

(1971) 11 DEL CK 0030

In the Delhi High Court

Case No : Civil Writ Appeal No. 32 of 1969

Ram Gopal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-11-1971

Acts Referred:

Citation : (1972) ILR Delhi 446

Hon'ble Judges : S.I. Rangarajan, J;Rajinder Sachar, J

Bench : Division Bench

Advocate : P.N. Lekhi, R.M. Mehta and B. Kirpal, for the Appellant;

Judgement

Sachar, J.

(1) This is a petition under Article 226 of the Constitution of India seeking to quash the list of. appointment of Superintendents Class Ii Gazetted (annexure "C") prepared by respondents 1 to 3 in pursuance of Rule 9(3) (a) of the Armed Forces Headquarters Civil Service Rules, 1968, (hereinafter called the Rules) and also asking for a mandamus directing the respondents i.e. Union of India and Depart- mental Promotion Committee respondents I and 2 respectively, to fill the post of the Superintendent of the Service by departmental candidates holding appointments in the existing grades by screening them for such initial appointment afresh. The petition also seeks to strike off Regulation 4(4) of the Armed Forces Headquarters Civil Services (Promotion to grades of Senior Civilian Staff Officers, Civilian Staff Officers. and Superintendent) Regulations, 1968, (hereinafter called the Regulations) as ultra virus of Articles. 14 & 16 of the Constitution and the Rules.

(2) Prior to 1st March, 1968, the petitioner was a holder of a permanent post of Superintendent (Class Ii non-gazetted) in the Armed Forces Headquarters and Inter Service Organisations. The said service was not a formally constituted service and was composed of the grades. classification and designation as follows:-

Designation Classification Pay Scale (grade) (a) Civilian Staff Officer Grade I 900-50-1250 Gazetted. (b) (i) Deputy Assistant Director Do. 800-40-1000 (ii) Civilian Supervisor Grade II (c) Officer Supervisor Class II Gazetted 740-30-830-35-900 (d) Superintendent Class II 350(400)-25-625 Non-gazetted (e) Assistant Class III 210-530 Non-gazetted (f) Upper Division Clerk Do. 130-280 (g) Lower Division Clerk Do. 110-180

(3) On 1-4-1968, the Government of India in exercise of power conferred by proviso to Article 309 of the Constitution promulgated the Rules which came into force on 1-3-1968. Under Rule, 3 of the Rules, the service known as the Armed Forces Headquarters Civil Service was created consisting of four grades. By Rule 17 the scale of pay attached to various grades of service was fixed. The grades, classification and pay arc as follows :-

Grade Classification Scale of pay (i) Senior Civilian Staff Officer Central Civil Service 1100-50-1400 (ii) Civilian Staff Officer class-I 740-30-800-50-1150. (iii) Superintendent Central Civil Service 350-25-500-30-590-EB- Class-II- Ministerial (iv) Assistant 210-10-270-15-300-EB- 15-450-Eb-20-350

The posts in the grades of Senior Civilian Staff Officer, Civilian Staff Officer and the Superintendent were made gazetted posts and those in the grade of Assistant were designated as non-gazetted posts.

(4) The Rules contain provision for the initial constitution and future maintenance of the service. It would be useful at this stage to refer to some of the relevant rules with reference to which the arguments were addressed.

(5) Rule 2 (g) defines "duty post" in relation to any Grade to mean a permanent or temporary post of that Grade. Rule 2 (h) defines "existing Grade to mean a Grade specified in column (1) of the Table below clause (b) of sub-rule (2) of rule 9 and existing immediately before the appointed day. Rule 9 provides that appointments against all permanent and temporary duty posts in the Service at its initial constitution shall be made from amongst departmental candidates. Sub-rule (2) of Rule 9 provides that duty posts in the Grades of Senior Civilian Staff Officer, Civilian Staff Officer and Superintendent shall be treated as selection posts and those in the Grade of Assistant as non-selection posts. The table below clause (b) of sub-rule (2) of Rule 9 shows, the existing grades in the Armed Forces Headquarters and Inter Service Organisations in column (1) shall be treated as equivalent Grades of the Service mentioned in the corresponding entry in column (2). The table shows that the existing grade of Superintendent is to be treated with equivalent grade of Superintendent. Rule 9 (3) (a) reads as under:-

"PERMANENT posts in the Grades of Senior Civilian Staff Officer, Civilian Staff Officer and Superintendent of the Service shall be filled by departmental candidates holding appointments in equivalent existing Grades, who may be screened for such appointments by the appropriate Selection Board or, as the case may be, Departmental Promotion Committee, on the basis; of merit with

due regard to" seniority."

(6) It is alleged in the petition that on 2-11-1968 respondent No. 1, circulated list of permanent superintendents and the petitioner was shown at No. 297 (the position which was allocated to him in the erstwhile grade of Superintendent (Class II non-gazetted) prior to the constitution of the service). He also found the names of every other permanent superintendent placed in the same order in which it was prior to the constitution of the Service. This approved seniority list has been annexed as annexure "C" to the petition. The petitioner's grievance is that according to sub-rule (3) of Rule 9 of the Rules, respondent No. 1 was under a duty to screen the eligible candidates on the merits with due regard to seniority. But that the respondents 1 to 3 had failed to perform this duty and have only transported mechanically the list which existed prior to the constitution of the service in the same order. It is claimed that if the list of Superintendents (Class II Gazetted) for initial constitution of the service had been drawn in accordance with Rule 9(3)(a), the petitioner would have been placed very much higher in seniority in the list and this would have materially improved his chance of future promotion as Superintendent. A few illustrative examples are mentioned in the petition (which shall be noticed later in the judgment) to show that there has been mechanical working and Departmental Promotion Committee (hereinafter called the D.P.C.) has not acted legally. The petitioner maintains that the impugned list annexure "C" which shows the seniority of the persons selected for promotion as superintendent gazetted was not in compliance with Rules and that the same should be quashed.

(7) The petitioner also makes a grievance regarding the virus of Regulation 4(4) of the Regulations. Rule 10 provides that the service shall be maintained in future as indicated in the Third Schedule. Rule 11 (2) provides that the procedure for competitive examinations referred to in the Third Schedule shall be as determined by regulations made by the Government, in consultation with the Commission. Rule 20 gives power to the Government to make Regulations not inconsistent with these rules to provide for all matters for which provision is necessary or expedient, for the purpose of giving effect to these rules. In pursuance of sub-rule (2) of Rule II, the Central Government has framed the Regulations which are mentioned previously.

(8) Regulation 2 (a) defines the "eligible officer" to mean an officer eligible to be considered for appointment to the Grade of Senior Civilian Staff Officer or Civilian Staff Officer or Superintendent of the Service, as the case may be, referred to in the Third Schedule to the rules as on the 1st October of the year in which the Select List is prepared.

(9) Regulation 2(b) defines the "field of selection to mean the list of eligible officers arranged in the order of their seniority from which a selection shall be made for inclusion in the Select List.

(10) Regulation 2(4) defines the Select List to mean the list of eligible officers

considered fit for appointment to the grade of Senior Civilian Staff Officer or Civilian Staff Officer and Superintendent of the Service, as the case may be, and prepared in accordance with Regulation 4.

(11) Regulation 4 provides that a Select List for promotion to the Grades of Senior Civilian Staff Officer, Civilian Staff Officer and Superintendent shall be prepared at least once every year if on the 1st October of the year the number of officers included in the Select List of the respective Grade is below the strength determined under sub-regulation (2).

(12) SUB-REGULATION (2) provides that the strength of officers to be included in the Select List for the Grade concerned shall be determined from time to time by the Central Government. Sub-regulation (3) provides that the names of officers who fulfill the eligibility conditions prescribed for promotion to the Grade concerned shall be arranged in a single seniority list. Sub-regulation (4) which has been challenged in the petition reads as under:-

"THE field of Selection shall ordinarily extend from three to five times: the number of officers to be included in the Select List, as may be decided by the Selection Board or, as the case may be, the Departmental Promotion Committee.

(13) The grievance of the petitioner is that Regulation 4(4) limits the area and field of selection for promotion to the grade of Civilian Staff Officer and that this is, arbitrary and also offends the Rule under which the Regulations have been framed.

(14) The petition in fact raises two points:- (1) that the seniority list annexure "C" issued by the respondents of the permanent superintendents gazetted has not been prepared in accordance with Rule 9 of the Rules and the list is, Therefore, bad, (2) that the Regulation 4(4) which restricts the field of selection to 3 to 5 times the number of officers to be included in the select list is arbitrary and discriminatory and is hit by Articles 14 and 16 of the Constitution.

(15) An affidavit on behalf of respondents 1 and 2 and sworn by Mr. R. D. Jain, Assistant Chief Administrative Officer, Ministry of defense, Government of India, New Delhi, dated 1-3-1969 has been filed in this court. In the affidavit, it was denied that the appointments to the grade of superintendents on its initial constitution were not made in accordance with Rule 9(3) (a) of the Rules. It was stated that the position assigned to the petitioner was the same as was recommended by the D.P.C. and finally approved by the government. It was denied that the appointments were made mechanically and without the application of mind. The challenge to the Regulations was stated to be misconceived. It was denied that the Regulations clothed the D.P.C. with arbitrary and unconstitutional power to determine and limit the field of selection. It was denied that the effect of Regulation 4(4) is to whittle down the force of statutory Rules. It was further denied that the Regulation 4(4) has in any way violated the provision of the Constitution, or is ultra vires Rule 20 and Third Schedule to the Rules.

(16) The petitioner filed a rejoinder on 5-3-1969 in this court. In the rejoinder objection was taken to the fact that affidavit on behalf of respondents 1 and 2 had been filed by Mr. R. D. Jain and it was stated that he was not competent to make the affidavit on behalf of respondent No. 2, D.P.C. as he was not a member of the same. The averments made in the petition were reiterated and it was maintained that there has been violation of Rule 9(3) (a) of the Rules and Regulations 4(4) of the Regulations; were arbitrary.

(17) A further reply to the rejoinder filed by the petitioner was filed on behalf of respondents I to 3 by means of an affidavit filed by Mr. R. D. Jain dated 19-4-1969. In the reply it was denied that the deponent was not a person to make and affirm the affidavit. It was stated that the deponent was the Assistant Chief Administrative Officer, Ministry of defense, Government of India, New Delhi, and that he was associated with the D.P.C. constituted for screening of the superintendents class Ii non-gazetted for appointment to the grade of Superintendent Class 11 gazetted at the initial constitution of the Armed Forces Headquarters Civil Service and all secretarial work in connection with that committee was done by him. It was again reiterated that the petitioner as well as other persons who were prior to 1st March, 1968, holding posts of Superintendent Class Ii non-gazetted were screened by the D.P.C. constituted by the government of India and that appointments were made after compliance with Rule 9(3) (a) of the Rules. In this reply the respondents also stated that the petitioner had filed in the Supreme Court earlier a writ petition challenging the initial constitution of the Service in regard to Superintendent Class It Gazetted and the same had been dismissed and the petitioner was raising identical grounds in this writ petition now.

(18) This writ petition came up for hearing before Hardy J. (as he then was) and Deshpande J. on 28-4-1971. Two preliminary objections were taken by the respondents I and 2 namely that some of the affected persons whose seniority was being challenged by the petitioner had not been impleaded, and further that the dismissal by the Supreme Court operated as a bar of res judicata. The petitioner thereupon undertook to implead the superintendents concerned and also to amend para 24 of this writ petition explaining the circumstances, of the filing of the writ petition in the Supreme Court and the dismissal thereof.

(19) The petitioner thereafter impleaded 336 respondents who are named in the petition. The petitioner also amended para 24 of the petition in which he admitted that Civil Writ petition 227 of 1968 was filed in the Supreme Court on 10-9-1968 but it was explained that respondent No. 1 had actually issued the list of seniority only on 22-11-1968 and the writ petition was, Therefore, filed before the cause of action accrued as the official seniority list was published much later and that the dismissal of the writ petition by the Supreme Court could not be said to be a decision on merits and could not operate as res judicata. It was also stated that the petitioner was in the present writ petition in this court challenging the virus of Regulation 4(4) of the Regulations and as the said Regulations only

came into existence with effect from 28-11-1968 there can be no question of the said matter having been decided by the Supreme Court in the earlier petition filed by him.

(20) An affidavit by Mr. Harbans Lal Sud dated 13-7-1971 on behalf of some of the added respondents was filed through Mr. B. N. Kirpal, learned counsel for the respondents. In this affidavit averment made on behalf of respondents I and 2 in the affidavit filed by Mr. R. D. Jain were accepted and reliance was placed on them. In reply to para 24 of the petition, the deponent stated that he was also one of the petitioners who had filed the writ petition in the Supreme Court of India along with the present petitioner. It was maintained that the said writ petition was argued on merits and the dismissal was also on merits. It was claimed that the present writ petition was, Therefore, barred by principle of res judicata. A copy of the petition filed in the Supreme Court and the order passed thereon were annexed along with it.

(21) One of the added respondents was N. K. Gupta, respondent No. 202 and he has also filed his return. In his reply, he has supported the position taken by the petitioner in the writ petition.

(22) We have heard Mr. Lekhi, learned counsel for the petitioner, and also Mr. N. K. Gupta, respondent who argued his case in person. We also heard Mr. Mehta, learned counsel on behalf of respondents I to 3. and Mr. Kirpal on behalf of some of the added respondents whom he represented.

(23) The petitioner had moved an application being C.M. 112-W of 1969 dated 11-4-1969 in which he had prayed that for fair and just disposal of the petition, the respondents be asked to produce the following documents at the date of hearing:-

(A) Proceedings of the Departmental Promotion Committee which allegedly screened the erstwhile Superintendents on the initial constitution of the service;

(B) Confidential reports on the petitioner for the last 5 years;

(C) File relating to the constitution of the Departmental Committee mentioned in (a) above and the minutes of the proceedings relating to screening also referred to in (a) above.

(24) This application came up for hearing before Khanna CJ. (as he then was) and Tatachari J. where on the submission of Mr. Mehta, learned counsel for respondents I to 3, it was ordered that this application be taken up at the hearing of the writ petition subject to a claim of privilege by the respondents. An affidavit dated 22-2-1971 has now been filed by Mr. K. B. Lal, Secretary to the Government of India, Ministry of defense in reply to the application dated 11-4-1969 of the petitioner. In the affidavit, it is stated that the document at Serial No. (i) to (iii) are one and the same namely the proceedings of the meeting of the D.P.C. which was convened for screening the departmental candidates for making appointments to the posts of Superintendents at the initial

constitution of the Armed Forces Headquarters Civil Service in accordance with the provision of Rule 9(3) of the Rules. The document at Serial No. 2 are only confidential records regarding the assessment of the quality of the petitioner's work, his integrity, character, personality etc. as assessed by his superior officers every year for the last 5 years i.e. from 1965 to 1969. It is stated that the proceedings of the D.P.C. contained matters which are always treated as highly confidential as a matter of policy so as to secure the appropriate functioning of public services. It is also stated that it would not be in the interest of furtherance of such policy or of proper functioning of public services to make a disclosure of such proceedings by not treating them as confidential. It is also stated that the annual confidential reports are highly privileged and confidential because they contain a frank, honest, unbiased and objective opinion and assessment of the quality of the work of the Government servant, his integrity, his character, his personality and so on, and unless it is ensured that the remarks which the reporting officer or the reviewing officer gives, will be treated as confidential and not exposed to public scrutiny, the reporting officer or the reviewing officer may not be able to express his views freely, frankly and fearlessly which he would otherwise do if the reports are treated as confidential and privileged. It was also maintained that these documents are unpublished official records relating to affairs of the State and that their disclosure will cause injury to public interest, for the reasons mentioned aforesaid. He has, therefore, prayed that we should refuse to give permission to any one u/s 123 of the Indian Evidence Act, 1872. to produce the documents or to give any evidence there from.

(25) Division Bench Judgment of this court in Civil Misc. No. 78-W of 1970

(26) In the present case before, us, the petitioner is alleging that the D.P.C. has not acted in accordance with Rule 9(3) (a) of the Rules and has merely acted mechanically in transporting the Superintendents who were in the service prior to 1-3-1968. Though it was not so stated in the petition, during, the argument it was even suggested that the D.P.C. had not considered the case of the Superintendents for appointment at the initial constitution of the Service. These were the questions which obviously could be best answered by making available the record and proceedings of the D.P.C. We fail to see how such record could in any manner be said to relate to that class of documents the disclosure of which will cause injury to public interest. On the other hand, we feel that by making available to the Court, the actual proceedings of the D.P.C. the department would be helpful to show its bonafide and to dispel any misapprehension of the petitioner, however, mis-placed.

(27) It is unfortunate that the government should in many cases claim privilege u/s 123 of the Evidence Act and thus unnecessarily invite suspicion when on the other hand disclosure will be to its benefit. This tendency of secretiveness in matters which concern vast number of employees is hardly consistent with the open and democratic society that our Constitution is committed to build. It is time that it is recognised that the public matters should be made open to public

scrutiny and it is only in cases which involve any danger to the security of the State that any documents should be withheld from the courts. In the present case after going through the proceedings of the D.P.C. we feel that the case of the government has only improved many of the unfounded suggestions made by the petitioner have been proved to be wrong. This example shows how some times under regard for secrecy results in even the best evidence being withheld on the untenable and weak plea of public interest.

(28) As regards item No. 2 we fail to see what purpose would be served by asking the confidential reports of the petitioner for the last five years. It is obvious that the only question that we are called upon to determine is whether the compliance with Rule 9(3) (a) of the Rules has been done or not. It is for this reason that we have disallowed the privilege claimed by the government for non-production of the proceedings of the D.P.C. As regards the annual confidential reports of the petitioner we do not feel that they have any relevancy to the point at issue nor will this in any manner assist us in the determination of the point that we will be called upon to decide in the present case. We Therefore, refused to direct the government to produce the annual confidential reports of the petitioner and rejected this part of the application of the petitioner.

(29) At the outset Mr. Lekhi contended that the affidavit of Mr. Jain should not be relied upon as he was not a competent person to swear affidavit. Mr. Lekhi referred to Order 27 Rule I CPC which provides that in a suit by or against the government, the plaint or written statement shall be signed by such person as the government, may, by general or special order, appoint in this behalf, and shall be verified by any person whom the government may so appoint and who is acquainted with the facts of the case. We do not think that Order 27 Rule I CPC has any relevancy to the question of the competency of any particular person to file an affidavit in the writ petition, it is obvious that any person may be authorised by the government to file an affidavit. It may be that if it is shown that the person filing an affidavit is deposing about facts which are not within his personal knowledge and which are not being verified from the record it may detract from the value to be placed on the said affidavit. But that is a question relating to the value of the affidavit and not to the competency of the person filing the affidavit. In this case Mr. Jain has sworn that he has filed an affidavit and is deposing the facts from the official records of respondent No. 1. There is no reason to disbelieve this averment and in our opinion the affidavit of Mr. Jain cannot be ruled out on this ground. That apart, Mr. Mehta, learned counsel for respondents 1 to 3 showed to us a letter No. D.U.O. F-72(I)/63/D(Coord), dated 21-12-1964 which contains an extract from S.R.O. No. 351 dated 25-1-1958 by which the government in exercise of power under Order 27 Rule 1 has authorised the various officers to sign and verify the plaint and writer statements. In the said notification one of the officers authorised to sign and verify is the Assistant Chief Administrative Officer. Ministry of defense, Government of India. Mr. Jain is an Assistant Chief Administrative officer and he is thus a person competent to verify the plaint and sign the written statement in terms of Rule 1 Order 27 of

the Code of Civil Procedure. The grievance of the petitioner on this score, Therefore, fails.

(30) The respondents have taken a preliminary objection to the maintainability of the writ petition. This is based on the fact that the petitioner's writ petition being Cw 277/68 which he had filed in the Supreme Court had been dismissed by the Supreme Court at a preliminary hearing on 15-10-1968. It is, Therefore, maintained by the counsel for the respondents that the petitioner having already challenged in the Supreme Court the impugned seniority list, cannot now be allowed to raise the same point in a writ petition in this court. It was, however, sought to be urged by Mr. Lekhi, that there is no bar or principle of res judicata on the ground that the writ petition in the Supreme Court was filed on 10-9-1968 while the impugned list (annexure C) was only issued on 22-11-1968 and, Therefore, there could be no bar of res judicata. In our opinion there is no merit in this contention. The President had issued a notification dated 13-5-1968 (which was published in the Gazette of India dated 1-6-1968) giving a list of persons who had been appointed as permanent Superintendents in the Grade of Superintendent (Class Ii Gazetted) in a substantive capacity in the Armed Forces Headquarters Civil Service at its initial constitution with effect from 1-3-1968. The said list is to be found at annexure "G" attached with the rejoinder filed by the petitioner. Rule 9.9 of the Rules provides that the initial appointment to the various grades of service shall be made in the order in which their names are arranged in the recommendations of the appropriate selection Board or, as the case may be, Departmental Promotion Committee as finally approved by the Government. Rule 16(2) provides that the seniority inter se of permanent officers included in the initial constitution of a Grade shall be regulated in the order in which they are so appointed. The petitioner was aware of these rules and was under no misapprehension that the notification published in the Gazette of 1-6-1968 was in fact the list of persons who had been appointed as Superintendent (Class Ii Gazetted) in substantive capacity and that their seniority was in the order in which it was shown in the notification. A reference to C.W. 277/68 filed in the Supreme Court will clearly bring this out. In para 8 of the said writ petition it was stated as under :-

"THE Departmental Promotion Committee, which was constituted for assessing the "Superintendents (Non- Gazetted) for appointment as Superintendent (Gazetted) in the higher Pay Scale on the basis of merit with due regard to seniority, however, completely violated the above cited statutory provisions. They arranged the names of eligible Superintendents in the same order in which they existed in the Seniority List of Superintendents (Non-Gazetted). Respondent No. 1 approved those recommendations and made appointments to the grade of Superintendents (Gazetted) on the initial constitution of the Armed Forces Headquarters Civil Service in that order of seniority."

In the prayer clause of the writ petition it was prayed that a writ of mandamus be issued directing the respondent. Union of India, to rearrange the order of

seniority of the Superintendent (Gazetted) appointed initially to the grade of Superintendent in accordance with the provisions of Rule 9 (3) (a)" of the Armed Forces Headquarters Civil Service Rules, 1968. A comparison of the names published in the Gazette notification on 1-6-1968 with the impugned list annexure "C" will show that they are identically the same names and also arranged identically in the same order. The only difference is that whereas in the gazette notification of 1-6-1968 Serial numbers were not given the same are given in the impugned list (annexure "C"). But this variation is of no consequence. It is apparent that after having made appointments, the impugned list of seniority (annexure C) was circulated for the information of the persons concerned. This list by itself cannot give any fresh cause of action to challenge the seniority list which the petitioner had already challenged in the writ petition filed in the Supreme Court. A reference to the averments made in the present writ petition will also show that the basis of attack on Rule 9(3) and the grievance that the D.P.C. did not apply its mind but acted mechanically is the same grievance which was urged before the Supreme Court. The relief sought in the present case also is for mandamus and rearranging the seniority. It, has Therefore, to be held that both in substance and in reality identical pleas so far as the challenge to the initial constitution and appointment as Superintendent (Class II Gazetted) is concerned, was the subject matter of writ petition in the Supreme Court as well as in the present case. The question, Therefore, that arises is whether in view of the fact that the writ petition before the Supreme Court was dismissed though at a preliminary hearing, the said dismissal operates as bar of res judicata or not. It was not disputed by Mr. Lekhi that if the petition filed in the Supreme Court is held to be dealing with the same points which are now being urged in the present writ petition and the dismissal of the petition is to be taken as dismissal on merits, the same would operate as res judicata so far as those points are raised in the present writ petition. The contention, however, is that as the said writ petition was dismissed in limine by the Supreme Court the same must be held to be a dismissal by a no speaking order and not dismissal on merits and, Therefore, it cannot operate res judicata. The Supreme Court has held in *Daryao and Others Vs. The State of U.P. and Others*, that if a writ petition filed by a party under Article 226 of the Constitution is considered on the merits and is dismissed, it would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. It also cannot be disputed that the mere fact that a petition has been dismissed in limine does not mean that it cannot operate as res judicata. In this connection the following observations in *Daryao's* case are helpful.

"If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar. except in

cases which are already indicated. If the petition is dismissed in liming without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata."

(31) A reference to the order of the Supreme Court dismissing the C.W. 277 of 1968 will show that though the petition was dismissed in liming yet in the circumstances it has been held that it was dismissed on merits. It is not essential that Supreme Court should give detailed order indicating, reasons for dismissal before it can be held that the said writ petition was dismissed on merits. The suggestion of the petitioner that the writ petition was dismissed because by then the actual seniority had not been circulated and, Therefore, the writ petition was premature is not supported by the order of dismissal passed by the Supreme Court. It is nowhere stated in the order that the petition was being dismissed as it was premature. The petition was dismissed after hearing the petitioner and because their lordships did not feel the necessity to issue the notice to the other side. It is necessary to appreciate that when the observations were made in Daryao's case that if dismissal is not by a speaking order by the High Court the same will not operate as bar of res judicata under Article 32 of the Constitution before the Supreme Court, the observations were confined to the situation where the dismissal is in liming by the High Court by a no speaking order. This is because an appeal lies to the Supreme Court against the order of the High Court and unless it was a speaking order the Supreme Court felt it was not possible for it to know whether the dismissal by the High Court was on merits. That consideration does not apply to the case of dismissal of a writ petition in liming by the Supreme Court so as to prevent the bar of res judicata when the same matter is sought to be re-agitated in subsequent petition under Article 226 before the High Court. This is on the basis that once the matter had been dismissed by the Supreme Court and the order does not indicate that it was dismissed on the ground that the application was premature, the same must be taken to be a dismissal on merits and it would not be open to the petitioner to urge the same matter before the High Court. It would be anomalous to suggest that a writ petition of which the Supreme Court did not consider it necessary to issue notice to the other side and dismissed it on preliminary hearing can nevertheless be allowed to be examined in detail by subsequent petition filed in the High Court. Such a view will be destructive of the finality of the judgment.

(32) In P.L. Lakhanpal Vs. Union of India (UOI) and Others, it was held that the petitioner cannot be permitted to reagitate the same contentions which had been decided in the earlier writ petition and when no new circumstance had arisen justifying their reagitation. Of course if the grounds are different in the subsequent writ petition than was urged in the previous writ petition the bar of res judicata or does not apply vide The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara, In Union of India (UOI) Vs. Nanak Singh, it was laid down that where a single judge who decided the respondent's writ petition decided both the grounds in his favor though in appeal the High Court reversed the judgment and dismissed the petition it must be deemed to

have been rejected, on both the grounds on which the petition was founded. It was, Therefore, held that the second plea must also be deemed to have been negated by the High Court and, therefore, the subsequent suit was barred by res judicata. In *Kirpal Singh v. The Union of India and others* 1965 P.L.A 862 it was held that the dismissal of writ petition by a single word "dismissed" passed in limine precludes the petitioner from presenting another application for the same relief on similar grounds before another bench of concurrent jurisdiction. The said case approved in a latter full bench decision of the Punjab and Haryana High Court in *Bansi and another v. Additional Director, Consolidation of Holdings, Rohtak and others* AIR Pun 28 where again it was reaffirmed that the dismissal in limine by a Division Bench operated as bar of res judicata. In *The Metal Corporation of India Ltd. and Another Vs. Union of India (UOI) and Another*, the petition filed under G Article 226 was held to be barred by res judicata because a writ petition on the same matter filed in the Supreme Court under Article 32 of the Constitution was dismissed in limine. It was held that even though it was not a speaking order, it operated as a bar of res judicata.

(33) As a result of the above discussion we hold that the present writ petition in so far as it challenges the list (annexure "C") is incompetent and is barred by the principle of constructive res judicata as the previous writ petition (CW 277 of 1968) filed in the Supreme Court and which raised the same challenge to the list (annexure "C") as the present writ petition, was dismissed. It is, Therefore, not open to the petitioner to urge the same points in this court. This of course does not preclude the petitioner from raising the point about the virus of the Regulation 4(4) of the Regulations as the same was not the subject matter of the writ petition which was dismissed by the Supreme Court. But as we allowed the counsel for the petitioner to argue the whole petition on merits also it is only fair that we should deal with the main contentions.

(34) In the petition there was no challenge to the facts that the D.P.C. had as a matter of fact made the selection and the same had been approved by the government. What had really been alleged by the petitioner was that the D.P.C. did not keep in view the requirement of Rule 9(3) (a) of the Rules and had only mechanically transported the list of existing superintendents (non-gazetted) who were in service prior to 1-3-1968. This allegation of course had been denied in the return. We have also in this connection had a look at the proceedings of the D.P.C. after rejecting the claim of privilege by the respondents I and 2. A reference to the proceedings will show that D.P.C. has dealt with the matter in detail. As a matter of fact we find that a suggestion was given to the committee that apart from the assessment of the record, there should also be an interview of the candidates. This suggestion, however, was not accepted by the committee as they felt that it was not necessary to have an interview and that the record which had been written over for a long period should be sufficient guide for the determination of the suitability of the candidates for their absorption. It was also reported to the committee that a few temporary superintendents were likely to be confirmed as Superintendents (Class II non-gazetted) in the vacancy arising

before 1-3-1968 and as a result of such confirmation with retrospective effect some of them may become senior to some of the existing permanent superintendents. The committee, however, decided that it should proceed to assess all the eligible individuals on the basis of their seniority, as permanent or temporary superintendents as on the date of assessment. The question whether the position of any individual in the grade of Superintendent (Class Ii Gazetted) should be adjusted as a result of any subsequent development would be decided by the government. Mr. Lekhi had by reference to this part of the decision of the D.P.C. sought to urge that the committee had only kept consideration of seniority and had not applied their mind to the requirement of Rule 9 (3) (a) of the Rules which requires them to consider the case on the basis of merit with due regard to seniority. We are of the view that the interpretation given by Mr. Lekhi to this part of the decision of the D.P.C. is mis-placed. This decision only related to the sequence in which the cases of all eligible individuals were to be considered. Apparently a suggestion was made that the cases of those temporary individuals who may by subsequent confirmation become senior to some of the existing permanent superintendents may be assessed first. It was this suggestion which was not accepted and not that the committee proceeded to constitute the service on the basis of seniority alone. A reference to the next part of the proceedings of the committee would show that it has examined the record of all eligible departmental candidates permanent as well as temporary. The committee then made recommendations on the basis of merits with due regard to seniority of individuals indicated in the attached list. The committee also recommended that the appointments are to be made according to the rank of the persons included in the list. We find that in case of one person suitability was postponed because his Cr Dossier was not available. We also find that the committee had recommended that on over all assessment of the confidential rolls mentioned in one of the annexures the committee did not consider certain persons fit for appointment as Superintendent (Class Ii Gazetted) at its initial constitution. The committee further made their recommendation regarding the individuals mentioned in another annexure against whom disciplinary proceedings were in progress, and placed the recommendations in sealed covers. These proceedings, dealing with different matters, clearly show that the D.P.C. applied its mind as required by Rule 9(3) (a) of the Rules. Not only the proceedings contain the names of the persons who were screened for initial appointment but it also contains the names of those who were not recommended for initial appointment as well as the separate recommendations regarding those against whom disciplinary proceedings were pending. All these details could not have found mention had there been no application of mind by the D.P.C. In order, however, to support his argument that in spite of these details the Rules have not been followed, Mr. Lekhi, learned counsel for the petitioner, contended that the seniority of the petitioner as well as other persons appointed at the time of initial constitution is at the same position which was allocated to them in the erstwhile grade of Superintendent (Class Ii non-gazetted) prior to the initial constitution of service. The suggestion was that, had the committee screened the various

eligible candidates on the basis of merit with due regard to seniority, it was inevitable that the seniority of the various persons would have been disturbed as it was impossible to contend that the merits of all the persons appointed at the time of initial constitution was the same. In this connection Mr. Lekhi placed much reliance on the fact that the Rules treat the post of the Superintendent (Class II Gazetted) as Selection post. It was his contention that as the post of Superintendent at the initial constitution is treated as selection post it was necessary that the erstwhile Superintendents Class II non-gazetted) should have been graded in various categories such as outstanding, very good, good on the basis of merit and the names should have been arranged inter se within each category in the order of their seniority. We do not agree. There is nothing in Rule 9(3) to lend support to this procedure suggested by Mr. Lekhi. The inspiration possibly for this argument seems to be from Regulation 4(5) and (8) of the Regulations which provides that the select list shall be prepared by including the required number of names first from amongst the officers finally classified as "out-standing", then from amongst those similarly classified as "very good" and thereafter from amongst those similarly classified as "Good" on the basis of merit. The names shall be arranged inters within each category in the order of their seniority. Further inspiration for this is also sought to be drawn from the fact that prior to 1-3-1968 whenever the D.P.C. considered for selection the erstwhile Superintendent (Class II non-gazetted) for promotion as supervisor which was (class II gazetted) post, principles similar to the above procedure were followed as prescribed by Government in Ministry of defense Office Memorandum No. II(5)/55/6310/D-Appts" dated 26th July, 1957 as amended and annexed as R. 3 to the return filed by Respondents 1 and 2. We find no justification for this requirement. of either Regulation or the procedure prevailing for selection of the erstwhile supervisor to be read in Rule 9(3). for the obvious reason that contains no such requirement. We cannot conceive of any reason why if the Rule making authority wanted the appointments at initial constitution to be made in the particular manner, it did not specifically so provide. On the contrary Rule 9(3) provides for screening on the basis of merit with due regard to seniority. Rule 9.9 further provides that the initial appointments to the various grades of the Service shall be made in the order in which their names are arranged ill the recommendations of the appropriate selection board or, as the case may be. Departmental Promotion Committee as finally approved by the Government. Thus the order in which the names are to be arranged have been left to be determined by the D.P.C. without any requirement that they must first categories the eligible candidates in the various categories indicated above. There is no force in this contention. One instance of the alleged mechanical functioning by the D.P.C. was mentioned by the petitioner by giving three lists, namely, of 1964, 1965 and 1966 of the persons who had been selected for appointment as supervisor (Class If Gazetted) with a view to "show that the persons selected were not necessarily the senior ones. But as already noticed the requirement of selection by promotion in that category was different from that provided in Rule 9(3), namely, merit with due regard to seniority the petitioner cannot derive any

assistance from these instances which have no parallel.

(35) Another instance of the alleged mechanical functioning of the D.P.C. had been made by the petitioner in para 18 in which he had given the names of 5 persons with the allegations that those persons were mechanically appointed in the grade of temporary duty post super tending (Gazetted) at the initial constitution. It was further stated that though their cases came up for confirmation in June, 1968, with effect from prior date they were found unfit and thus not eligible for confirmation. The conclusion drawn by the petitioner was that if those persons were found to be unfit in June. 1968, for appointments as substantive permanent Superintendent (Class I[non-gazetted) for the year 1966 how could they be considered eligible on the basis of merit with due regard to seniority as eligible for appointment to the post of Superintendent (Class Ii Gazetted) with effect from 1-3-1968. Those p allegations were denied in the return affidavit by Mr. R. D. Jain. was stated that it was wrong that those persons were considered for confirmation as Superintendent (Class It non-Gazetted) in June. 1968. It was stated that those persons were considered in August, 1967, but the committee recommended them as not yet fit for confirmation on the basis of the confidential reports then available. Subsequently, however, on the promulgation of 1968 Rules they were considered after another confidential report had been rendered on them and having been found suitable they were appointed as officiating Superintendent (Class Ii Gazetted). It is thus apparent that the basis of the allegations of the petitioner was based on wrong premises and data.

(36) In the affidavit of Mr. Jain. dated 1-3-1969, it has been stated that after considering the record of service of departmental candidates the list had been prepared and the petitioner and others had been appointed as Superintendents (Class It Gazetted) excepting. 5 persons whose names were mentioned in para 8 of "the affidavit. It was explained that these five persons had not been appointed because they were not found suitable by the D.P.C. and its findings had been kept in sealed covers pending the result of disciplinary proceedings instituted against them by the Government. Even their numbers were mentioned as No. 77 A, 140 A, 168A, 169 A and 342 A. In reply to this, the petitioner in para Ii of his rejoinder boldly averred that there has been no screening as contemplated by the Rules and that he was sure that if the sealed covers were also opened the seniority of tile officers kept in the "sealed cover would be found to be the same as it was on 29-2-1968, despite their merit being under enquiry. A further reply dated 19-4-1969 to the rejoinder was filed by Mr. R. D. Jain in which this part of the averment of the petitioner was denied. It was stated that out of the five persons mentioned at Serial No. 140 A had not been recommended by the D.P.C. for appointment as Superintendent (Class Ii Gazetted) while the committee"s finding about 4 others had been kept in sealed covers. It was also stated that of these persons disciplinary proceedings against two i.e. Serial numbers 140 A and 168A had been completed and the sealed covers containing the findings of the D.P.C. in respect of these- persons were opened and it was found that the

committee had not recommended them for appointment as superintendent (Class Ii Gazetted). It will thus be seen that the averment of the petitioner that there was a mechanical application of the mind is not only not supported but is contrary to the facts. We have also looked into the original proceedings of the D.P.C. and find that the affidavit of Mr. Jain finds support from the proceedings. It is quite clear that the D.P.C. made those initial appointments after proper application of the mind.

(37) The whole argument of Mr. Lekhi on this question really hinges on his reading Rule 9(3) (a) as if it postulates that the appointments to be made by the D.P.C. are for promotion to selection posts and. Therefore, merit is the. only criterion. The word "select" denotes a choosing from a number of persons by fitness or preference. The D.P.C. was not acting as a selection body for the purpose of promotion but were only required to screen the various candidates holding appointments in equivalent existing grades for the purpose of filling the new reclassified grade on the basis of merit with due regard to seniority. It is pertinent to note that the word used is "screened" and not "selection for higher promotion". It is only natural that this requirement was provided in the Rules because it could not have been contemplated that on the coming into force of the new Rules there was to be a complete break with the past with no regard to the continuity of the service and to the existing post. It was for this reason that the Rules provide that the candidates will be "screened" on the basis of merit with due regard to seniority. The word "screen" obviously suggests that the committee was to examine the fitness of persons to be absorbed at the initial constitution of the service. A further limitation was also placed on the D.P.C. by providing that the screening was to be done on the basis of merit with due regard to seniority. This obviously means that even if the D.P.C. was to find that a person very junior had more merit than a person with a longer service it did not necessarily mean that the former person was to be placed senior to the latter. This is implicit in the rule requiring, the D.P.C. to make appointment on the basis of merit with due regard to the seniority. Paying due regard to seniority means that the D.P.C. owes a duty under law to pay attention and show consideration to the seniority of the person concerned. It would be appreciated that though the rules A were being promulgated in 1968 it was essentially a service which was existing though it was being reorganized. From this it could hardly be imagined that a complete upsetting of seniority was contemplated by the rules. Of course if the D.P.C. found that on consideration of merit with due regard to seniority some rearranging of seniority was necessary, it was open to it to give effect to its decision in any manner it thought fit. But the D.P.C. has on a consideration of all the relevant matters and the rule not chosen to change the seniority in the manner to the liking of the petitioner. Can it, because of this, be said that the D.P.C. has acted mechanically or not in accordance with Rules. We find that the D.P.C. consists of very senior officers. It is clearly stated in the proceedings of the D.P.C. that it assessed the respective merits of all the eligible candidates and having regard to their merits and seniority it recommended the

appointment in the order given by it. There is no allegation that the D.P.C. was actuated by any malice against the petitioner or that in coming to the decision it was inclined to unduly favor any of the respondents. The only charges was that there was no application of mind by the D.P.C. The proceedings on the other hand, show that the matter was considered by it by applying the relevant rules. It is not, Therefore, possible for us to hold that Rule 9(3)(a) of the Rules was not complied with. It should be appreciated that this court does not sit as a court of appeal on the deliberation and recommendations of the D.P.C. In the absence of any balefire or violation of the rules the decision of the D.P.C. in recommending the appointment in the order in which they have made is not open to scrutiny by this court. We have already found that the allegation that there was no application of mind by the D.P.C. is belied by the record. The fact that the D.P.C. did not recommend certain persons for being appointed at the time of initial constitution clearly shows that it was alive to the requirement of Rules and other relevant circumstances in arriving at its conclusion. The challenge, therefore. that the impugned list (annexure "C") should be quashed as it was not made in compliance with Rule 9(3)(a) of the Rules cannot be accepted and must be repelled.

(38) The next challenge was to the virus of Clause (4) of Regulation 4 of the Regulations, inasmuch as the said clause limits the field of selection ordinarily to 3 to 5 times of number of officers to be included in the select list. The argument is that while Rule 10 of the Rules read with Schedule 3 provides that all the Superintendents with a minimum of 10 years continuous approved service are thus entitled to be considered for promotion to the post of Civilian Staff Officers will not be so considered unless he falls within the field of selection .is defined in the said Regulations. It is urged that there is no warrant in law for so restricting the field of selection and that all persons who fulfill the eligibility condition of third schedule of the Rules should free entitled to be considered for promotion. It is, Therefore, submitted that the Regulation 4(4) is incompetent and violates not only the Rules but also Articles 14 and 16 of the Constitution of India.

(39) As regards clause (4) of Regulation 4 being vocative of the Rules. the argument of the petitioner assumes that Regulation 4(4) is in conflict with the third schedule and, Therefore, in terms of Rule 20, the Regulation is incompetent as no regulation can be made which is inconsistent with the Rules. In our opinion the argument proceeds on a mis-apprehension. The third schedule only mentions the eligibility condition for being promoted to the grade Civilian Staff Officer (.Class 1). The Regulation has not in any manner deviated from that eligibility condition which is kept intact. All that has happened is that as the number of eligible persons may be much larger as against the actual strength of officers to be included in the select list in terms of Regulation 4(2), Regulation 4(4) has provided that in preparing the select list for promotion to grade of Civilian Staff Officer, the field of selection shall ordinarily extend from 3 to 5 times the number of officers to be included in the select list. It will be appreciated that Rules nowhere provide that when preparing the select list for promotion to the grades

of Civilian Staff Officers, the list must contain the names of all the persons who satisfy the eligibility conditions. Actually Rule 11(2) itself provides that the procedure for making selection for promotion to the grades of Civilian Staff Officers shall be determined by Regulations made by the Government in consultation with the Commission. It was in pursuance of this power that the Regulations have been framed. It is not as if the restrictions of the field of selection from 3 to 5 times the number of officers to be included in the select list means that the selection board is competent to pick up any eligible persons without any restrictions. Actually Regulation 4(3) provides that the names of officers who fulfill the eligibility conditions prescribed for promotion to the Grade concerned shall be arranged in a single seniority list. Thus, Therefore, when Regulation 4(4) talks of the field of selection ordinarily being limited to 3 to 5 times the number of officers to be included in the select list, it necessarily limits the selection board to make selection out of the senior most persons included in the list maintained under Regulation 4(3). This is a vital safe guard in the interest of employee which means that the selection board will not arbitrarily ignore the seniority of the eligible persons when making promotion for selection. It is also well settled that the government cannot amend or supersede the statutory Rules by administrative instructions but if the Rules are silent on any particular point the government can fill up the caps and supplement the rules and issue instructions not inconsistent with the Rules already framed vide *Sant Ram Sharma v. State of Rajasthan and Am.* (1968 Dscr 111). As in the present case the Rules do not provide for any procedure for making selection for promotion to the Grade of Civilian Staff Officer it was open to the government to provide by Regulations that the field of Selection may be restricted to 3 to 5 times the number of officers to be included in the select list.

(40) The next attack against the Regulation 4(4) was that Rule 10 along with third schedule itself envisaged that there would be disturbance of seniority and this suggests that the Rule making authority did not contemplate that the field of selection will be limited as has been done by the Regulations. Third Schedule to the Rules provide that for the recruitment of Civilian Staff Officers the temporary vacancies are to be filled up by promotion from Superintendents on the basis of selection provided that if any person in the Superintendent's grade is considered for promotion to the Grade of Civilian Staff officer. all persons senior to him in that Grade shall also be so considered notwithstanding that they may not have rendered 10 years continuous approved service in that Grade. The petitioner is obviously referring to this provision in support of his above argument. In our opinion this interpretation is mis-placed. Actually this provision deals with a different situation and aspect of the matter. The proviso in Column 3. of the Third Schedule relates to persons who are directly recruited on the basis of competitive examination to the grade of Superintendents (Class Ii Gazetted) against 25 per cent of the substantive vacancies in that grade. Such direct recruits will be appointed to the permanent vacancies and on confirmation they would become senior to some of the persons promoted to that grade against some of the

temporary vacancies. Under the proviso such direct recruits are also eligible for promotion to the grade although they may not have rendered 10 years continuous approved service if a superintendent junior to them but with 10 years continuous approved service to his credit is considered for promotion to the grade of Civilian Staff Officer. The petitioner has thus misunderstood the true scope of the proviso and his contention on the unworkability of the rule is, Therefore,, repelled.

(41) The next attack on Regulation 4(4) is on the extreme assertion that it is not competent for the government to make any regulation which does not provide for all eligible persons being considered for promotion to the Grade of Civilian Staff Officer, even if one name is to be included in the select list. The contention is that once a person fulfills the eligibility condition for promotion it is his fundamental right to be considered for promotion and that any Rules or Regulations which limit the choice of the selecting authority by providing for field of selection is per se bad and void, as violating Articles 14 and 16 of the Constitution. So stated the argument cannot be accepted. It is true that normally if there is no restriction by Regulations or Rules or instructions limiting the field of selection then all persons who fulfill the eligibility condition have a right to be considered for promotion to the next higher grade. But one cannot ignore practical and administrative realities. To accept this extreme argument would mean that even if there is one vacancy, and there are over 100 persons who fulfill the eligibility condition all must be considered otherwise vitiating the appointment. We cannot accept this position which would put such extreme strain on the service and make the application of the rules almost unworkable. On the contrary we are of the view that the present Regulations provide for an equitable and impartial manner of making selection for promotion. Regulation 4(3) provides that the names of officers who fulfill the eligibility conditions prescribed for promotion to the Grade concerned shall be arranged in a single seniority list. The result is that the Selection Board will normally consider the names of 3 to 5 officers in the order of seniority for one vacancy which is to be included in the select list. It is not understood how this procedure in any way violates the equality clause Articles 14 and 16 of the Constitution. Of course speaking in the abstract and in theory it is possible to urge that a person at the very bottom of seniority list may have more merit than a person who is very - much higher in the seniority list. But to judge whether any regulation denies any equality of treatment, the test to be applied is the test of reasonable situation and not of a situation imagined in the abstract. That restricting the field of selection to a certain multiple of the vacancies is not per se violative of Article 16 of the Constitution has been authoritatively decided by their lordships of the Supreme Court in Guman Singh and Others Vs. State of Rajasthan and Others, . In that case Rule 28-B dealt with the appointments by promotion to the post in the service to be made by selection strictly on the basis of merit and on the basis of seniority-cum-merit. Sub-rule (2) of A Rule 28B reads as follows :-

"SELECTION strictly on the basis of merit shall be made from amongst persons

who are otherwise eligible for promotion "under these rules, the number of eligible candidates to be considered for the purpose shall be ten times the total number of vacancies to be filled in on the basis of merit and " seniority-cum-merit provided such number is available; where the number of eligible candidates exceeds ten times the number of vacancies, the requisite number of senior-most persons shall be considered for the purpose."

THE learned single judge of Rajasthan High Court held that the provision of Rule (2) of Rule 28B restricting the number of eligible candidates to be considered for promotion to 10 times the total number " of vacancies was violative of Article 16 inasmuch as the claims of various other eligible officers for being considered for promotion was bad. In appeal before the Letters Patent Bench, the Division Bench disagreed with the learned single judge and held that the provision of Rule 28B(2) regarding the field of selection being confined to senior most officers in the junior scale not exceeding 10 times the total number of vacancies was reasonable. They, Therefore, held that Rule 28B (2) was not invalid. The matter was, Therefore, brought to the Supreme Court. Their lordships expressed their agreement with the Division Bench of the Rajasthan High Court. Their lordships observed as follows:-

"WE are also not impressed with the contention that Rule 28-B(2) and its proviso confining the selection to senior E- most officers not exceeding ten times the number of total vacancies to be filled up and the further restriction regarding the eligibility of officers who have put in at least six years of service for first promotion offend Article 16 of the Constitution. In this respect also we agree with the views expressed by the Division Bench of the Rajasthan High Court in D.B. Special Appeal No. 57 of 1968."

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"THE provisions contained in sub-rule (2) confining the selection to senior-most officers not exceeding ten times the number of total vacancies is also, in our opinion, reasonable Such a provision will encourage the members of the service to aspire for promotion for making themselves eligible by increasing their efficiency in the discharge of the duties. We are of the view that Rules 28-B and 32 do not offend either Article 14 or 16 of the Constitution."

THE extreme proposition, Therefore, that any Rule which limits the field of selection being confined to a certain number of senior most 11 officers and not to all eligible officers is per se violative of Article 16 of the Constitution cannot be accepted in view of the judgment of the Supreme Court.

(42) Mr Lekhi sought to distinguish this authority by suggesting that the Supreme Court had only upheld the field of selection in a case where it is limited to 10 times the number of total vacancies. According to the learned counsel as the field of selection in the present case under Regulation 4(4) is being restricted 3 to 5 times the number of officers to be included in the select list, the said Regulation is not saved by the ratio of the Supreme Court case. In our view this

distinction is without any meaning. The Supreme Court having held that it is permissible for the government to restrict the field of selection to a particular multiple of senior most officers even if there are persons outside the field of selection who fulfill the eligibility condition, it cannot be held that merely because the field of selection in the present case is less than 10 times the number of vacancies the said Regulation. is bad. Whether the field of selection should be limited to 10 times the number of vacancies or should be restricted to 3 to 5 times the number of vacancies as in the present case, is a matter which will necessarily vary with each service, keeping in view the requirements and secularities of each service. These are all matters which necessarily have to be left to the authorities concerned, who are familiar with the needs of the situation and it is obviously neither feasible nor proper for this court to lay down that in all cases the field of selection necessarily must be limited to a particular multiple of number of vacancies. It is not as if the field of selection being limited to 3 to 5 times the number to be included in the select list has been fixed without any basis. A reference to Annexure 3 dated 26-7-1957 along with corrigendum dated 1-11-1957 annexed to the return filed by respondents I and 2 will show that the Ministry of defense has issued instructions as far back as 29-4-1955 for effecting promotion to selection posts. In the letter of 26th July, 1957, the field of choice originally had been kept to 5 to 6 times the number of vacancies expected within a year. This note was, however, amended by the Government of India, Ministry of defense by its corrigendum dated 1-11-1957 and the field of choice though kept at 5 to 6 times, left a discretion with the D.P.C. to keep the limitation of field of choice to three times the number of vacancies instead of five or six times. The post of Civilian Staff Officer is also a selection post and, Therefore, if the field of choice has been limited to 3 to 5 times the number of vacancies, it is in continuation of the policy which has been existing in the department for such a long time. This is another reason why it cannot be held that the field of choice has been arbitrarily limited and is, Therefore, bad.

(43) Mr. Lekhi also contended that the requirement of Regulation 4(4) that the field of selection should ordinarily extend from 3 to 5 times gave unbridled discretion to the selection Board, as it was not laid down when the board was to limit the field of selection to three times and when to five times. Stress was laid on the word "ordinarily" used in Regulation 4(4) to point out that the selection board was not even limited to restrict the field of selection to 3 to 5 times but could even so beyond the limit of 5 times. It is true that the word "ordinarily" does not mean invariably, see *Kailash Chandra Vs. Union of India (UOI)*, , *Krishan Dayal and Others Vs. General Manager, Northern Railway, Baroda House, New Delhi*, and *Kapur Singh v. The Deputy Custodian General. New delhi 1957 P.L.R. 52(^)*. But that by itself does not mean that the discretion given to the selection board to limit the field of from 3 to 5 times or in a rare case to extend it beyond is per se arbitrary and discriminatory. Even though no Rules or directions have been issued laying down in what particular eventuality the field of selection is to be limited up to a particular multiple of the number of vacancy, the Rules do

contemplate that ordinarily it will extend from 3 to 5 times the number of officers to be included in the select list. This obviously means that. if the selection board wishes to take the field of selection beyond 5 times the number of vacancies, it will have to be for, an apt reason and only in very exceptional cases. It will be readily accepted that it is not possible to lay down any such minute details which will have the effect of tying the hands of the selection board when making selection at any particular time. These details necessarily have to be worked out at the relevant time when need arises and keeping in view the various relevant circumstances like the number of vacancies, the number of eligible officers and the various other factors in the interest of harmony and efficiency of the Service. It is necessary in the very nature of things that some discretion of this nature has to be left to the selection board in these matters and permit it to take appropriate decisions for obtaining: the ends of service to be achieved. It is well settled that though a power may be discretionary. it is not necessarily discriminatory and abuse of power cannot easily be assumed where the discretion is invested in high officers. There is also a presumption that public officials will discharge their duties. honestly and in accordance with the rules of law vide Messrs Panahil Binjraj and others v. Union of India and of/u"rs A.T.R. 1957 S.C. 398. The selection board is constituted under Regulation 3 and comprised of a chairman or a member of the Commission, Joint Secretary- in charge of Armed Forces Headquarters Civilian Establishment. Ministry of defense, Chief Administrative Officer, Ministry of defense and a representative of each of Army Headquarters; Naval Headquarters, and Air Headquarters not below the status of a Director. It 17, is obvious that this is a high powered board consisting, of very senior officers and it cannot be assumed that merely because there is some discretion given under Regulation 4(4) in the field of selection, the said power will necessarily be exercised discriminatory and mala fide. It may further be seen that there is no allegation in the petition suggesting that the selection board was actuated by any malice or acted on collateral reasons. No material has been placed on record to show that in the decision taken there has been any hostile discrimination against the petitioner or that any undue favoritism has been shown to any other member of the service. We. Therefore, cannot accept the contention that Regulation 4(4) is in any manner discriminatory or unconstitutional. This contention, Therefore, is rejected.

(44) The result is that there is no merit in the petition and we dismiss the same, but with no order as to costs.