

## FULL BENCH

*Before S. B. Capoor, R. S. Narula and H. R. Sodhi, JJ.*

DR. KARTAR SINGH RAI,—*Petitioner*

*versus*

THE STATE OF PUNJAB AND ANOTHER,—*Respondents*

**Civil Writ No. 1981 of 1966**

November 4, 1968

*Constitution of India (1950)—Article 16—Promotion to a selection post—Respective merits of all the officers in the cadre—Whether must be considered—Post not advertised—An officer making application all the same—His application not considered—Article 16—Whether violated.*

*Held*, per majority (Capoor and Sodhi, JJ.), Narula, J. *contra*), that when making promotion to selection posts it is not incumbent on the authority concerned to review the respective merits of all the officers in the cadre. It is also a mistaken approach to think that in case of every appointment or recruitment to a service or promotion, the State should first invite applications. The fundamental right guaranteed by the Constitution is not only to make an application for a post under the Government but the right to be considered on merits for the post for which an application has been made. This principle would only apply if Government invited applications for any post under it and in that event it would be bound to consider the application made by persons who had minimum qualification laid down in the advertisement. There is no obligation on the State Government to invite applications when it seeks to make an appointment to a selection post by promotion, and therefore, there is none to consider an application made by an over-ambitious officer. The non-consideration of such an application does not violate Article 16 of the Constitution.

*Held* (per Sodhi, J.), that Article 16 forms part of the same code of constitutional guarantees as given in Articles 14 and 15 of the Constitution and supplements them. It is only one of the instances of the application of the general rule of equality so far as services under the State or the Union are concerned. This guarantee of equality in the absence of any statutory rules relating to selection to a post by departmental promotion is violated only where the appointing authority brings in arbitrariness in the exercise of its executive power and denies to any individual officer in the same class and similarly situated his right to be considered for that post. There is no dispute that Article 16(1) of the Constitution guarantees equal opportunity not only in the matter of initial appointment to a service, but also

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in regard to future promotions to higher posts, but at the same time no civil servant has a claim to ask for a selection post as of right. It is a prerogative of the competent authority to give an officer promotion or refuse the same provided it does not act in the exercise of its executive power in an arbitrary manner.

*Held* (per Narula, J.), that selection for appointment in Government service has got to be on a competitive basis and those whose past service is free from blemish can certainly be said to be better qualified for Government service than those whose record was not free from any blemish. It is equally clear that the State can either by appropriate legislation, under Article 309 of the Constitution or by statutory rules framed under the proviso to that Article restrict the eligibility of citizens for appointment to any particular post by prescribing the essential qualifications and possible disqualifications, etc. So long, however, as neither any qualifications or disqualifications as laid down for a post by any enactment or statutory rules nor (in the absence of any statute or statutory rules) have the same been laid down by the executive order of the appropriate authority, every citizen, who is *prima facie* qualified for any post or public service is entitled to his fundamental right under Article 16(1) of the Constitution which may in this respect be said to consist of two distinct legal rights, viz.:—

- (i) the right to make an application for any post under the Government; and
- (ii) the right to be considered on the merits for the posts for which an application has been made.

When an officer exercises his fundamental right under Article 16(1) of the Constitution by submitting his application for appointment to a post, the government infringes this right by not considering his application on merits. The fundamental right under Article 16 of the Constitution would become wholly illusory and would be reduced to a mockery if the Government could be permitted to say that in a particular case they had made up their mind to appoint a particular person to a newly created post for any reason whatsoever, and that, therefore, they refused to consider the written application of another duly qualified and eligible person merely because he was at one time junior to the person sought to be appointed though he may be better qualified and may have had a cleaner service record.

*Case referred by the Hon'ble Mr. Justice R. S. Narula, on 17th May, 1967 to a larger Bench for decision of an important question of law involved in it. The case was finally decided by a Full Bench consisting of the Hon'ble Mr. Justice S. B. Capoor, the Hon'ble Mr. Justice R. S. Narula and the Hon'ble Mr. Justice H. R. Sodhi, on 4th November, 1968.*

*Writ Petition under Article 226 of the Constitution of India, praying that an appropriate writ, order or direction be issued quashing the orders of the Government, dated 1st January, 1966 abolishing the post of Deputy Director, Research and Medical Education and reverting the petitioner to the post of Professor, Forensic*

*Medicine, the order of the Government dated 27th/29th April, 1966, appointing Dr. K. Moti Singh to the newly created post of Additional Director, Health Services, and the order of the Punjab Government dated 22nd August, 1966, appointing Dr. Kanwar Moti Singh substantively to the post of Director of Health Services Punjab and directing the respondent No. 1, to consider the case of the petitioner for appointment to the new post of Additional Director, Health Services (Medical Education), with effect from 29th April, 1966 and for consequent promotion as Director, Health Services, with effect from the date of relinquishment of this post by Dr. Deepak Bhatia.*

ANAND SWAROOP, SENIOR ADVOCATE WITH R. S. MITTAL, ADVOCATE, for the Petitioner.

H. L. SIBAL AND ABNASHA SINGH, ADVOCATES, for the State of Punjab AND J. N. KAUSHAL, SENIOR ADVOCATE WITH H. L. SONI, ADVOCATE, for respondent No. 2.

#### JUDGMENT

CAFOOR, J.—The petitioner in this writ petition under Article 226 of the Constitution of India is Dr. K. S. Rai. The petition was originally presented on 13th September, 1966, and was admitted on the 16th September, 1966. The respondents to the petition were (1) State of Punjab and (2) Dr. K. Moti Singh, Officiating Director Health Services, Punjab, Chandigarh. The prayer was for the issuance of an appropriate writ, direction or order quashing the orders of the Government (Respondent No. 1) dated the 1st of January, 1966, abolishing the post of Deputy Director, Research and Medical Education (hereinafter referred to as D.D.R.M.E.), reverting the petitioner to the post of Professor, Forensic Medicine, as also the order of the Government dated the 27th/29th April, 1966, appointing Respondent No. 2 to the newly created post of Additional Director, Health Services and for a direction to the Government to consider the case of the petitioner for appointment to the latter post and for consequent promotion. On the 22nd of August, 1966, Respondent No. 2 was appointed substantively to the post of Director of Health Services, Punjab (hereinafter referred to as D.H.S.), and the petition was allowed to be amended. The amended petition dated the 3rd of October, 1966, challenged the substantive appointment of Respondent No. 2 to the post of D.H.S. also.

(2) Both the respondents have submitted written statements opposing the petition and numerous affidavits by one or other of the parties have been allowed to be placed on the record from time to time with the result that the record has become quite bulky. There

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is, however, little dispute about the facts. The petitioner was (see Annexure R. 2/17) appointed in officiating capacity in the Punjab Civil Medical Service II (hereinafter referred to as P.C.M.S., II), on the 15th February, 1949, and was confirmed in that Service on 15th February, 1951. There was also Provincial Civil Medical Service I and the departmental head of both these services was the Director of Health Services. These cadres provided the personnel both for medical education and general medical services in the State. In the year 1959 for the first time a separate directorate for Research and Medical Education was created and Dr. Tulsi Dass was appointed as the first Director Research and Medical Education in the grade of Rs. 2,500—3,000 per mensem. The post of Deputy Director, Research and Medical Education was created in the year 1961 and by order of the Punjab Government dated the 4th January, 1962, (Annexure R. 2/5) Dr. Dipak Bhatia, Chief Medical Officer, Chandigarh, who according to the final gradation list of P.C.M.S., Class I and II as published in the notification dated the 7th December, 1963, issued by the Integration Department (copy Annexure R. 2/4) was shown at Serial No. 1, was appointed to that post in the scale of Rs. 1,500—60—1,800/75—2,100 plus a non-practicing allowance of 400 per mensem. Respondent No. 2 was at No. 9 of the Joint Seniority List mentioned above. The grade of D.H.S. was at that time only Rs. 1,800—100—2,000. Dr. Jagdish Singh was holding charge of the post of D.H.S. until his death on the 25th December, 1962. Respondent No. 2, who was then officiating as Deputy Director (Medical Health Services) in the scale of Rs. 1,300—50—1,500 was.—*vide* Annexure R. 2/15, dated the 31st December, 1962, appointed to hold the current charge of the duties of the post of Director Health Services, Punjab, pending filling of that vacancy on a permanent basis. Dr. Dipak Bhatia, on the 14th February, 1963, was appointed as permanent D.H.S., relieving Respondent No. 2 of the current charge. On the 29th March, 1963 (*vide* copy Annexure I), the teaching cadre of the medical colleges of the State was separated from the general cadre of the P.C.M.S., though P.C.M.S. officers were eligible for being appointed to the teaching cadre also. In this teaching cadre, the revised grade of the Associate Professors was Rs. 800—50—1,400 and the petitioner in the year 1963 was working as Associate Professor in the Medical College, Patiala.

(3) Consequent on the appointment of Dr. Bhatia as D.H.S., the post of D.D.R.M.E., fell vacant and by order of the Governor of Punjab, dated the 24th August, 1963 (Annexure III), the petitioner

was appointed against the vacant post as Officer on Special Duty at Chandigarh in his existing scale of pay. A copy of the Punjab Government letter (Annexure IV) shows that the petitioner was holding as Officer on Special Duty and the post of D.D.R.M.E. was held in abeyance. It was eventually decided to advertise the post of D.D.R.M.E. through the Punjab Public Service Commission and the advertisement in that connection is Annexure A-I. According to the advertisement, this was a special post in Class I and was temporary sanctioned up to 28th February, 1964, but was likely to be retained on permanent basis eventually. It was to be made pensionable if made permanent and the period of probation of the selected incumbent was to be two years. It was further stated in the advertisement that the incumbent might be considered for the post of D.R.M.E., Punjab on merits along with others in due course if and when such post fell vacant. Another condition was that the services of the incumbent could be terminated on one month's notice on either side till the incumbent was confirmed. The pay was Rs. 1,500—60—1,800/75—2,100 and the essential qualifications were as follows:—

- (i) M.B.B.S. with distinguished academic career;
- (ii) Must be registered with a State/Central Medical Council;
- (iii) Post-graduate qualifications, e.g., M.D., or M.S. or M.R.C.P. or F.R.C.S.
- (iv) 10 years administrative/Professional/teaching and Research experience;
- (v) 15 years standing in the profession;
- (vi) Adequate knowledge of Hindi or Punjabi.

(4) The duties of the post were to assist the Director, Research and Medical Education, Punjab, in the administration of his office and other Medical Institutions in the Punjab State under his control at Chandigarh. This had a special reference to the Post-graduate Medical Institute which was being set up at Chandigarh. One important condition was that the candidates serving under the Union/State Government will not be entitled to any benefits of their past service under their respective Government. Presumably on account of this discouraging rider, only three persons (including the petitioner) applied for the post and the petitioner was selected by the Public Service Commission. He actually joined as D.D.R.M.E. on 31st of August, 1964, but this was in an officiating capacity and

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according to the memorandum dated the 31st of August, 1964 (copy Annexure A/2), the Government required that a report on his work and conduct should be submitted with his personal file immediately on completion of one year's service to enable Government to decide whether or not he may be allowed to continue to officiate in that capacity beyond one year.

(5) Dr. Tulsi Dass was pressing the Government for being relieved from the post of D.R.M.E. and the petitioner's main grievance is that while the resignation of Dr. Tulsi Dass was under the consideration of the Government, the Secretary Health (who at the relevant time was Mrs. Serla Grewal, I.A.S.), evolved a scheme to deprive the petitioner of the post of D.D.R.M.E., as also of his future prospects of promotion. The grievance has been put in sub-paragraph 'x' of paragraph 23 of the petition in the following words:—

“the whole sequence of events and actions taken by the Administrative Department since the submission of proposal by the Secretary, Health, for amalgamation of the two Directorates, shows that the Administrative Department was acting with ulterior motive, namely, to remove the petitioner from his rightful place in order to pave the way for bringing Dr. K. Moti Singh to the position of Director, Health Services, which he could not have attained in the ordinary way. The impugned orders are thus *mala fide.*”

(6) As stated in the petition, the salient features of the proposal, which the Secretary Health submitted in her note dated the 11th November, 1965, with a view to amalgamate the Directorate of Health Services and the Directorate of Research and Medical Education, were as follows:—

- (i) Abolition of the post of D.R.M.E.;
- (ii) replacement of the post of D.R.M.E. by a new post of Joint Director, Medical Education in the grade of Rs. 1,800—2,000 (Regular grade of D.H.S.) plus non-practising allowance as allowed to all senior posts in Medical Colleges;
- (iii) reduction of the post of D.D.R.M.E.;
- (iv) filling up of the vacant post of Assistant Director (Training);

- (v) establishing a convention that when the D.H.S. from the General Cadre, the Joint Director will be from the College Cadre and vice-versa.

(ii) It was further stated in the petition that on 15th December, 1965, the Health Minister Shrimati Om Prabha Jain did not agree with the proposal submitted by the Secretary Health *in toto* but she ordered that—

- (i) a post of Additional Director be created in the grade of Rs. 1,800—2,000 plus non-practising allowance;
- (ii) the Additional Director should be held exclusively responsible for administrative matters to the Administrative Department;
- (iii) the post of D.R.M.E. and D.D.R.M.E. should not be abolished completely;
- (iv) the Finance Department should be approached for sanctioning the post of Additional Director with an assurance that at one time only one of the three posts, viz., D.R.M.E., D.D.R.M.E. or Additional Director Medical Education will be filled.

(8) The next day, that is on the 16th December, 1965, the Health Minister discussed the case with the Chief Minister who agreed with the arrangement suggested by her but even before the post of Additional Director, Medical Education was sanctioned by the Finance Department and against the specific orders of the Chief Minister the Administrative Department abolished the post of D.D.R.M.E., and on the 1st January, 1966 (*vide* Annexure 'D') passed an order to the following effect:—

- (i) Upgrading of the post of Associate Professor of Forensic Medicine, Government Medical College, Patiala, to that of the Professor, Forensic Medicine in the scale of Rs. 1,000—75—1,600 plus Non-Practising Allowance with effect from 1st January, 1966.
- (ii) Transfer of the post of the Professor, Forensic Medicine, Medical College, Patiala, to the P.G.I., Chandigarh, with effect from 1st January, 1966.
- (iii) Appointment and posting of Dr. Rai. (the petitioner) to the post mentioned at (ii) above with effect from 1st

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January, 1966, at Rs. 1,560 per mensem, i.e., Rs. 1,525 per mensem as pay plus Rs. 35 personal pay (inclusive of Non-Practising Allowance) to be absorbed in the next annual increment when it falls due; and

- (iv) the holding of the additional charge of the post of Deputy Medical Superintendent, P.G.I., to be vacated by Dr. Kashyap, by Dr. Rai, with effect from 1st January, 1966, without additional remuneration.

(9) On 17th December, 1965, a news-item appeared in the Press that the posts of D.R.M.E. and D.D.R.M.E. are to be abolished and are to be replaced by a new post of Additional Director, Health Services for work pertaining to Medical Education. The petitioner then wrote on the 20th December, 1965, a letter (copy Annexure 'E' to the petition) in which he pressed his claim for appointment as Additional Director, Health Services (Medical Education). However, when the post of Additional Director, Health Services, was eventually sanctioned for a period of six months by the Government's order dated the 27th/29th April, 1966 (copy Annexure 'F' to the petition), the petitioner's application was not even considered by the Government but Respondent No. 2 was appointed to that post. The petitioner made a representation (copy Annexure 'G') against that appointment to the Chief Minister on the 11th May, 1966, and the Chief Minister called for the comments of the Administrative Department. These comments did not reach him till he relinquished his office on the 5th July, 1966. The petitioner then made another representation dated the 12th/14th July, 1966 (copy Annexure 'H') to the Governor of the Punjab and on the 12th of August, 1966, also made a request to the Governor for a personal hearing but these representations were ignored. Dr. Dipak Bhatia on getting an appointment in the Government of India, relinquished the post of D.H.S. and Respondent No. 2 was, by notification of the Punjab Government, dated the 22nd of August, 1966, appointed substantively to the post of D.H.S. The main grounds, on which the appointment of Respondent No. 2 to the post of A.D.H.S., and his promotion as D.H.S. is challenged, are as follows:—

- (i) The proposals of the Secretary, Health for the abolition of the post of D.D.R.M.E. and for the creation of the post of A.D.H.S. were not, as required by the Rules of Business of the Punjab Government Part II, brought for consideration of the Council of Ministers.



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- (ii) The post of A.D.H.S. was created to look after Medical Education for which there is a separate cadre and this post had to be filled by some one belonging to Medical Education cadre and Respondent No. 2 who was in general cadre was not eligible for this post.
- (iii) The petitioner, on selection by the Public Service Commission for appointment as D.D.R.M.E. in the grade of 1,500—2,100, became senior to Respondent No. 2 who at that time was in the grade of 1,300—1,600.
- (iv) Since the new post of A.D.H.S. was intended to replace D.R.M.E. and D.D.R.M.E, the essential qualifications laid down for the post of D.D.R.M.E. should be deemed to be essential qualifications for the post of A.D.H.S. and Respondent No. 2 did not possess those qualifications.
- (v) While advertising the post of D.D.R.M.E. the Public Service Commission gave an assurance that the incumbent of the post may be considered for the post of D.R.M.E. on merits along with others and so the appointment of Respondent No. 2 to the post of Additional Director, Health Services (Medical Education) was a breach of this assurance.
- (vi) There were serious allegations reflecting on the moral character of Respondent No. 2, *vide* D.O. letter No. 4200-IHBI-62/19157, dated the 1st/4th May, 1962, written by Secretary to Government, Punjab, Medical to Respondent No. 2.
- (vii) The impugned actions of Government promoting Respondent No. 2 as A.D.H.S. and subsequently appointing him as D.H.S. were not only *mala fide* but by not considering the claim of the petitioner to these posts, the guarantee of equal opportunity granted under Article 16 of the Constitution of India had been violated.
- (10) The written statements of the two respondents opposing the petition were on similar lines. It was pointed out that after the amalgamation of Medical Department and Punjab Health Department in the year 1948, there was only one department namely Punjab Health Department, the Head of the Department of which was known as Director Health Services. P.C.M.S. cadre

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consisted of P.C.M.S. Class I and Class II and incumbents on the post of Professors were not P.C.M.S. Class I although they were Class I officers. The petitioner's contention that only the Professors of Medical Colleges were appointed as D.H.S. was denied and two instances that of Dr. P.C. Dutta and Dr. Jagdish Singh who were both Civil Surgeons and who were respectively appointed as D.H.S. on 18th February, 1950, and 1st of November, 1956, respectively were cited. It was stated that Dr. Dipak Bhatia was appointed to the post of D.H.S., with effect from 15th March, 1963, by selection in view of his being the senior-most Officer on the cadre of P.C.M.S.I. For appointment to the post of D.H.S., no qualifications/experience were laid down. The doctors both on general side and teaching side were considered for this post and the best suitable man was selected. It was stressed that when the petitioner was appointed as Associate Professor of Forensic Medicine with effect from 5th September, 1960 in a temporary post he continued to hold his lien in P.C.M.S. II and since he had not so far been confirmed against any of the posts in the teaching cadre he continued to hold his lien in P.C.M.S. II cadre though he was given pro forma promotion with effect from 25th/26th April, 1964, in P.C.M.S. Class I in an officiating capacity. The post of Professor against which he was appointed from 1st January, 1966, was also temporary and hence the petitioner did not hold any lien in the teaching cadre. Respondent No. 2 on the other hand had been promoted to P.C.M.S. I with effect from 5th July, 1949, and was confirmed in P.C.M.S. I with effect from 5th July, 1950, had been promoted to selection grade @ Rs. 1,300 with effect from 4th February, 1962, and promoted as Deputy Director (Medical) with effect from 24th May, 1962, in the scale of Rs. 1,350—50—1,600. He was confirmed as Deputy Director (Medical) with effect from 14th October, 1963, Apart from holding the current charge of the duties of D.H.S. from 25th December, 1962, to 14th February, 1963, Respondent No. 2 also officiated as D.H.S. Punjab, from 13th January, 1964, to 31st March, 1964, in the scale of Rs. 1,800—2,000 while Dr. Dipak Bhatia was away on study tour abroad. During the latter period, another post of Additional D. H. S., in the scale of Rs. 1,800—2,000 was created for Respondent No. 2. Respondent No. 2 was, after the appointment of Dr. Dipak Bhatia to a post in the Government of India, the senior-most officer in P.C.M.S.I. A reference was made to the P.C.M.S. Class I (Recruitment and Conditions of Service) Rules, 1940, according to clause 8 of which, the seniority of the members of the service was to be determined by the dates of their

confirmation in the service and on the basis of the comparative records of service of the petitioner and Respondent No. 2 it was asserted that Respondent No. 2 was indisputably senior. In fact it was pointed out that the petitioner was in the seniority list of P.C.M.S. officers 58 steps below Respondent No. 2.

(11) In the return by Respondent No. 1, it was admitted that no specific order for the abolition of the post of D.D.R.M.E. had been issued by the Government. It was, however, denied that the approval to the creation of the post of A.D.H.S. had to be obtained from the Council of Ministers. This was not necessary when the post of A.D.H.S. was created for a period of six months only. This post was created for all the administrative work of the department and not for looking after the medical education side only. Though there was no requirement that this post was to be filled from the teaching side only, nevertheless, senior teachers were considered for the post but none of them was willing to accept it. The petitioner was not considered because he was very junior in the list of Professors. So far as the allegations regarding the immoral character of Respondent No. 2 are concerned it was stated that they were refuted by Respondent No. 2 in his letter of the 13th May, 1962, and not only no further action was taken against Respondent No. 2 on the basis of these allegations, but only a few days later he was promoted as Deputy Director (Medical). So far as the allegations of *mala fide* are considered, they were controverted and on the other hand it was stated that Government had always been giving favourable treatment to the petitioner.

(12) As regards the various representations made by the petitioner against the impugned promotions of Respondent No. 2 it was stated that these representations were in due course considered and rejected.

(13) The petitioner's allegations of *mala fide* against the Secretary Health may first be considered. His contention is that he was pressurised or duped by the Secretary to accept the appointment as Professor of Forensic Medicine with additional charge of Deputy Medical Superintendent of the Post-graduate Institute, Chandigarh (hereinafter referred to as the P.G.I.), the Secretary's hidden object being to give undue promotion to Respondent No. 2 at the expense of the petitioner's claim to be appointed as A.D.H.S. Since, accord

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ing to the petitioner's claim, the mischief started with Secretary's note dated the 11th November, 1965 (copy Annexure VII) that note requires to be reproduced in its entirety:

"This case related to the application of Dr. Tulsi Das asking Government to accept his resignation. H.M. is aware that several times Dr. Tulsi Dass over the last year and a half has put in his request for quitting Government service and we have been persuading him to defer his desire from time to time. I invite H.M's kind attention to her note dated 27th August, 1965. Thereafter, Dr. Tulsi Das was called by CM and it appears from the noting of the Special Secretary to CM that Dr. Tulsi Dass had agreed to stay on. The PUC indicates, however, that he did so on account of the emergency and now that a Cease Fire has been announced he wishes to quit service. The work done by Dr. Tulsi Das in the field of medical education has been outstanding and it is due to his efforts that the PGI which we see it in the form today has come about. Keeping the valuable services he has rendered we have from time to time been strongly insisting that he should not go away. But Dr. Tulsi Das appears to be adamant and under no circumstances wishes to stay. I have had occasion to talk to him several times and till now was just treating the matter casually and thought he could be brought round. My final talk with him has given me the impression that he does not want to stay any longer in Govt. service and would like to be relieved. Though we value Dr. Tulsi Das's worth and would not like him to go away yet it is not good to keep an unwilling worker especially when a man of Dr. Tulsi Das's calibre has spent the major portion of his life in work and now wants to retire for taking up professional work of his own. Under these circumstances I would suggest that in the interest of work it is high time we take a decision and I would say that we should now accept his resignation and allow him to go away. The question of posting a substitute, in my opinion, does not arise as Dr. Tulsi Das was brought in solely for the purpose of creating the P.G.I. and organizing medical education in the State. Formerly, the medical colleges and the field jobs were under the control of one officer, i.e., Director Health Services.

With the P.G.I. now having been properly set up and a full time senior officer (senior than the present D.H.S.) is holding charge of the Director of the P.G.I., in the scale of Rs. 2,500—100—3,000, getting the maximum of the scale with a special pay of Rs. 500, i.e., Rs. 3,500 in all. I feel, therefore, that we can do away with the job of D.R.M.E. and declare the Director, P.G.I. as Head of the Department as that he could address communications to Government direct. This will remove the Director's grievance of delay taking place at certain levels when he could correspond direct with Government. In view of the emergency when we have been called upon to surrender so many posts and the Legislature as well as the public being highly critical of the top heavy administration, I think we may abolish the post of D.R.M.E. and in its place create a post of Joint Director Medical Education in the grade of Rs. 1,800—2,000 plus N.P.A. as private practice/NPA is allowed to all posts in Medical Colleges (the regular grade of D.H.S.) and make him in conjunction with D.H.S. The post of Deputy Director, Research and Medical Education (1,500—2,100 scale) can, therefore, also be reduced as there will be no longer any need to have a separate office to deal with the work of the P.G.I. The clerical staff of the D.R.M.E. already sits in the office of the Director, P.G.I. and can put up the papers now to the Director of P. G. I. The Joint Director, Medical Education can supervise the training programmes of para-medical staff as well as look after the medical education in the colleges and to assist him we are already filling the post of Assistant Director (Training) for this purpose. The convention can be established that when the D.H.S. is from the General Cadre, the Joint Director will be from the College Cadre and vice versa. In the past the Director of Health Services has been in-charge of medical education as well as general medicine and in all other parts of the country there is no such post of D.R.M.E. We will be going back to normalcy if this proposal is accepted. However, the post of Joint Director Medical Education is justified on the ground of expansion having taken place in the field of medical education, i.e., the increase in the number of medical colleges as well as the huge step up in the training programmes

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of medical education. At the time of the laying of the foundation stone of the P.G.I., Dr. Nayar emphatically urged the State Government to amalgamate the offices of the Director, Research and Medical Education and the Director Health Services, as she felt to separate teaching from general practice was a great hindrance to the turn out of medical graduates for field work. Our recent experience has shown that medical graduates had been reluctant to going out in the field and they went to seek jobs as they are not given suitable training and orientation for field work. Recently, under the direction of HM I have already requested the Medical Faculty of Punjab University to introduce necessary amendments for making the teaching of preventive and social medicines as an examination subject at the University level. The amalgamation of the office of the D.R.M.E. and D.H.S. would further strengthen the relations of the experts in the field as well as in the medical institutions the need for turning out medical graduates for the rural areas. Once there is one Director incharge of both wings there will be no difficulty in getting the programmes orientated to the needs of the field as well as to the colleges and a proper balance will then be maintained. I have informally discussed this with HM and my views indicated above are based upon my discussions with the technical people. The details of this scheme can be worked out after a decision to retire Dr. Tulsi Das is taken and HM can call me as well as D.H.S. to give her the detailed outlines. I would like to bring to HM's notice that when the late Dr. Jagdish Singh died while working as D.H.S., the question arose as to what should be the set up of Health Services in the State. At that time the decision was that both the Directorates should be merged but the matter was deferred to a later date and it was felt that the amalgamation should come about when the P.G.I. has been properly set up. In my opinion, the stage has now been reached when the P.G.I. can be suitably and effectively handled by the Director of the P.G.I. himself with his team of senior colleagues we could dispense with the post of D.R.M.E. as well as D.D.R.M.E. and in its place as indicated above have a Joint Director, Medical Education and an Assistant Director (Training) in the scales of

Rs. 1,800—2,000 and Rs. 750—1,250, respectively. The latter post already exists.”

(14) The Health Minister Shrimati Om Prabha Jain in her note of 13th November, 1965, felt inclined to agree with the Secretary's proposal but wished to consider the matter further. These notes were seen by the Chief Minister and the Health Minister on the 29th of November, 1965, directed that Dr. Tulsi Das's resignation may be accepted. The next note by the Secretary Health dated the 1st of December, 1965, is Annexure VIII and so far as it is relevant, omitting the eulogistic reference to Dr. Tulsi Das, is as follows:—

“I have subsequently discussed with HM the proposed set up after the retirement of Dr. Tulsi Das and she has been pleased to accept my proposals. She informally discussed the matter in my presence with D.H.S. also. It was generally agreed that the Joint Director, Medical Education would be declared independent of the D.H.S. for the day to day administration of medical colleges but would be responsible to the Director, Health Services in his overall capacity for carrying and formulating of medical policy of the State. If H.M. approves then we may formally move the F.D. for the creation of the post of Joint Director, Medical Education in the scale of Rs. 1,800—2,000 plus NPA as it is admissible to doctors in the medical colleges in case they are not indulging in private practice as any one who will come from the Medical College will be deprived of the practice and he should, therefore, be compensated as we are doing in the case of C.M.O.s. on the general side. Once this is done we can also at the same time abolish the post of D.R.M.E. and D.D.R.M.E. The D.D.R.M.E. who belongs to the general cadre would be posted by D.H.S., suitably in some district. Government will have to issue a notification amalgamating the office of D.R.M.E. and that of D.H.S. I understand that D.R.M.E. had borrowed 3-4 members of the staff of the P.G.I. for carrying on the administration relating to this institution. In the order we shall indicate that this staff stands reverted to the Director, P.G.I. who would also by a separate notification be declared as Head of the Department and would function directly under the Government. I place below the personal files of the 7 senior officers in the Medical Colleges who can be considered

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for appointment as Joint Director, Medical Education.  
They are as under:—

- (1) Dr. Amarjit Singh, Principal, Medical College, Patiala.
- (2) Dr. Y. Sachdeva, Principal, Medical College, Amritsar.
- (3) Dr. Inderjit Dewan, Principal, Medical College, Rohtak.
- (4) Dr. Ram Parkash Malhotra, Professor of Medicine, Medical College, Amritsar.
- (5) Dr. Man Singh Nirankari, Professor of Ophthalmology, Medical College, Amritsar.
- (6) Dr. Ramji Das, Professor of Anatomy, Medical College, Patiala.
- (7) Dr. M. S. Grewal, Professor of Pharmacology, Medical College, Patiala.

As regards Dr. Amarjit Singh, since he is retiring in a year's time we may not consider him. In the case of the others we may make a formal request and find out whether any of them is willing to come to the Directorate on the job of Joint Director."

(15) Since the decision had been taken to abolish the post of D.D.R.M.E., a question arose as to what would happen to the petitioner. In the ordinary course he would revert to the post of Associate Professor of Forensic Medicine, Patiala, which he had held before he was brought to Chandigarh as Officer on Special Duty to discharge the duties of D.D.R.M.E., but such a course would have meant a substantial monetary loss to him. The notes on the files abundantly establish that far from trying to put the petitioner down, the Secretary, Health and others concerned in the matter were anxious that he should not revert to the lower appointment at Patiala and that his pay should be protected. The petitioner's representation dated the 20th December, 1965, for being considered for the post of A.D.H.S., reached the Secretary, Health on 22nd December, 1965, but earlier to this viz., on the 20th December, 1965, the petitioner was called by the Secretary, Health to her office (*vide* the petitioner's additional affidavit dated the 20th April, 1967) and was told of the impending abolition of the post of D.D.R.M.E. It appears that during those days the post of Deputy Medical Superintendent of the P.G.I. Hospital at Chandigarh was vacant and on account of certain financial implications that post was to be filled on or before the 1st of



January, 1966. The way found to protect the pay of the petitioner as well as to keep him at Chandigarh was that the post of Associate Professor of Forensic Medicine was upgraded to that of Professor of Forensic Medicine with grade of Rs. 1,000—1,600 instead of Associate Professor in the grade of Rs. 800—1,400 and the incumbent along with the post be transferred temporarily to Chandigarh and made to work at Chandigarh for organising the proposed Medical College to be set up there and also discharging the duties of Deputy Medical Superintendent. This position was put personally by Dr. P. N. Chuttani, Dean of the P.G.I., to the petitioner on the 21st December, 1965, and he then gave his letter of acceptance personally to Dr. Chuttani who, as would be clear from the letter (copy Annexure IX), gave the petitioner's letter to Mrs. Grewal and she marked the case on the same day, viz., 21st of December, 1965, to her Deputy Secretary Shri B. S. Ojha. Mrs. Grewal was to proceed on tour and the Deputy Secretary submitted his note (copy Annexure X) direct to the Health Minister. This note displays the anxiety of the Department to help the petitioner. It is as follows:—

“H.M. may kindly persue copy of SMW's note dated 23rd December, 1965, at page 47-48 *ante* recorded by her in pursuance of the former's instructions on the file relating to the appointment of D.M.S., at P.G.I. SHBI's note at pages 49—51 *ante* gives the background about Dr. Rai's case. A decision having been taken to keep the post of D.D.R.M.E. in abeyance and the intention being to abolish it, Dr. Rai is naturally feeling considerably upset. He would be losing the post carrying a scale of Rs. 1,500—2,100 although he has been doing good work. But his grievance notwithstanding, the decision has been taken to amalgamate the two Directorates in the larger interests of the department. Improved institutional arrangements must claim preference to individual cases for betterment. As such D.D.R.M.E's. post cannot be retained.

- (2) As pointed out by SHBI, the correct technical position is that Dr. Rai having exercised his final option to revert to the general cadre in 1963 holds a lien on PCMS II post. He was given proforma promotion to PCMS I last year and now his salary there would be Rs. 800 in the scale of Rs. 750—1,250. If Dr. Rai has to be adjusted, he can correctly speaking be adjusted only in PCMS I at Rs. 300

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per mensem. However, he has put in his request placed below at flag 'F' for giving him the grade of Rs. 1,000—1,600, i.e., a Professor's grade on the ground that if he had continued as Associate Professor in Forensic Medicine he would have become Professor by now. When in 1963, the proposal for making him Professor in Forensic Medicine was mooted, it was revealed that he was short of about ten months prescribed experience and after that he has done teaching only for about two months. So technically again he is not qualified to hold the post of Professor in Forensic Medicine. However, in view of the fact that Dr. Rai has done good work and earned good reports during his term as D.D.R.M.E and that post is being abolished in the interest of the department Dr. Rai's request deserves a sympathetic consideration. He became D.D.R.M.E after competing for the post through PSC. He has a certain merits. So there is considerable justification for appointing him as Professor in Forensic Medicine. The precedents of Doctors Ohri, Chug and Dhillon are available who were made Professors by relaxing the conditions of teaching experience (They were given the designation immediately and pay of the post on their completing the teaching experience). Strictly speaking Dr. Rai should also be treated like-wise. But as I have mentioned earlier his request deserves special sympathetic consideration. We may agree to appoint him as Professor in Forensic Medicine at Medical College, Patiala, by upgrading the existing post of Associate Professor Forensic Medicine in the grade of Rs. 800—1,400 to Rs. 1,000—1,600 the case for relaxing the condition of teaching experience can be got regularised through the Special Selection Committee which is being separately reconstituted under HM's orders for three months pending the reversion of the posts in medical colleges to the purview of the PSC.

- (3) We have to start an Under-Graduate College attached to PGI, Chandigarh, and Dr. Rai's administrative experience will come in handy in starting it. Therefore, the proposal as verbally approved by SMWPHM/CM is that Dr. Rai on being appointed as Professor in Medical College, Patiala may be transferred along with his post temporarily to Chandigarh and made to work in the P.G.I. on organizing

the Under-Graduate College and also discharging the duties of Deputy Medical Superintendent. This would result in economising the post of D.M.S. carrying a pay scale of Rs. 1,000—1,400. Dr. Rai is quite willing to accept this arrangement.

- (4) In his application at flag 'F' Dr. Rai has requested that his present pay be protected. He is drawing Rs. 1,560 in the grade of Rs. 1,500—2,100. As his present pay is in an officiating capacity, AD is not competent to protect it. Perhaps this can be protected with a special relaxation given by FD. It may be ordered if it is desired to protect his pay, FD's concurrence may be sought for fixing his pay at Rs. 1,560 inclusive of NPA in the grade of Rs. 1,000—1,600.
- (5) SMW has personally desired the undersigned to put up the case to HM straightway as CM has spoken to her on a couple of occasions about this case, the last being on 22nd December, 1965, and HM has also ordered that we should finalise this arrangement quickly so that Dr. Rai is able to start looking after the duties of DMS, PGI, in addition with effect from 1st January, 1966. As pointed out by SHBI the post to be created carries a scale higher than Rs. 800 and CM's formal concurrence is necessary, but as CM has himself desired that this should be processed quickly, we may at this stage presume his approval and obtain *ex post facto* formal approval later on."

(16) The Health Minister in her note of the 24th December, 1965, also observed that they had to be sympathetic towards the petitioner who should not be put to any substantial financial loss and recommended that Finance Department should accept the proposals made by the Deputy Secretary. The Finance Minister discussed the case with the Health Minister, her Secretary and Director Medical and in his order of the 27th December, 1965, referred it to the Finance Department. The Deputy Secretary, Finance in his U.O. No. 14063-FDI-65, dated the 31st December, 1965 (copy of which also forms part of Annexure VIII) agreed to the proposal for abolition of the post of D.R.M.E. and D.D.R.M.E. and the creation of the post of A.D.H.S. in the grade of Rs. 1,800—2,000 and in that connection agreed to the following arrangement:—

- (i) Upgrading the post of the Assistant Professor, Forensic Medicine, Government Medical College, Patiala, to the

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post of the Professor, Forensic Medicine (Rs. 1,000--1,600 plus NPA), with effect from 1st January, 1966;

- (ii) Transfer of the post of the Professor, Forensic Medicine, Medical College, Patiala, to the PGI, Chandigarh, with effect from 1st January, 1966;
- (iii) appointment and posting of Dr. Rai to the post mentioned at (ii) above with effect from 1st January, 1966, at Rs. 1,560 per mensem, i.e., Rs. 1,525 per mensem as pay plus Rs. 35 personal pay (inclusive of NPA) to be absorbed in the next annual increment when it falls due; and
- (iv) the holding of the additional charge of the post of the Deputy Medical Superintendent, PGI, to be vacated by Dr. Kashyap, by Dr. Rai, with effect from 1st January, 1966, without additional remuneration."

(17) It was under these circumstances that the order of the 1st of January, 1966 (copy Annexure 'D'), whereby the sanction of the Governor of Punjab to the above arrangement approved by the Finance Department, was issued. The notings and the sequence of events as given above establish beyond shadow of doubt that the Secretary Health, the Health Minister and the Finance Department of the Punjab Government were anxious that the petitioner should be kept at Chandigarh without any financial loss to him and it is a travesty of facts to say, as urged by the petitioner, that the Secretary or the other officers of the Health Department were out to harm him and damage his chances of promotion. Keeping in view the comparatively low position as regards the seniority which the petitioner held in the P.C.M.S. all his legitimate aspirations should have been satisfied by the order of 1st of January, 1966, though not the overweening ambitions of the petitioner.

(18) It is important to remember in this connection that it was four months later that the post of A.D.H.S. was created and filled and it would be twisting the facts to argue that with a view to bypass the petitioner's supposed claims for appointment as A.D.H.S. he was deceived into accepting the post of Professor of Forensic Medicine with additional charge of the duties of Deputy Medical Superintendent of the P.G.I. hospital at Chandigarh.

(19) We have, therefore, no hesitation in rejecting the allegations of *mala fide* as altogether baseless.

(20) Mr. Anand Sarup, the petitioner's learned counsel then argued that the mere fact that the petitioner's application of the 20th December, 1965 (copy Annexure 'C') was not considered when the appointment of Respondent No. 2 to the post of A.D.H.S. was made would make that appointment bad as it involved denial to the petitioner of the equal opportunity guaranteed under Article 16 of the Constitution of India. The position taken up in the written statement is that the petitioner was too junior to be considered for that appointment. While in the gradation list of P.C.M.S.I as on the 16th August, 1966 (copy Annexure R.2/18), as pointed out on behalf of the respondents, the petitioner's position was at No. 58, it is stated that according to the gradation list of the teaching staff of the Medical Colleges as stood on 1st March, 1966 (Annexure R.2/12), the petitioner was at No. 56. On the question of seniority the contention by the petitioner's learned counsel is that he was no longer in P.C.M.S. and by the notification of 1st January, 1956, he was a permanent professor in the teaching cadre. Both the submissions are incorrect. Though the petitioner was serving on the teaching side he had not lost his lien in the substantive post in the P.C.M.S. This is apparent from the proforma supplied by the petitioner himself to the D.R.M.E. (copy Annexure X) the heading of which is Recruitment to P.C.M.S.I. In this he gives the date of his entry in P.C.M.S.II as 15th February, 1949, and confirmation in that service on the 15th August, 1950. Against the question "Whether opts for retention in the teaching cadre or would like to revert P.C.M.S. General I cadre?" the petitioner's reply is "would like to revert to general cadre, unless promoted as Professor with effect from 5-9-62, the date on which I have become eligible for such a promotion and thus my *inter se* seniority in college cadre restored, which has been upset by recent promotion of Assistant Professors as Professors." The request to revert to P.C.M.S. General Cadre was repeated in petitioner's letter dated the 30th April, 1963 (Annexure REP/19) in case he was not to be appointed as Professor. In the letter dated August 7, 1963 from D.R.M.E. to Secretary Health (at page 371 of the Paper Book), a proposal was made for appointing the petitioner as Officer on Special Duty. In this letter, it was observed that since the post of D.D.R.M.E. had been vacated by Dr. D. Bhatia, D.R.M.E. had been on the look out of a suitable officer for appointment against this post. It was further observed that the request of the petitioner to relinquish the charge of the Associate Professor of Forensic Medicine at Patiala had been accepted by the Government and he would prove useful as D.D.R.M.E., but since he was not senior enough to

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claim scale of that pay, the Government may consider him for appointment as Officer on Special Duty in that post for a period of six months in the first instance. This shows the special circumstances in which the petitioner got the promotion on which he mainly bases his claim for appointment as A.D.H.S. and eventually promotion as D.H.S. The Chief Minister's note approving the D.R.M.E.'s proposal is dated the 16th August, 1963, and also mentions that the petitioner had opted for reversion to the general line. In fact the petitioner himself, as late as the year 1967, gave himself out as an officer in the P.C.M.S. This is clear from the particulars furnished by him in his application to the Union Public Service Commission for the post of Superintendent, Central Hospital, Asansol. One of the columns in the application form is 11-A "If you have, at any time been employed, give details including those of present employment, if any". Under this column, the petitioner describes himself "P.C.M.S. II, P.C.M.S. I", Under the column "Full reasons for leaving the previous service, his reply is "still continuing" Thus, the plea advanced by the learned counsel as to his having somehow got out of the P.C.M.S. appears to be only for the purpose of this case.

(21) In this connection it was also submitted that the petitioner's appointment as Professor of Forensic Medicine was in a permanent capacity but this submission is equally unwarranted, Reliance was placed on letter No. 8095-IHBIV-65/49048, dated the 17th December, 1965, from the Secretary to Government, Punjab, Medical and Health Department to the Director, Research and Medical Education, Punjab. The subject is "Continuance of the posts for the department of Forensic Medicine at the Government Medical College, Patiala, for the year 1966-67 (Technically new scheme other than Plan). It was argued that according to rule 2.46 of the Civil Service Rules, a permanent post is defined as one sanctioned without limit of time and hence the post of Professor in the Department of Forensic Medicine was to be treated as permanent post. Annexure VII at page 361 of the Paper Book is enclosure of Annexure REP/10 at page 219 of the Paper Book and there is no post of Professor of Forensic Medicine according to that enclosure. There is only a post of Associate Professor of Forensic Medicine in Government Medical College, Patiala, for the year 1966. Annexure REP/11-A in fact shows that the post of Professor of Forensic Medicine in Patiala Medical College, was made permanent as late as in October, 1966, which is after the filing of the writ petition. Thus, the position taken up by the respondents that when the impugned appointment was made, the substantive

post of the petitioner was on the general side in the P.C.M.S. II and not on the teaching side and that he had not even been confirmed in P.C.M.S.I., is correct. It cannot be gainsaid that the petitioner was far junior in the P.C.M.S. to respondent No. 2 who at the time of impugned appointment was at No 1 of the gradation list of the P.C.M.S., while the petitioner was at No. 59.

(22) Mr. Anand Sarup in the alternative argued that the petitioner must at the time of the impugned appointment be deemed to be holding the post of D.D.R.M.E. because, as admitted in the return, specific orders for the abolition of that post had not been passed by the Government until the writ petition was filed. It is said that this post could not be abolished without obtaining the orders of the Council of Ministers. The argument is misconceived. Admittedly, financial sanction for the post of D.D.R.M.E., was only up to 28th of February, 1966. The petitioner had vacated the post of the D.D.R.M.E. when on 1st of January, 1966, he accepted the appointment of Professor of Forensic Medicine. This appointment, as the note from the Finance Department shows, was consequential to the abolition of the posts of D.R.M.E. and D.D.R.M.E. So in effect and for all practical purposes, the posts of D.R.M.E. and D.D.R.M.E. stood abolished.

(23) It was then submitted by Mr. Anand Sarup that the post of A.D.H. is admittedly super time-scale of the P.C.M.S. and selection had to be made on the basis of merit and not of seniority. He referred to notification dated the 20th January, 1962, of the Punjab Government (copy Annexure R. 2/6), whereby Punjab Services (Appointment by Promotion) Rules, 1962, were published. They were made by the Governor of Punjab in exercise of the powers conferred by Article 309 of the Constitution of India. Scheduled Post, according to the definition given in clause 2 meant a post specified in the Schedule appended to these rules. Clause 3 provided that when appointment to any Scheduled Post was required under the Service Rules to be made by promotion, then, notwithstanding anything to the contrary contained in such rules, the appointment by promotion to such post shall be made by selection on merit and no person shall be entitled to claim as of right promotion to such post on the basis of seniority. One of the posts in the Schedule is that of Director, Health Services, Punjab and there are also two posts of Deputy Director, Health Services. Even though the post of Additional Director, Health Services is not mentioned in the Schedule, it may be taken that since it was a super time-scale post it was not to go on the basis of seniority alone but merit was guiding factor.

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(24) In the P.C.M.S. Class I (Recruitment and Conditions of Service) Rules, 1940 (Annexure R. 2/2), also it is stated in Rule 9.2 that promotion to the selection grade shall be made strictly by selection and no member of the service shall be entitled as of right to such promotion. It would, therefore, be correct to say that promotion to the post of A.D.H.S. which was above the selection grade would also be by selection. The method of selection is indicated in the instructions issued by the Punjab Government in the year 1956 (copy Annexure V) according to which when the question of promotion to selection posts arises, a list of officers should be drawn up and selection will be confined to first three candidates for the vacancy and if the selection has been made that does not mean that the other two become unsuitable. For the next vacancy another slab of three will be formed and the two who were not selected for the first vacancy will necessarily have to be included in that slab. We have now to see what method was adopted in making the promotion to the post of D.H.S. previous to the appointment of Respondent No. 2 as D. H. S., Then the Chief Secretary Shri Kahlon in his note dated the 4th February, 1963, dealt with the case for appointment of a new Director of Health Services in succession to late Dr. Jagdish Singh. Four doctors from the directorate and four from the medical education side were considered as being eligible in order of seniority for the appointment. The Chief Secretary noted that the doctors on the educational/research side were unwilling to come over to the directorate for executive and administrative jobs and it would, therefore, be correct and justified to select a Director of Health Services from among the people on the directorate side who are used to and are well in, practice, with the working of this side. He recommended Col. D. Bhatia for the appointment, *inter alia* noting that he had also worked as D.D.R.M.E. That appointment was approved by the Finance Minister in his note dated the 7th February, 1963

(25) The method adopted for selection to the post of A.D.H.S., was, as the note dated the 22nd April, 1966, by the Secretary, Health (copy Annexure XI) indicates, in accordance with past precedents and quite fair. That note is as follows:—

“As desired by HM and in view of the fact that we have agreed to release Dr. Bhatia for going to the Government of India, it has become imperative to fill up the post of Additional Director of Health Services which since the



amalgamation of the offices of DRME and DHS we had kept pending. This post of Additional Director of Health Services which is in the scale of Rs. 1,800—2,000 plus NPA at the rate of 25 per cent of pay subject to a maximum of Rs. 400 per mensem, HM will remember was earmarked for an officer from the medical college side. Accordingly the first seven doctors in order of seniority were addressed to find out whether they would be keen for this job. Replies at PUC I-VII will indicate that none of them is keen for this post. However, when later on Dr. Bhatia's release came up for consideration then I informally talked to Dr. Yudhvir, the seniormost doctor from the medical college side as well as Dr. Inderjit Dewan, whether either of them would be willing to come as DHS. Both of them have refused. Dr. Yudhvir refused because he does not find this job to his liking as his interest is in the field of Surgery. I even held out the lure to him of getting the same scale of pay as we had given to Dr. Bhatia, i.e., Rs. 2,500—3,000 but he totally refused. Dr. Inderjit Dewan with whom I had discussed the matter refused to come as DHS on the scale of Rs. 1,800—2,000 plus NPA but said that he would be prepared to consider if he were given Rs. 2,500—3,000. This in my opinion would not be acceptable to FD as Dr. Dewan's own line is not so profitable as to enable him to earn the amount which he asks for in his own line even. The case of Dr. Yudhvir is different as he is already enjoying a private practice of Rs. 5,000 per mensem. Similarly Dr. Bhatia who was given this special pay scale was given the same for consideration of his excellent performance in his own profession and to compensate him for his private practice he was given this personal grade. Further, in view of all these difficulties, we may give up the idea of posting any one from the college side as Additional DHS. The question now arises as to whom we should post as the person who will be posted on this job will ultimately have to take over from Dr. Bhatia when the two new States are formed and at that time we will have to consider the posting again of an Additional DHS because the two new States will be each having a separate Head of the Department and it would be easier then to allot the DHS designate as well as the Additional DHS

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to each of the two respective States. In the meantime, however, in order of seniority Dr. Moti Singh is the seniormost Deputy Director to be considered for the post of Additional DHS. I place below his personal file at flag 'D' which HM may kindly glance through herself. It contains both good as well as bad remarks. However, to be fair to Dr. Moti Singh, since his posting as Deputy Director from 1962-63 onwards he has earned very good reports and even the reports of one or two years earlier speak very highly of him. Taking into consideration the considerable field experience of Dr. Moti Singh as well as the grasp of office working at the Directorate under the present circumstances, I feel we should try him out as Additional DHS and see how he fares in the next 3-4 months by which time we should be in a position to decide whether he would take over as DHS from Dr. Bhatia. In my opinion he will be able to do his job well as he officiated as DHS in the absence of Dr. Bhatia on two occasions during my tenure and I found his work quite satisfactory. It will be noticed that the grade of Additional DHS is Rs. 1,800—2,000 plus NPA while originally the grade of Director is Rs. 1,800—2,000. It would be very anomalous to post the Additional DHS and give him NPA and not give him the same when he becomes the DHS. In all fairness, therefore, we may get NPA sanctioned for the post of DHS in the grade of Rs. 1,800—2,000 also specially in view of the fact that all Directorate Officers now both Assistant Directors/Deputy Directors are in receipt of NPA. If this is decided then we may post Dr. Moti Singh as Additional DHS as under study to Dr. Bhatia with immediate effect in the pay-scale of Rs. 1,800—2,000 plus NPA and move the case for attaching NPA to the original grade of DHS also. It appears now that the jobs at the Directorate are no longer attractive to the doctors on the medical education side. The co-ordination at the Directorate level so far as medical education is concerned is very vital and essential and it was with that end in view that we amalgamated the two wings and created a separate post of Additional DHS in the office of the DHS. With none of the doctors from the college side willing to come over, we have not been able to achieve that co-ordination. As has been discussed in

my earlier note, extracts of which are available at pages 3-4 *ante*, I feel that the medical colleges being big institutions should function to a large extent on an independent basis but to effect co-ordination in the matter of policy as well as in recruitment of doctors and training of other para-medical personnel, some co-ordination at the Directorate level is called for. It was with this end in view that I suggested the formation of a State Level Committee comprising of Secretary, Health, as Chairman and the DHS and the three Principals of the Colleges as members to function to sort out the important policy matters. This Committee will still continue to function. As to how we should get co-ordination in the matter of training programmes of colleges linked up at the Directorate level, I feel that we may designate one of the Principals as Adviser on Medical Education whose role should be to advise the DHS as well as the Government on problems relating to medical education and how the work could be co-ordinated at the Directorate level. This Adviser could address Government as well as the DHS and effect co-ordination in the execution of policy matters concerning the medical colleges. To my mind, I feel that the seniormost man though is Dr. Amarjit Singh, yet more progressive one is the next senior person Dr. Yudhvir who could act as a Medical Adviser. In the Ministry of Health, Government of India, also there is the institution of an Adviser on Medical Education and I think the purpose would be served if we designate Dr. Yudhvir as Adviser on Medical Education and give him some suitable honorarium for this job. This will ensure the same purpose as was envisaged by having a separate post of Additional DHS we can see how this arrangement functions and if it functions well, we can abolish the post of Additional DHS which was originally meant only for a college side doctor. In view of the impending re-organization, considerable economy will have to be effected and I think this arrangement will be more suitable as by so doing we will be giving up the post of Additional DHS and only giving him some honorarium for acting as Adviser. The number of colleges would be reduced also in the respective States and there the Medical Adviser would not have any difficulty in advising both the Government as

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well as the DHS on problems relating to medical education. I may here like to emphasise that it will be improper for us to have the post of Additional DHS to continue to exist in the Directorate without getting someone from the college side to man this post. Therefore, the above arrangement has to be thought out as it will be irregular, in my opinion, to post someone from the general side as Additional DHS. The arrangement which I have suggested above will be only a stop-gap as shortly with re-organization and Dr. Bhatia going away we will be able to abandon the post of Additional DHS and will have only one post of DHS in the scale of Rs. 1,800—2,000 plus NPA.”

(26) Dr. K. Moti Singh was already in the field of choice as the Chief Secretary's note of 4th February, 1963, would show and the promotion of seniormost Deputy Director to the post of A.D.H.S., was obviously in the natural and normal course. In fact, if the Secretary, Health Department was actuated by any motive to favour Respondent No 2 at the expense of the petitioner she would not have referred to the unfavourable remarks in the personal file of Respondent No 2 prior to the year 1962.

(27) In the note of 22nd April, 1966, the Health Minister Shrimati Om Prabha Jain on the same day ordered the promotion of Respondent No. 2 as A.D.H.S. and observed that the question of retaining the post of Additional Director (Medical Education) may be left over to the respective State Governments and that post need not be filled up when Respondent No. 2 became D.H.S.

(28) It is, therefore, established that the Secretary, Health Department in her note of 22nd April, 1966, had considered the claims of those in the field of choice. It will also show the circumstances in which preference in making the appointment was given to an officer from the general side rather than that from the education side. There is, therefore, no force in the submission made on behalf of the petitioner that the appointment should have been restricted to a doctor from the college side. Since the post of D.R.M.E. as well as D.D.R.M.E, were no longer in existence when the appointment of Respondent No. 2 as A.D.H.S. was made, the petitioner cannot derive any support from the observations made by the Public Service Commission while advertising the post of D.D.R.M.E, that the incumbent of the post may be considered for the post of D.R.M.E. on merits along with others. Respondent No. 2 who had worked in the post of Deputy Director, Health Services

for a number of years and had even been confirmed in that post had obviously the qualifications to be appointed as A.D.H.S. and as already observed Government had attached no importance to the unsubstantiated allegations about immoral character of Respondent No 2. It would also be futile to argue that the petitioner who was in the gradation list at No. 59 on the general side and at No. 56 on the teaching side, was in the possible field of choice. This disposes of the various grounds on which the petitioner challenged the appointment of Respondent No. 2 to the post of A.D.H.S. and his subsequent appointment as D.H.S. which have been summarised in the earlier part of the judgment

(29) Mr. Anand Sarup, learned counsel for the petitioner urged that in making the appointment to a selection post, merit alone should be the criterion and seniority should be ignored and in support of his contention cited *Sant Ram Sharma v. State of Rajasthan and others* (1), but nothing in that judgment support the extreme position taken up by him. A reference has, in particular, been made to the following observations at page 1916:—

“The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem, therefore, is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man?”

(30) In that connection, certain observations Learned O. White in “Introduction to the Study of Public Administration, 4th Edition,

(1)A.I.R. 1967 S.C. 1910.

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pp. 380. 383" have been quoted and then it was observed that as a matter of long administrative practice promotion to selection grade posts in the Indian Police Service had been based on merit and seniority had been taken into consideration only when merit of the candidates was otherwise equal. Their Lordships nowhere laid down that when making promotion to selection posts it was incumbent on the authority concerned to review the respective merits of all the officers in the cadre, and having regard to the existing instructions of the Punjab Government on the subject we can find no substance at all in the contention that when making appointments to the post of A.D.H.S., it was incumbent on the authorities to consider, along with Deputy Directors of Health Services and the senior professors, the name of the petitioner also who had not by then been even confirmed P.C.M.S. Class I.

(31) Then, it was submitted that the petitioner had already applied for being considered for the post of A.D.H.S. and it was incumbent on the Secretary of the Department and the Minister to consider that application. The judgment of the Supreme Court in *B. N. Nagarajan and others v. State of Mysore and others* (2), was relied upon for the proposition that either it was incumbent on the executive to make rules for recruitment to the post of A.D.H.S., or to invite applications for that post. What actually was held in that case, however, was that the contention that if executive is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309, Articles 15 and 16 would be breached, is untenable. It was also observed that rules usually take a long time to make, various authorities have to be consulted and it could not have been the intention to halt the working of the public departments till rules were framed. It has already been shown that the object of the creation of the post of A.D.H.S. was to provide an under-study to Dr. Bhatia and the officer so appointed would eventually take over from Dr. Bhatia. The appointment was, therefore, only for comparatively a short period and in the circumstances no rules were made. Accordingly, the counsel for the petitioner cannot derive any help from the observations in paragraph 7 of *Nagarajan's case* (supra) that if the Government advertises the appointments and the conditions of service of the appointments and makes a selection after advertisement there would be no breach of Article 15 or 16 of the Constitution

(2) A.I.R. 1966 S.C. 1942.

because everybody who is eligible in view of the conditions of service would be entitled to be considered by the State. There is no requirement in the rules of the P.C.M.S. that when appointment of D.H.S. (and *ipso facto* to that of A.D.H.S. when that post is created) is made, the Government must advertise that post. Normally, the senior-most Professors or the Deputy Directors of Health Services would be the person eligible for such an appointment and there would be frustration in the service if some outsider is brought over their heads.

(32) Mr. Anand Sarup in support of his submission that if rules for appointment to a particular post are not made by the Government, it must advertise that post, relied on *Krishan Chander Nayar v. The Chairman, Central Tractor Organisation* (3), but the facts of that case were entirely different. The services of the petitioner in that case were terminated by reason of his antecedents in accordance with rules 5 of the Central Civil Services (Temporary Service) Rules, 1949, and a ban was imposed by the Government against him in the matter of his employment under the Government. The petitioner approached the Supreme Court under Article 32 of the Constitution of India for a direction to remove the ban. The affidavit filed on behalf of the Government did not indicate the nature of the ban and the justification therefor. It was held that the petitioner had been deprived of his Constitutional right contained in Article 16(1) of the Constitution. So long as the ban subsisted, any application made by the petitioner for employment under the State was bound to be treated as waste paper. The fundamental right guaranteed by the Constitution was not only to make an application for a post under the Government but the further right to be considered on merits for the post for which an application had been made. The principle laid down in this case would only apply if Government invited applications for any post under it and in that event it would be bound to consider the applications made by persons who had minimum qualifications laid down in the advertisement. No such situation arose in the case before us.

(33) I would, hold, therefore, that there is no force in the submission on behalf of the petitioner that when appointment to the post of A.D.H.S., was made, it was incumbent on the Government to consider his application.

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(3) A.I.R. 1962 S.C. 602.

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(34) The petitioner has also made a grievance of the fact that subsequent to the appointment of Respondent No. 2 as A.D.H.S., his representations against that appointment were ignored by the Secretary. His first representation is of 11th May, 1966 (copy Annexure 'D') which was addressed to the Chief Minister, Punjab. It was dealt with in the office and when the office notes were put up before the Secretary, Health Department on the 11th of August, 1966, President's rule had come in the Punjab and the representation was ordered to be filed by the Secretary. So it is not correct to say that the Secretary and *mala fide* intentions in withholding the representation from the Chief Minister. The second representation by the petitioner is dated the 12th July, 1966. It was addressed to the Governor, Punjab. It was submitted through the Director of the P.G.I. We have verified from the file that though Dr. Santokh Singh forwarded the representation on 19th July, 1966, to the Secretary, Health, but the endorsement from the office of the P.G.I., forwarding the representation is dated the 6th September, 1966, by which time Respondent No. 2 had already been appointed as Director of Health Services.

(35) The conclusion, therefore, is that the petitioner's challenge to the impugned appointment is baseless and I would dismiss the writ petition with costs which, inasmuch as there are two respondents, are assessed at Rs. 300.

NARULA, J.—(36) I agree with my Lord Capoor, J., that none of the orders impugned in this case by the petitioner is in any manner vitiated by the *mala fides* of either the Health Department as such (referred to as "the Administrative Department" in the writ petition) or of the then Secretary to the Punjab Government in that Department. It appears that mere inferential allegations of *mala fides* levelled by the petitioner against the Government were possibly based on some misapprehension caused by the ultimate situation in which the petitioner found himself as a result of all that actually happened between November 11, 1965, and April 29, 1966, which was somehow wholly inconsistent with the hopes created in the mind of the petitioner by the contents of the notice issued by the Punjab Public Service Commission (Annexure A-1 to the writ petition) while inviting applications for the post of D.D.R.M.E. At the same time it does not appear to be improbable that once the Health Department had arrived at the decision to virtually abolish the post of D.D.R.M.E. substantial efforts were made by all concerned to save the petitioner from economic loss, which he would indeed have suffered



if the Government had not upgraded the post of the Assistant Professor of Forensic Medicine in the Medical College, Patiala, to that of a Professor, and then transferred the said post along with its incumbent to the Post-Graduate Institution at Chandigarh and if Government had not given the petitioner a personal or special pay to enable him to draw the emoluments which he was actually receiving as D.D.R.M.E., to which he would not have been entitled on the abolition of that post and on his reversion to the P.C.M.S. The charge of *mala fide*, therefore, fails.

(37) I also agree (except for the last point relating to the constitutional guarantee under Article 16 of the Constitution) that the petitioner has not made out any case for interference by this Court under Article 226 of the Constitution with any of the impugned orders on the other grounds urged by him. With the greatest respect to my learned Brother Capoor, J., I have not, however, been able to persuade myself to agree with the view that Article 16 of the Constitution has not been infringed in this case, inasmuch as the State Government has admittedly refused to consider the application of the petitioner for the post of A.D.H.S. for which he had applied in writing and for appointment to which he was, as already stated, not disqualified in any manner.

(38) Whatever may be the rival merits or demerits of the petitioner on the one hand and of respondent No. 2 on the other, it is apparent that no special qualifications having been definitely laid down for the post of Additional Director of Health Services either by any rules or even by any clear-cut executive instructions, respondent No. 2 was not disqualified in any manner for being appointed to that post; though it is equally clear and indeed has not been denied at any stage that even the petitioner was qualified for such appointment, and there was no legal impediment to the Government appointing him if it were to choose to do so.

(39) The relevant facts of the case have been given in substantial detail in my order of reference and again in the judgment prepared by my Lord Capoor, J. and need not be repeated. But it appears to be necessary to take special notice of some of the admitted or proved facts relevant for considering the grievance of the petitioner about the violation of his fundamental right enshrined in Article 16(1) of the Constitution guaranteeing to all citizens equal opportunity in matters relating to employment or appointment to any office under

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the State. Though the petitioner had undoubtedly put in much lesser number of years in the State Medical Service than respondent No. 2, it is the common case of both sides that whereas respondent No. 2 is only an ordinary M.B.B.S. with no post-graduate qualification, the petitioner is an F.R.C.S. The first Director of Medical Education, Dr. Tulsi Dass had been so much enamoured of the qualifications and qualities of the petitioner that he appears to have insisted on obtaining the services of the petitioner as Officer on Special Duty (to carry on the work which the D.D.R.M.E. used to do) when Dr. D. Bhatia, F.R.C.S. relinquished charge of the post of D.D.R.M.E., though Dr. Tulsi Dass considered the petitioner to be too junior at that time to be appointed as D.D.R.M.E. The petitioner was appointed as "Officer on Special Duty" and brought from the Medical College, Patiala for that purpose under the order of the Governor, Punjab, dated August 24, 1964. He was to hold the post of Officer on Special Duty only till a suitable man could be selected for appointment as D.D.R.M.E. on a regular basis by the Public Service Commission. When the Public Service Commission invited applications for the said post, three persons including one senior to the petitioner applied for the post and the petitioner was selected on merits over the head of even his senior. Counsel for the respondents tried to argue that the condition of losing previous services contained in the public notice issued by the Public Service Commission might have acted as a deterrent to the comparatively senior people applying for the temporary post. Though there is not much logic in this argument, the possibility of such a consideration having weighed with some particular person cannot be excluded. The post of D.D.R.M.E. was temporary one and so far as any permanent Government servant was concerned, he had no risk of being worse off on the abolition of the higher post as he would have reverted to his substantive post on the abolition of the post of the D.D.R.M.E. if such a situation had arisen. It is needless to go into this matter as it cannot be disputed that respondent No. 2 did not possess even the essential qualifications for holding the post of the D.D.R.M.E. advertised by the Public Service Commission (Annexure 'A-1'). Be that as it may, the fact remains that the scale of pay of the post of D.D.R.M.E. (Rs. 1,500—2,100 plus Rs. 400 per mensem as non-practising allowance) was higher than that of even the Deputy Director of Health Services, i.e., higher than the scale of the post which was at that time held by the second respondent. The maximum of this scale (Rs. 2,100) was higher than

the maximum of the grade of pay fixed for the A.D.H.S. (Rs. 2,000),—*vide* sanction of the Governor, dated April 27/29, 1966 (Annexure 'F'). What is still more significant is that respondent No. 2 did in fact represent in writing against the appointment of the petitioner as D.D.R.M.E. with effect from August 24, 1964. The original representation sent by respondent No. 2 on October 7, 1964, was shown to us by the learned Advocate-General at the hearing of this petition. Respondent No. 2 had bitterly complained in his representation that he was senior to the petitioner and he objected to the appointment of the petitioner who was so junior to him. At that time, the representation of respondent No. 2 was turned down by the Government with the following observations:—

“After careful consideration, the representation of Dr. K. Moti Singh is rejected as he had no claim automatically to be appointed as Deputy Director, Research and Medical Education.”

(Paragraph 3 of petitioner's affidavit, dated April 20, 1967).

(40) The main grievance of respondent No. 2 was that his seniority had been ignored. The rejection of his representation shows that the Government was not prepared to prefer respondent No. 2 over the petitioner for the post of D.D.R.M.E. merely on account of his seniority. The petitioner continued to serve as D.D.R.M.E. from August 31, 1964, till the post was abolished for all practical purposes on December 31, 1965. That post was not lower than that of Deputy Director of Health Services. The grade of pay of the post of D.D.R.M.E. was higher than that of Deputy Director of Health Services. Even in his earlier report, dated January 30, 1964 (R.E.P. 5) about petitioner's work as Officer on Special Duty (in which report it was recommended that the petitioner may be appointed as D.D.R.M.E.), the then Director of Medical Education stated *inter alia*:—

“Dr. Rai was not at all keen to take up this job. He wanted to revert to the joint cadre. It was with great difficulty that I persuaded him to take up this non-professional work. He was taken on six months' probation as Officer on Special Duty to adjudge his suitability for the appointment. I have great pleasure in recording my appreciation

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of the way in which he has equipped himself during this period of five months. I, therefore, request the Government to appoint Dr. Kartar Singh Rai as Deputy Director, Research and Medical Education, Punjab with effect from April 2, 1964, the day he completes his six months of probation as Officer on Special Duty."

(41) As against this, the Secretary, Health, had herself written to respondent No. 2 who was then merely C.M.O., Nangal, on May 4, 1962 (Annexure 'J' to the writ petition), that "serious allegations" had been made against him from time to time "reflecting on his moral character" and that though "the Government were contemplating some serious action against him", it had been decided to give him a further opportunity to improve his reputation. In the demi-official letter issued by the Secretary to the Government, to the Director, Health Services, on the same subject it was stated that Government had further decided "that the conduct of Dr. Moti Singh both in his official and private capacity should be closely watched".

(42) I neither mean to suggest that all the complaints received by the Government against respondent No. 2 "from time to time" could not be found to be false immediately thereafter, nor want to convey the impression that I have in any manner come to the conclusion that respondent No. 2 adopted any peculiar means to rebound with redoubled force to the brighter side within a couple of weeks after the receipt of the above mentioned stinker. Cases have been known where interested persons or those inimically inclined have managed to pile up any number of baseless complaints against absolutely innocent and well-meaning candidates for higher posts. It is indeed for the Government to look into such matters and to come to a fair, just and appropriate decision. I have mentioned these few facts merely in order to bring to the surface some out of many things which would have weighed with the Government in deciding the rival claims of the two contestants for the post of Additional Director of Health Services, if the Government had not decided to consider no one except respondent No. 2 and if the Government had not sought to create the post merely to pave the way of respondent No. 2 to the post of Director, Health Services to which he could normally have moved up from his previous post of Deputy Director, Health Services only by comparative selection from other Deputy Directors. I have stated that the appointment of

respondent No. 2 to the post of A.D.H.S. was to pave his way to the post of D.H.S. as by being so posted respondent No. 2 went into a post which was almost equivalent to that of D.H.S. (though in a much lower scale) a few months before the time when the post of D.H.S. was likely to fall vacant. The upshot of this discussion is that the petitioner as well as respondent No. 2 were qualified and eligible and none of them was disqualified or ineligible for being considered for appointment to the post of A.D.H.S.

(43) The constitutional issue has, therefore, to be decided in the following perspective and in the light of the undermentioned facts:—

- (i) The education cadre and the general cadre were separate in the Punjab Medical Service at the relevant time. The post of the Additional Director of Health Services was not in the Schedule to the Service Rules of 1962 (Annexure R-2/6), and was, therefore, for all practical purposes, an ex-cadre post ;
- (ii) The petitioner though originally drawn from the P.C.M.S., was serving in the education cadre after having already served for some time in the general line. Respondent No. 2, on the other hand, had never served on the education side and was even at the relevant time serving in the general cadre ;
- (iii) The highest post which respondent No. 2 had ever held before April, 1966, was that of Deputy Director, Health Services though he had once or twice officiated as Director, Health Services, to provide stop-gap arrangement during the temporary absence of permanent incumbents of that post. The highest post which the petitioner had on the other hand held till that time was that of D.D.R.M.E. which he would have continued to hold if it had not been decided to abolish that post with chances of further promotion to the post of Director, Research and Medical Education ;
- (iv) The educational qualifications of the petitioner were far higher than those of respondent No. 2. Petitioner had experience of research work which respondent No. 2 did not have ;

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- (v) Whereas shadow had at one time been cast in (1962) in writing over the conduct of respondent No. 2, the petitioner had unblemished and meritorious service record ;
- (vi) The petitioner had been selected for the post of D.D.R.M.E. by the Public Service Commission over the head of his senior and the representation of respondent No. 2 based on his seniority against that selection was rejected by the Punjab Government ;
- (vii) The post of A.D.H.S. was originally intended to be filled by a doctor from the education side, but it was later decided to be filled by respondent No. 2 as the three Principles of the Medical Colleges and a couple of senior-most permanent Professors had declined the offer for being considered for the temporary post of A.D.H.S. for six months, and it was thought that none of the fairly senior doctors on the education side was likely to accept the temporary post ;
- (viii) No rules had been framed by the Government for filling the post of A.D.H.S. and the post was ultimately created as a temporary one for six months only.
- (ix) Doctors from the education side as well as from general side were eligible for the post of A.D.H.S. Indeed the noting in the Punjab Government file to which reference has already been made in the judgment prepared by my Lord Capoor, J. shows that some doctors from the education side were actually considered for appointment to the new post ;
- (x) The petitioner as well as respondent No. 2 were qualified to hold the post in question and none of them was disqualified for being appointed thereto ;
- (xi) The post had been created as a substitute for the original post of D.D.R.M.E. and an undertaking had been given by the Administrative Department to the Finance Department of the Punjab Government that any one time either an Additional Director of Health Services would be

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appointed or a D.D.R.M.E. or D.R.M.E. would be appointed and that the three posts would be considered to be available for being filled in only in the alternative ;

- (xii) Government did not advertise the post nor issued any public invitation for application to the post of A.D.H.S. All the same, the petitioner had admittedly specifically applied in advance for the post of A.D.H.S. and had categorically asked that he may be considered whenever the post was intended to be filled in. The petitioner had given details of his special claim to the new post in his application ;
- (xiii) At the time of appointment to the post of A.D.H.S., the application of the petitioner, dated December 20, 1965 (Annexure 'E' to the writ petition) was meticulously kept out of consideration without at that time assigning any reason for doing so ;
- (xiv) In reply to the petitioner's attack on the appointment of respondent No. 2 as A.D.H.S. on the allegation of infringement of petitioner's fundamental right under Article 16 of the Constitution, the defence of the State as also of respondent No. 2 is that the second respondent was far senior to the petitioner in the P.C.M.S. In this context it is significant to note that though the petitioner had at one time desired to be reverted to the general side and the Governor had specifically allowed his request in that behalf, an option was subsequently again given to the petitioner and in response to it he had continued to serve on the medical education side. After the termination of his appointment as D.D.R.M.E. he was again asked if he wanted to revert to the general side or continue to work on the college side. On special facilities having been provided to the petitioner, he continued to work on the medical education side and is still so working. The only other defence to the alleged infringement of the petitioner's fundamental right under Article 16 of the Constitution raised by the respondents in one of their pleadings for the first time is that the petitioner is deemed to have withdrawn his application, dated December 20, 1965 (Annexure 'E', which reached the Department on December 22, 1965) by his letter, dated December 21, 1965

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Annexure 'IX') addressed to the Dean of the Medical Department of the Post-Graduate Institute wherein he had referred to the oral talk with the Dean and agreed to accept the post of Deputy Medical Superintendent of the Post-Graduate Institute on honorary basis along with the post of Professor of Forensic Medicine after the termination of the post of D.D.R.M.E. This letter was written only one day after the application of the petitioner had been sent. The previous application was not even by implication withdrawn by this letter which was clearly intended to make stop-gap arrangement as the petitioner was definitely given to understand that the post of D.D.R.M.E. was being abolished with effect from January 1, 1966, and the post of A.D.H.S. had not yet been created. Petitioner's application was for appointment as A.D.H.S. with effect from the date when the post was created. The petitioner's letter, dated December 21, 1965, related to the arrangement with effect from January 1, 1966. To say the least, this new defence of the State against the charge under Article 16 of the Constitution is wholly disingenuous and a mere after thought.

(xv) It had been decided by the Health Department that whoever was selected as A.D.H.S., would automatically be promoted as D.H.S. when the later post would fall vacant. When respondent No. 2 was appointed as D.H.S. the only ground on which he was selected without considering anyone else was that he was already working as A.D.H.S and had given a good account of himself in that capacity. The appointment of respondent No. 2 as D.H.S. will, therefore, automatically stand or fall with the validity of his appointment as A.D.H.S. It was fairly conceded by the learned Advocate-General for the State that whoever would have been appointed A.D.H. in April, 1966, would normally have automatically become the D.H.S. as soon as that post fell vacant.

(44) This is the relevant factual aspect of the case. So far as the legal position is concerned, it does not appear to admit of any doubt.



Clause (1) of Article 16 of the Constitution which is a mere projection of the guarantee of equal protection contained in Article 14 of the Constitution is couched in the following language :—

“There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”

(45) It is the common case of both sides that the petitioner is a citizen of India, and so is respondent No. 2. In the matter of appointment, what Article 16(1) guarantees is an equal opportunity to all citizens to apply for appointment under the State, and to be considered for that appointment. In *M. R. Balaji and others v. The State of Mysore and others* (4) and in several other cases thereafter, it has been authoritatively held by their Lordships of the Supreme Court that “appointment” in Article 16 includes promotion to higher posts. In *Banarsidas and others v. State of Uttar Pradesh and others* (5) it was held that selection for appointment in Government service has got to be on a competitive basis and those whose past service is free from blemish can certainly be said to be better qualified for Government service than those whose record was not free from any blemish. It is equally clear that the State can either by appropriate legislation under Article 309 of the Constitution or by statutory rules framed under the proviso to that Article restrict the eligibility of citizens for appointment to any particular post by prescribing the essential qualifications and possible disqualifications etc. So long, however, as neither any qualifications or disqualifications are laid down for a post by any enactment or statutory rules nor (in the absence of any statute or statutory rules) have the same been laid down by the executive order of the appropriate authority, every citizen, who is *prima facie* qualified for any post or public service is entitled to his fundamental right under Article 16(1) of the Constitution which may in this respect be said to consist of two distinct legal rights, viz.:—

- (i) the right to make an application for any post under the Government; and
- (ii) the right to be considered on the merits for the post for which an application has been made.

(4) A.I.R. 1963 S.C. 649.

(5) A.I.R. 1956 S.C. 520.

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(46) It has been held in the *High Court, Calcutta and another v. Amal Kumar Roy and others* (6), that "equal opportunity" does not mean getting the particular post for which a number of persons may have been considered, and so long as the aggrieved person was given consideration along with others, and had been given his chance, it cannot be said that he had not had equal opportunity along with others who may have been selected in preference to him. The fact that the Government may make its choice in a particular way cannot be said to amount to discrimination against the applicant who was duly considered but not appointed. In the same case it was also observed that mere seniority does not confer a right for selection for a higher post. In *Krishan Chander Nayar v. The Chairman, Central Tractor Organisation and others*, (3) it was categorically held that "the fundamental right guaranteed by the Constitution is not only to make an application for a post under the Government, but the further right to be considered on merits for the post for which an application has been made. Of course, the right does not extend to being actually appointed to the post for which an application may have been made." What has happened in the instant case is that the petitioner has exercised half of his fundamental right under Article 16(1) by submitting his application for appointment to the post of A.D.H.S., but the Government has infringed the second part of the petitioner's fundamental right "to be considered on merits for the post for which" he had applied. In *B. N. Nagarajan and others v. State of Mysore and others* (2), it was observed by their Lordship of the Supreme Court (in paragraph 7 at page 1945 of the A.I.R. report) as follows:—

"Mr. Nambiar in this connection also relied on Articles 15 and 16 of the Constitution. He urged that if the executive is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309, Articles 15 and 16 would be breached because the appointments in that case would be arbitrary and dependent on the mere whim of the executive. We are unable to hold that Articles 15 and 16 in any way lead us to this conclusion. If the Government advertises the appointments and the conditions of service of the appointments and makes a selection after

advertisement there would be no breach of Article 15 or Article 16 of the Constitution because everybody who is eligible in view of the conditions of service would be entitled to be considered by the State."

(47) The analysis of the ratio of the above quoted passage in the judgment of Supreme Court in *B.N. Nagarajan's case* (supra) appears to be—

- (i) that the executive has the power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309; and by so doing the guarantee under Articles 15 and 16 would not be breached;
- (ii) that if selection and appointment to a post is made in accordance with the rules framed under Article 309, no question of violation of Article 15 or Article 16 would arise;
- (iii) that even if no such rules are framed, the guarantee of Article 16 of the Constitution would not be infringed if the Government advertises the post and the conditions of service for appointment thereto and then makes a selection out of all the eligible persons who have submitted their applications for the post.

(48) Though no reason was given for not considering the petitioner at the relevant time, the main reason for the State which has been given, i.e., about the petitioner having been for junior to respondent No. 2 in the Medical Service is wholly irrelevant for purposes of Article 16 of the Constitution, particularly when the post of A.D.H.S. was not meant or intended to be filled in exclusively from the medical side and the said post was a new post. It is the admitted case of both sides that the said new post was not intended to be filled in necessarily by promotion. It has been the consistent case of the respondents as disclosed in their written statement that the post in question had to be filled in by selection and that nobody could claim it on the basis of seniority alone. Even if they had not so stated, it is clear, as held by the Supreme Court in *Sant Ram Sharma v. State of Rajasthan and others* (1), that the question of seniority comes in the matters of selection to a post only if two candidates for the post are otherwise

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found to be equal. According to the ratio of the judgment of the Supreme Court in *Sant Ram Sharma's case* (supra), seniority cannot be used as a lever for creating inequality between two eligible candidates for a selection post. It is the common case of both sides that the post of Additional Director of Health Services was created as a select post and that nobody could claim a right to be appointed to that post by promotion. In connection with the filling of a similar post in the Police Department, it was held by their Lordships of the Supreme Court in *Sant Ram Sharma's case*:—

“The circumstance that these posts are classed as ‘Selection Grade Posts’ itself suggests that promotion to these posts is not automatic being made only on the basis of ranking in the Gradation List but the question of merit enters in promotion to selection posts. In our opinion, the respondents are right in their contention that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to selection post and that it is a well-established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone.”

(49) Emphasis was then laid by the Supreme Court on the following principles:—

“The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available.”

(50) The defence of the State based on seniority of respondent No. 2 as compared with that of the petitioner in the P.C.M.S., is, therefore, not a valid defence at all for refusing to consider the application of the petitioner on merits for the select post in dispute. The mere fact that the petitioner was qualified and eligible for the post of A.D.H.S., and he had applied for it entitled him to be considered on merits. In as much as the Government admittedly did not consider his application on merits for the said post, his fundamental right under Article 16(1) has been infringed and breached. To me there appears to be no answer to this charge of the petitioner regarding the violation of his constitutional fundamental right. The Government did not refuse to consider him at that stage on the

ground that he was too junior. They just ignored his application. The ground of comparative juniority of the petitioner is the solitary ultimate shield by which this attack of the petitioner against the impugned appointment of respondent No. 2 is now sought to be warded off. As already held by me this defence is defenceless, and devoid of all merit. According to the pronouncement of the Supreme Court in *Sant Ram Sharma's* case the consideration of seniority could enter the field in a case like this if the merits of two candidates were otherwise judged to be equal. Such a stage was admittedly never reached.

(51) The fundamental right under Article 16 of the Constitution would become wholly illusory and would be reduced to a mockery if the Government could be permitted to say that in a particular case they had made up their mind to appoint a particular person to a newly created post for any reason whatsoever, and that, therefore, they refused to consider the written application of another duly qualified and eligible person merely because he was at one time junior to the person sought to be appointed though he may be better qualified and may have had a cleaner service record. Article 16, as already stated does not confer a right on anyone to be appointed to any particular post. The only rights of a citizen are : (i) to apply and (ii) to be considered on merits. The latter part of the petitioner's fundamental right has been clearly infringed in this case. The appointment of respondent No. 2 to the post of A.D.H.S. as a result of the violation of the fundamental right of the petitioner cannot, therefore, be sustained. There was no other ground on which the promotion of respondent No. 2 to the post of the Director of Health Services was justified except that he happened to be the Additional Director of Health Services at the time when higher post fell vacant. Once it is held that the appointment of respondent No. 2 as Additional Director was unconstitutional, his further promotion and appointment as Director of Health Services automatically falls and cannot be sustained.

(52) I would, therefore, allow this writ petition with costs and set aside the order of the State Government appointing respondent No. 2 originally as Additional Director Health Services and later on consequently promoting him to the post of Director. Health Services.

H. R. SODHI J.—I have had the privilege of going through the judgments of my learned brothers Capoor and Narula, JJ. Both are

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agreed that none of the orders impugned by the petitioner can be said to have been vitiated on account of any *mala fides* of the Administrative Department of Punjab Government of which Mrs. Serla Grewal was the Secretary at the relevant time. I am in respectful agreement with them on this point. To me it appears that the charge of *mala fides* levelled by a responsible officer like the petitioner was not only misconceived but wholly uncalled for, when we find it proved beyond any doubt that the Administrative Department had actually been going out of the way to help the petitioner, first in his appointment as Officer on Special Duty and then to save him from any monetary loss because of the abolition of the temporary post of Deputy Director, Research and Medical Education, hereinafter described as DD/RME, which post he got on account of the special efforts which Dr. Tulsi Dass, then Director of the Post-graduate Institute of Medical Education and Research, Chandigarh, appears to have made for him.

(54) Facts have been stated very succinctly by Capoor, J. and the brief narrative thereof so far as Narula, J. has thought necessary for the purpose of deciding the question if Article 16 of the Constitution of India has been violated is also not in controversy. This narrative, however, seems to suggest that the petitioner being possessed of higher academic qualifications was probably more qualified than respondent No. 2 Kanwar Moti Singh who was the permanent incumbent of the post of the Deputy Director, Health Services, Punjab, and had been promoted as an Additional Director for a shortwhile and then as a Director. In all services, there are certain basic qualifications which a candidate must possess in order to enter into that service and once he has done so whether on account of these qualifications or higher ones, all members of that service are to be treated equally in the matter of further promotion. Mere possession of higher educational qualifications cannot by itself be taken to be the proof of more merit in a particular officer. It is the general talent of the officer, his basic qualifications, experience (more so in the case of doctors) and several other matters, the cumulative effect of which has to be considered in order to determine whether that officer is possessed of higher merit than others and difference in educational qualifications is only one of the factors which might or might not be treated as relevant by the competent authority in the matter of appointment to a selection post.

(55) With great respect to my learned brother Narula, J., I do not agree that Article 16 of the Constitution of India has, in any way,

been violated in the circumstances of the instant case on account of the appointment of respondent No. 2 as Director, Health Services, Punjab. I need not recapitulate all the facts, but in order to determine if the impugned orders have infringed Article 16 of the Constitution, a few established facts have to be stated in their true perspective.

(56) There are in the State of Punjab two classes of Punjab Civil Medical Services, one known as Punjab Civil Medical Service Class I, hereinafter referred to as P.C.M.S. I, and Punjab Civil Medical Service Class II, hereinafter referred to as P.C.M.S. II, though the departmental head of both these Services has always been the same officer designated as Director of Health Services. The petitioner admittedly joined P.C.M.S. II on 15th December, 1949 and was confirmed in that Service on 15th February, 1951. He was promoted in an officiating capacity to P.C.M.S. I only on 25th/26th April, 1964, and has not yet been confirmed in that post, nor is he due for the selection grade. The petitioner was transferred to the teaching side in a temporary post on 5th September, 1960, as an Associate Professor of Forensic Medicine in the grade of Rs. 750—50—1,400 in the Medical College, Patiala, though he continued to retain his lien in the general cadre, namely, P.C.M.S. II.

(57) A Post-Graduate Institute of Medical Education and Research had been set up at Chandigarh by the Punjab Government and it was in the year 1955 that for the first time a separate temporary post of a Director of Research and Medical Education was created. Dr. Tulsi Dass who was already incharge of this institute, was appointed its first Director, though administrative control of the general cadre and Medical Colleges still remained with the Director of Health Services. It was later thought necessary to have a Deputy Director under Dr. Tulsi Dass and a temporary post was accordingly created. Dr. Deepak Bhatia was appointed to this post in the year 1961 with the approval of the Punjab Public Service Commission. The post was not advertised nor any applications invited when Dr. Bhatia was appointed as Deputy Director. The newly created post of the Deputy Director was not included either of the P.C.M.S. or teaching cadres. Dr. Jagdish Singh, who was the Director of Health Service, Punjab, at that time, died on 25th December, 1962 and Dr. Deepak Bhatia the senior-most in the cadre of P.C.M.S. I, was appointed Director in his place with effect

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from 15th March, 1963. On the appointment of Dr. Bhatia as Director, the post of DD/RME fell vacant and it appears from the record that Dr. Tulsi Dass was keen to have the petitioner appointed as Deputy Director. There were several difficulties in his way as the petitioner was very junior in his own cadre for that post. A way out was found presumably by Dr. Tulsi Dass inasmuch as a temporary post of an Officer on Special Duty was created. The petitioner was appointed to that post at the instance of the said Dr. Tulsi Dass and got transferred from Patiala to Chandigarh to work against the vacant post of the Deputy Director in September 1963. It was after this when the ground had been fully prepared for the petitioner that an advertisement, filed as annexure 'A' with the writ petition, was published through the Punjab Public Service Commission in July, 1964, inviting applications for the post of the DD/RME. The advertisement was in the following terms -----

"PUNJAB PUBLIC SERVICE COMMISSION, PATIALA.

Closing date 14-7-1964

28th July, 1964 for applicants from abroad

Recruitment to a permanent post of Deputy Director, Research and Medical Education, Punjab, Class I.

INFORMATION FOR CANDIDATES NO. 8(ii).

- (1) Applications must be submitted on the prescribed form attached here with together with the enclosed sheet of additional questions duly completed. They must reach the Secretary, Punjab Public Service Commission, Patiala, not later than 14th July, 1964, (28th July, 1964, for applicants from abroad). Applications received after that date will not be entertained.
- (2) This is a special post in Class I and is temporary sanctioned up to 28th February, 1965. It is likely to be retained on permanent basis eventually. It will be pensionable when made permanent. The person appointed will be eligible to subscribe to the General Provident Fund. The period of probation will be two years.



- (3) The post is reserved for Scheduled Castes/Tribes and Backward Classes candidates of Punjab but if no suitable person is available it may be filled up by others.
- (4) The incumbent of the post may be considered for promotion to the post of Director, Research and Medical Education, Punjab, on merits along with others in due course if/when such a post falls vacant.
- (5) The services of the incumbent can be terminated on one month's notice on either side till the incumbent is confirmed.
- (6) The selected candidate must be prepared to join duty immediately after selection.
- (7) *Age* : (a) Not less than 40 years and not more than 50 years (56 years for members of Scheduled Castes/Tribes and Backward Classes) on 1st April, 1964.
- (b) Candidates serving under the Union/State Governments will not be entitled to any benefits of their past service under their respective Governments.
- (8) *Pay* : Rs. 1,500—60—1,800/75—2,100. Higher initial start may be allowed in specially deserving cases on merits.
- (9) *Qualifications : Essential.*—(i) M.B.B.S., with distinguished academic career; (ii) must be registered with a State/Central Medical Council; (iii) Post-graduate qualifications, e.g. M.D. or M.S. or M.R.C.P. or F.R.C.S.; (iv) 10 years administrative/professional/teaching and research experience; (v) 15 years standing in the profession; (vi) adequate knowledge of Hindi or Punjabi.
- Preferential* : 3—5 years teaching experience.
- (10) *Duties* : (a) To assist the Director, Research and Medical Education, Punjab, in the Administration of his office and other Medical Institutions in the Punjab State under his control at Chandigarh.
- (b) The incumbent of the post will be required to serve at Chandigarh or anywhere else in the Punjab State according to exigencies of service.
- (11) No other concession such as rent free quarters, etc., are admissible.

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*IMPORTANT*

*N.B.*—According to the revised classification issued by the Punjab Government 'Backward Class' candidates fall under the following two categories:

- (a) All the residents of Punjab State, whose family income is less than Rs. 1,000 per annum irrespective of the fact as to which caste, community or class they belong to and what profession they are following.
- (b) Persons belonging to classes/communities which have already been/may be declared as 'Backward' by the Punjab Government provided their family income does not exceed Rs. 1,800 per annum.

Candidates claiming concessions admissible to Backward Classes should produce the relevant affidavits filed before a 1st class Magistrate in the enclosed form (A) or (B) "

(58) There were only three other applicants, two of whom were junior to the petitioner, whereas nothing is known about the record of service of the candidate who was senior to him. The conditions laid down in the advertisement were such that no officer, already in the permanent service of the State or the Union Government feeling secure in his service in the general cadre and fairly high up in seniority with any chances of promotion, was likely to apply for a temporary post and lose the benefit of permanent service.

(59) The petitioner was almost 57 steps below respondent No. 2 on the seniority list of PCMS I to which class the former has not yet been confirmed while on the teaching side where the petitioner had been appointed as Associate Professor against a temporary post, there were about 55 professors above him, in the order of seniority, some of them possessing higher qualifications than the petitioner as per annexure P. 2/12 filed by the respondents showing the gradation of the teaching staff as it stood on 1st March, 1966. The position of the petitioner, in the final gradation list of the P.C.M.S. I and II prepared on 7th December, 1963, under the States Reorganisation Act, 1956 (Central Act 37 of 1956) after the merger of the States of erstwhile PEPSU and Punjab as per annexure P.2/4. was as low as

121. Twenty-five officers on the teaching line, originally junior to the petitioner, had been promoted and made senior to him, list whereof is given in annexure R. 2/19. The petitioner with such a position in the general cadre not having been even promoted to P.C.M.S. I and being very low in the order of seniority in the teaching staff had everything to gain if he was appointed as DD/RME, though the post was a temporary one and terminable on one month's notice on either side. As a matter of fact the petitioner circumstanced as he was in his own cadre had no chances of early promotion in the ordinary way.

(60) He applied for the post of DD/RME, was selected and consequently appointed to this post with effect from 31st August, 1964, in a grade of Rs. 1,500—2,100. Respondent No. 2 who was at that time working as Deputy Director, Health Services, lodged a protest against the petitioner being given a job carrying a higher scale of pay. The petitioner was put on probation in terms of his appointment for two years, but before this period could run out, the post itself was abolished, with effect from 1st January, 1966. On the abolition of the post the administrative department in order to accommodate the petitioner and protect his pay recommended that the post of Associate Professor of Forensic Medicine in the Medical College at Patiala be upgraded in the scale of Rs. 1,000—75—1,600 with effect from 1st January, 1966 and the petitioner be appointed to that post on the same emoluments which he was enjoying as Deputy Director, Research and Medical Education. He was also given the additional charge of the post of the Deputy Medical Superintendent in the Post-graduate Institute.

(61) It may be mentioned here that at this stage the amalgamation of the two wings of the Health Services has had a chequered history. Before the partition of the country in the year 1947 and afterwards up to 8th November, 1948, there were two separate departments known as Medical Department and Public Health Department under the Inspector-General of Civil Hospitals and Director, Public Health, respectively. On 26th October, 1948, by a notification No. 5907-M-4A/577803 issued by the State Government, these two departments were amalgamated with effect from 8th November, 1948, and put under the charge of one officer designated as Director, Health Services. A copy of this notification has been filed by the respondents as annexure R. 2/1. The cadres of P.C.M.S. I and II were kept separate as before and there are different rules

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relating to the appointment, terms and conditions of the two cadres. The professors in Medical Colleges were kept separate as a class from P.C.M.S. I in the matter of seniority. In the year 1963, by notification No. 4013-2HB-63/2436, dated 29th March, 1963, the teaching cadre of Medical Colleges was separated from the general cadres of the P.C.M.S. I and P.C.M.S. II and it was directed that the recruitment to all teaching posts at the Colleges would in future be made direct through the Punjab Public Service Commission, though the serving personnel were also eligible. In the year 1965, by order, dated 18th December, 1965, all these services were again amalgamated and the Director of Health Services was declared as Head of Department for Medical Education and Research except the Post-graduate Institute at Chandigarh. The Director of Health Services, Punjab, was therefore, from that date onwards, the Head of the Medical Services and the Medical Education and Research in the State of Punjab except in respect of the Post-graduate Institute.

(62) A need was consequently felt to have a Joint Director and there was at one time a proposal that the said officer be taken from the teaching side, but ultimately it was decided to have an Additional Director, without there being any obligation to have him from amongst the teaching staff. The petitioner seemed to wrongly think that the temporary post of an Additional Director should have gone to an officer on the teaching side, as he believed that it had been created in lieu of that of the Deputy Director, Research and Medical Education. My learned brother, Capoor, J.; has elaborately dealt with the matter. There is no material to warrant the assumption that it was a post reserved for the teaching line, whatever might have been the proposals and counter-proposals at one time. An offer of the post of the Additional Director was nonetheless made to senior-most professors in the teaching line, but they declined.

(63) Kanwar Moti Singh, respondent No. 2, had been promoted to PCMS I with effect from 5th July, 1949 and confirmed in that cadre with effect from 5th July, 1950. He got the selection grade in PCMS I with effect from 4th February, 1961 and promoted as Deputy Director, Health Services, Punjab, in the scale of Rs. 1,300—50—1,600 from 24th May, 1962. He had also been confirmed as Deputy Director with effect from 14th October, 1963. The office of the Director, Health Services, fell vacant twice and he had held the same in an officiating capacity. When the appointment of Dr. Bhatia was

made as Director in March, 1963, respondent No. 2 was also considered, though in the matter of seniority he was at that time at serial No. 9 amongst Class I Officers and obviously this consideration implied that he was thought to be possessed of merit making him eligible for selection irrespective of his seniority. It was Dr. Bhatia, of course, who was ultimately selected. In these circumstances, when the temporary post of the Additional Director was to be filled up, respondent No. 2 who was already working as Deputy Director was appointed to that post in the scale of Rs. 1,800—100—2,000 plus non-practising allowance of Rs. 400 per mensem with effect from 29th April, 1966. On 22nd August, 1966, this respondent was promoted as Director when the post fell vacant on Dr. Deepak Bhatia going to the Government of India.

(64) It was in the background of this history of the service of these two contesting officers who belong to different classes that it was to be seen how far the petitioner had any right to be considered for selection as Additional Director or Director of Health Services. The petitioner belongs to P.C.M.S. II though officiating in P.C.M.S. I, whereas the respondent holds a confirmed post in the selection grade in P.C.M.S., I. These two officers could not, therefore, be said to be members of the same class of service, apart from the seniority of the petitioner which was very low as already stated above, and the question arises whether in such circumstances, can it be said that the petitioner has been accorded any discriminatory treatment by the State Government by not considering him for these posts.

(65) Mr. Anand Swarup referred to a demi-official letter in which a reference was made to certain complaints of a personal nature against respondent No. 2 which were denied by the said respondent. It is on record that instead of any action being taken against the respondent, he was rather promoted as a Deputy Director within a few days of the said letter. It would be very uncharitable in the absence of any data to establish the allegations regarding the personal character of respondent No. 2, to take notice thereof in determining the respective merits of the petitioner and the respondent, and whether Article 16 of the Constitution of India has been violated. The argument of Mr. Anand Swarup based on these allegations has no merit and must, therefore, be straightaway rejected.

(66) The State Government in the exercise of its executive power under Article 162 of the Constitution of India has a right to

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make appointments to various offices and grant promotions from time to time as it might think proper. A Government servant holds his office during the pleasure of the President or the Governor of the State, as the case may be, and the only limitations laid down on the exercise of that power of the Government are as given in Article 311 of the Constitution or Article 16 thereof. No Government servant holding a civil service post under the Union or the State can be dismissed or removed or reduced in rank except by the authority by which he was appointed and that too after an enquiry in which he has been given a reasonable opportunity of being heard in respect of the charges against him and when it is proposed to take some action on the basis of that enquiry he has been given a further opportunity to make a representation against the proposed penalty. Article 16 forms part of the same code of constitutional guarantees as given in Articles 14 and 15 of the Constitution of India and supplements them. It is only one of the instances of the application of the general rule of equality so far as services under the State or the Union are concerned. This guarantee of equality in the absence of any statutory rules relating to selection to a post by departmental promotion is violated only where the appointing authority brings in arbitrariness in the exercise of its executive power and denies to any individual officer in the same class and similarly situated his right to be considered for that post. It was observed by their Lordships of the Supreme court in *All India Station Masters and Assistant Station Masters' Association, Delhi v. General Manager, Central Railways* (7), that equality of opportunity in matters of promotion must mean equality as between members of the same class of employees and not equality between members of separate, independent classes.

(67) There is no dispute that Article 16(1) of the Constitution guarantees equal opportunity not only in the matter of initial appointment to a service, but also in regard to future promotions to higher posts, but at the same time no civil servant has a claim to ask for a selection post as of right. It is a prerogative of the competent authority to give an officer promotion or refuse the same provided it does not act in the exercise of its executive power in an arbitrary manner. This guarantee of equality under Articles 14, 15 and 16 of the Constitution, as held by their Lordships of the Supreme

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(7) A.I.R. 1960 S.C. 384.

Court in *Banarsidas's case* (infra) does not take away the right of the Government to pick and choose proper persons when it is intended to fill up a civil post from out of a number of officers.

(68) In order to support his contention that Article 16 has been violated in the case before us, reliance has been placed by the learned counsel for the petitioner on some observations made by their Lordships of the Supreme Court in *Banarsidas and others v. State of Uttar Pradesh and others* (5), where the writ petition filed by Banarsidas and others under Article 32 of the Constitution complaining of an infringement of Article 16 was dismissed. There, some Patwaris who had been working as part-time Government servants in Uttar Pradesh in the Revenue Department, had indulged in acts of indiscipline by trying to paralyse the Revenue Department and coerce the Government to accept their demands. These Patwaris tendered their resignations and the Government accepted the same relieving them of their duties soon after submission of their resignations. On the next day the Government reorganised the cadre by creating a new service of Lakhpals, but the cadre included all those Patwaris whose record of service was free from blemishes and had withdrawn their resignations.

(69) The Government rather gave *locus poenitentiae* to those ex-Patwaris who realised their mistakes in joining the agitation but did not take into service in the reorganised cadre those Patwaris who had been found guilty of lack of sense of discipline. In these circumstances, some Patwaris who had preferred the writ petition in the Supreme Court contended that the direction of the State Government that only those ex-Patwaris whose resignations had been accepted but had an excellent record of service would be absorbed in the new cadre, denied to them equality of opportunity and offended against Article 16. The contention was repelled it being held by their Lordships that the Government like all other employers are entitled to pick and choose from amongst a large number of candidates offering themselves for employment under Government and no question of any violation of Article 16 arose. It was in this context that an observation was made in the judgment that the Government service has got to be on a competitive basis. The expression 'selection for appointment in Government service has got to be on a competitive basis' cannot be taken out of the context and interpreted to mean that whenever a departmental promotion is to be made, all officers in a particular

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service get a right to apply for the selection post and whether an application is submitted or not, to be considered for the same, even if they are not equally situated in the relevant cadre. If a competent authority selects an officer to a selection post by a departmental promotion, there is inherent in this selection a competition. It is not understood how the observation referred to above can possibly help the petitioner.

(70) Reference was again made to *the High Court, Calcutta and other v. Amal Kumar Roy and others* (6), in support of the contention that mere seniority does not confer a right to be selected to any higher post. It is incorrect to say that respondent No. 2 has been selected solely on the ground of seniority. Seniority-cum-merit are relevant considerations to a selection post and there is nothing to indicate that respondent No. 2 was not possessed of merit and he was selected simply because he happened to be the senior-most. As already stated, merit does not mean merely possessing higher educational qualifications.

(71) The petitioner also cannot derive any help from the observations made by their Lordships of the Supreme Court in *Krishan Chander Nayar v. The Chairman, Central Tractor Organisation and others* (3). The facts of that case are distinguishable and there is not indeed a ghost of semblance between the facts of that case and the instant one. The services of one Krishan Chander Nayar, who had been employed on a purely temporary basis as a machineman in the Central Tractor Organisation, which was a temporary one under the Ministry of Agriculture, Government of India, New Delhi, were terminated in terms of his employment on the ground that he was no longer required in that Organisation. The Government while terminating his services placed a ban on his being ever taken into Government service, for which there was obviously no justification. The stand taken up by the Government in defence of its action was that the alleged ban was purely a departmental instruction for future guidance not intended, in any way, to prevent the petitioner from applying for any post under the Government. In spite of denial of the Government about the existence of any ban their Lordships came to a conclusion that, as a matter of fact, a ban as alleged by the petitioner had been imposed and that any application made by the petitioner (Krishan Chander Nayar) seeking employment under the Government would be treated as a waste paper in view of the ban. In these circumstances, their Lordships considered the question of the violation of Article 16 and made an observation that the



fundamental right guaranteed by the said Article consisted not only in making an application for a post to the Government, but the further right to be considered on merits for the post for which an application had been made. It was while quashing the ban that their Lordships of the Supreme Court observed that Krishan Chander Nayar had a right to make an application and to be considered for a post. It could not be intended to be laid down by their Lordships that in every case where a person, whether similarly situated or not and whatever his position in any particular service be, has a right to make an application for a departmental promotion when no applications have been invited therefor. The decision in *Krishan Chander Nayar's case* has to be confined to the facts of that case.

(72) The learned counsel for the petitioner laid great emphasis in his submissions on some observations made by their Lordships of the Supreme Court in *B. N. Nagarajan and others v. State of Mysore and others* (2). I do not see how this authority can be pressed into service by the petitioner. The contention was raised on behalf of the petitioners there that Articles 15 and 16 of the Constitution would be violated if the executive were held to have the power to make appointments and lay down conditions of service without making rules in that behalf under proviso to Article 309 of the Constitution. This contention was repelled by their Lordships it being held that it is not obligatory under proviso to Article 309 of the Constitution to make rules of recruitment, etc., before the service can be constituted or proposed, or created or filled, and that the State Government has executive powers in relation to all matters with respect to which the legislature of the State has power to make laws and entry No. 41 in List II (State List) empowers the State legislature to make laws with regard to the State public services. In that case, advertisement had been made and applications invited for the recruitment of Assistant Engineers in the executive cadre of the Mysore Public Works Department. The argument of arbitrariness and violation of Articles 15 and 16 was negatived because the applications had been invited giving equal opportunity to all citizens duly qualified to make applications which were considered by the Public Service Commission. It is not seriously contended before us that their Lordships have in *Nagarajan's case* laid down that advertisement for any selection post, where departmental promotion is to be made in the exercise of the executive power of the State, is necessary, and if not made, it would amount to denial of

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equality guaranteed by Articles 15 and 16 of the Constitution. No such contention can possibly be advanced with reasonableness as inviting of applications by advertisement is only one of the modes of recruitment which would exclude arbitrariness. There may be appointment even without an advertisement and still no arbitrariness is brought in. It will depend on the facts and circumstances of each case as to whether a particular appointment has been so made as to discriminate between two persons similarly situated so that it can be said that a differential treatment has been accorded to one at the cost of the other.

(73) It is a mistaken approach to think that in case of every appointment or recruitment to a service or promotion, the State should first invite applications. My brother Narula, J., has also not gone to the extent of holding on the basis of *Nagaraajan's case* that inviting of applications was necessary but all that has been observed by the learned Judge is that the application made in writing by the petitioner should have been considered. I do not appreciate how it became incumbent on the State Government to consider the so-called application or representation of the petitioner simply because on reading an unofficial news item in the press he submitted the said representation. If there was no obligation on the State Government to invite applications when it sought to make an appointment to a selection post by promotion, there was none to consider one made by an over ambitious officer like the petitioner who, though not equally situated in any manner, thought that he was more qualified simply because of his having higher educational qualifications and on account of his having enjoyed certain temporary advantage at one time as DD/RMR. The petitioner is not even confirmed in PCMS, I and actually belongs to PCMS II. The two classes of PCMS are quite distinct and separate from each other, though an officer in Class II could be promoted to Class I. The petitioner might have believed that he had more merit but the State Government considered the claims of all those persons whom it thought were senior on the teaching side and better qualified and it was only when they declined that the post of the Additional Director was offered to respondent No. 2. There is nothing to indicate that any of the senior professors on the teaching side had any grievance against the appointment of respondent No. 2 as Additional Director. It is the petitioner alone, who though in no way equated with this respondent, chose to make an application for being appointed to the Selection post. The

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appointment of respondent No. 2 as Director was made in the same manner as was being done hither-to-before and I do not think that any injustice has been caused to the petitioner or that his fundamental right guaranteed under Article 16 has in any way, been violated.

(74) For the foregoing reasons the writ petition has no merit and agreeing with my learned brother, Capoor, J., I dismiss the same with costs which, there being two respondents, I assess at Rs. 300.

#### ORDER OF FULL BENCH

(75) In accordance with the decision of the majority of the Bench, the writ petition is dismissed with costs, which, inasmuch there are two respondents, are assessed at Rs. 300.

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K.S.K.