recruited as Train Examiners and no discrimination could be made as against the latter merely because they were promotees. This is the true meaning of the observation extracted above no more than this can be read into the sentence next following: "To put it differently, once the direct recruits and promotees are absorbed into one cadre, they form one

A class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C' ". In terms, this was just a different way of putting what had preceded.

Thus, all that Roshan Lal' case lays down is that direct recruits and promotees lose their birth-marks on fusion into a common stream of
B service and they cannot thereafter be treated differently by reference to the consideration that they were recruited from different sources. Their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequals once again".

C It has, therefore, to be appreciated that when posts in a cadre are to be filled in from two sources whether the candidate comes from the source of departmental promotees or by way of direct recruitment once both of them enter a common cadre their birth marks disappear and they get completely integrated in the common cadre. This would be in consonance with the thrust of Article 16(1) of the Constitution of India. No question of exception to the
D said general thrust of he constitutional provision would survive as Article 16 (4) would be out of picture in such a case. Consequently the decision rendered by the Constitution Bench in *R.K. Sabharwal's* case (supra) in connection with Article 16(4) and the operation of roster for achieving the reservation of posts for SCs, STs and BCs as per the scheme of reservation cannot be
E pressed in service for the present scheme of Rule 9(1) is not as per Article 16(4) but is governed by the general sweep of Article 16(1). The attempt of learned counsel for the respondent to treat a quota rule as reservation rule would result in requiring the State authorities to continue the birth-marks of direct recruits and promotees even after they enter the common cadre through two separate entry points regulating their induction to the cadre. Therefore,
F the roster for 3 promotees and one direct recruit is to be continued every time a vacancy arises and there is no question of filling up a vacancy arising out of a retirement of a direct recruit by a direct recruit or on the retirement vacancy of a promotee by a promotee. Consequently, the question of rotating the vacancies as posts or for treating the posts mentioned in the rules of
G recruitment as necessarily referable to total posts in the cadre at a given point of time in the light of *R.K. Sabharwal's* judgment (supra), therefore, cannot survive for in the case of a quota rule between direct recruits and promotees the same is to be judged on the touchstone of Article 16(1) and the statutory rules governing the recruitment to the posts of Professor constituting the Punjab Medical Education Service (Class-I) and not on the basis of Article
H 16(4). The Division Bench in the impugned judgment with respect wrongly

applied the ratio of *R.K. Sabharwal's* case (supra) governing Article 16(4) to the facts of the present case which are governed by Article 16(1). A

We may also mention that in brief written submissions filed on behalf of the respondent an attempt is made to show that the word 'reserve' means to appropriate or to set aside. Dictionary meaning found in 'The Law Lexicon' 1997 edition of P. Ramanatha Aiyar is pressed in service in this connection. B It is stated therein that reserve would mean 'to set apart' but as we have already discussed Rule 9 is concerned with reservation of appointments from two sources of recruitment. It does not envisage a scheme of reservation of posts. Consequently, as the aforesaid dictionary meaning of term 'reserve' cannot advance the case of the respondent.

C

On the other hand, the situation which has fallen for our consideration in the present case in the light of Article 16(1) is squarely covered by a decision of this Court in *Paramjit Singh's* case (supra) as clarified by a latter decision in the very same case reported in [1982] 3 SCC 191. In the aforesaid main case, D.A. Desai, J., speaking for a bench of two learned Judges of this Court, had to consider in paragraph 11 of the Report a recruitment rule which D permitted fixed percentage of posts to be filled up in the given cadre from two different sources, namely, promotees and direct recruits. Rule 6 of the Punjab Police Service Rules, 1959, which came for consideration in that case provided for a method of recruitment from two different sources i.e. 80% by promotion from the rank of Inspectors and 20% by direct recruitment. Examining the E working of the aforesaid quota rule for recruitment in the light of the relevant rotational scheme of vacancies in the cadre to which such recruitment was to be made, the following pertinent observations were made in paragraph 11 of the Report:

> "Where recruitment to a cadre is from two sources and the Service F Rules prescribe quota for recruitment for both sources a question would always arise whether the quota rule would apply at the initial stage of recruitment or also at the stage of confirmation. Ordinarily, if quota is prescribed for recruitment to a cadre, the quota rule will have to be observed at the recruitment stage. The quota would then be co-related to vacancies to be filled in by recruitment but after G recruitment is made from two different sources they will have to be integrated into a common cadre and while so doing, the question of their *inter se* seniority would surface....."

As there was some doubt about the observations found in the aforesaid paragraph 11 and as to how the recruitment rule in question was to be H

A operated in the light of the quota prescribed therein and the rotational method of achieving the said quota of recruitment from two sources, a later Bench clarified the position in the subsequent judgment in the case of *Paramjit Singh* (supra). Another bench of two learned Judges, wherein D.A.Desai, J., was common, clarified the observation in paragraph 11 of the earlier Report as under :

B

"In our opinion there is no ambiguity in the judgment. Ordinarily speaking, where recruitment is from two sources with a view to integrating recruits from both sources after the recruitment seniority is determined from the date of entry into the cadre except where there C has been a substantial violation of the quota giving undeserved advantage to one or the other source. Seniority ordinarily speaking is determined with reference to the date of entry into the cadre which in service jurisprudence is styled the date of continues officiation. These notions of service jurisprudence may have to yield place to the specific rules and the fact situation with reference to Rule 10 did D compel this Court to depart from the normal concept in service jurisprudence. However, introduction of a roster system is very well known in service jurisprudence. What this Court meant while saying that when a quota rule is prescribed for recruitment to a cadre it meant that quota should be co-related to the vacancies which are to be filled E in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule. Promotees who came to the service at an advanced age may retire, early and direct recruits who enter the service at a comparatively young age may continue for a long time. If, therefore, in a given year larger number of promotees retire and every time the F vacancy is filled in by referring to the source from which the retiring person was recruited it would substantially disturb the quota rule itself. Therefore, while making recruitment quota rule is required to be strictly adhered to. That was what was meant by this Court when it said :

G

"The quota rule would apply to vacancies and recruitment has to be made keeping in view the vacancies available to the two sources according to the quota. The quota in the present case is 4:1 that is, four promotees to one direct recruit. Therefore, whenever vacancies occur in the service the appointing authority has to go on recruiting H according to quota. In other words, whenever vacancies occur, first

recruit four promotees irrespective of the factors or circumstances causing the vacancies and as soon as four promotees are recruited bring in a direct recruit. That was what was meant by this Court when it said that a roster has to be introduced and this roster must continue while giving confirmation. The sentence which seems to have created a difference of opinion reads as under :

> "A roster is introduced while giving confirmation ascertaining every time which post has fallen vacant and recruit from that source has to be confirmed in the post available to the source."

The sentence cannot be read in isolation. It has to be read with the earlier sentence that the quota rule would apply to the vacancies and recruitment has to be made keeping in view the vacancies available to the two sources according to the quota. The Court then proceeded to say that if the quota rule is strictly adhered to there will be no difficulty in giving confirmation keeping in view the quota rule even at the time of confirmation."

The aforesaid decision which squarely applies to the facts of the present case, therefore, leaves no room for doubt that when under the recruitment Rule 9 in question there is no reservation of any given category of candidates like SCs, STs or BCs to the posts in the cadre of Professors, appointments to the posts in the cadre have to be made in the light of the percentage of vacancies in the posts to be filled in by promotees or direct recruits. The quota of percentage of departmental promotees and direct recruits has to be worked out on the basis of the roster points taking into consideration vacancies that fall due at a given point of time. As stated earlier, as the roster for 3 promotees and one direct recruit moves forward, there is no question of filling up the vacancy created by the retirement of a direct recruit by a direct recruit or the vacancy created by a promotee by a promotee. Irrespective of the identity of the person retiring, the post is to be filled by the onward motion of 3 promotees and one direct recruit. Consequently, learned counsel for the appellant and learned senior counsel for the intervenor were right when they contended that the High Court in its impugned judgment had patently erred in invoking the ratio of decision of this Court in *R.K. Sabharwal's* case (supra) which was rendered in an entirely different context for resolving an entirely different controversy which did not arise on the facts of the present case. They were also right in contending that the ratio of the decision of this Court in *Paramjit Singh's* case (supra) read with the decision of this Court in the same case reported in [1982] 3 SCC 191 would get squarely attracted

in the facts of the present case. Once that conclusion is reached, the result becomes obvious. Whenever in the cadre of Professors of Ophthalmology vacancies arise for being filled in at any given point of time, those vacancies in the posts have to be filled in by operating the roster in such a way that available vacancies get filled up by allotting 75% of them to departmental promotees and 25% to direct recruits. Exactly in this way the roster in the present case was operated by the appellant-State to regulate entry in the cadre of Professors. The factual position in the present case, in the light of operation of the roster for appointing candidates in the cadre of Professors of Ophthalmology projects the following picture:

AS PER THE STATE GOVERNMENT ROSTER POINT:

1.	Dr. Dhanwant Singh	3.5.67	Promotion
2.	Dr. Ranbir Singh	9.10.68	Promotion
3.	Dr. Sohan Lal Sharma	10.9.69	Promotion
4.	Dr. M.R.Chadha	13.12.71	Direct recruitment
5.	Dr. Daljit Singh	26.6.74	Promotion
6.	Dr. K.K. Khanna	29.6.81	Promotion
7.	Dr. D.C. Bansal	9.1.82	Promotion
8.	Dr. Charanjit Lal	2.2.85	Direct recruitment
9.	Dr. S.S. Rudra	1.11.83	Promotion
10.	Dr. D.C. Aggarwal	26.9.85	Promotion
11.	Dr. M.S. Hora	3.10.85	Promotion
12.	Dr. S.S. Shergill	8.7.94	Direct recruitment
13.	Dr. Pawanjit Singh Sandhu	20.10.90A 9.10.93R	Promotion
14.	Dr. M.S.Bhatia	6.12.96	Promotion
15.	Dr. Stal Paul	7.12.96	Promotion

As noted earlier, we are concerned with the disputed vacancy no. 16 which occurred at the *roster point no. 16.* As the percentage for recruitment of Professors from departmental candidates was 75% and 25% of the appointments to posts were reserved for direct recruits, the first three vacancies in the cadre would go to promotees and fourth vacancy would go to a direct recruit, similarly 5th, 6th and 7th were to be filled in by departmental candidates and the 8th vacancy go to direct recruit, 9th, 10th and 11th would go to departmental promotees and the 12th vacancy would go to a direct recruit 13th, 14th and 15th vacancies would go to departmental promotees. Therefore, the disputed 16th vacancy would necessarily go to a direct recruit. That is how the roster points were worked out by the appellant for regulating the recruitment from two sources i.e. promotees and direct recruits. Though the word "post" is used in Rule 9 of the rules it cannot be said that it must necessarily refer to total posts in the cadre and not to vacancies. It is obvious that recruitment to fill up the vacancies as may be existing from time to time in the cadre is controlled by the quota or percentage of posts earmarked for promotees as compared to direct recruits. As laid down by this Court in the aforesaid two decisions rendered by the Division Benches of two learned Judges, speaking through D.A.Desai, J., it has to be held that for working out the rule of recruitment envisaging appointments from two sources of promotees and direct recruits vacancies in the cadre of Professors had to be kept in view and not the posts themselves. Learned counsel for the appellant and learned senior counsel for the intervenor were right when they contended that if the view which appealed to the High Court is to be accepted the very Rule 9 and the scheme envisaged by it for effecting appointments to the cadre in the ratio of 75% for promotees and 25% for direct recruits would get stultified and frustrated. It was rightly submitted that if four vacancies are filled in from promotees and only one vacancy is to be kept for a direct recruit on the basis that there are total five posts in the cadre, then 75% of five posts would work out at 3.75 and have to be rounded up as four for the promotees and the remaining 1.25 posts have to be rounded up as only one being less than 1.50. Thus, in substance, the source of recruitment for promotees would get enhanced to 80% and that of direct recruits would be reduced to 20%. That would *fly* in the face of the statutory rule which does not envisage such percentage of reservation for promotees and direct recruits. It was also rightly contended that the rule in question controls the recruitment to entire Punjab Medical Education Service (Class I). This service consist of various categories of posts as specified in Appendix 'B' to the rules. Rule 4 provides that the service shall comprise the posts shown in Appendix 'B'. When we turn to Appendix 'B', we find that there are number of posts of Professors sanctioned

A as on 1st September, 1974 in various disciplines. For example, in the Department of Pharmacology there are only 2 posts, while in the Department of Forensic Medicine there is only one post of Professor. Now, if the reasoning adopted by the High Court is pressed in service for applicability of Rule 9 of the recruitment rules then a very curious and anomalous situation would arise. In the Department of Pharmacology out of the two posts of Professor if 75%
B of the total posts in the cadre are to be earmarked for being filled in by departmental promotees then it would result in earmarking of 1.50 posts for promotees and only 0.50% posts for direct recruits. Ignoring these digits it would result in earmarking one post for promotee and one post for a direct recruit in the entire cadre of Professors of Pharmacology. If that happens, then
C earmarking would reflect an entirely different scheme of recruitment rules namely, 50% of posts of Professor would be available to be filled up by promotees and 50% of posts would be available to be filled up by direct recruits. That is not the scheme of Rule 9. Similarly, in case of Forensic Medicine there is only one post of Professor. Adopting the line of reasoning which appealed to the High Court for working out Rule 9 if 75% of the said
D posts of Professor is earmarked for promotees it would result into one as more than 0.50% has to be rounded up to one. Therefore, there being only one post of Professor in the cadre of Professor of Forensic Medicine, it will always to go to a promotee and there will be no direct recruitment for that post. Meaning thereby, Rule 9 in its applicability for regulating recruitment to the
E post of Professor in Forensic Medicine would result in earmarking the post for a departmental promotee only by way of 100% reservation and there will be no direct recruitment to the said post at any time in future making 0% reservation for that service. This would stultify the operation of Rule 9 so far as the cadre of Professors in Forensic Medicine goes. It must, therefore, be held that Rule 9 which regulates appointments to the posts in the Punjab
F Medical Education Service (Class-I) has to be applied uniformly for recruitment of Professors in all the cadres of disciplines. In such cases the method followed by the appellant-State for recruitment of Professors in diverse cadres of discipline as shown in Appendix 'B' to the rules remains the only workable one. It is to the effect that as and when vacancy arises in the concerned cadre
G of posts in any of the discipline first three future vacancies would go to departmental promotees and the fourth future vacancy would go to a direct recruit. Meaning thereby, even in the cadre of Professor of Forensic Medicine where only one post of Professor is for the first time to be filled in, it will go to a promotee and as and when such promotee retires or resigns or unfortunately dies in harness the second vacancy would also go to a promotee,
H similarly, the third one but the fourth vacancy would go to a direct recruit.

That is how Rule 9 laying down quota and rota for monitoring recruitment from two sources of departmental promotees and direct recruits can work uniformly in all the departments for recruitment of Professors where the posts of Professor in the concerned cadres of departments may consist of a solitary post or two posts or more than two posts or may be five posts, as in the present case. This would result in a harmonious operation of Rule 4 and Rule 9 and no part of Rule 9 will be rendered otiose or truncated in such a case. It must, therefore, be held that reasoning adopted by the High Court in connection with the working of the aforesaid rule falls foul on the touchstone of Article 16(1) read with statutory scheme as envisaged by these rules. In the light of our aforesaid conclusion, it become obvious that the disputed 16th vacancy in the cadre of Professors of Ophthalmology consisting of five posts would necessarily go to direct recruit and not a departmental promotee as wrongly assumed by the High Court while allowing the writ petition.

Before parting with this discussion, we may mention one submission placed for our consideration by learned counsel for the respondent. Placing reliance on a latter Constitution Bench judgment in Post Graduate Institute of Medical *Education & Research, Chandigarh* v. *Faculty Association and Ors.*, [1998] 4 SCC 1, it was contended that this Court in the light of *R.K. Sabharwal's* case (supra) held that where there was only one post in a cadre, there could not be any reservation under Article 16 (4) for SCs and STs and BCs. Similarly, if there is one post of a Professor, Rule 9 may not apply. In this connection, Paragraphs 34 and 35 of the Report at page 23 were pressed in service. Ray, J., speaking for the Constitution Bench, stated in the said paragraphs as under:

> "In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.
>
> Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post

whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society."

It is difficult to appreciate how this decision can be of any assistance to learned counsel for the respondent. It is obvious that in the aforesaid case the Constitution Bench was concerned with a similar scheme of reservation for SC, ST & BC candidates and, therefore, Article 16(4) squarely arose for consideration. To that extent the said decision falls in line with the legal position examined by the earlier Constitution Bench in *R.K. Sabharwal's* case (supra). As we have already opined earlier, the factual and legal situation in the present case is entirely different. We are not concerned with any scheme of reservation under Article 16(4). Therefore, *R.K. Sabharwal's* case (supra) cannot be pressed in service, as seen earlier. If that is so, on the same lines the ratio of the decision of this Court in the *Post Graduate Institute of Medical Education & Research case* (supra) would also not apply. While deciding the question of working out the recruitment rule for appointment from two sources of promotees and direct recruits wherein only Article 16(1) would hold the field, un-inhibited by the exceptional category carved out from said sub-article (1) by sub-article (4) thereof. The first point for determination is, therefore, answered in favour of the appellants and against the respondent.

Point No. 2 :

So far as this point is concerned, learned counsel for the respondent heavily relied upon the factual position regarding constitution of the cadre of Professors of Ophthalmology, which according to him, would show the correct application of the roster points. It was submitted that even assuming that the interpretation of learned counsel for the appellant for working out the roster for future vacancies is correct, and which we have found to be correct while answering point no.1 as aforesaid, according to learned counsel for the respondent, when vacancies were filled up from the very inception in the cadre consisting of five posts of Professor of Opthalmology, the following picture emerged :

THE CORRECT POSITION ACCORDING TO LEARNED COUNSEL FOR THE RESPONDENT:

1.	Dr. Dhanwant Singh	3.5.67	Promotion
2.	Dr. Ranbir Singh	9.10.68	Promotion
3.	Dr. Sohan Lal Sharma	10.9.69	Promotion
4.	Dr. M.R.Chadha	13.12.71	Direct recruitment
5.	Dr. Daljit Singh	26.6.74	Promotion
6.	Dr. K.K. Khanna	29.6.81	Promotion
7.	Dr. D.C. Bansal	9.1.82	Promotion
8.	Dr. S.S. Rudra	1.11.83	Promotion
9.	Dr. Charanjit Lal	2.2.85	Direct recruitment
10.	Dr. D.C. Aggarwal	26.9.85	Promotion
11.	Dr. M.S. Hora	3.10.85	Promotion
12.	Dr. Pawanjit Singh Sandhu	20.10.90A 1.10.93R	Promotion
13.	Dr. S.S. Shergill	8.7.94	Direct recruitment
14.	Dr. M.S.Bhatia	6.12.96	Promotion
15.	Dr. Sat Paul	7.12.96	Promotion

It was submitted that let us assume that the first three vacancies in the said cadre of five Professors would go to promotees and the fourth point would go to a direct recruit, then up to Dr D.C. Bansal at point no. 7, rotational cycle can be said to have correctly operated. However when we go to roster point no. 8, that was filled in by Dr. S.S. Rudra on 1.11.83 by promotion, it could be said that the 8th point which would have been reserved for direct recruit was made available by the department on account of the exigency of service to a promotee. Therefore, 8th point was shifted to 9th point which was given to Dr. Charanjit Lal by way of direct recruitment. Thereafter when the cycle was to operate vacancies arising beyond the 9th vacancy 10th, 11th and 12th vacancies would go to promotees, the 13th vacancy would go to a direct recruit and thereafter the next 14th, 15th and 16th vacancies would go to promotees as per the methodology adopted by the appellants themselves while working out this roster. It was, therefore, contended that 16th vacancy

A which is the disputed vacancy must go to a promotee. It is difficult to appreciate this contention. Reason is obvious. The so-called correct position of incumbency in the cadre of Professors consisting of five posts as submitted for our consideration by learned counsel for the respondent clearly reflects the seniority list and has nothing to do with the situation emerging from the working out of the roster controlling the entry points for recruitment to the B said posts from two different sources. It is obvious that the 8th roster point was to be filled in by a direct recruit and as the counter filed by the appellant in the present proceedings shows that the filling up of the post by direct recruitment took more time because it had to be done through Public Service Commission. Hence the departmental promotee Dr S.S. Rudra was promoted on C 1.11.83 but while he was so promoted, he could fill in only the 9th vacancy which was earmarked for a departmental promotee. The 8th roster point earmarked for a direct recruit was, therefore, carried forward and when Dr. Charanjit Lal came to be appointed qua roster point no. 8 on 2.2.85 though he was treated as junior to *Dr S.S. Rudra,* he could be said to be appointed on the roster point no. 8 which was carried forward. He could not be said to have D occupied roster point no. 9 which was meant only for a departmental promotee and on which point Dr S.S. Rudra got advance or accelerated promotion. Consequently, the 9th roster point got exhausted by promotee Dr. Rudra and 10th, 11th points went to promotees, counting 9th point as starting point for fresh cycle for 3 promotees and 12th point then was for direct recruit- Dr S.S. E Shergill. Similarly, 13th, 14th and 15th vacancies went to promotees and consequently, the 16th vacancy must go to a direct recruit as rightly submitted by learned counsel for the appellants and learned senior counsel for the intervenor and that is how the roster on reservation of vacancies operated from the inception i.e. from 1967 onwards firstly, as per executive instructions and later on with effect from 28th July, 1978 as per the statutory rules. The F working of the roster points up to 15 as indicated in an earlier part of this judgment subject to what has to be considered while deciding point no. 3, cannot be found fault with. In the result, the second point for determination also has to be answered in favour of the appellant and against the respondent.

G **Point No. 3 :**

In the light of our conclusions on point nos. 1 and 2, this appeal would have been required to be allowed and the decision of the High Court would have been required to be set aside. However, a fresh contention canvassed for our consideration in the alternative by learned counsel for the respondent H requires a closer scrutiny, as in our view the decision thereon in favour of the

respondent may entitle him to succeed and get the final decision of the High Court allowing the writ petition sustained on this alternative ground. A

We may, however, mention at the outset, one primary objection pressed in service by Shri Rao, learned senior counsel for the intervenor in this connection. He submitted that this alternative contention in any case should not be entertained for the first time in this appeal as such a contention was not canvassed before the High Court in the writ petition. That may be so. However, we fail to appreciate how a pure question of law centering round the construction of the proviso to statutory Rule 3 cannot be agitated by learned counsel for the respondent for our consideration in these proceedings. No disputed question of fact arises for consideration as wrongly assumed by learned senior counsel for the intervenor. Accepting the facts as well established on the record the only question which would become relevant for considering this alternative contention would be the correct scope and ambit of the proviso to statutory Rule 3 of the rules. For raising such a pure question of law, therefore, respondent's learned counsel, cannot be told off-the-gates. This preliminary objection is, therefore, overruled. B C D

In support of this point, it was submitted by learned counsel for the respondent that the Punjab Medical Education Service (Class-I) was constituted for the first time by the statutory rules with effect from 28th July, 1978. That Rule 4 of the rules lays down that the service shall comprise of posts shown in Appendix 'B'. We have referred to Rule 4 and entries in Appendix 'B' while considering point no.1 Rule 9(i) lays down that appointment to the posts in the service shall be made in the manner provided therein. As noted earlier, Rule 9(i)(d) enjoins that in case of Professors 75% of posts were to be filled in by promotion while 25% posts by direct recruitment. Therefore, the Punjab Medical Education Service (Class-I) which was constituted with effect from 28th July, 1978 as per the statutory rules had to comprise of cadre of Professors mentioned in Appendix 'B'. The recruitment to such cadres of Professors would be governed by Rule 9(i)(d). It becomes, therefore, clear that from 28th July, 1978 onwards while working out the statutory scheme of the rules for the purpose of constitution of the service in question, the rotational cycle envisaged by the quota of rule as aforesaid had to start from the very first vacancy in the cadre occurring on or after 28th July, 1978. This conclusion is reached on a conjoint reading of Rules 3 and 9 of the rules as aforesaid. As Rule 3 clearly provides that there shall be the constitution of service to be known as the "Punjab Medical Education Service (Class-I)" consisting of persons recruited to the service under Rule 9 after the commencement of E F G H

A these rules. Thus, fresh recruitment to the service had to be made under Rule 9 after the commencement of the rules. However, a question arose as to what was to be done with respect to those incumbents in the cadre who were earlier recruited when the erstwhile executive instructions were holding the fleld and wherein the same quota rule governing the recruitment from two sources i.e. promotion and direct recruitment was holding the field. For answering that B question proviso to Rule 3 got enacted. It has to be examined closely. It lays down that "the persons holding the posts specified in Appendix 'B' to these rules immediately before such commencement shall be deemed to be appointed to the service in accordance with the provisions of the rules on the designation, grade and any scale laid down in Appendix 'B' to these rules or the grade C and pay scale for which they duly exercised their option". If the proviso was to operate, the following conditions were to be satisfied before the deeming fiction laid down therein could give signals in favour of incumbents in the cadre of Professors recruited earlier under the erstwhile executive instructions for recruitment :

D (i) The persons concerned must be holding posts specified in Appendix 'B';

(ii) They must be holding posts immediately before the commencement i.e. immediately before 28th July, 1978, meaning thereby they must be working as Professors when the statutory E rules came into force;

(iii) If the aforesaid two conditions were satisfied then such existing incumbents to the posts in the cadre of Professors would be deemed to have been appointed in service in accordance with the provisions of the rules meaning thereby, they will not be F treated to be outside the cadre of Professors as envisaged by the statutory rules i.e. not ex-cadre employees and their existing incumbency will be protected though actually when they were recruited, Rule 9 was not in the picture and it is not the case of any one that Rule 9 has any retrospective effect; if the aforesaid G three conditions are satisfied the deeming fiction with reference to these incumbents holding posts of Professors in the cadre on 28th July 1978, will operate and treat them to have been appointed regularly with a view to protect their rank, grade and scale laid down in Appendix 'B' to the rules or the grade and pay scale for which they duly exercised their option earlier. The deeming H fiction created by the proviso has a limited effect. It only regulates

the incumbency of the holders of the post of Professors in the cadre on the appointed day when the statutory rules operated and, therefore, regularisation will be deemed to be under the new rules for the purpose of protecting their rank, grade and scale of pay. The deeming fiction has been created by the proviso for this limited purpose only. It, therefore, becomes obvious that this deeming fiction cannot be extended by analogy to cover any other field not meant to be covered by its sweep. It is difficult to accept the contention of learned senior counsel *Shri Rao* for the intervenor that because of this deeming fiction it can also be visualised that all those Professors who were earlier recruited under the erstwhile executive instructions can be deemed to have been recruited as per 75% quota of departmental promotees and 25% quota of direct recruits as envisaged by Rule 9(i)(d). To accept this contention would amount to re-writing the proviso to the effect that the persons appointed to the posts specified in Appendix 'B' of these rules immediately before such commencement including those who have retired and were not holding any post as on 28th July, 1978 shall be deemed to be in service in accordance with the provisions of these rules on the designation, grade and any scale laid down in Appendix 'B' etc. to these rules or the grade and pay scale for which duly exercised their option. It is obvious that the proviso has purposely not used the phraseology "persons appointed to the posts" but has only used the phrase "persons holding posts as found in Appendix B". The source of their appointments under the erstwhile executive instructions and the erstwhile percentage of reservation earmarking posts for promotees and direct recruits as per executive instructions earlier operating, would remain outside the scope and sweep of the proviso. In other words, if the aforesaid four conditions envisaged by the proviso were satisfied then the incumbents of all posts in the cadre who were actually holding such posts when the statutory rules applied would remain in the cadre irrespective of the source of their earlier recruitment and nothing more. How they came into service earlier when executive instructions held the field is a consideration which is foreign to the express wordings of the proviso. It is also obvious that the earlier method of recruiting these persons cannot be said to have any role to play while constituting the statutory service, namely,

Punjab Medical Education Service (Class-I) which had to be constituted as per Rule 9 read with Rule 3 first part with effect from 28-7-78 and in undertaking that exercise the proviso would remain out of picture. Valiant effort made by learned senior counsel Shri Rao for the intervenor to extend the scope and reach of the proviso so as to import earlier cycles of rotation of vacancies which had got filled in past when executive scheme of quota and rota operated and to treat them as cycles of rotation under Rule 9 cannot be countenanced.

Once it is held on the correct construction of the proviso to Rule 3 that the incumbents who were holding the posts of Professor in the cadre of Professors of Ophthalmology on 28th July, 1978 were protected and remained employed in that cadre, let us see what factual position emerges by the operation of the proviso on which there is no dispute between the parties. In fact Shri Rao, learned senior counsel for the intervenor in fairness placed for our consideration a chart showing the exact factual data, which is also accepted by learned counsel for the respondent. The chart submitted by Shri Rao for our consideration is as under:

Appointments made according to roster in the cadre of Professors of Ophthalmology from time to time :

Sl. No.	Name	Dt. of Joining	Dt. of Retitrement
1.	Dr. Dhanwant Singh	3.5.67(P)	After 28.7.1978
2.	Dr. Ranbir Singh	9.10.68(P)	Retired on 1.6.1974
3.	Dr. Sohan Lal Sharma	10.9.69(P)	After 28.7.1978
4.	Dr. M.R.Chadda	13.12.71(D)	After 28.7.1978
5.	Dr. Daljit Singh	26.6.74(P)	After 28.7.1978

Now, a mere look at this chart shows that on 28th July, 1978 when the statutory rules came into force, in the cadre of Professors consisting of five posts only four were actually occupied as Dr. Ranbir Singh who had joined on 9.10.1968 being a promotee had retired from 1st June, 1974 and was no longer available to be covered by the sweep of the proviso to Rule 3, as he was not a person holding the post of the Professor immediately before the commencement of the rules. Once Dr.Ranbir Singh is excluded from

consideration and is not within the sweep of the proviso to Rule 3, the latter will project the following picture qua incumbents to the posts of Professor in the cadre in question. Dr. Dhanwant Singh, Dr. Sohan Lal Sharma and Dr. Daljit Singh were promotee Professors while Dr M.R.Chadda was a direct recruit. Thus, out of the five posts in the cadre, three were filled in by departmental promotees and one was filled in by a direct recruit. The rotational cycle which was earlier envisaged by the executive instructions was on the same lines as the statutory rotational cycle envisaged by Rule 9. Meaning thereby, the first three vacancies will go to promotees and the fourth vacancy will go to a direct recruit. Consequently, by the time the statutory rules came into force and constituted the Punjab Medical Education Service (Class-I) in the cadre of Professors of Ophthalmology three posts were filled in by promotees and one post was filled in by a direct recruit and the proviso would protect them and treat them as cadre employees. That resulted in the complete running up of the first rotational cycle as according to learned counsel for the appellant and learned senior counsel for the intervenor the rotational cycle for the purpose of earmarking the posts in the cadre of Professors would be 75% of posts for promotees and 25% of posts for direct recruits. Meaning thereby, out of four vacancies three will go to promotees and one will go to a direct recruit. Moment that is achieved, the cycle took a full turn even under the proviso, as on 28-7-78. As per the proviso to Rule 3 in the light of the aforesaid factual data, therefore, there is no deviation from the conclusion that the earlier cycle of rotation envisaged by the erstwhile executive instructions had taken a full turn. Therefore, any vacancies arising after Dr. Daljit Singh's incumbency would naturally have to be subjected to a new cycle of rotation as per Rule 9(i)(d) of the rules meaning thereby the 1st, 2nd and 3rd vacancies after the rules came into force would go to promotees and 4th would go to a direct recruit. When we turn to the incumbency position in the light of the roster points in the cadre in question, as per the chart at page 30 of the judgment, we find that after Dr. Daljit Singh at roster points no.5, the 6th, 7th and 8th points would become roster points nos. 1, 2, 3 and would be available for filling up by promotion, when cycle of rotation under rule 9 will operate for the first time. Then roster point no.9 would operate as point no.4 for direct recruit. Roster points 10, 11, 12 would operate as roster points 5, 6 and 7 for promotees; roster point 13 occupied by Dr. Pawanjit Singh will be treated as roster point no.8 for direct recruit and roster point nos. 14,15 will in effect become roster point nos.9 and 10 available to promotees. Therefore, the last vacancy of roster point shown at serial no. 16 in substance will become roster point no. 11 available to a promotee and only thereafter the next future vacancy at point no. 17, which in substance, would be point

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A no. 12 in the cycle envisaged by Rule 9(i)(d) would only go to a direct recruit. Uptill now that vacancy has not arisen in the cadre. The disputed point at serial no. 16 which in substance falls at roster point no. 11, therefore, goes to the promotees. Consequently, on this alternative point, the conclusion is inevitable that the disputed point no. 16 which in substance is point no.11 when considered in the light of new cycle of rotation as per Rule 9(i)(d) as B discussed earlier would be a vacancy point available to be filled in by a departmental promotee. The submission of learned senior counsel, Shri Rao for the intervenor that even though Dr. Ranbir Singh was not holding the post on the appointed day when the statutory rules came into force his vacancy has to be treated to have been occupied by roster point under the earlier C rotational system of executive instructions meant for a promotee and that may be considered for working out the cycle under the erstwhile executive instructions cannot be countenanced for the simple reason that the said submission would result in enlarging the scope of the proviso and the deeming fiction beyond the limited periphery on which it is required to be operated, as discussed earlier. In the result, it must be held that the alternative point D no. 3 is well sustained and has to be answered in favour of the respondent and against the appellants and the intervenor. Once this conclusion is reached, the final decision rendered by the High Court in the impugned judgment to the effect that the advertisement dated 10th May, 1977 has to be quahed when it sought to fill up the post of Professor in the Department of Ophthalmology E by direct recruitment, has to be sustained. The final decision of the High Court is upheld by us entirely on a different reasoning centering round the consideration of the new alternative point no.3, though the reasoning adopted by the High Court for coming to the said conclusion is not accepted by us while deciding point no. 1 as seen in earlier part of this judgment. It is, therefore, held that the impugned advertisement was unauthorised and illegal F as it was in connection with roster point no. 16 which in substance was roster point no. 11 and was to be filled in only by a departmental promotee.

Point No.4:

In the result, this appeal fails and is dismissed. However, on the facts G and circumstance of the case, there will be no order as to costs.

V.S.S. Appeal dismissed.