

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) No. 8034/2014**

% **Reserved on:** 3rd May, 2016
Date of Decision: 12th August, 2016

DR. NIDHI CHOPRA AND OTHERSPetitioners
Through Ms. Aishwarya Bhati, Mr. Dilip Kumar
Nayak & Ms. Heena Khan, Advocates.

Versus

GOVERNMENT OF NCT OF DELHI AND OTHERS
....Respondents
Through Mr. Sanjoy Ghose, ASC & Mr. Yash Vijay,
Advocate for GNCTD.
Mr. Naresh Kaushik, Advocate for UPSC.

WRIT PETITION (CIVIL) No. 8035/2014

DR. NEETU CHAUDHARY AND OTHERSPetitioners
Through Ms. Aishwarya Bhati, Mr. Dilip Kumar
Nayak & Ms. Heena Khan, Advocates.

Versus

GOVERNMENT OF NCT OF DELHI AND OTHERS
....Respondents
Through Mr. Sanjoy Ghose, ASC & Mr. Yash Vijay,
Advocate for GNCTD.
Mr. Naresh Kaushik, Advocate for UPSC.

WRIT PETITION (CIVIL) No. 8439/2014

DR. ATUL JAINPetitioner

Through Mr. P.P. Khurana, Sr. Advocate with Mr. Shree Prakash Sinha, Mr. Rakesh Mishra & Mr. Yogesh Goel, Advocates.

Versus

GOVERNMENT OF NCT OF DELHI AND OTHERS

....Respondents

Through Mr. Sanjoy Ghose, ASC & Mr. Yash Vijay, Advocate for GNCTD.
Mr. Naresh Kaushik, Advocate for UPSC.

WRIT PETITION (CIVIL) No. 8444/2014

DR. AMIT SHOKEEN & OTHERS

....Petitioners

Through Ms. Aishwarya Bhati, Mr. Dilip Kumar Nayak & Ms. Heena Khan, Advocates.

Versus

GOVERNMENT OF NCT OF DELHI AND OTHERS

....Respondents

Through Mr. Sanjoy Ghose, ASC & Mr. Yash Vijay, Advocate for GNCTD.
Mr. Naresh Kaushik, Advocate for UPSC.

WRIT PETITION (CIVIL) No. 1201/2015

DR. NITIN ANAND & OTHERS

....Petitioners

Through Mr. P.P. Khurana, Sr. Advocate with Mr. Shree Prakash Sinha, Mr. Rakesh Mishra & Mr. Yogesh Goel, Advocates.

Versus

GOVERNMENT OF NCT OF DELHI AND OTHERS

....Respondents
Through Mr. Sanjoy Ghose, ASC & Mr. Yash Vijay,
Advocate for GNCTD.
Mr. Naresh Kaushik, Advocate for UPSC.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.

1. The afore-stated writ petitions can be divided into two categories or separate sets.
2. Writ Petition (C) No. 8034/2014 is for issue of writ of certiorari and setting aside the common judgment and order dated 7th May, 2012 passed by the Principal Bench of the Central Administrative Tribunal, New Delhi (Tribunal, for short) in the Original Application No. 1259/2011 and other connected matters. The second prayer is for issue of a writ in the nature of mandamus directing the respondents to include the petitioners in the initial constitution of the Delhi Health Service by relaxing Rule 6(2) of the Delhi Health Service (Allopathy) Rules, 2009, (Rules for Short). The third prayer is to quash the communication dated 19th August, 2014 by which the Government of NCT of Delhi had agreed with the advice rendered by the Union Public Service Commission (UPSC) against the grant of the aforesaid relaxation.
3. The second set of writ petitions, i.e., Writ Petition (C) Nos. 8035/2014, 8039/2014, 8444/2014 and 1201/2015 challenge the

judgment and order dated 1st October, 2014 passed by the Tribunal in the CP No. 126/2014 in O.A. No. 3827/2013. The petitioners have also prayed for quashing/setting aside of the letter dated 19th August, 2014 written by the Government of NCT of Delhi to the UPSC accepting the latter's advice given vide letter dated 20.01.2014, against relaxation of Rule 6(2) of the Rules. The third prayer is for issue of a writ in the nature of mandamus for directing the Government of NCT of Delhi to abide by the Cabinet decision No. 1974 dated 10th January, 2013, approved by the Lieutenant Governor on 12th February, 2013, and accordingly accord relaxation of Rule 6(2) of the Rules. Still another prayer in some of the writ petitions is that the UPSC must be directed to accept and accord approval to the request for grant of relaxation of Rule 6 (2).

4. To appreciate the controversy, we would like to set out the relevant facts. National Capital Territory of Delhi as a Union Territory stands accorded a special status vide the 69th Constitutional amendment dated 21st December 1991. Until 1996, the Government of NCT of Delhi had relied on the doctors belonging to the Central Health Service cadre for operation, and upgradation of health services in their hospitals and dispensaries. However, in mid 1990s, the Central Government stopped en-cadrement of new posts of doctors required by the Government of NCT of Delhi. This was stalling and was preventing upgradation and setting up of hospitals, dispensaries and health centres of the Government of NCT of Delhi.

To meet the shortage of doctors, as a stop-gap arrangement, the Union of India had suggested to the Government of NCT of Delhi to fill up the vacant post of doctors by way of contractual appointments. The Lieutenant Governor of the Government of NCT of Delhi, from time to time, in order to meet the emergent and growing requirements had sanctioned and created ex cadre posts of General Duty Medical Officers (GDMOs, for short) and non-teaching specialists. This in turn led to a situation where more than 600 doctors were working on contractual basis. Faced with the aforesaid unacceptable position, the Ministry of Health and Welfare, Government of India had asked the Government of NCT of Delhi examine feasibility of their own cadre of health service. A proposal for the creation of Delhi Health Service was put up before the Cabinet of the Government of NCT of Delhi and approved in the meeting dated 26th April, 2014. The Government of NCT of Delhi then had 1174 sanctioned posts of GDMOs, 110 sanctioned posts of non-teaching specialists, 349 sanctioned posts of teaching specialists and 4 sanctioned posts of public health specialists including 438 ex cadre posts of GDMOs and 242 posts of non-teaching specialists. 418 GDMOs and 252 non-teaching specialists were working on contractual basis. In spite of the *ad hoc* contractual appointments, there was a shortage of 238 GDMOs and 53 non-teaching specialists, which was unpalatable and was adversely impacting the health centres and hospitals of the Government of NCT of Delhi.

5. The Government of NCT of Delhi had earlier sent two requisitions to the UPSC for filling up of 418 posts of GDMOs and 242 posts of non-teaching specialists, but recommendations and select lists had not been received. The proposal noted that the Lieutenant Governor of Delhi was empowered to create posts as the Administrator and make appointment to posts on the basis of recommendation of the UPSC. It was suggested that the initial constitution of the new service would be by way of transfer of employees from the Central Health Service, who would be given an option subject to the right to the Government of NCT of Delhi to reject a candidate on the ground of unsuitability. Future appointments would be made on the basis of a written test and interview to be conducted by the UPSC. The Cabinet decision No. 1139 dated 13th November, 2006 while approving the proposal had authorized the Department of Health and Family Welfare of the Government of NCT of Delhi to take consequential steps, including holding of consultation with the UPSC for framing of service regulations and assessment of suitability of persons to be appointed under the initial constitution.
6. The Lieutenant Governor accepted the recommendations of the Council of Ministers. He had desired that the process of settling service regulations with the UPSC should be initiated with identification and notification of posts in the new service. Thereupon, OM dated 18th December, 2006 was issued by the Government of NCT of Delhi for the formation of a new service known as the Delhi Health Service, a new Group A service,

although the recruitment rules etc. were still to be framed. The Department of Health and Family Welfare under the Government of NCT of Delhi thereafter started consultation with the UPSC for framing service rules for recruitment etc. and assessment of suitability of doctors for the initial constitution.

7. By notification dated 23rd December, 2009 published in the Delhi Gazette, the Lieutenant Governor of Delhi, in exercise of the power conferred under Article 309 of the Constitution of India, enacted and promulgated the Rules i.e. Delhi Health Service (Allopathy) Rules, 2009. Rule 6 dealt with the initial constitution of the service and reads :-

"6. Initial Constitution of the Service

(1) All the officers appointed under the Central Health Service Rules, 1996, who are working in the Government of NCT of Delhi as on the date of publication of these rules in the official gazette and who opt to be part of this service shall be deemed to have been appointed under these rules and they shall be members of the service in the respective grades.

(2) All officers appointed on contract basis/ad-hoc basis on or before 18th December 2006, i.e. the date of issue of the Government of Delhi's O.M. No.F.70/49/2006/H&FW/SSHFW/463-475 dated 18th December, 2006, on the basis of their suitability as assessed by the Commission and requisite educational qualifications and experience prescribed for the post and being found fit, shall be deemed to have been appointed under these Rules and assigned to the Sub-Cadre of General Duty Medical Officers or Non-teaching Specialists, as the case may be, and they shall be members of the Service at the entry level of the respective Sub-Cadre at the initial constitution stage."

Under sub-rule (1) of the said Rule, doctors belonging to the Central Health Service working with the Government of NCT of Delhi on the date of publication of the rules had the option to opt for absorption in the Delhi Health Service. Under sub-rule (2) doctors appointed on contractual/ad hoc basis on or before 18th December, 2006, i.e., the date of issue of OM No. F.70/49/2006/H&FW/SSHFW/463-475 constituting the Delhi Health Service, were deemed to be appointed under the Rules provided they had the requisite educational qualification and experience as desired for the post and they were found to be suitable as assessed by the UPSC.

8. The petitioners herein are doctors, who were appointed on ad hoc/contractual basis after 18th December, 2006 and prior to 23rd December, 2009. They were not covered under sub-rule (2) to Rule 6 and, therefore, were not a part of the initial constitution.
9. Aggrieved by their non-inclusion, some of the doctors appointed between 18th December, 2006 and 23rd December, 2009 filed Original Applications including OA No. 1259/2011 before the Tribunal. The validity of sub-rule (2) to Rule 6 of the Rules was challenged. The contention was that the cutoff date of 18th December, 2006 had no legal sanctity and was arbitrary. The rules having been notified on 23rd December, 2009, it was irrational and absurd to fix the date of initial constitution as 18th December, 2006. The Government of NCT of Delhi and the UPSC filed a counter affidavit opposing the said Original Applications. By a detailed

speaking and well reasoned final judgment and order dated 7th May, 2012, the Original Applications were dismissed. This final judgment and order was initially not challenged, and after about two years has been challenged in WP(C) No. 8034/2014. We shall refer to the reasoning in the judgment dated 7th May, 2012 subsequently. In brief, it was held that the Rule 6(2) of the Rules was perfectly valid and not unconstitutional. The validity of the cutoff date of 18th December, 2006 was upheld. However, the Tribunal, in the last paragraph of the order dated 7th May, 2012, by way of obiter observed that the Government of NCT of Delhi should seek advice from the UPSC for doctors who were appointed post 18th December, 2006 and prior to 23rd December, 2009 for inclusion in the constitution of the initial cadre. The Government of NCT of Delhi might also consider the matter of age relaxation for these doctors. For the sake of completeness and convenience, we would like to reproduce paragraph 32 of the order dated 7th May, 2012, which reads as under:-

“32. Before parting with the order, we consider our solemn duty to make certain observations in the concluding part of the order also in the light of the observations made in the body of the order regarding doctors who were appointed post 18.12.2006 and prior to 23.12.2009 for inclusion in the constitution of the cadre. We advise the Govt. of NCT of Delhi as is their stand regarding the post 18.12.2006 appointed doctors to seek advice of UPSC to consider the contractually appointed such doctors for inclusion in the constitution of the cadre. The Govt. of NCT of Delhi shall also consider the matter of age relaxation of these doctors. No order as to costs.”

10. The aforesaid directions became the edifice and foundation of the second round of litigation with some of the petitioners filing OA Nos. 3827/2013 and 2565/2013. These OAs were disposed of vide order dated 22nd November, 2013, whereby the respondents were directed to finalize the process of relaxation of Rule 6 (2) of the Rules in terms of Rule 16 thereof within a period of 4 weeks from the date of receipt of a copy of the order, with further directions to undertake assessment of the suitability of the doctors upon relaxation of Rule 6 (2). This order also dealt with the apprehension of the petitioners regarding fresh appointments and it was noted that the new selections being made were not for replacing ad hoc doctors appointed on contractual basis. Therefore, no prejudice was caused to the applicants therein. The said directions and observations were made without waiting for the reply and ascertaining the stand and stance of the UPSC. Reference was made to the short reply filed by the Government of NCT of Delhi to the effect that they had requested the UPSC for regularization of GDMOs and non-teaching specialists appointed between 18th December, 2006 to 23rd December, 2009, but the UPSC had advised the retention of provisions. Reliance was also placed on the letter dated 15th December, 2013 written by the Government of NCT of Delhi to the UPSC for relaxation of Rule 6 (2). The order records that it was the prerogative of the Executive to frame, amend and relax the recruitment rules, and Article 320 clause (3) requires consultation with the UPSC on all matters relating to recruitment to

services and civil posts. After elucidating the case law on the meaning and scope of the term “consultation”, it was observed that the expression “consultation” as used in the aforesaid Article was different from that of approval or acceptance, but at the same time “consultation” did not mean mechanical concurrence. The duty of the consultant was to apply their mind and give their opinion fairly. In the final and operative portion of the order dated 22nd November, 2013, it was directed as under:-

“6. In the circumstances, OAs are disposed of with direction to respondents to finalize the process of relaxation of Rule 6(2) of the Delhi Health Services (Allopathy) Rules, 2009 undertaken by them in terms of the provisions of Rule 16 thereof within a period of four weeks from the date of receipt of a copy of this order and when the rules are finally relaxed, to undertake the further exercise of assessing of suitability of applicants in terms of the relaxed Rule 6(2) of the RRs keeping in view the aforesaid orders of the Tribunal and also that of High Court, within further period four weeks.”

11. The UPSC, by letter dated 20th January, 2014, addressed to the Chief Secretary of the Government of NCT of Delhi, Department of Health and Family Welfare, opined against relaxation of Rule 6(2) and observed that the Commission would not accept or accede to the said request. The UPSC took the stand that the doctors appointed between 18th December, 2006 and 23rd December, 2009 should not be equated with and were not similar to those appointed up to 18th December, 2006. On the question of age relaxation, the UPSC was inclined to consider the same and had opined that

relaxation of age for such doctors, to the extent of service rendered by them on ad hoc/contractual basis under the Government of NCT of Delhi upon selection as a direct recruit, would be considered if a proposal was brought forward. This was because some of the doctors might have become over aged.

12. In the meanwhile, the petitioners in OA No. 3827/2013 and OA No. 2565/2013 filed CP Nos. 126/2014 and 146/2014 before the tribunal on account of delay in the decision on relaxation. These contempt petitions stand dismissed by the Tribunal vide order dated 1st October, 2014 holding that the tribunal had never directed that Rule 6(2) must be relaxed or the doctors engaged on ad hoc or contractual basis between 18th December, 2006 and 23rd December, 2009 must be inducted as members of the service at the time of initial constitution. It was held that the Government of NCT of Delhi, vide order of the Lieutenant Governor dated 15th July, 2014, had, in its wisdom, decided not to go against the advice of the UPSC tendered vide letter dated 20th January, 2014. The Tribunal justified their finding by observing that for invoking the contempt jurisdiction, it must be shown that there was willful and contumacious disobedience of the earlier order and if there were two equal consistent possibilities on interpretation of an order, a contempt petition would not lie. When there was substantial compliance of the directions in the order dated 22nd November, 2013, the contempt court would not go into the secondary aspects in the contempt petition. The Government of NCT of Delhi had

decided not to relax Rule 6(2) and the UPSC had never committed contempt. Thus, no further directions in the contempt proceedings were required or could be issued. The tribunal, conscious that they had not examined the merits of the decision taken by the Government of NCT of Delhi, left it open to the applicants therein to challenge the decision against relaxation of Rule 6(2).

13. Writ Petition (C) Nos. 8439/2014, 8435/2014 and 8444/2014 had come up for hearing before a Division Bench on 16th January, 2015 when the following detailed order was passed:-

“The common challenge in these Writ Petitions filed by the petitioners who were appointed as General Duty Medical Officer (in short ‘GDMO’) and Specialist Grade-II between the period 18.12.2006 to 23.12.2009 by the Government of NCT of Delhi is against the order dated 01.10.2014 passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as ‘CAT’) dismissing the Contempt Petition Nos.126/2014 in OA No.3827/2013 and 146/2014 in OA No.2565/2013 respectively preferred by them.

The learned counsel for the petitioners also raised the grievance that while dismissing the Contempt Petitions, the learned CAT has exceeded its jurisdiction by modifying the earlier order dated 22.11.2013 passed in OA No.3827/2013 and 2565/2013 respectively.

We have heard the learned counsel for the petitioners and Mrs. Zubeda Begum, Standing Counsel for GNCTD for R-1, Mrs. Avnish Ahlawat, the learned counsel for respondent No. 2 and Mr. Naresh Kaushik, the learned counsel for respondent No.3 who appears on advance notice

and accept notice on behalf of respondent Nos.1, 2 and 3 respectively.

In the Contempt Petitions filed by the petitioners, they were seeking the enforcement of the orders dated 22.11.2013 passed in OA No.3827/2013 and 2565/2013 respectively. The operative portion of para 6 of the same is extracted below:

6. In the circumstances, OAs are disposed of with the direction to respondents to finalise the process of the relaxation of Rule 6 (2) of the Delhi Health Services (Allopathy) Rules, 2009 undertaken by them in terms of the provisions of Rule 16 thereof within a period of four weeks from the date of receipt of a copy of this order and when the rules were finally relaxed, to undertake the further exercise of assessing of suitability of applicants in terms of the relaxed Rule 6(2) of the RRs keeping in view the aforesaid orders of the Tribunal and also that of High Court, within a further period of four weeks.”

Taking into consideration the said positive direction given by the learned CAT, we are prima facie of the view that as per the direction given by the learned CAT, the respondents were to finalise the process of the relaxation of Rule 6 (2) of the Delhi Health Services (Allopathy) Rules, 2009 undertaken by them in terms of the provisions of Rule 16 thereof within a period of four weeks from the date of receipt of the said order. The learned CAT also directed that when the rules are finally relaxed, the respondents shall undertake the further exercise of assessing suitability of the applicants in terms of the relaxed Rule 6(2) of the RRs keeping in view the order of the learned CAT and the High Court within a further period of four weeks.

Let the respondents file their affidavits to apprise the

Court with regard to the compliance of the said direction given by the learned CAT by the common order dated 22.11.2013 passed in OA No.3827/2013 and 2565/2013, respectively within a period of four weeks. Replies, if any, be filed by the petitioners within a period of two weeks thereafter.

List these matters on 17.03.2015.

In the meantime, status quo shall be maintained by the parties with regard to the service of the petitioners vis-a-vis those who are continuing in their service.”

14. A reading of the aforesaid order illustrates and reflects the reason why notice was issued. The court had prima facie felt that the order dated 22nd November, 2013 passed in OA No. 3827/2013 and 2565/2013 had been misinterpreted. We have already quoted the operative portion of the order dated 22nd November, 2013 passed in OA Nos. 3827/2013 and 2565/2013 and the relevant findings and observations. The Tribunal had made observations and interpreted the term consultation, but did not make any final pronouncement or issue any directions to the UPSC. The respondents were directed to finalize the process of relaxation and if the rules were relaxed, to undertake the further exercise of assessing suitability under relaxed Rule 6(2) within a further period of four weeks. We would not read the last paragraph of the order dated 22nd November, 2013 as an order which had firmed or directed that relaxation under Rule 16 must be granted to the doctors appointed between 18th December, 2006 and 23rd December, 2009.

15. Learned counsel for the petitioners had emphasized on the observations interpreting the word "consultation", in consonance with judicial decisions on clause (3) of Article 320 and on the role of the UPSC in particular. Our attention was drawn to the quotation in *State of Haryana and Others versus Piara Singh and Others*, (1992) 4 SCC 118 and the following passage from the order of the Tribunal dated 22nd November 2013 was referred to:-

“The UPSC provided for in Article 320 of the Constitution has the duty to conduct examinations for appointments to the services of the Union or State respectively. Article 320 (3) provides for consultation with the UPSC on all matters relating to method of recruitment to civil services and for civil posts. For easy reference, said article is extracted hereinbelow:-

“320(3)(a) on all matters relating to methods of recruitment to civil services and for civil posts.”

Nevertheless in proviso to said Article, it is specified that the Governor may make regulations specifying the matters in which either generally or in any particular class of case or in any particular circumstances, it shall not be necessary for a public service commission to be consulted. Nevertheless having due regard to Rule 6 (2) of the aforementioned constitutional provisions in the aforementioned Recruitment Rules, i.e. Delhi Health Services (Allopathy) Rules, 2009, it could be provided that where Government is of the opinion that it is necessary or expedient to so it may, for the reasons to be recorded in writing and in consultation with the Commission, relax any of the provisions of the rules with respect to any class or category of persons. In exercise of such power, the Cabinet took the aforementioned decision for relaxing Rule 6 (2) of the RRs and to consider such GDMOs/Specialist Grade III who were appointed between 18.12.2006 and 23.12.2009 at par with those who were appointed prior to 18.12. 2006. The role assigned to Union

Public Service Commission in framing the RRs or relaxing the same is only of consultation and not the decision making. Such role may not be assumed by the UPSC as an authority over the rule making authority under Article 309 of the Constitution. The meaning of consultation as mentioned in Black's Law Dictionary is deliberation of persons on some subject or a conference between the counsel engaged in a case to discuss its questions or arrange the method of conducting it. The said meaning is extracted hereinbelow:-

“Black's law dictionary Consultation. Act of consulting or conferring: e.g. patient with doctor: client with lawyer. Deliberation of persons on some subject. A conference between the counsel engaged in a case, to discuss its questions or arrange the method of conducting it.

An old writ whereby a cause which had been wrongfully removed by prohibition out of an ecclesiastical court to a temporal court was returned to the ecclesiastical court.”

When the Cabinet, Delhi Government has taken a decision to relax the rules, the role of UPSC is only to suggest the method of carrying out such relaxation and its implementation. Consultant cannot confer upon the authority required to be consulted, the power of accepting or rejecting authority. The function of consultation is entirely different from that of approval and acceptance. Nevertheless the consultation may not be understood as a mechanical concurrence. It is the duty of the consultant to apply its mind on the subject and give its expert opinion fairly.

3. In the present case once the Cabinet of Govt. of NCT of Delhi has taken the decision for inclusion in the initial constitution of Delhi Health Service (Allopathy) of doctors, even such doctors who were appointed on contract basis upto 23.12.2009, the same need to be acted upon, as period of more than 10 months has already passed. The early implementation of the said decision would also avoid a future seniority dispute between the doctors to be considered in terms of Rule 6 (2) of the Recruitment Rules, i.e., the persons like the applicants

herein and those who would be directly recruited by way of open competition.”

16. In the aforesaid passage, the Tribunal had held that the role of UPSC was to suggest the method of carrying out the relaxation and its implementation, *albeit* the consultant did not have the power as an accepting or rejecting authority. Nevertheless, the Tribunal had cautioned that the word “consultation” cannot be understood as mechanical concurrence. It was the duty of the consultant to apply his mind on the subject and give his fair and expert opinion. The Tribunal had also observed that there had been a considerable delay, for the decision of the Cabinet of the Government of NCT of Delhi had remained pending for almost ten months. An early implementation of the decision, it was advised, would avoid complications in the nature of seniority disputes, etc.
17. What is meant by the term “consultation” in clause (3) of Article 320 of the Constitution has been the subject matter of consideration and explanation in *State of U.P. versus Manbodhan Lal Srivastava*, AIR 1957 SC 912, *Suraj Prakash Gupta and Others versus State of J & K and Others*, (2000) 7 SCC 561, *J & K Public Service Commission and Others versus Dr. Narinder Mohan and Others*, (1994) 2 SCC 630 and *Jatinder Kumar and Others versus State of Punjab and Others*, (1985) 1 SCC 122. In a latter decision of the Supreme Court in *Indian Administrative Services (S.C.S) Association & Ors. Vs. Union Of India & Ors.* 1993 Supp (1) 730, it has been observed as under:-

“**26.** The result of the above discussion leads to the following conclusions:

(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

(2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.

(3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

(4) When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.

(5) When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action “after consultation”.

(6) No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine

in each case in the light of its facts and circumstances whether the action is “after consultation”; “was in fact consulted” or was it a “sufficient consultation”.

(7) Where any action is legislative in character, the consultation envisages like one under Section 3(1) of the Act, that the Central Government is to intimate to the State Governments concerned of the proposed action in general outlines and on receiving the objections or suggestions, the Central Government or Legislature is free to evolve its policy decision, make appropriate legislation with necessary additions or modification or omit the proposed one in draft bill or rules. The revised draft bill or rules, amendments or additions in the altered or modified form need not again be communicated to all the concerned State Governments nor have prior fresh consultation. Rules or Regulations being legislative in character, would tacitly receive the approval of the State Governments through the people's representatives when laid on the floor of each House of Parliament. The Act or the Rule made at the final shape is not rendered void or ultra vires or invalid for non-consultation."

18. In Writ Petition (C) No. 4151/2014, titled ***Mrs. Sapna Channa and Others versus Government of NCT of Delhi and Others*** and another connected matter, on the question of consultation with the UPSC and the advice rendered by them, it was declared that the term “consultation” with the UPSC did not mean that the opinion rendered by them was conclusive. However, this would at the same time not prohibit the Government of NCT of Delhi from considering the advice rendered by the UPSC before taking a final view, which need not be the same as while sending the proposal for advice to the UPSC. It was logical to conclude that before taking the final decision and passing an order of relaxation of Rules, the

decision making authority could apply their mind to the opinion or advice rendered by the UPSC. The Government of NCT of Delhi could finally take a view, contrary to the one they prima facie had while sending the proposal. The reasoning in the aforementioned decision is apt and would rationally apply to the factual matrix of the present case.

19. Papers on record in the present case would show that the Government of NCT of Delhi by their communication dated 22nd May, 2013, had expressed their view that the contractual ad hoc doctors appointed between 18th December, 2006 to 23rd December, 2009 should be treated as included in the initial constitution of the Delhi Health Service cadre. The reason and foundation was that the cadre rules and the recruitment rules for the new service were notified on 23rd December, 2009. Till the rules were notified, only contractual appointments were made and regular appointments were not made in the absence of the rules. It does appear that this was the consistent view of the Government of NCT of Delhi, for this was expressed even earlier when the recruitment rules were being framed in consultation with the UPSC. By their letter dated 12th September, 2013, the Government of NCT of Delhi had informed the UPSC that due to non-availability of recruitment rules, contractual or *ad hoc* appointments of doctors had been made. The selection was on the basis of a written test for GDMOs and interview for the Junior Specialists. The Ministry of Health and Family Welfare, Government of India had permitted the

Government of NCT of Delhi to make contractual/ ad hoc appointments after making a reference to Regulation 4 of the UPSC (Exemption and Consultation) Regulations, 1958. The UPSC on the other hand, in their written communication dated 27th September, 2013, had professed violation of the Constitution, as the aforesaid Regulations for ad hoc/contractual appointments were made for periods exceeding one year, without consultation with the UPSC. In OM No. AB-14017/5/82-Estt. (RR) dated 19th April, 1982, the Department of Personnel and Training had advised and warned all administrative ministries/departments to obtain prior clearance in the matter of relaxation of recruitment rules and only thereafter a proposal for relaxation should be forwarded to the UPSC. Further, ad hoc/contractual appointments should be made rarely and only in real exigent circumstances. Continuation of ad hoc/contractual appointments beyond one year would require the approval of DoP&T. The Government of NCT of Delhi by their letter dated 22nd November, 2013 had mentioned that they had approached the Ministry of Home Affairs, Government of India, who had stated that the DoP&T was not required to be consulted as the Government of NCT of Delhi was not a Central Government agency. The Government of India was in knowledge of, and had consented to the ad hoc contractual appointments of doctors. Further, the Lieutenant Governor was empowered to frame regulations and the approval from the Ministry of Home Affairs was not required. The contractual appointments were made with the prior approval of the competent authority to tackle the

requirement on account of increasing patient load in the Delhi Government Hospitals and in public interest.

20. The UPSC in their letter dated 20th January, 2014 has given as many as 12 grounds/reasons why there should not be any relaxation of Rule 6(2). One of the reasons given was that the contractual/ad hoc appointment was with the understanding and stipulation that such service would not confer a right to claim regular appointment. The contractual doctors were free to seek regular appointment on selection through medical service examination conducted by the UPSC and other recruitment agencies. The UPSC felt that there was no reason and ground to extend or change the cutoff date of 18th December, 2006. The said date had a nexus and a rationale as the Delhi Health Service was constituted on the said date. The doctors appointed thereafter were not similarly placed and could not claim parity.
21. Pursuant to the aforesaid opinion, the matter was placed before the Lieutenant Governor of Delhi, who in his order dated 15th July, 2014 examined the UPSC advice as well as the advice given by the Law Department. He observed that the UPSC had not agreed for relaxation of Rule 6(2) and had advised against the said move. The UPSC had agreed to consider grant of age relaxation for such contractual doctors. The Lieutenant Governor opined that he would not go against the advice of the UPSC, even after the order of the tribunal. The file was thereafter examined by the Secretary, Department of Family Welfare and the Chief Secretary,

Government of NCT of Delhi, who have agreed and accepted the view of the Lieutenant Governor. The consequential action, it was directed, should be taken on the above lines. The Chief Secretary wrote that the advice tendered by the UPSC might be followed.

22. We may at this stage note and record that the Government of NCT of Delhi filed a counter affidavit in Writ Petition (C) No. 8035/2014 on or about 13th October, 2015, in which they have stated that the UPSC had not acceded to the request of the Government of NCT of Delhi for inclusion of ad hoc/contractual doctors appointed between 18th December, 2006 to 23rd December, 2009 in the initial cadre. The UPSC, in their reply dated 15th June, 2015 to letter dated 24th April, 2015, had again rejected the request of the Government of NCT of Delhi. In reply to paragraph 32 of the writ petition, it is stated that Government of NCT of Delhi had considered the case of the petitioners and wished to provide them with absorption in Delhi Health Service as a one- time measure. During the course of hearing before us, Mr. Sanjay Ghose, Advocate and Additional Standing Counsel for the Government of NCT of Delhi had reiterated the said stand and stance.
23. It is apparent that the Government of NCT of Delhi has, in their additional affidavit dated 16th September 2014, changed their stand from what was stated before the Tribunal when the contempt proceedings in CP No. 126/2014 in OA No. 3827/2013 and CP No. 146/2014 in OA No. 2565/2013 were pending. In spite of the counter affidavit filed by the Government of NCT of Delhi in Writ

Petition (C) No. 8035/2014 to the effect that they wish to provide the petitioners absorption in the Delhi Health Service as a one-time measure, no order of relaxation has been passed. Indeed, it is not even the stand and assertion of the Government of NCT of Delhi that the said relaxation has been granted.

24. It is a fact that the power of relaxation has not been exercised. Proposal for relaxation, after due consideration, has been rejected. This final decision has not been overturned or reviewed. One of the reasons and possibly the primary reason is that relaxation requires approval and concurrence of the Lieutenant Governor of Delhi, who is the competent authority. Otherwise there does not appear to be any ground or cause why the Government of NCT of Delhi has, inspite of their stand not passed an order of relaxation. We have already recorded and noted that the Lieutenant Governor in his noting dated 15th July, 2014 had accepted the advice given by the UPSC, which was then accepted by the Secretary, Health and Family Welfare of the Government of NCT of Delhi and the Chief Secretary, Government of NCT of Delhi. It will not be correct for us to enter into the controversy on the power and authority of the Lieutenant Governor or hold that the Government of NCT of Delhi has accepted the request of the petitioners for relaxation of Rule 6(2) and, therefore, this Court should proceed on the basis that an order of relaxation under Rule 16 has been passed relaxing Rule 6(2). In *Bacchittar Singh Vs. State of Punjab*, AIR 1963 SC 395, the Supreme Court has observed and held as under:-

"10 ... Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the "order" of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned.....Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

The decision in *Bacchittar Singh* (supra) was relied upon in *Laxminarayan R. Bhattad & Ors. Vs. State of Maharashtra & Anr.* (2003) SCC 413, observing that to confer an enforceable right, the order or the decision of a statutory authority must be communicated. It is a fact, de facto and de jure that no order of relaxation under Rule 16 has been passed. We have already quoted the last paragraph of the order dated 1st October, 2014 disposing of the contempt petition, which gives liberty to the petitioners to challenge the decision of the Government of NCT of Delhi and the UPSC not to relax Rule 6(2).

25. There is another reason why we should not enter into this controversy as a writ Court. The stand and stance of the Government of NCT of Delhi, which can, in the given facts may or could mean and imply that the power of relaxation vests with the Lieutenant Governor. This final decision has not been made the

subject matter of challenge before the tribunal. The tribunal is the court of the first instance, where the disputes must be raised and adjudicated. In ***L. Chandra Kumar versus Union of India and Others***, (1997) 3 SCC 261, the Seven Judge Constitution Bench of the Supreme Court while reversing the earlier judgment in the case of ***S.P. Sampath Kumar versus Union of India***, (1987) 1 SCC 124, had held that the tribunals created pursuant to Article 323A or 323B of the Constitution will be subject to the High Courts' writ jurisdiction under Articles 226/227 of the Constitution, but the tribunals could be the courts of the first instance. The Constitution Bench judgment in ***L. Chandra Kumar*** (supra) was referred to and elucidated upon in ***T. Sudhakar Prasad versus Government of A.P. and Others***, (2001) 1 SCC 516 in relation to contempt proceedings and right to appeal under Section 19 of the Contempt of Courts Act, 1971 and had held:-

“17. It is thus clear that the Constitution Bench has not declared the provisions of Article 323-A(2)(b) or Article 323-B(3)(d) or Section 17 of the Act ultra vires the Constitution. The High Court has, in its judgment under appeal, noted with emphasis the Tribunal having been compared to like “courts of first instance” and then proceeded to hold that the status of Administrative Tribunals having been held to be equivalent to courts or Tribunals subordinate to the High Court the jurisdiction to hear their own contempt was lost by the Administrative Tribunals and the only course available to them was either to make a reference to the High Court or to file a complaint under Sections 193, 219 and 228 IPC as provided by Section 30 of the Act. The High Court has proceeded on the reasoning that the Tribunal having been held to be subordinate to the High Court for the purpose of Articles 226/227 of the Constitution and its decisions having

been subjected to judicial review jurisdiction of the High Court under Articles 226/227 of the Constitution, the right to file an appeal to the Supreme Court against an order passed by the Tribunal punishing for contempt under Section 17 of the Act was defeated and on these twin grounds Section 17 of the Act became unworkable and unconstitutional. We do not find any basis for such conclusion or inference being drawn from the judgments of this Court in the cases of *Supreme Court Bar Assn.* [(1998) 4 SCC 409] or *L. Chandra Kumar* [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] or any other decision of this Court. The Constitution Bench has in so many words said that the jurisdiction conferred on the High Courts under Articles 226/227 could not be taken away by conferring the same on any court or Tribunal and jurisdiction hitherto exercised by the High Court now legislatively conferred on Tribunals to the exclusion of the High Court on specified matters, did not amount to assigning Tribunals a status of *substitute* for the High Court but such jurisdiction was capable of being conferred *additionally* or *supplementally* on any court or Tribunal which is not a concept strange to the scheme of the Constitution more so in view of Articles 323-A and 323-B. Clause (2)(b) of Article 323-A specifically empowers Parliament to enact a law specifying the jurisdiction and powers, including the power to punish for contempt, being conferred on the Administrative Tribunals constituted under Article 323-A. Section 17 of the Act derives its legislative sanctity therefrom. The power of the High Court to punish for contempt of itself under Article 215 of the Constitution remains intact but the jurisdiction, power and authority to hear and decide the matters covered by sub-section (1) of Section 14 of the Act having been conferred on the Administrative Tribunals the jurisdiction of the High Court to that extent has been taken away and hence the same jurisdiction which vested in the High Court to punish for contempt of itself in the matters now falling within the jurisdiction of Tribunals if those matters would have continued to be heard by the High Court has now been conferred on the Administrative Tribunals under Section 17 of the Act. The jurisdiction is the same as vesting in the High Courts under Article 215 of the Constitution read with the provisions of the

Contempt of Courts Act, 1971. The need for enacting Section 17 arose, firstly, to avoid doubts, and secondly, because the Tribunals are not “courts of record”. While holding the proceedings under Section 17 of the Act the Tribunal remains a Tribunal and so would be amenable to the jurisdiction of the High Court under Articles 226/227 of the Constitution subject to the well-established rules of self-restraint governing the discretion of the High Court to interfere with the pending proceedings and upset the interim or interlocutory orders of the Tribunals. However any order or decision of the Tribunal punishing for contempt shall be appealable only to the Supreme Court within 60 days from the date of the order appealed against in view of the specific provision contained in Section 19 of the Contempt of Courts Act, 1971 read with Section 17 of the Administrative Tribunals Act, 1985. Section 17 of the Administrative Tribunals Act is a piece of legislation by reference. The provisions of the Contempt of Courts Act are not as if lifted and incorporated in the text of the Administrative Tribunals Act (as is in the case of legislation by incorporation); they remain there where they are, yet while reading the provisions of the Contempt of Courts Act in the context of Tribunals, the same will be so read as to read the word “Tribunal” in place of the word “High Court” wherever it occurs, subject to the modifications set out in Section 17 of the Administrative Tribunals Act. Section 19 of the Contempt of Courts Act, 1971 provides for appeals. In its text also by virtue of Section 17 of the Administrative Tribunals Act, 1985 the word “High Court” shall be read as “Tribunal”. Here, by way of abundant caution, we make it clear that the concept of intra-Tribunal appeals i.e. appeal from an order or decision of a Member of a Tribunal sitting singly to a Bench of not less than two Members of the Tribunal is alien to the Administrative Tribunals Act, 1985. The question of any order made under the provisions of the Contempt of Courts Act, 1971 by a Member of the Tribunal sitting singly, if the rules of business framed by the Tribunal or the appropriate Government permit such hearing, being subjected to an appeal before a Bench of two or more Members of the Tribunal therefore does not arise. Any order or

decision of the Tribunal punishing for contempt is appealable under Section 19 of the Act to the Supreme Court only. The Supreme Court in the case of *L. Chandra Kumar* [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] has nowhere said that orders of the Tribunal holding the contemner guilty and punishing for contempt shall also be subject to judicial scrutiny of the High Court under Articles 226/227 of the Constitution in spite of remedy of statutory appeal provided by Section 19 of the Contempt of Courts Act being available. The distinction between orders passed by the Administrative Tribunal on matters covered by Section 14(1) of the Administrative Tribunals Act and orders punishing for contempt under Section 19 of the Contempt of Courts Act read with Section 17 of the Administrative Tribunals Act, is this: as against the former there is no remedy of appeal statutorily provided, but as against the latter statutory remedy of appeal is provided by Section 19 of the Contempt of Courts Act itself.”

26. We are conscious that in the present case the contempt proceedings have been dismissed. We have relied on *T. Sudhakar Prasad* (supra) and quoted from the said decision for the reason that it has been held that the administrative tribunals are the courts of the first instance and, therefore, the writ court should not examine service matters which have to be made the subject matter of the tribunal. It is before the tribunal that the question of relaxation, advice/consultation and the question as to whether the power of relaxation vests with the Lieutenant Governor or the Government of NCT of Delhi, etc. would arise for consideration/examination. The advice rendered by the UPSC in their letter dated 20th January, 2014 and the decision of the Lieutenant Governor thereafter on 15th July, 2014 and the communications thereafter written on 19th August,

2014 have not been made the subject matter of challenge before the Tribunal. The petitioners cannot bypass and jump the Tribunal and approach the High Court by way of writ petitions. The petitioners, therefore, must approach the Tribunal first and only in case of an adverse order, approach the High Court by way of a writ petition.

27. The aforesaid discussion would take care of Writ Petition (C) Nos. 8035/2014, 8439/2014, 8444/2014 and 1201/2015. It also takes care and decides the prayer clauses (b) and (c) of the Writ Petition (C) No. 8034/2014.
28. The issue which survives relates to the challenge to the judgment and order dated 7th May, 2012 by which OA No. 1259/2011 was dismissed. The petitioners had, in the said OA, challenged validity of Rule 6(2) of the Rules by which the cutoff date for initial recruitment for contractual doctors was fixed as 18th December, 2006. Doctors appointed post the said date and up to the notification of the recruitment rules on 23rd December, 2009 were excluded. We are in agreement with the finding of the tribunal that the date fixed in Rule 6(2) is valid and constitutional. Whatever be the stand and stance of the Government of NCT of Delhi, it is an accepted fact that the Rules, i.e., Delhi Health Service (Allopathy) Rules, 2009 notified on 23rd December, 2009 in exercise of power under Article 309 of the Constitution fixed the said date in Rule 6(2). It is therefore, not possible to accept the contention of the petitioners that the Government of NCT of Delhi had earlier recommended or suggested that the cutoff date for initial induction

should be the date on which the Rules were notified, i.e., 23rd December, 2009. This was an internal matter or opinion that would not confer any legal rights on the petitioners. This date was not accorded acceptance in the Rules when they were finalized and published. Cut off dates are normally fixed keeping in view the several facets and parameters. In the present case, it is the date on which the Delhi Health Service was created and came into existence as a new service. The date mentioned in Rule 6(2), is 18th December, 2006, i.e. the date on which OM No. F.70/49/2006/H&FW/SSHFW/463-475 was issued. This date is the foundation and the basis. The said date can be declared unconstitutional in case there is violation of any constitutional rights or Fundamental Rights. No such contention or argument has been raised. The Delhi Health Service is a Group A service. Regular appointments to a Group A service can be made only in consultation with the UPSC. In the present case, the petitioners were not appointed in a selection process initiated and undertaken by the UPSC.

29. The claim of the petitioner-doctors, that those appointed prior to 18th December, 2006 have been treated differently has to be rejected for the simple reason that the said appointments were before the creation of Delhi Health Service. Further, if the said cut-off date is changed and declared to be invalid, doctors appointed by way of contractual or ad hoc appointments after 23rd December, 2009, could possibly claim regularization of such appointment as falling

within the initial constitution. Possibly, no end point should then be fixed. The appointments of the petitioners was on contract and as ad hoc doctors with the clear stipulation that they would not be entitled to regular absorption nor would their appointments be treated as conferring any such right. It was and is open to the petitioners to participate in the selection process and compete with other candidates. Indeed several other doctors similarly situated had participated in the selections as advertised for appointment as regular doctors. Many of them have succeeded, while others have not succeeded or did not participate. As noted above, the Government of NCT of Delhi and the UPSC have agreed to grant age relaxation. The challenge to Rule 6(2) and the cut-off date as fixed is rejected.

30. The writ petitions are disposed of in above terms. No order as to costs.

(SANJIV KHANNA)
JUDGE

(NAJMI WAZIRI)
JUDGE

AUGUST 12th, 2016
VKR/ssn