Central Administrative Tribunal
Principal Bench
New Delhi

OA No.494/2017

Reserved on : 21.09.2017
Pronounced on : 05.04.2018

Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. K. N. Shrivastava, Member (A)

Dr. Jagdish Prasad S/o Akloo Prasad,
Presently Director General of Health Services,
Government of India,
R/o Bungalow No.2, New Moti Bagh,
New Delhi-110023. … Applicant

(By Mr. Nidhesh Gupta, Senior Advocate and with him Mr. Nilansh Gaur and Mr. Tarun Gupta, Advocates)

Versus

1. Union of India through Secretary,
Ministry of Health and Family Welfare,
Government of India, Nirman Bhawan,
New Delhi-110001.

2. Ministry of Personnel, Public Grievances and
Pensions, Government of India,
Department of Personnel & Training through its
Secretary, North Block,
New Delhi. … Respondents

3. Dr. Badrinath Dhruvnath Athani,
Special Director General of Health Services,
Office of Director General of Health Services,
Ministry of Health and Family Welfare,
Government of India, New Delhi. … Intervener

(By Mr. Rajiv Sharma, Advocate for official Respondents; Mr. Ravi Sikri, Senior Advocate and with him Mr. M. K. Bhardwaj and Mr. Deepak Yadav, Advocates for Intervener)

O R D E R

Justice Permod Kohli, Chairman :

The applicant in this OA belongs to the sub-cadre of Non-Teaching Specialists under the Central Health Service (CHS) of the Government of India. He earned promotions from time to time and on the basis of his seniority, was promoted as Director General of Health Services (DGHS). He was due to retire on attaining the age of 62 years on 15.02.2017.

2. Under Fundamental Rule 56 the age of retirement of Non-Teaching Specialists in the CHS was 62 years. Earlier in the year 2009, on account of acute shortage of teaching faculty, the age of superannuation of the Teaching sub-cadre of CHS was enhanced from 62 to 65 years vide office memorandum dated 13.02.2009. Subsequently, vide office memorandum dated 24.04.2009, an option was given to the officers of Teaching sub-cadre occupying administrative positions to avail the benefit of enhancement of the age of superannuation up to 65 years by opting for teaching positions only. Accordingly, an amendment to this effect was carried out by inserting FR 56 (bb) with a proviso inserted thereunder vide notification dated 12.06.2009.

3. It appears that on account of acute shortage of medical faculty as a whole, the Union Cabinet in its meeting held on

15.06.2016 approved the enhancement of the age of superannuation of all sub-cadres of CHS to 65 years with effect from 31.05.2016. The Ministry of Health and Family Welfare was advised to take appropriate decision in respect of the age of officers of sub-cadres of CHS for holding the charge of administrative positions as per the functional requirement. The Cabinet decision to enhance the age of superannuation of all sub-cadres of CHS was implemented by issuance of notification dated 31.05.2016 substituting the existing clause (bb) of FR 56 by the following provision:

> "(bb) The age of superannuation in respect of General Duty Medical Officers and specialists included in Teaching, Non-Teaching and Public Health sub-cadres of Central Health Service shall be sixty-five years."

On account of the aforesaid substitution of the rule relating to enhancement of age of superannuation, all the sub-cadres of CHS were brought at par and their age of superannuation came to be enhanced to 65 years. The respondents issued office memorandum dated 19.07.2016 whereby following stipulation has been made:

> "(i) CHS officers of Non-Teaching Specialist, Public Health Specialist and GDMO sub-cadres of CHS will hold the administrative posts till the date of attaining the age of 62 years and thereafter their services would be placed in Non-Administrative positions with the following designations:

S.No.	Sub-cadre	HAG and above	HAG
1.	Non-Teaching Specialists	Principal Consultant	Consultant
2.	Public Health Specialists	Principal Advisor	Advisor
3.	GDMO	Senior CMO (HAG)	Senior CMO (SAG)

(ii) The officers of Teaching Specialists sub-cadre of CHS will continue to hold Administrative positions till the age of 62 years as provided in this Ministry's OM No.A-11016/09-CHS-V dated 24th February, 2012."

As a consequence of the aforesaid office memorandum, order dated 16.09.2016 (Annexure A-3) was issued by the Ministry of Health and Family Welfare posting one Dr. N. S. Dharamshaktu, Special DG, Directorate General of Health Services as Principal Advisor to Ministry on Public Health. Apprehending similar treatment of divesting the post of Director General of Health Services, as the applicant was to attain the age of 62 years on 15.02.2017, he made a representation dated 24.10.2016. While the said representation was pending, present OA was filed challenging the office memorandum dated 19.07.2016. The applicant also sought interim relief. After issuance of notice to the respondents and hearing the parties on the question of interim relief, this Tribunal vide order dated 14.02.2017 stayed the memorandum dated 19.07.2016 *qua* the applicant. A further direction was issued that the applicant would be allowed to

discharge the duties of the office held by him including administrative powers even after attaining the age of 62 years. Relevant extract of the order reads as under:

> "…The impugned memorandum dated 19.07.2016 is thus stayed qua the applicant. The applicant shall be allowed to discharge duties of the office held by him, including administrative powers, even after attaining the age of 62 years. It goes without saying that the respondents have the power/jurisdiction and authority to transfer the applicant on any post borne on the cadre of their service in accordance with law, if the respondents so desire, without taking away any power or authority attached to the post."

4. During pendency of this OA, the intervener, namely, Dr. Badrinath Dhruvnath Athani, Special Director General of Health Services in the office of Director General of Health Services, filed a misc. application, MA No.1213/2017 seeking impleadment or in the alternative as intervener. This MA was allowed vide order dated 05.04.2017 allowing him to intervene without any right to file pleadings. Despite such a conditional order, the said intervener has filed counter-reply without the leave of the Tribunal, which is on record.

5. During pendency of this OA, the respondents issued notification dated 22.03.2017 further amending FR 56 (bb) by introduction of the proviso thereto, which *inter alia* provided for taking away administrative powers from Teaching, Non-Teaching, Public Health Specialists and General Duty Medical Officers sub-

cadres of CHS on attaining the age of 62 years. Relevant part of the aforesaid notification reads as under:

> "2. In the Fundamental Rules, 1972, in rule 56, in clause (bb), the following proviso shall be inserted, namely:-
>
> "Provided that notwithstanding anything contained in any other rules, Teaching, Non-Teaching, Public Health Specialists and General Duty Medical Officer sub-cadres of the Central Health Service shall hold the administrative posts till the date of attaining the age of 62 years and thereafter their services shall be placed in Non-Administrative positions."

In view of the aforesaid notification, the applicant filed MA No.1348/2017 seeking amendment of this OA. This MA was allowed vide order dated 17.04.2017. The applicant accordingly filed amended OA challenging the *vires* of notification dated 22.03.2017. Relief claimed in the present OA after the amendment is as under:

> "8.1 Quash and set aside Office Memorandum dated 19.7.2016 insofar as it divests the applicant of his administrative position and nomenclature him on the designation of Principal Consultant upto 65 years of age vide Annexure A-1;
>
> 8.2 Direct the respondents to delete/modify the above provisions and the applicant be continued as DGHS with all powers, functions and duties till the age of 65 years with all consequences;
>
> 8.3 Any other relief which this Hon'ble Tribunal may deem fit and appropriate in the circumstances of the case; and
>
> 8.4 Call for the records leading to impugned amendment including the deliberations between respondents No.1 and 2 and set aside as illegal, arbitrary, mala fide and ultra vires, amendment by

way of insertion of proviso to FR 56(bb) vide Notification dated 22.3.2017 (Annexure A-1A) and further direct to allow the applicant to continue upto the age of 65 years as DGHS with all administrative and statutory powers along with all consequences."

6. The applicant seeks to challenge the constitutionality, legality and validity of the office memorandum dated 19.07.2016 as also the notification dated 22.03.2017 inserting the impugned proviso to FR 56(bb) on the following grounds:

(i) That the office memorandum dated 19.07.2016 supplants FR 56(bb), the said office memorandum being only in the nature of executive instructions is not sustainable in law.

(ii) That the amendment to FR 56(bb) vide notification dated 22.03.2017 introducing the impugned proviso thereto has been carried out without the approval of the Cabinet, and is thus illegal.

(iii) That the enhancement of the age to 65 years vide FR 56(bb) creates a vested right with effect from 31.05.2016 to continue up to the age of 65 years; such right carries with it the status, the powers and the privileges attached to the post. The office memorandum dated 19.07.2016 and the subsequent amendment vide notification dated 22.03.2017 take away such vested right, and are illegal, arbitrary and unconstitutional.

(iv) That the amendment, i.e., notification dated 22.03.2017 is violative of Articles 14, 16 and 311(2) of the Constitution of India, as it amounts to reduction in rank/status of the applicant.

(v) That there is no post equivalent to the rank/status of the Director General of Health Services where the applicant can be posted without reducing his rank/status.

(vi) That the amendment is also violative of CHS recruitment rules whereunder the senior-most HAG officer is to be appointed as the Director General. By virtue of this amendment, the applicant would be made to work under his junior officer who will exercise administrative control over him, which is contrary to the service jurisprudence.

(vii) That the amendment dated 22.03.2017 is only prospective in nature and would be applicable only from the date it came into operation. The applicant attained the age of 62 years prior to the said amendment and hence this amendment would not be attracted *qua* the applicant to deny him the administrative position.

7. The official respondents have filed their counter-affidavit contesting the claim of the applicant. It is stated that in view of the amendment of the statutory rules present OA has been rendered

infructuous. The present statutory position is that officers of Teaching, Non-Teaching, Public Health Specialists and General Duty Medical Officers of sub-cadres of CHS cannot hold administrative positions beyond 62 years of age and thus the applicant has no right to hold administrative post beyond the age of 62 years. While defending the office memorandum dated 19.07.2016, it is stated that executive instructions can occupy the field which is not covered by the statutory rules. It is stated that the statutory rules were silent as to the date up to which a person belonging to a specified sub-cadre of CHS could hold administrative post, and that by virtue of the office memorandum dated 19.07.2016 the gap is sought to be filled up. The said memorandum is thus valid in law. It is further stated that even prior to 31.05.2016 the position was that the age of superannuation for persons holding posts in various sub-cadres of CHS was 62 years. However, for specialists included only in the teaching sub-cadres of CHS engaged in teaching activities and not occupying the administrative positions, the age of superannuation was 65 years. The specialists of teaching sub-cadres who were occupying administrative positions had the option to hold teaching position in case they wished to continue up to the age of 65 years. Vide the subsequent amendment in FR 56(bb), the age of superannuation in respect of all the sub-cadres of CHS has been increased to 65 years. A proposal was mooted that after the age of 62 years which was earlier

the age of superannuation, such persons should not hold administrative positions. This proposal is in line with what was already provided for by the second proviso to FR 56(bb) introduced in the year 2009. It is the stand of the respondents that it is a policy decision of the Government that the officers of various sub-cadres of CHS should not hold administrative posts after the age of 62 years. The office memorandum dated 19.07.2016 was issued to give effect to the said policy decision. This office memorandum was preceded by the decision of the Union Cabinet dated 15.06.2016 empowering the Ministry of Health and Family Welfare to take appropriate decision in respect of the age for holding the charge of administrative posts as per the functional requirements. It is further stated that after issuance of the office memorandum dated 19.07.2016 the Ministry moved a proposal on 18.08.2016 for amendment in the Fundamental Rules to give statutory backing to the said memorandum, which culminated into the Fundamental (Second Amendment) Rules, 2017 as notified vide notification dated 22.03.2017. It is also stated that the notification dated 22.03.2017 would apply to all persons who are members of the Central Health Service, irrespective of the fact whether they have attained the age of 62 years or not. The effect of the notification is that a person borne on any sub-cadre of CHS would cease to hold administrative position on attaining the age of 62 years, and such persons who have already attained the age of 62

years but have not attained the age of 65 years have no right to hold such posts. It is the further stand of the respondents that the notification does not alter the service conditions of any person to his disadvantage nor is the doctrine of legitimate expectation attracted. While enhancing the age of superannuation, the respondents had the right to add a condition as to the post that could be held by an incumbent during the extended tenure of service from 62 to 65 years. Such condition could have been added simultaneously with the notification dated 31.05.2016 or separately. It is stated that such conditions are valid irrespective of the fact whether they are imposed subsequently.

8. Contesting the plea of the applicant that the notification dated 22.03.2017 is bad in law having been notified without the approval of the Cabinet, it is stated that the proposal that a person should not hold administrative position after the age of 62 years was placed before the Cabinet prior to the amendment being notified. The Cabinet left it to the Ministry of Health and Family Welfare to take appropriate decision in this regard, and accordingly the office memorandum dated 19.07.2016 and the notification dated 22.03.2017 were issued.

9. The intervener has by and large submitted its reply on the same lines as the official respondents. The intervener has, however,

relied upon the judgment of the Hon'ble High Court of Delhi in case of ***Dr. Richa Dewan*** [WP(C) No.2740/2014]. No new point has been raised in its counter.

10. In the rejoinder filed by the applicant, averments made in the OA have been reiterated. It is additionally mentioned that the applicant cannot be shifted to a non-existing post. Referring to FR 17, it is stated that till a person draws salary of a post, the status and functions are co-terminus. It is further stated that constitutional safeguards particularly under Articles 13, 14, 16, 19 and 311 restrict the discretion of the competent authority regarding alteration of such conditions of service. It is stated that as per Schedule-I of CHS rules, the post of DGHS as also the post of Special DGHS are in the same Pay Band of Rs.80000/- (Fixed). However, the post of Additional DGHS exists in Pay Band of Rs.67000-79000/- (pre-revised). According to the applicant, to become DGHS, an Additional DGHS has to earn promotion, and amongst the promotees the senior-most Special DGHS gets the post and designation of DGHS. This clearly shows that the DGHS is a promotional post. The applicant has also invoked the doctrine of legitimate expectation. Regarding the amendment carried out in 2009 in FR 56(bb), it is stated that the decision was not *per se* for enhancement of age of superannuation. However, vide notification dated12.06.2009 the specialists included in Teaching sub-cadre of CHS were offered continuity of appointment

by exercising option in writing, if desirous to continue up to the age of 65 years without occupying administrative positions.

11. We have heard the learned counsel for parties at length and perused the written submissions filed by parties.

12. The contention on behalf of the applicant is that by virtue of amendment dated 31.05.2016 enhancing the age of superannuation from 62 to 65 years a vested right is created. Amendment in Fundamental Rule 56 (bb), is recognition of the right of the applicant to continue in service up to the age of 65 years in the same capacity. The office memorandum dated 19.07.2016 and subsequent amendment in Fundamental Rule 56 vide notification dated 22.03.2017 takes away the vested right and as such the amendment operates retrospectively.

13. In (1987) 3 SCC 622 titled ***P. D. Agarwal and Others vs. State of U.P. & Ors.*** while considering the power of the government to make rules under proviso to Article 309 of the Constitution of India, the Hon'ble Supreme Court has observed as under:-

> **"16.** This memorandum dated December 7, 1961 was considered in *Baleshwar Dass case* [(1980) 4 SCC 226 : 1980 SCC (L&S) 531 : (1981) 1 SCR 449 : 1980 Lab IC 1155] by this Court and it was held that "this GO was not arbitrary insofar as it fixes the proportion of permanent vacancies to be filled from various sources, and it has statutory force being under Rule 6". It has also been observed that: [SCC p. 238, SCC (L&S) p. 544, para 22]

> "The office memorandum makes it clear that direct recruitments will be made to '*both permanent and temporary* vacancies of Assistant Engineers'. But this scheme of 1961 cannot stand in isolation and has to be read as subordinate to the 1936 Rules. After all, the 1961 Memorandum cannot override the Rules which are valid under Article 313, and so must be treated as filling the gaps, not flouting the provisions." (*emphasis in original*)

Hence the said OM does not affect the petitioners who have become members of the Service and are entitled to have their seniority reckoned from the date of their being member of the Service according to Rule 23 of the 1936 Rules. The 1969 Rules and 1971 Rules have however, affected the rights of the respondents who have become members of the Service being substantively appointed in temporary posts as Assistant Engineers inasmuch as there has been an amendment effected in Rule 3(*b*) by providing that a member of the Service meant a government servant appointed in a substantive capacity to a post in the cadre of the Service. Rule 3(*c*) also amends the earlier provisions by meaning direct recruitment as in the manner prescribed in Rules 5(*a*)(*i*) and 5(*b*)(*i*). Similar amendments have been made in Rules 5 and 6. The effect of these amendments is that Assistant Engineers who have become members of the Service being appointed substantively in temporary posts will no longer be members of the Service and will have to wait till they are selected and appointed as Assistant Engineers under Rule 5(*a*)(*ii*) against quota fixed by Rule 6 for this purpose. This creates serious prejudice to them and it also creates uncertainty as to when they will be selected and appointed against the quota set up for such selection under Rule 5(*a*)(*ii*). The amended Rule 23 lays down that a seniority will be determined from the date of order of appointment in substantive vacancy. These amended Rule 23 lays down that seniority will be determined from March 1, 1962 to the existing officers i.e. the respondents appointed substantively against temporary vacancies. It has been urged that government has the power to amend rules retrospectively and such rules are quite valid. Several decisions have been cited of this Court at the bar.

Undoubtedly the Government has got the power under proviso to Article 309 of the Constitution to make rules and amend the rules giving retrospective effect. Nevertheless, such retrospective amendments cannot take away the vested rights and the amendments must be reasonable, not arbitrary or discriminatory violating Articles 14 and 16 of the Constitution.

17. In the case *T.R. Kapur* v. *State of Haryana* [1986 Supp SCC 584] (in which one of us was a party) this Court observed: (SCC p. 595, para 16)

> "It is well settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: *B.S. Vadhera* v. *Union of India* [(1968) 3 SCR 575 : 1969 Lab IC 100 : (1970) 1 LLJ 499] , *Raj Kumar* v. *Union of India* [(1975) 4 SCC 13 : 1975 SCC (L&S) 198 : (1975) 3 SCR 963] , *K. Nagaraj* v. *State of A.P.* [(1985) 1 SCC 523 : 1985 SCC (L&S) 280] and *State of J&K* v. *Triloki Nath Khosa* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771 : (1974) 1 LLJ 121]. It is equally well settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well-recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of

> the rules, cannot be reverted and their promotion cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the tests of Articles 14 and 16(1) of the Constitution."

18. It has been held by this Court in *E.P. Royappa* v. *State of Tamil Nadu* [AIR 1974 SC 555, 583 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165] , *Maneka Gandhi* v. *Union of India* [AIR 1978 SC 597, 624 : (1978) 1 SCC 248] that there should not be arbitrariness in State action and the State action must ensure fairness and equality of treatment. It is open to judicial review whether any rule or provision of any Act has violated the principles of equality and non-arbitrariness and thereby invaded the rights of citizens guaranteed under Articles 14 and 16 of the Constitution. As has been stated hereinbefore the Assistant Engineers who have already become members of the Service on being appointed substantively against temporary posts have already acquired the benefit of 1936 Rules for having their seniority computed from the date of their becoming member of the Service. 1969 and 1971 Amended Rules take away this right of these temporary Assistant Engineers by expressly providing that those Assistant Engineers who are selected and appointed in permanent vacancies against 50 per cent quota provided by Rule 6 of the amended 1969 Rules will only be considered for the purpose of computation of seniority from the date of their appointment against permanent vacancies. Therefore the temporary Assistant Engineers are not only deprived of the right that accrued to them in the matter of determination of their seniority but they are driven to a very peculiar position inasmuch as they are to wait until they are selected and appointed against permanent vacancies in the quota set up for this purpose by the amended Rule 6. The direct recruits on the basis of the competitive examination conducted by the Commission and appointed against permanent vacancies on probation will supersede the rights that accrued under the unamended rules to the temporary Assistant Engineers having precedence in the matter of determination of their seniority from the date of their appointment against permanent vacancies. In other

words, the Assistant Engineers appointed substantively against temporary posts several years before the direct recruits and working in the posts of Assistant Engineers will be pushed down to the direct recruits against permanent vacancies. It is also evident that there are about 200 Assistant Engineers who have been appointed substantively by the Government with the approval of the Public Service Commission before the enforcement of 1969 Rules. The direct recruits appointed on the basis of the examination against permanent vacancies will get precedence over Assistant Engineers appointed in the matter of determination of their seniority in the cadre of Assistant Engineers on the basis of changed rules, particularly new Rule 23 which takes into account only appointments in substantive vacancies. Thus appointments made under Rule 5(*b*)(*i*) are to be treated as temporary i.e. 'T' category officers and their such services will not be taken into consideration in determining seniority until they are selected and appointed to permanent posts under Rule 5(*a*)(*ii*). Note I to Rule 23 made it clear that an appointment made substantively on probation against a clear vacancy in a permanent post will be treated as substantive appointment. Thus the 1969 and 1971 amendments in effect take away from the officers appointed to the temporary posts in the cadre through Public Service Commission i.e. after selection by Public Service Commission, the substantive character of their appointment. These amendments are not only disadvantageous to the future recruits against temporary vacancies but they were made applicable retrospectively from March 1, 1962 even to existing officers recruited against temporary vacancies through Public Service Commission. <u>As has been stated hereinbefore that the Government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution</u>.

Regarding the status of an office memorandum/rules again following observations have been made:-

> "**20.** The office memorandum dated December 7, 1961 which purports to amend the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 in our opinion cannot override, amend or supersede statutory rules. This memorandum is nothing but an administrative order or instruction and as such it cannot amend or supersede the statutory rules by adding something therein as has been observed by this Court in *Sant Ram Sharma* v. *State of Rajasthan* [AIR 1967 SC 1910 : (1968) 1 SCR 111 : (1968) 2 LLJ 830] . Moreover the benefits that have been conferred on the temporary Assistant Engineers who have become members of the service after being selected by the Public Service Commission in accordance with the service rules are entitled to have their seniority reckoned in accordance with the provisions of Rule 23 as it was then, from the date of their becoming member of the service, and this cannot be taken away by giving retrospective effect to the rules of 1969 and 1971 as it is arbitrary, irrational and not reasonable."

In (2006) 13 SCC 542 ***Union of India & Ors. vs. Asian Food Industries***, the Apex Court has observed as under:-

> **"48.** The Delhi High Court, however, in our view correctly opined that the Notification dated 4-7-2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot *a fortiori* be taken away by an amendment thereof."

To the contrary, respondents have relied upon the following judgments in support of their contention:-

"Ramji Purshottam (dead) by Lrs. and Others vs.Laxman Bhai D. Kurlawala (Dead) by lrs. and Another 2004 (6) SCC 455:-

13. Strictly speaking, in the present case, the application of the amendment brought in by the statute to the pending proceedings does not have the effect of retrospectivity. The rent is alleged to have fallen in arrears for the period 1-6-1969 to 31-1-1970. Some payment of water charges is said to have been made referable to the same period. Thus, both the events are referable to a period anterior to the coming into force of Act 51 of 1975. The law coming into force during the pendency of the proceedings is being applied on the date of judgment to the pre-existing facts for the purpose of giving benefit to the tenant in the pending proceedings. This is not retroactivity.

14. Justice G.P. Singh states in *Principles of Statutory Interpretation* (9th Edn., 2004, at p. 462)—

> "The fact that a prospective benefit under a statutory provision is in certain cases to be measured by or depends on antecedent facts does not necessarily make the provision retrospective. … the rule against retrospective construction is not always applicable to a statute merely 'because a part of the requisites for its action is drawn from time antecedent to its passing'."

In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subhash Chandra Yograj Sinha* [AIR 1961 SC 1596] the Constitution Bench held that Bombay Act 57 of 1947 is a piece of legislation passed to protect the tenants against the evil of eviction. And the benefit of the provisions of the Act ought to be extended to the tenants against whom the proceedings are pending on the date of coming into force of the legislation.

15. In the present appeal, once the provisions of Act 51 of 1975 became applicable, the tenants became entitled to take benefit of the amended provisions. However, it shall have to be borne in mind that the cause of action on which the landlord's action was founded was referable to the period from 1-6-1969 to 31-1-1970 for which the tenants were alleged to be in arrears. The

> tenants could have shown, and the Court could have entered into the question, if the tenants had made any such payment on account of water charges as would have exonerated them of their liability to make the payment of the rent claimed in the plaint as arrears by claiming adjustment so as to hold that on the date of the institution of the suit they were not in arrears for a period of six months or more and that such arrears did not continue to remain so for the period of one month after the date of service of the notice."

State of Uttar Pradesh and Others vs. Hirendra Pal Singh and Others 2011 (5) SCC 305, the Apex Court has observed as under-

> **"29.** Therefore, it is evident that under certain circumstances, an Act which stood repealed, may revive in case the substituted Act is declared ultra vires/unconstitutional by the court on the ground of legislative competence, etc., however, the same shall not be the position in case of subordinate legislation. In the instant case, the LR Manual consisted of executive instructions, which can be replaced any time by another set of executive instructions. (Vide *Johri Mal* [(2004) 4 SCC 714 : AIR 2004 SC 3800] .)
>
> **30.** Therefore, question of revival of the repealed clauses of the LR Manual in case the substituted clauses are struck down by the court, would not arise. In view of this, the interim order would amount to substituting the legal policy by the judicial order, and thus not sustainable."

14. Shri Nidhesh Gupta, learned Sr. Advocate assisted by Shri Nilansh Gaur, learned counsel for the applicant, while challenging the validity of proviso to FR 56 (bb) vide notification dated 22.03.2017 submits that the proviso is in contravention of the main provisions contained in FR 56 (bb). Referring to the rules of interpretation, it is argued that a proviso may create an exception but

it cannot nullify the main provision or render it otiose. According to him, the benefit of enhancement of age from 62 to 65 years conferred by amending FR 55 (bb) is being nullified vide proviso introduced on 22.03.2017. His submission is that the enhancement of age from 62 to 65 years is without any condition. It carries with it all rights and benefits attached to the post held by the applicant at the time of enhancement of his age. It is only by virtue of the proviso that the status of the applicant is sought to be changed. It is submitted that the administrative post of Director General of Health Services carries with it certain privileges. By virtue of proviso, the applicant is to be shifted to a non-existent post which definitely affects the status, reputation and privileges which are attached to the administrative post. According to him, the administrative post is held by the applicant on the basis of his seniority and in accordance with the provisions of recruitment rules. In support of his contention, he relies upon the following judgments:-

In ***J.K. Industries Ltd. and Others vs. Chief Inspector of Factories and Boilers and others*** (1996) 6 SCC 665, the Hon'ble Supreme Court has observed as under:-

> **"34.** A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing something

by way of *addition* to the main provision which is *foreign* to the main provision itself.

35. Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and if it is so, it would be ultra vires of the main provision and struck down. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justify its necessity."

In ***Casio India Company Private Limited vs. State of Haryana*** (2016) 6 SCC 209, the Apex Court has observed as under:-

"20. It is not disputed that on all intra-State sales no tax has been charged as the said transactions were treated as exempt by the tax authorities. However, in the course of inter-State sales, it is submitted by the Revenue that the exemption would be limited and available only if the manufacturer i.e. the eligible industrial unit makes sale in inter-State trade or commerce, but if a third party, who had procured the goods from the eligible industrial unit makes inter-State sale, such trade or commerce would not be exempt. The contention of the State suffers from incorrect appreciation and understanding of the purport and objective behind Rule 28-A and the Notification in question. The basic objective and purpose is to exempt the goods manufactured in the State when they are further transferred in the course of inter-State or intra-State trade or commerce. Therefore, reference is made to the eligible industries and the goods manufactured by the said industries, which are entitled to exemption. The exemption notification refers to the sale of goods manufactured by a dealer holding a valid exemption certificate. The emphasis is on the goods manufactured. However, it is confined by the condition that the said manufacture should be within the exemption period and by a dealer holding an exemption certificate."

In ***Rohtash Kumar and Others vs. Om Prakash Sharma and Others*** (2013) 11 SCC 451, the Apex Court has held as under:-

> **"20.** The normal function of a proviso is generally to provide for an exception i.e. exception of something that is outside the ambit of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, a proviso cannot be interpreted as a general rule that has been provided for. Nor it can be interpreted in a manner that would nullify the enactment, or take away in entirety, a right that has been conferred by the statute. In case the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude by implication, what clearly falls within its expressed terms. If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit and scope. [Vide *CIT* v. *Indo Mercantile Bank Ltd.* [AIR 1959 SC 713] , *Kush Saigal* v. *M.C. Mitter* [(2000) 4 SCC 526 : AIR 2000 SC 1390] , *Haryana State Coop. Land Development Bank Ltd.* v. *Employees Union* [(2004) 1 SCC 574 : 2004 SCC (L&S) 257] , *Nagar Palika Nigam* v. *Krishi Upaj Mandi Samiti* [(2008) 12 SCC 364 : AIR 2009 SC 187] and *State of Kerala* v. *B. Six Holiday Resorts (P) Ltd.* [(2010) 5 SCC 186]"

In ***Union of India and others vs. S. Srinivasan and others*** [(2012) 7 SCC 683], the Hon'ble Supreme Court has observed as under:-

> **"37.** The first proviso stipulates that the number of either full-time members or part-time members shall not exceed two. This proviso introduces the concept of part-time member. There can be no trace of doubt that it travels beyond the enabling provision and is totally inconsistent with it. The Rule does not conform to the main enactment. Therefore, in our opinion, the High

> Court is justified in declaring the said provision as ultra vires."

On this issue, the respondents relied upon ***J. K. Industries Ltd. and others vs. Chief Inspector of Factories and Boilers and Others 1996*** (6) SCC 665, wherein the Apex Court has observed as under:-

> **"33.** A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully scrutinize and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the section be construed first without reference to the proviso and if the same is found to be ambiguous only then recourse may be had to examine the proviso as has been canvassed before us. On the other hand an accepted rule of interpretation is that a section and the proviso thereto must be construed as a whole, each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially."

15. It is also sought to be argued that by virtue of proviso and earlier OM dated 19.07.2016, a person holding the administrative post, i.e., Head of the Department, is being reduced in rank and thus it is violative of Article 311 (2) of Constitution of India. To explain the expression "reduced in rank", it is stated that even reduction in power, authority and privileges and reduction in status would hit the mandate of Article 311. His further contention is that the post of Consultant is not an equivalent post to the Director General, Health Services. It is a matter of fact that there is no such post under the

recruitment rules or otherwise. By shifting the applicant to the said post of Consultant all his privileges and status would be taken away.

16. In the matter of ***Madan Gopal Singh vs. Union of India and another*** [1969 SCC On Line Del 53; 1969 SLR 576] decided by Hon'ble Delhi High Court, the petitioner therein appointed as Inspector General of Police on deputation with the Himachal Pradesh Government was transferred as Deputy Inspector General, CRPF. He challenged his transfer and appointment on various grounds including reduction in rank/status and loss of privileges. Considering the issue, Hon'ble Delhi High Court observed as under:-

> **"60.** Thus, the appointment and transfer of the petitioner to the post of D.I.G.C.R.P. involves not only a reduction in the rank in the physical sense, but also penal consequences viz., loss of powers, privileges, status, seniority and future chances of promotion. It is, therefore, a reduction in rank within the meaning of Article 311(2) and as the provisions of the said Article were not admittedly complied with, the order of his appointment and transfer as D.I.G.C.R.P. (Annexure 'N') is liable to be quashed as violative of the mandatory provision in Article 311(2) of the Constitution."

In Sub-Inspector ***Roop Lal and Another vs. Lt. Governor through Chief Secretary, Delhi and others*** [(2000) 1 SCC 644], the Hon'ble Supreme Court while considering the question of equivalence of the post has observed as under:-

> **"17.** In law, it is necessary that if the previous service of a transferred official is to be counted for seniority in the

transferred post then the two posts should be equivalent. One of the objections raised by the respondents in this case as well as in the earlier case of Antony Mathew is that the post of Sub-Inspector in BSF is not equivalent to the post of Sub-Inspector (Executive) in the Delhi Police. This argument is solely based on the fact that the pay scales of the two posts are not equal. Though the original Bench of the Tribunal rejected this argument of the respondent, which was confirmed at the stage of SLP by this Court, this argument found favour with the subsequent Bench of the same Tribunal whose order is in appeal before us in these cases. Hence, we will proceed to deal with this argument now. Equivalency of two posts is not judged by the sole fact of equal pay. While determining the equation of two posts many factors other than "pay" will have to be taken into consideration, like the nature of duties, responsibilities, minimum qualification etc. It is so held by this Court as far back as in the year 1968 in the case of *Union of India* v. *P.K. Roy* [AIR 1968 SC 850 : (1968) 2 SCR 186] . In the said judgment, this Court accepted the factors laid down by the Committee of Chief Secretaries which was constituted for settling the disputes regarding equation of posts arising out of the States Reorganisation Act, 1956. These four factors are: (*i*) the nature and duties of a post; (*ii*) the responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged; (*iii*) the minimum qualifications, if any, prescribed for recruitment to the post; and (*iv*) the salary of the post. It is seen that the salary of a post for the purpose of finding out the equivalency of posts is the last of the criteria. If the earlier three criteria mentioned above are fulfilled then the fact that the salaries of the two posts are different would not in any way make the post "not equivalent". In the instant case, it is not the case of the respondents that the first three criteria mentioned hereinabove are in any manner different between the two posts concerned. Therefore, it should be held that the view taken by the Tribunal in the impugned order that the two posts of Sub-Inspector in BSF and Sub-Inspector (Executive) in the Delhi Police are not equivalent merely on the ground that the two posts did not carry the same pay scale, is necessarily to be rejected. We are further supported in this view of ours by another judgment of this Court in the case of *Vice-Chancellor, L.N. Mithila University* v. *Dayanand Jha* [(1986) 3 SCC 7 : 1986 SCC (L&S) 378 : (1986) 1 ATC 42]

wherein at SCC para 8 of the judgment, this Court held: (SCC pp. 10 & 11)

> "Learned counsel for the respondent is therefore right in contending that equivalence of the pay scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. We are inclined to agree with him that the real criterion to adopt is whether they could be regarded of equal status and responsibility. … The true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts."

In ***Mrs. Paramjit Gill vs. The Chairman Managing Committee Army Public School and Anr.*** (2006) Online Delhi 1643; (2007) 1 SLR 652, the Hon'ble Supreme Court has observed as under:-

> **"21.** The above provision, as is immediately apparent, not only enacts and obligation to grant pay scales which are equivalent to what is granted in schools of the appropriate government, but also extend similar, proscribed benefits, which are granted to those with "employees of the corresponding status in school run by the appropriate authority". The obligation, and the corresponding right of the teacher/employee, is as to the corresponding status". It is, therefore, idle to contend that shifting of a teacher from one post to another cannot lead to a grievance at all, so long as he is given pay protection. If such a logic were accepted, a Post graduate teacher can not complain, if he is required to work as a trained graduate teacher, a and assigned duties in a lower post, which could be the feeder grade to his post. Likewise, a Principal cannot, by analogy, complain if he is asked to perform the duties of a PGT, if his emoluments as a principal are protected. The fallacy, of the schools' defence, in my opinion is the treatment of a teachers' work as any other employment, and the assertion of the management's right as in the case of any other commercial organization, or industrial concern. The primacy of a teacher's status, in a society, can never be undermined; upon him falls the difficult, and delicate

> task of not only imparting education, but also instilling social and moral values, that are essential building blocks for a sound and just society. Our society has always prided in granting that pride of place to teachers; it would indeed be a sad day if they are treated as mere cogs in organizations, as factors of production. There is sufficient material on record to conclude that the post of "Head of primary wing" held by the petitioner, is none other than that of Headmistress, in government of NGT schools. Likewise, the creation of a post of "Head Co-curricular activities" is a position that does not exist in the hierarchy of posts in any school managed by the Govt. of NCT. The impugned order, therefore, seeking to shift the petitioner as Head of Primary Wing, to the new post, is unsupported in law. My findings are also supported by the decision of the Supreme Court in *S.I. Rooplal's case* (supra) where the issue of equivalence of a post was held not to be confined only to equal pay, but also to extend to job content and other considerations. Here, indisputably, the petitioner worked as Head, Primary Wing (to which she was recruited, and in which post she was confirmed in 1991) for 14 years. The work content of both the posts are entirely different; that new post is non-academic, and the petitioner has a justifiable grievance that shifting her there, from a post where she discharged supervisory duties, in addition to holding academic/teaching assignments, amounted to an adverse change of her status. The claim of the management, that the post was "ex-cadre" is a mere assertion, to justify the indefensible; no material was produced in support of the stand. I am of the opinion that such a position is contrary to law, i.e. Section 10 of the Act; the impugned order is therefore illegal, and liable to be quashed.

17. Shri Rajeev Sharma, learned counsel appearing for the official respondents, however, controverted the submissions made by Shri Nidhesh Gupta, learned Sr. Advocate. Shri Sharma has pleaded that the issues sought to be raised by the applicant that the

amendment in the fundamental rules or for that matter the office memorandum dated 19.07.2016 has been issued without the approval of the Prime Minister/Cabinet has no basis and in any case not relevant after the amendment of the rules.

18. It is also argued on behalf of the applicants that the impugned OM dated 19.07.2016 and amendment dated 22.03.2017 are also in contravention of the recruitment rules as notified vide Notification dated 08.03.1996 as amended in 2014. The recruitment rules for the Central Health Services were notified vide GSR 460 (E) Notification dated 08.10.1996. The Rules are called "Central Health Service Rules, 1996". The relevant extracts of the rules are reproduced hereunder:-

> "2 (d) "Duty Post" means any post, whether permanent or temporary, specified in Schedule II.
>
> 3. Composition of the Service- All duty posts, included in the service shall be classified as Central Civil Service Group "A" and the grades, scales of pay, non-practicing allowance and other matters connected therewith shall be as specified in Schedule-I.
>
> 4. Authorized strength of the Service—
>
> (1) The authorized strength of the duty posts included in the various grades of the Service on the date of commencement of these rules shall be as specified in Schedule-II.
>
> (2) After the commencement of these rules, the authorized permanent strength of the duty posts in the various grades shall be such as may, from time to time, be determined by the Government.

(3) The Government may make temporary additional to, or reduction in, the strength of the duty posts in the various grades as deemed necessary from time to time.

(4) The Government may, in consultation with the Commission, include in the Service any post other than those included in Schedule-II or exclude from the Service a post included in the said Schedule."

Schedule-II- prescribes authorized strength of CHS duty post. The same is as under:-

"Schedule-II
Authorized strength of Central Health Service
DUTY POSTS
Higher Administrative Grade

S.No.	Designation	No. of Posts
	MINISTRY OF HEALTH AND FAMILY WELFARE	
1.	Director General of Health Service	1
2.	Additional Director General of Health Services/Head of Institutions And Organizations/National Programmes	12"

Rule 2 (d) defines a duty post and includes permanent and temporary posts specified in Schedule-II. Rule 3 deals with composition of service and the details of such central civil services Group-A post are specified in Schedule-I. Rule 4 deals with authorized strength of service and refers to the authorized strength of duty posts as included for various grades of services as specified in Schedule-II. Sub rule 3 of this rule empowers the government to make temporary additions and reduction in the strength of duty

posts in various grades from time to time. Sub-rule 4 further empowers the government to include in the service any post other than those included in the Schedule-II or exclude any such post specified therein in consultation with the Commission. Both under Schedule I & II, there is one post of Director General of Health Services in the fixed pay of Rs.80,000. The post of Director General is thus a cadre post. There being only one post, there is no equivalent post in the hierarchy of service. It is also not in dispute that the duty posts have been specified under Schedule-II. Position of service is as prescribed under Schedule-I and authorized strength of service is as specified in Schedule-II. The government has, however, the power to add or reduce the strength of the duty post in various grades as may be deemed necessary from time to time. However, under sub-rule 4 of Rule 4 such power can only be exercised in consultation with the UPSC to include or exclude any post in Schedule-II. It is not the case of the respondents that any such power has been exercised or the government has either added any post of the rank of Director General of Health Services or for that matter post in other ranks by amendment of Schedule-II in consultation with UPSC.

19. Shri Nidhesh Gupta has also referred to notings obtained under RTI Act, 2005 (Annexure A/5) reference to the same shall be made later in the judgment.

20. Further contention of Mr. Rajeev Sharma is that the amendment to fundamental rule and the introduction of the proviso is a policy matter of the State. In his written submissions, the object of the policy is stated to be to overcome the shortage of medical professionals and to avail experience of such professionals. It is accordingly submitted that where merely the scheme is not implemented in one go and came to be implemented in stages is a mere fortuitous circumstance and does not confer any right on the applicant. Neither the fundamental rule 56 nor the implementation of the policy in phases creates any vested or accrued right in the applicant. Whatever right is created by enhancement of age is a mere statutory right and does not confer any indefeasible right to continue to discharge administrative functions. His submission is that right crated by a statute can also be taken away by statute. In this context reference is made to following judgments:-

Ram Avtar Pandey vs. State of Uttar Pradesh and another, AIR 1962 All 328 (FB):-

> **"55.** Relying on Art. 367 of the Constitution, learned counsel for the petitioner urged that Art. 309 should be interpreted keeping in view Sec. 21 of the General Clauses Act. That section, according to him, clearly provided that the Governor's power to amend R. 56 could be exercised only in the manner and subject to the sanctions and conditions under which he could make the rule itself. Learned counsel urged that if the Governor could not make a rule with retrospective effect he could not amend a rule with similar effect.

> The simple answer to his contention is that there is nothing in the proviso to Art. 309 to justify the contention that the-Governor has no power to make a rule with retrospective effect. It is true that the powers of the Governor to amend a rule are subject to some conditions and limitations as his power to frame a rule but if, as it appears in the present case, there is no restriction to his making a rule with retrospective effect there can be no restriction on his power to amend a rule with that effect.
>
> **56.** The argument that a Government employee can claim a vested right under any rule relating to his conditions of service and that on that account it is not permissible for the rule making authority to amend the rule so as to affect that right does not appear to be acceptable at all. It may be pointed out in this connection that certain audit instructions have been issued regarding R. 56 which are printed just below the rule in the Financial Handbook, Volume II, Part I. Instruction No. 1-B reads:—
>
> > "The purpose of Fundamental R. 56 is not to confer upon government servants any right to be retained in service up to a particular age, but to prescribe the age beyond which they may not be retained in service."
>
> **57.** This shows the intention with which the rule was framed. What to say of a vested right, not even a right was intended to be conferred by R. 56. The petitioner could not, therefore, say that because at one stage 58 was the age of superannuation according to the rule a right was conferred upon him under which he could insist that he should be retained in service till that age and that the rule making authority had lost its right to change the rule and to reduce the age of superannuation to a lower figure.

In ***Trimbak Damodhar Rajpurkar vs. Assaram Hiraman Patil and Others*** [AIR 1966 SC 1758], the Hon'ble Supreme Court observed as under:-

> **"9.** In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. As observed by Buckley, L.J. in *West* v. *Gwynne* [1911 2 Ch 1 at pp. 11, 12] retrospective operation is one matter and interference with existing rights is another. "If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law". These observations were made in dealing with the question as to the retrospective construction of Section 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). In substance Section 3 provided that in all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent. It was held that the provisions of the said section applied to all leases whether executed before or after the commencement of the Act; and, according to Buckley, L.J., this construction did not make the Act retrospective in operation; it merely affected in future existing rights under all leases whether executed before or after the date of the Act. The position in regard to the operation of Section 5(1) of the amending Act with which we are concerned appears to us to be substantially similar."

In ***Shri Bakul Oil Industries and Another vs. State of Gujarat and Another,*** [(1987) 1 SCC 31], the Apex Court has observed as under:-

> **"10.** Much of the arguments of the appellants' counsel proceeded on the assumption that the appellants had acquired a vested right under the notification issued by the Government on November 11, 1970 to claim exemption from payment of sales tax for a period of five years and consequently the Government had no right to take away the appellants' vested right. The contentions are untenable because of the fallacy contained in them viz. the wrong assumption that the appellants had acquired a vested right. The High Court has rightly repelled the plea that the appellants had acquired a vested right and were, therefore, entitled to claim exemption from payment of tax for a period of five years notwithstanding the revocation of the exemption under the notification dated July 17, 1971. The High Court has further taken the view that the earlier notifications granting exemption of tax only created existing rights and such existing rights can always be withdrawn by means of a revocation notification and that is exactly what has happened in this case.

21. The amendment dated 22.03.2017 is said to be prospective in nature, and is being applied prospectively w.e.f. the said date. The effect of this notification is that the officers belonging to CHS sub cadres cannot hold administrative post or discharge administrative functions after attaining the age of 62 years. It hardly matters whether a person has attained the age of 62 years prior to the notification or thereafter.

22. It is argued that merely the applicant had attained the age of 62 years prior to the amendment does not mean that the amendment cannot be applied to the applicant. The amendment is prospective and is being applied to the antecedent facts. Reliance is placed upon the following judgments:-

Punjab University vs. Subhash Chander and Another 1984 (3) SCC 603:-

> **"11.** We do not agree with the learned Judges of the Full Bench of the High Court that there is any element of retrospectivity in the change brought about by the addition of the exception to Rule 2.1 of the Calendar for the year 1970. "Retrospective" according to the *Shorter Oxford English Dictionary*, Third Edn., in relation to Statutes, etc. means "Operative with regard to past time". The change brought about by the addition of the exception to Rule 2.1 does not say that it shall be operative with effect from any earlier date. It is obviously prospective. It is not possible to hold that it is retrospective in operation merely because though introduced in 1970 it was applied to Subash Chander, Respondent 1, who appeared for the final examination in 1974, after he had joined the course earlier in 1965. No promise was made or could be deemed to have been made to him at the time of his admission in 1965 that there will be no alteration of the rule or regulation in regard to the percentage of marks required for passing any examination or award of grace marks and that the rules relating thereto which were in force at the time of his admission would continue to be applied to him until he finished his whole course. In the Calendar for 1979 we find the following at p. 1:
>
> > "Notwithstanding the integrated nature of a course spread over more than one academic year, the regulations in force at the time a student joins a course shall hold good only for the examinations held during or at the end of the academic year. Nothing in these regulations shall be deemed to debar the University from amending the regulations subsequently and the amended regulations, if any, shall apply to all students whether old or new."
>
> This is as it should be, though there was no such provision in the Calendar of 1965 when Subash Chander was admitted to the course. It is admitted that it was introduced only in 1971. The absence of such a provision in the Calendar of 1965 is of no consequence. It is necessary to note in this connection

what this Court had said in regard to retrospectivity in such matters in *Bishun Narain Mishra* v. *State of U.P.* [AIR 1965 SC 1567 : (1965) 1 SCR 693 : (1965) 2 SCJ 718 : (1966) 1 LLJ 45] It is this:

> "The next contention on behalf of the appellant is that the rule is retrospective and that no retrospective rule can be made. As we read the rule we do not find any retrospectivity in it. All that the rule provides is that from the date it comes into force the age of retirement would be 55 years. It would therefore apply from that date to all government servants, even though they may have been recruited before May 25, 1961 in the same way as the rule of 1957 which increased the age from 55 years to 58 years applied to all government servants even though they were recruited before 1957. But it is urged that the proviso shows that the rule was applied retrospectively. We have already referred to the proviso which lays down that government servants who had attained the age of 55 years on or before June 17, 1957 and had not attained the age of 58 years on May 25, 1961 would be deemed to have been retained in service after the date of superannuation, namely 55 years. This proviso in our opinion does not make the rule retrospective; it only provides as to how the period of service beyond 55 years should be treated in view of the earlier rule of 1957 which was being changed by the rule of 1961. Further the second order issued on the same day also clearly shows that there was no retrospective operation of the rule for in actual effect no government servant was retired before the date of the new rule i.e. May 25, 1961 and all of them were continued in service upto December 31, 1961 except those who completed the age of 58 years between May 25, 1961 and December 31, 1961 and were therefore to retire on reaching the age of superannuation according to the old rule. We are, therefore, of opinion that the new rule

> reducing the age of retirement from 58 years to 55 years cannot be said to be retrospective. The proviso to the new rule and second notification are only methods to tide over the difficult situation which would arise in the public service if the new rule was applied at once and also to meet any financial objection arising out of the enforcement of the new rule. The new rule therefore, cannot be struck down on the ground that it is retrospective in operation."

Defending the notification dated 19.07.2016 and statutory amendment dated 22.03.2017, it is contended that the object of amendment to FR 56 by introducing (substituted-bb) on 31.05.2016 was to avail the benefit of experience of the doctors in the field of medicine and health care by enhancing their age of superannuation. It is also submitted that simultaneously it was decided that they will not discharge administrative functions after attaining a particular age which was specifically fixed at 62 years. To explain the rationale, it is argued that the rationale was to utilize their experience in the field of health care and medicine and not administrative acumen. The official as well as the private respondents have heavily relied upon the judgment of the Delhi High Court in the matter of ***Dr. Richa Dewan & Anr. vs. Union of India & Ors.,*** reported as 231 (2016) Delhi Law Times 314 (DB).

23. We have carefully perused this judgment.

24. It is deemed necessary to note some of the relevant features and the circumstances wherein the aforesaid judgment was

delivered. In the existing fundamental rule 56-A which *inter alia* provided the age of superannuation of all government servants at 60 years, the amendment was carried out in respect to the teaching and non teaching public health sub cadre of CHS by introduction of 56 (bb). The said amendment is as under:-

> ""[(bb) The age of superannuation in respect of specialists included in the Teaching, Non-Teaching and Public Health sub-cadres of Central Health Service shall be 62 years.
>
> [Provided that for the specialist included in the Teaching sub-cadres of the Central Health Service who are engaged only in teaching activities and not occupying administrative positions, the age of superannuation shall be sixty-five years.
>
> Provided further that such specialists of the Teaching sub-cadre of Central Health Service who are occupying administrative positions shall have the option of seeking appointment to the teaching positions in case they wish to continue in service up to sixty-five years.]"

25. Dr. Richa Sharma and Dr. Neelam Bala Vaid were the petitioners who were holding the posts of HOD in their respective Specialties. They approached the CAT Principal Bench. OA No.3632/2013 was filed by Dr. Richa Sharma and OA No.992/2013 by Dr. Neelam Bala Vaid. These doctors challenged the office memorandum dated 24.02.2012 whereby they were deprived of the administrative position/designation of Head of Department in their respective specialties of teaching sub cadre after they attained the age of 62 years. The challenge before the Tribunal was rejected vide

common order dated 26.04.2014. The judgment of the Tribunal came to be challenged before the Hon'ble Delhi High Court. The Hon'ble High Court examined the contentions raised. The respondents relied upon an OM dated 24.02.2012 which *inter alia* provided that the Specialists who want to continue beyond the age of 62 years can work up to 65 years must fully devote to academic work including clinical work and they should not get involved in the work associated with the administration in any department or institute. Since the proviso added to FR 56 (bb) gave an option to the teaching faculty to avail the benefit of enhancement of age of superannuation of 65 years subject to relinquishing the administrative positions, the doctors had exercised the option. Considering the aforesaid circumstances, the Hon'ble High Court observed as under:-

> "10. The object behind the impugned OM is to clearly differentiate and demarcate what constitutes teaching and non-teaching work. The said demarcation can be by way of administrative instructions and is not required to be by way of rules framed under Article 309 of the Constitution. In fact, there is a contradiction in the contention raised by the petitioners. Once they accept that there is no statutory rule for creation and fixing duties and functions for the post of Head of Department, then their grievance questioning the administrative order in the form of OM dated 24th February, 2013 on the ground that for such stipulation a statutory rule is mandated or a must, lacks substratum and merit. <u>The designation of Head of Department over the years has gained recognition even when it is not a statutory post and position. The appointment is by way of convention, and is not regulated by any statutory rule or regulation. In such circumstances, administrative</u>

decision can be taken, for this would fall in the realm of policy. The OM in question has been issued in exercise of executive power, which vests with the Executive. The said instructions nowhere contravene any statutory rule or regulation.

11. As noticed above, clause (bb) of FR 56 (A) is not under challenge. The said clause itself makes a distinction between teaching or academic work and administrative work. The Fundamental Rules, however, do not define and clearly demarcate what is teaching and administrative work. Statutory provisions are not violated for they do not provide and stipulate the distinction between teaching or academic activities and administrative positions or work. When the Fundamental Rules or other Rules are silent or not expressive, it is open to the Government to supplement the rules by issuing an OM stating the posts or designations which are administrative posts and would be included and treated as academic or teaching work. We agree that the classification or differentiation by an OM, which is in the nature of an executive instruction should not be absurd, capricious and arbitrary. Once the said touchstone is satisfied, the court cannot interfere with the policy stated in the OM. The impugned OM opining that the „Head of the Department" is an administrative post cannot be faulted on the ground of absurdity, capriciousness or arbitrariness. No such argument is raised. Even if raised, cannot be accepted. Further, why and for what reason specialists above the age of 62 years should not hold administrative positions though not challenged and questioned, falls within the domain of policy. Courts cannot substitute and override government policy. The reasons for the policy are perceptible, but need not be recorded for this is not a lis or the dispute raised. Once again we record that the petitioners do not dispute and have not challenged the provisos to clause (bb) to FR 56 (A). Courts can exercise power of judicial review and declare policy as violative of Articles 14, 16 or other fundamental rights or statutory rights when such rights are contravened or negated. In the present case, challenge to the OM dated 24th February 2014 is rather restricted and limited. The OM holds that designation as the Head of the Department would be given to those who are involved in

> administrative work. When it is accepted that specialists between 62 and 65 years have opted to continue in the teaching sub-cadre and do academic work, we find it difficult to accept the position that they would like to exercise and yield administrative authority as the Head of the Department. The said contention is contradictory and should not be accepted."

Based upon this judgment, the common argument of counsel for respondent and intervener is that the issue having been decided by the aforesaid judgment which has attained finality, the present OA is liable to be dismissed.

26. The main contention raised by the respondents in their counter reply as also during the course of arguments was that the issue raised in the present OA having been decided by the Hon'ble High Court of Delhi in case of ***Dr. Richa Dewan*** (supra), the said decision would operate as *res judicata*, or is at least, would be a binding precedent. We have carefully considered the judgment in ***Richa Dewan***'s case. The two issues are very important which need to be brought to fore. In case of ***Richa Dewan***, the proviso to clause *(bb)* of FR 56 was not under challenge. This has been noticed by the Hon'ble High Court in para 11. In ***Richa Dewan***'s case, by virtue of the amendment, generally the age of superannuation of CHS Cadres was never enhanced to 65 years. It continued to be 62 years. What the proviso provided was that those belonging to the teaching sub-cadre who want to devote towards the academics and are not

discharging any administrative functions, may opt for enhancement of age up to 65 years and continue in service up to the said enhanced age, and in respect to those who are holding administrative positions and belonging to the teaching sub-cadre, were given an option to opt for enhancement of age subject to relinquishing their administrative positions. It was left to the choice of the doctors who belong to teaching sub-cadre to take the benefit of the proviso or not. There was no compulsion under the amendment to relinquish the charge. Those who were willing to opt, could also do so, and whose who were not, they were allowed to continue to occupy the administrative positions. The position in the present case is altogether different. Here, the age of superannuation has been enhanced from 62 to 65 years in respect to all the sub-cadres of CHS by substitution of FR 56 *(bb)* irrespective of the fact whether a person is holding administrative position or not. This amendment was made on 31.05.2016. After about one and a half month of the said amendment, the impugned memorandum dated 19.07.2016 was issued whereunder the concept of relinquishment of the administrative position was brought in. This was carried out without any corresponding amendment in the rules. When this memorandum came to be challenged before this Tribunal in the present OA, after hearing the parties, the Tribunal passed a detailed order dated 14.02.2017. The impugned memorandum was stayed, with further

liberty to the respondents to transfer the applicant on any post borne on the cadre of the Service in accordance with law, without taking away any power or authority attached to the post. One of the ground for interference was absence of any statutory provision to divest a person of his administrative position so long as he was duly and validly appointed to a post having all the administrative powers attached to it. This seems to have prompted the respondents to amend the rule by introduction of proviso vide amendment dated 22.03.2017. When this amendment was carried out, the applicant amended the OA with the leave of the Tribunal, and in the amended OA the *vires* of the proviso introduced vide the amendment dated 22.03.2017 has also been challenged.

27. In ***Richa Dewan***'s case (supra), the Hon'ble High Court turned down the challenge to the OM dated 24.02.2012. The reasons are contained in paras 10 & 11 noticed hereinabove. It has been held by Hon'ble Delhi High Court in ***Richa Dewan's case*** (supra) that HOD is not a statutory post. The post of HOD is merely on the basis of recognized convention and is not regulated by any statutory rules or regulations. Under such circumstances, it was opined that administrative decision was permissive to deprive the position of HOD. HOD not being a statutory post once the classification or differentiation by an OM which is in the nature of executive instructions satisfy that the same are not absurd, capricious or

arbitrary, no interference with the policy stated in the OM is warranted. The Hon'ble High Court also noticed that the court cannot substitute and override the government policy. It was also noticed that the specialists between 62 and 65 years opted to continue in the teaching sub-cadre and do academic work and it was under these circumstances the interference by the court was declined. It was further held by Hon'ble Delhi High Court that the statutory amendment under Rule 56 (A) (bb) including the provisos thereto whereby the Doctors who have given the option to seek the benefit of enhancement of the age of superannuation by opting for the teaching activity is not under challenge.

28. In the present case, not only the OM dated 19.07.2016 but even the proviso as inserted vide the impugned amendment dated 22.03.2017 is under challenge. The circumstances noticed by the Hon'ble High Court to decline the challenge were different than the position in the present case. Even the Hon'ble High Court agreed that where any government policy suffers from the vice of arbitrariness or is absurd or capricious, judicial intervention may be permitted. Thus, we have to examine whether the impugned OM dated 19.07.2016 and the consequential amendment dated 22.03.2017 suffer from any legal infirmity, vice of arbitrariness or the policy is capricious or suffers from any other infirmity, warranting judicial intervention in exercise of power of judicial review. Judgment in

Richa Dewan's case (supra) is clearly distinguishable on facts and attending circumstances.

29. Regarding the issue of reduction in rank raised by the applicants, it is stated on behalf of respondents that there is no element of reduction in rank as the applicant would continue to hold the apex level post and will draw the same salary. He will report to the Secretary, Ministry of Health as he does now. Thus, merely that he will not discharge administrative functions will not amount to reduction in rank. Article 311 is not attracted. In respect to the position existing under the recruitment rules, it is argued by Mr. Rajiv Sharma that amendment to FR 56 (bb) contains a *non obstante* clause and thus it over ride all other rules including the recruitment rules. Shri Sharma also relies upon recruitment rules, particularly, Rule 4 (2) (3) which empowers the government to make temporary additions or reductions in the strength of the duty posts as may be deemed necessary.

30. As noticed above, the OM dated 19.07.2016 does not reveal any rationale for introduction of the policy. It is legally not required that the OM should contain the rationale for the policy decision, but the object and purport for which such policy is introduced must be evident from the files of the government. The policy has to be judged on the basis of the rationale and reasoning for introduction of such policy. In absence of any rationale or reasoning

or indicating the object sought to be achieved, a policy decision can be doubted and construed as arbitrary exercise. A welfare State has to act in consonance with law and well defined principles of governance. No policy which is not in public interest can operate, in whatever field it may be, particularly in respect to the right of the government servants who play a pivotal role in the governance of the country. Medical profession is one of the most revered profession. Doctors who achieve the highest positions do so by the dint of their hard work, integrity, devotion and knowledge in their respective fields. Thus, any policy decision which adversely affects them must be well thought of and based upon valid reasons and intelligible differentia. We have carefully examined the notings in the official records. No other notings or record has been produced by the official respondents either to rebut the notings produced by the applicant secured through RTI, or to indicate that there were other reasons or circumstances for formulating such a policy. The prime consideration for any government policy must be the larger public interest. From the records, we find that the decision to enhance the retirement age of doctors working under the CHS belonging to all sub-cadres was taken by the Government and approved by the Cabinet. The reply filed as also in the written submissions, the object for enhancement of age of retirement from 62 to 65 years is stated to be to utilize the experience and knowledge of the doctors. It is in

public domain that there is deficiency of doctors, particularly government doctors in all the fields. The citizens are being deprived of adequate health care on account of deficiency of doctors particularly the poor class of this country who cannot afford treatment in private hospitals and are totally dependent upon the government hospitals. The doctor patient ratio in our country is much wanting. This is admittedly a sole objective for enhancement of the age of doctors in all sub cadres of CHS. CHS is the premier health service of the central government throughout the country. The decision of the Central Government to enhance the age of superannuation to cater to the health care needs of the citizens is appreciable and laudable. It was in larger public interest. It is in this context the validity of the proviso is required to be examined.

31. It is deemed appropriate to refer to the information received by the applicant under Right to Information Act and placed on record.

32. The applicant before the amendment in FR 56 was carried out by addition of proviso, made a representation dated 24.10.2016 to the Secretary, Ministry of Health and Family Welfare, projecting his grievances, and requested for withdrawal of the OM dated 19.07.2016. This representation was examined in the Ministry. The applicant has placed on record the notings on the file secured

through RTI. Some of the relevant notings are reproduced hereunder:

> "The issue under deliberation and for decision is the representation dated 24.10.2016 received from Directorate General of Health Services (DGHS) placed at FR 6 77/C in which it has been requested to withdraw the O.M. No.A-12034/1/2014-CHS dated 19.7.2016.
>
> 2. The O.M. dated 19.7.2016, CHS officers of teaching specialists, non teaching specialists and GDMO sub cadres of DGHS will hold the administrative posts till the age of attaining 62 years only and thereafter their services would be placed in non-administrative positions with the designations such as Principal Consultant/Principal Adviser/Senior CMO (HAG) etc. Also 13 categories of posts have been listed as positions of administrative nature applicable to the positions of cadres of Central Health Service (CHS).
>
> 3. Vide notification dated 31.5.2016, Fundamental Rules 1922, FR 56 (BB) was substituted as "the age of superannuation in respect of general duty medical officers and specialists included in teaching and non-teaching and public health sub cadres of Central Health Service shall be 65 years".
>
> 4. In the Cabinet Note dated 8th June, 2016, from enhancing the age of superannuation of medical officers of CHS to 65 years w.e.f. 31st May, 2016, the Cabinet also approved to empower the Department of Health and Family Welfare, MoHFW to take an appropriate decision in respect of the age of the officers of sub cadres of CHS for holding the charge of administrative position as per the functional requirement."
>
> "8. In the representation it has also been mentioned that the articled 311(2) of Constitution says that no person should be dismissed or removed from service except after an inquiry. Therefore, degrading the post of Special D.G. tantamounts to violation of provision of Constitution.

9. DGHS also mentioned that the O.M. in question will have adverse effect on the overall hierarchical structure of Dte. of GHS which is working on Secretariat pattern and where the power of final decision vests with the officer heading the organization. The designation of Principal Adviser, etc. (with the condition that they will not attend to any administrative power) there are no such posts in the hierarchical system prescribed under the CSS Rules. Further, the charges will lead to demoralization amongst the incumbents holding these posts apart from their losing interest in their work. This will also be disadvantageous to the Government as it will lose the benefit of their vast experience and expertise which is the very purpose of enhancement of age of superannuation to 65 years."

"16. The legal issues raised in the representations of DGHS like doctrine of *stare decisis* and doctrine of *legitimate expectation* is very much relevant in the instant case. The age of superannuation is the final bar beyond which a government servant cannot hold any post or position in the government. Before attaining the age of superannuation government servant can hold any position as per the recruitment rules of his cadre as well as he can get promoted and hold administrative posts as contained in the recruitment rules for holding such position.

17. The decision of the Ministry debarring medical officers from holding any administrative post or getting promoted to a higher post after attaining the age of 62 years seems not to be in conformity established by decisions in earlier cases of apex court. The artificial bar of 62 years for administrative positions where as such position not existing in any other cadre of government servants before attaining the age of superannuation may not hold legal scrutiny in the eyes of law/courts. It may lead to litigations by the incumbents holding various administrative positions thereby affecting the work culture as well as equality of service to the citizens.

18. However, before deciding on the representation of DGHS, opinion of Law Department and DOPT may be obtained on the issue of putting age bar of 62 years for

holding of administrative positions or getting promoted to hold promotional posts for medical professionals in the Department of Health and Family Welfare in absence of similar provisions for any other cadre or category of service in Government of India."

Further information was sought by one Pavitra Mohan Sharma, Advocate. The relevant notings supplied to him are reproduced hereunder:

"5. The Ministry has received several representations opposing the decision about the restriction of holding administrative positions upto 62 years, on the following grounds:-

i. The DGHS, Spl. DGHS (Apex Scale) and Addl. DGHS (HAG) have been given promotion to the earmarked posts with the approval of the ACC. All these posts are categorized as Administrative posts. Putting the age bar of 62 years will automatically deprive them of holding such positions.

ii. <u>The DGHS/Spl. DGHS/Addl. DGHS have "legitimate expectations" under Article 14 and 16(1) of the Constitution to enjoy the status, powers and functions attached to the post of Special DGs and DGHS up to the age of 65 years</u>.

iii. Removing the incumbents from the posts of Spl. DGHS/Addl. DGHS on attaining the age of 62 years tantamount to violation of Article 311(2) of the Constitution.

iv. Statutory provisions cannot be altered or modified by way of executive instructions. Therefore, it is not permissible to withdraw the administrative, financial and statutory powers of the present incumbents of the posts of Special DGs and DGHS on attaining the age of 62 years by way of executive instructions.

v. The proposed classification of similarly circumstanced Civil Servants into two or more categories in the absence of intelligible-differentia is in conflict of *Doctrine of stare decisis*.

vi. The issue of demitting office on attaining the age of 62 years after having worked as Head of Departments/MS/Addl. MS in the same office/institution/hospital has also given rise to issues of seniors working under the juniors.

6. It is proposed that before deciding the representations, opinion of DoPT and DoLA may be solicited on following points:-

i. Whether OM dated 19th July, 2016 is legally tenable.

ii. Consequent upon age of superannuation now becoming 65 years for all doctors of the CHS, whether the condition set for the incumbents not to hold administrative posts beyond the age of 62 years will be legally sustainable.

iii. If the incumbents of posts of Spl. DGHS/Addl. DGHS, which are promotional posts and who have been appointed with the approval of ACC can be shifted to non-administrative positions, with designations enumerated in the OM dated 19.7.2016, which are otherwise non-existent in CHS Rules."

In view of para 6 of the noting above, the DOP&T returned the proposal with the request to first consult the Department of Legal Affairs. Accordingly following note was recorded on 16.12.2016:

"The Department of Legal Affairs has been consulted (p.4043/n of Linked file); however, categorical response from them has not been received vide their E.O. No.23144/B/16 dated 7th October, 2016 (p.44/n of

> Linked file). Now, with the approval of AS(H), it has been decided to keep the matter in abeyance till opinion of DoPT and DoLA is received on the points raised below para 6 at p.17/n in the linked file.
>
> iii. The request of DGHS to exclude the post of HoD from the purview of Administrative posts referred to DoLA for their opinion (p.98-100/c), which in turn advised (p.101/c) this Ministry to take an administrative decision. Thereafter, with the approval of the Hon'ble HFM, it has been decided to stick to the decision that the persons above 62 years should not hold the post of HoD or any administrative job (p.104-105/c).
>
> 3. Thus, it may be perused that earlier reference was made to DoPT for amendment in FR-56 (bb). The DoPT has not been consulted earlier on the issue raised by the DGHS in his representation dated 21st October, 2016 (p.68-72/c)."

In view of the above noting, the DOP&T was again consulted by the Ministry of Health and Family Welfare vide its note dated 26.12.2016.

The points for reference are reproduced hereunder:

> "(i) Whether OM dated 19.07.2016 is legally tenable.
>
> (ii) Consequent upon age of superannuation now becoming 65 years for all doctors of the CHS, whether the condition set for the incumbents not to hold the Administrative posts beyond the age of 62 years will be legally sustainable.
>
> (iii) If the incumbents of posts of Spl. DGHS/Addl. DGHS, which are promotional posts and who have been appointed with the approval of ACC can be shifted to non-administrative positions, with designations enumerated in the OM dated 19.07.2016, which are otherwise non-existent in CHS rules."

The DOP&T gave its opinion on the above points as follows:

"(i) The DoPT may not be in a position to give advice on the legal tenability of any OM. The legal issues *per se* need to be consulted with the Ministry of Law. It is, however, noted that the Cabinet at its meeting held on 15.6.2016 had authorized Department of Health and Family Welfare to take appropriate decision in that regard. Therefore, it would be for that department to take an appropriate decision.

(ii) The legal tenability of the condition set for the incumbents not to hold the Administrative post beyond the age of 62 years, when the age of superannuation has now become 65 years can be answered by Ministry of Law. The Department of Health and Family Welfare may however, like to examine the issue in the light of the precedent where the members of the teaching sub-cadre were allowed to go up to 65 years of age whereas the maximum age of holding the Administrative post was only 62 years. There have also been instances where Director of Institute superannuated at a younger age as compared to the members of the faculty.

(iii) The appointment of the officers as referred to in para 3 to non-administrative position would have to be consistent with the provisions of the CHS Rules. Reference may be made to Rule 4(3) which provides that the Government may make temporary addition to or reduction in the strength of the duty post in the various grades as deemed necessary from time to time. Rule 4(4) allows the Government in consultation with the Commission to include in the service anyone other than those included in the Schedule 2 or exclude from service a post included in the said Schedule. Wherever any eventuality is to arise where an incumbent of a senior position will have to be moved to a non-administrative position not enumerated in the CHS Rules, action in accordance with the above rules would have to be taken."

33. It appears that the Ministry of Health and Family Welfare adhered to its decision despite the opinion of the DOP&T and the

Department of Legal Affairs. Neither the DOP&T nor the Department of Legal Affairs approved the proposed amendment. Finally, the proviso to FR 56 (bb) was incorporated vide amendment dated 22.03.2017 at the instance of Ministry of Health and Family Welfare and without the opinion of Ministry of Law on the legal tenability of proposed amendment.

34. The Ministry of Health and Family Welfare did attempt to introduce the condition for taking away the administrative positions after the age of 62 years, but it was not accepted at that stage, and it was left to the wisdom of the Ministry of Health and Family Welfare. When OM dated 19.07.2016 was issued, what persuaded the Government to do so, has not been revealed. The plea raised by the respondents time and again is that it being a policy decision cannot be interfered judicially. Same argument is advanced in respect to the proviso introduced vide amendment dated 22.03.2017. The OM dated 19.07.2016 only notifies the posts to which a member of CHS would be transferred after he attains the age of 62 years. In case of non-teaching specialists, public health specialists and GDMO sub-cadres in HAG and above grades, the alternative posts indicated are Principal Consultant, Principal Advisor and Senior CMO (HAG); and in SAG grade the posts indicated are Consultant, Advisor and Senior CMO (SAG) for the specialists in non-teaching, public health and

GDMO sub-cadres, respectively. The entire notings on record which we have reproduced hereinabove do not reveal as to what is the objective for such a decision. In the written submission as also during the course of arguments Mr. Rajiv Sharma, learned counsel appearing for the respondents, has impressed upon the court that the rationale is that a doctor should devote towards the medical care rather than hold administrative position. Weighing this argument, one fails to understand by any logical parameters that the next man who will occupy the administrative position would also be a doctor, and his primary job is also to provide healthcare to patients. If a person below the age of 62 years who also is called upon to perform both the functions, i.e., providing healthcare and to look after the administration, can do so, why a person who crosses the age of 62 years cannot. The primary job of every doctor is to provide services for the health and medical care of patients. If a doctor above 62 years of age can perform surgeries and treat the patients, why he cannot look after the administration, particularly when he has much more and better experience than the next man. Performing surgery and treating the patients is a more serious and onerous job; of course, the administration is also important. From the record we find that there is no policy statement why this is being done. This cannot be compared with the earlier amendment in the year 2009 wherein option was given for enhancement of age, and it was left for the

individual to opt for it or not. There was a defined policy of strengthening the teaching activity. Here, the age of superannuation has been enhanced irrespective of the cadre or the nature of the job or position, and subsequently, the impugned policy has been introduced. Firstly, there is no valid rationale justifying the above policy decision, which seems to be in the realm of arbitrariness and is justiciable on that count.

35. On hearing the learned counsel for the parties, we have already formulated the issues raised and the judgments cited by the parties on various issues.

36. The argument of Mr. Nidhesh Gupta that the OM dated 19.07.2016 supplants FR 56 *(bb)* and the same being only executive instructions is not valid, may not be gone into as subsequently an amendment has been introduced on 22.03.2017. Once the challenge to the amendment is sustained, the validity of OM can also be tested on the same footing. Therefore, we will only examine the validity of the amendment, particularly when the OM dated 19.07.2016 stands replaced by statutory provision.

37. A person holding any of the cadre/duty post under CHS is a member of the Service as defined under rule 2 (d) read with rules 3, 4 and Schedule II. By enhancement of age of superannuation, one does not cease to be a member of the Service and continues to be

borne on the respective cadres of the service. A person is liable to be transferred to any post borne on the cadres of the Service. Under the recruitment rules dated 08.10.1996 a member of the Service can be posted anywhere in India or even abroad. Under rule 13 he is also liable to serve in any defence service for the tenure mentioned therein. Insofar as the post of DGHS is concerned, there is only one post in the whole country and thus the question of transfer of the applicant to any other post does not arise unless he is selected for some other post with his consent. It is settled legal position that a member of the Service can be transferred to any post borne on the cadre of the Service. He is, however, not liable to be transferred to an ex-cadre post without his consent. The post of DGHS is the highest post in the cadre of the Service. There is no equivalent post under the recruitment rules. The respondents have mentioned some posts like Principal Consultant, Principal Advisor etc. Firstly, these posts have not been created in accordance with law. In any case, these posts are not borne on the cadre of the service. Even when a person is posted as Principal Consultant/Principal Advisor, etc., his salary is to be drawn from the next post in the cadre, as is evident from the record. These posts cannot be terms as equivalent to the status of the DGHS. Rule 4 of the recruitment rules does permit the government to add or exclude any posts from the Schedule II, but such addition/exclusion has to be by amendment of the rules, and that too in consultation

with the UPSC. It is undisputed position that no amendment in the rules has been carried out, particularly in Schedule II, and thus the question of consultation with the UPSC has not arisen at all. Thus, the post referred to above, against which the applicant is sought to be placed after attaining the age of 62 years, is in fact a non-existent post, and thus is in contravention of the recruitment rules, which are also statutory in nature.

38. Mr. Rajiv Sharma has argued that the amendment dated 22.03.2017 contains a *non obstante* clause, "notwithstanding anything contained in any other rules", and thus the amendment would have the effect of superseding the recruitment rules. With a view to appreciate this contention, we have examined the scope of the Fundamental Rules as also the recruitment rules, and the source thereof. The Fundamental Rules came into force with effect from 1st of January, 1922. Thus, these Rules are of the pre-Constitution era. At the relevant time, there was perhaps no source for such rules, like we have the proviso to Article 309 of the Constitution of India, and thus these Rules could have been framed in exercise of the executive authority of the then Government. There does not seem to be any statutory backing for these Rules. Sometimes, even the executive instructions are defined as 'rules' notwithstanding the fact that they have not been adopted in exercise of any legislative power. However, it cannot be disputed that even post-Constitution, the

Fundamental Rules are being enacted/amended from time to time. The impugned amendment has been carried out in exercise of the powers under proviso to Article 309 of the Constitution. The source of recruitment rules is also the same. Thus, the Fundamental Rules and the recruitment rules, both are shown to be enacted in exercise of the power under proviso to Article 309. In the event of conflict, which rule should operate, is another incidental question. We are of the opinion that the Fundamental Rules are general rules which may be applicable to all the government servants or a class or section of them, but their character continues to be general in nature, which govern the general conditions of service, like the age of retirement and other related issues. The recruitment rules are specifically framed to lay down the specific service conditions and method of recruitment etc. for the members of a particular service created by virtue of the rules. The covenants and conditions contained in the recruitment rules are specific to the particular service and members thereof. Under such a situation the recruitment rules are to be construed as special law notwithstanding the fact that the source of the Fundamental Rules and the recruitment rules may be common. A special law would prevail over the general law, and thus in our considered opinion the recruitment rules could not be superseded by any condition in the Fundamental Rules. The argument of Mr. Sharma is rejected.

39. Now we may examine whether the proviso introduced vide amendment dated 22.03.2017 nullifies or tampers with the main provision of FR 56 *(bb)* and supplants it so as to invalidate the proviso. Mr. Nidhesh Gupta has greatly emphasized on this question and cited various judgments noticed by us hereinabove. The ratio of the judgments noted by us hereinabove only lays down the law that a proviso cannot render the main provision *otiose*. The object of the proviso is only to create an exception and if it tends to contravene the main provision, it is liable to be set aside. The main provision, i.e., FR 56 *(bb)* simply provides the enhancement of age of various sub-cadres of CHS to 65 years. By virtue of the proviso, a member of the Service whose age of superannuation is enhanced to 65 years is being deprived of administrative position on attaining the age of 62 years. How and in what manner the proviso contravenes the main provision is a significant question. The contention of Mr. Nidhesh Gupta is that it changes the service conditions of a member of the service after 62 years and thus interferes with the main provision contained in FR 56 *(bb)*. We are unable to agree with this contention. The only object and scope of FR 56 *(bb)* is to enhance the age of superannuation up to 65 years, and nothing more. The proviso which was added to the main rule does not, in any manner change the legislative intent of the main rule. It may have collateral impact upon the functioning of the government servant whose age is

enhanced, but *per se*, the proviso does not in any manner nullifies, alters or interferes in the enhancement of age of members of the various sub-cadres of CHS, as mandated under the main rule. This argument is not sustainable.

40. Another vociferous argument of Mr. Nidhesh Gupta is that by operation of the proviso, the status of the applicant is reduced; he is deprived of various privileges and powers which hitherto were attached to the post held by the applicant, and this amounts to reduction in rank, and thus contravenes Article 311 (2) of the Constitution. To appreciate this argument, we have to again fall back to the position of the applicant, which he was holding prior to the impugned amendment and is still holding on the strength of interim order. This is the highest position in the hierarchy of the Service. Obviously, his status as head of the department is such that he commands the privilege of being number one in the whole of the country, as CHS is meant for whole of the country, and a head of department is of course entitled to administer the entire service within the precincts of the rules and norms. As a top man in the hierarchy of service, he is conferred with some power, authority and privileges attached to the post. On deprivation of this position, he will definitely lose all India jurisdiction right to govern and administer the CHS and also various other privileges attached to the

post. The reduction in rank envisaged under Article 311 (2) of the Constitution is to be construed bringing a person to a lower position.

41. Mr. Rajiv Sharma, learned counsel appearing for the respondents, has strenuously argued that taking away the administrative position does not amount to reduction in rank. His contention is that the applicant would continue to be at the level of HAG+, his salary is intact, and, therefore, it does not amount to reduction in rank. The term 'rank' though not defined under the recruitment rules, however, commonly this expression is understood to mean a position in an organization showing the importance of the person having it. The term 'rank' is defined in different dictionaries as under:

> *Concise Oxford English Dictionary (South Asia Edition)*
> "1. A position within a fixed hierarchy,....
> 2. high social standing"
>
> *P. Ramanatha Aiyar's Concise Law Dictionary (Third Edition)*
> "Rank. Precedence. The work 'rank' in common parlance, as also in English diction refers to a position, especially an official one within a social organization, of high social order or other standing status...."

Thus, 'rank' has to be understood as a position held in the hierarchy of the service with certain amount of power, authority, jurisdiction and privileges. In ***Sub-Inspector Rooplal & others v Lt. Governor through Chief Secretary, Delhi & another*** [(2000) 1 SCC 644], the Hon'ble Supreme Court was examining the equivalence of posts. It

was held that to determine the equivalence of posts, many factors other than the pay will have to be taken into consideration, like the nature of duties of a post, the responsibilities and powers exercised by the officer holding the post, the extent of territorial or other charge held or the responsibility discharged, the minimum qualifications, if any, prescribed for recruitment to the post, and the salary of the post. Reduction in the rank has to be understood in that context. Even if a person's salary and his level of the grade is maintained, nonetheless, if he is deprived of various other rights and privileges attached to the post held by him, like in the present case where the applicant has territorial jurisdiction all over the country as DGHS, having powers and responsibilities that of a head of department, which *inter alia* include administration of the whole department, may be some allowances or other perks that may be attached to the post, he would definitely be deprived of these powers, privileges and advantages once he is shifted to a table post in the Ministry, whatever designation it may be. It is significant to note that the applicant is holding the post of DGHS which is a statutory post. In the spirit of Article 311 (2), this would amount to reduction in rank. This is one of the constitutional safeguards for a government servant.

42. Another argument which was advanced is that the proviso operates retrospectively. We need not go into this question, as this OA is being allowed on other grounds.

43. The respondent in its wisdom chose to notify circular dated 19.07.2016 followed by statutory amendment dated 22.03.2017. It cannot be disputed that this is a policy decision of the government. Even though, there are prima facie observations that the policy does not carry any rationale for depriving the doctors who attain the age of 62 years from discharging their administrative functions, none the less, the Courts are to be reluctant in interfering in the policy matters. It is not in dispute that the central government had the legislative competence to amend the Fundamental Rules. Once, the legislative competence is conceded, there is a presumption of constitutionality of a statute. Even though, there are some deficiencies, interference in the statutory provisions is not desired. The Hon'ble Supreme Court in ***State of Karnataka and Another vs. Hansa Corporation*** (1980) 4 SCC 697 held as under:-

> **"15.** There is always a presumption of constitutionality of a statute. If the language is rather not clear and precise as it ought to be, attempt of the court is to ascertain the intention of the legislature and put that construction which would lean in favour of the constitutionality unless such construction is wholly untenable. However, where one has to look at a section not very well drafted but the object behind the legislation and the purpose of enacting the same is clearly discernible, the court cannot hold its hand and blame the draftsman and chart an easy course of striking down the statute. In such a situation the court should be guided by a creative approach to ascertain what was intended to be done by the legislature in enacting the legislation and so construe it as to give force and life to the intention of the legislature. This is not charting any hazardous course but is amply borne out by an observation worth reproducing in extenso in *Seaford Court Estates*

Ltd. v. *Asher*[(1949) 2 All ER 155, 164 : (1949) 2 QB 481] . It reads as under:

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down (3 Co Rep 7b) by the resolution of the Judges (Sir Roger Manwood, C.B., and the other barons of the Exchequer) in *Heydon case* [(1584) 3 Co Rep 7a : 42 Digest 614] and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his note (2 Plowd 465) to *Eyston* v. *Studd* [(1574) 2 Plowd 463 : 42 Digest 635] . Put into homely metaphor it is this: A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

The Hon'ble Supreme Court in ***Hinsa Virodhak Sangh vs. Mirzapur Moti Kuresh Jamat and Others*** (2008) 5 SCC 33 held as under:-

> **"39.** We have recently held in *Govt. of A.P.* v. *P. Laxmi Devi* [(2008) 4 SCC 720 : JT (2008) 2 SC 639] , that the court should exercise judicial restraint while judging the constitutional validity of statutes. In our opinion, the same principle also applies when judging the constitutional validity of delegated legislation and here also there should be judicial restraint. There is a presumption in favour of the constitutionality of statutes as well as delegated legislation, and it is only when there is a clear violation of a constitutional provision (or of the parent statute, in the case of delegated legislation) beyond reasonable doubt that the court should declare it to be unconstitutional."

Thus, in view of the law laid down by the Hon'ble Supreme Court in the aforesaid judgments, we refrain from striking down the proviso introduced vide amendment dated 22.03.2017. Even, while we have not interfered in the proviso introduced vide amendment dated 22.03.2017, none the less, the applicant cannot be deprived of his right to continue on the post unless an equivalent post of his rank and status is created under the recruitment rules in accordance with the mandate of rules 3 & 4 of Recruitment Rules. Shifting to a non-existent ex-cadre post which takes away all the existing rights, power, authority, status and privileges would be violative of Article 311 (2) of the Constitution of India.

44. In the ultimate analysis of the factual and legal aspects, this OA is allowed. The respondents are directed to allow the applicant to continue to hold the post of Director General, Health

Services till he attains the age of 65 years or till an equivalent post of his status, rank and privileges is created in accordance with the mandate of Recruitment Rules.

(K. N. Shrivastava)
Member (A)

(Justice Permod Kohli)
Chairman

/pj/