

Reportable

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Civil Appeal No. 152 of 2022

The Employees' State Insurance Corporation

....Appellant

Versus

Union of India & Ors.

.... Respondents

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

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A Introduction

1 Leave granted.

2 The Employees' State Insurance Corporation¹ is in appeal against a judgment of a Division Bench of the Karnataka High Court dated 5 September 2019. The Division Bench rejected the petition filed by the appellant against the promotion of the contesting respondents - Respondent 3 to 25, to the post of "Associate Professor" under the Dynamic Assured Career Progression² Scheme as opposed to the appellant's recruitment regulations.

3 ESIC, the appellant, is a statutory body constituted under the Employees' State Insurance Act 1948³. The recruitment and promotion of its teaching staff are governed by the Employees' State Insurance Corporation (Medical Teaching Faculty Posts) Recruitment Regulations 2015⁴ which came into effect on 5 July 2015. Respondent 3 to 25⁵ joined the appellant as Assistant Professors at ESIC Model Hospital, Rajajinagar, Bengaluru. They joined service between 7 February 2012 and 26 June 2014. The Central Government, through the Central Health Service Division of the Ministry of Health and Family Welfare, had issued the DACP Scheme through an Office Memorandum dated 29 October 2008. The DACP Scheme contemplated promotion as Associate Professor upon completion of two years of service in the post of Assistant Professor as an officer under the Ministry of Health and Family

¹ "ESIC" (interchangeably referred to as the appellant)

² "DACP"

³ "ESI Act"

⁴ "ESIC Recruitment Regulations 2015"

⁵ interchangeably referred to as "contesting respondents"

Welfare. After two years of service as Assistant Professor on 2 February 2017, the contesting respondents sought promotion under the DACP Scheme and instituted proceedings before the Central Administrative Tribunal⁶, Bengaluru.

4 On 7 February 2018, the CAT relied on the submission by the Counsel for the appellant and held that the ESIC Recruitment Regulations 2015 were not relevant for adjudication of the matter. The CAT also relied on a letter dated 23 September 2014 addressed by the Joint Director of ESIC to the Dean of ESIC which mentioned the implementation of the DACP Scheme to the Medical Officer Cadres. Thus, the CAT directed the appellant to consider the contesting respondents for promotion under the DACP Scheme.

5 The appellant challenged the order of the CAT in a writ petition before the High Court of Karnataka. The High Court dismissed the petition on 5 September 2019 by holding that:

- (i) Since the contesting respondents were recruited before the ESIC Recruitment Regulations 2015 came into effect, they would get the benefit of the DACP Scheme;
 - (ii) The DACP Scheme has statutory effect under Section 17 of the ESI Act. The ESIC Recruitment Regulations 2015 have departed from the DACP Scheme without seeking the prior approval of the Central Government;
- and

⁶ "CAT"

- (iii) Counsel for the appellant conceded that the appellant would implement the DACP Scheme and the ESIC Recruitment Regulations 2015 do not apply.

B Submissions

6 Mr Santhosh Krishnan, appearing on behalf of the appellant has urged the following submissions:

- (i) The appellant is an autonomous statutory corporation incorporated under the ESI Act. It is within the administrative control of the Ministry of Labour and Employment of the Government of India;
- (ii) Section 97 of the ESI Act confers power on the appellant to frame its own regulations. The terms and conditions of service of Assistant Professors are governed by the ESIC Recruitment Regulations 2015. These regulations stipulate that a minimum of five years of qualifying service as Assistant Professor is mandatory for promotion as Associate Professor. The ESIC Regulations 2015 cannot be overridden by the DACP Scheme;
- (iii) The Office Memorandum dated 29 October 2008 implementing the DACP Scheme is applicable to employees of the Ministries and Departments of the Central Government, but not a statutory body like the ESIC. The text of the DACP Scheme makes it clear that the Office Memorandum applies to employees of the Ministry of Health, subject to an appropriate amendment in

the recruitment rules. Thus, the DACP Scheme does not override or supersede statutory regulations made under the ESI Act;

- (iv) Section 17(2) permits the ESIC to depart from the conditions of service applicable to employees of the Central Government, subject to prior approval of the Central Government. Section 97(3) empowers the ESIC to frame regulations that are deemed to have the same effect as statutory provisions;
- (v) The contesting respondents joined the ESIC Medical College and PGIMSR, Rajajinagar, Bengaluru as Assistant Professors on different dates between 7 February 2014 and 26 June 2016. These Respondents were governed by the Employees' State Insurance Corporation (Medical Teaching Faculty Posts) Recruitment Regulations, 2008⁷;
- (vi) The High Court incorrectly held that the conditions for promotion from Assistant Professor to Associate Professor were governed by the DACP Scheme on the ground that the ESIC Recruitment Regulations 2015 were inapplicable to the contesting respondents. The ESIC Recruitment Regulations 2008 were gazetted on 2 May 2009 and stipulated four years of qualifying service for promotion from Assistant Professor to Associate Professor. Therefore, none of the contesting respondents would have completed four years of service before the ESIC Recruitment Regulations 2015 came into effect, i.e. on 3 July 2015;

⁷ "ESIC Recruitment Regulations 2008"

- (vii) Under the ESIC Recruitment Regulations 2008, the contesting respondents became eligible for promotion after the ESIC Recruitment Regulations 2015 came into effect. Thus, the operation of ESIC Regulations 2015 in regard to their service conditions cannot be ignored and there can be no estoppel against legislative action. This Court, in **C Sankarnarayanan v. State of Kerala**⁸, has held that there is no estoppel against legislative action concerning service conditions;
- (viii) It is settled law that in the event of an inconsistency or conflict between a statutory provision and an executive instruction, the former must be given effect. This Court in **Union of India v. Ashok Kumar Aggarwal**⁹ has held that government-issued memorandums or executive instructions can be used only to supplement the statutory rules but not to supplant them;
- (ix) The appellant's counsel mistakenly made a concession before the CAT when they stated that the ESIC Recruitment Regulations 2015 would not govern the matter. However, this incorrect concession does not amount to estoppel against statutory regulation. This has been held by this Court in **State of Uttar Pradesh v. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti**¹⁰;
- (x) The High Court has incorrectly recorded that the ESIC Recruitment Regulations 2015 were issued without approval from the Central Government. The preamble to the ESIC Recruitment Regulations 2015 explicitly states that the regulations were made after approval of the Central Government;

⁸ (1971) 2 SCC 361

⁹ (2013) 16 SCC 147

¹⁰ (2008) 12 SCC 675

- (xi) The submission of the contesting respondents that the advertisement issued by the appellant contemplated the application of the DACP Scheme, is irrelevant to the adjudication of the matter. It is settled law that if an advertisement is inconsistent with recruitment rules, the rules would prevail, as held by this Court in **Malik Mazhar Sultan v. UPSC**¹¹, **Ashish Kumar v. State of UP**¹² and **Raminder Singh v. State of Punjab**¹³;
- (xii) The applicability of the DACP to non-teaching staff of the ESIC is irrelevant since the ESIC Recruitment Regulations 2015 specifically govern “Medical Teaching Faculty Posts”; and
- (xiii) Except in three cases, the contesting respondents have been granted promotions upon completion of five years of regular service, in accordance with the ESIC Recruitment Regulations 2015.

7 Mr Yatindra Singh, Senior Counsel and Mr Anand Sanjay M Nuli, appearing on behalf of the contesting respondents, Respondent 3 to 25, has urged the following submissions:

- (i) The Office Memorandum dated 29 August 2008 extended the DACP Scheme to all Medical doctors, whether belonging to Organized Services, or holding isolated posts. It also directed all Ministries/Departments to implement the DACP Scheme. By another Office Memorandum dated 29 October 2008, the Government of India extended the DACP Scheme to

¹¹ (2006) 9 SCC 507, para 21

¹² (2018) 3 SCC 55, para 27

¹³ (2016) 16 SCC 95, paras 24 and 25

- various sub-cadres of the Central Health Service, including the teaching cadre. Under Section 17(2)(a) of the ESI Act, the DACP Scheme is binding on the appellant;
- (ii) The ESIC Recruitment Regulations 2008, which stipulate four years of qualifying service for promotion from Assistant Professor to Associate Professor, were issued without the approval of the Central Government;
 - (iii) The appellant has issued advertisements on 19 August 2011, 12 December 2012 and once in 2013 for the post of Assistant Professor by stating “Promotional avenues in the Department are available under DACP guidelines of Govt. of India”. The contesting respondents joined the services of the appellant as Assistant Professors in Pay Band-3 with a grade pay of Rs. 6600/- pursuant to various recruitment advertisements of the appellant;
 - (iv) On 23 September 2011, the appellant addressed a letter to the Dean of ESIC Dental College by stating that “the existing recruitment regulations are under active process of revision vis-à-vis provisions of the DACP Scheme”;
 - (v) The ESIC Recruitment Regulations 2015 were issued without obtaining prior approval from the Central Government, as contemplated under Section 17(2)(a) of the ESI Act;
 - (vi) After the contesting respondents instituted an application before the CAT, the Assistant Director (Med), CSIC, Headquarter Office addressed a letter to the Medical Superintendent of the ESIC Model Hospital, Rajaji Nagar,

- Bangalore on 26 December 2017 stating that “a proposal for considering promotion under DACP Scheme.... is under process”;
- (vii) The appellant admitted before the CAT and even in its writ petition before the High Court that the DACP Scheme is applicable to its employees and that it is willing to be bound by the DACP rules. The argument that the DACP Scheme is inapplicable to the contesting respondents is being raised for the first time before this Court;
 - (viii) The DACP Scheme has statutory force under Section 17 of the ESI Act. The DACP Scheme was made on 29 October 2008, before the enforcement of the ESIC Recruitment Regulations 2008 on 2 May 2009. Since the ESIC Recruitment Regulations 2008 were issued without approval of the Central Government mandated under Section 17(2)(a) of the ESI Act, they do not override the DACP Scheme;
 - (ix) The ESIC Recruitment Regulations 2015 were also issued without the “prior approval” mandated under Section 17(2)(a) of the ESI Act. The appellant has not furthered any evidence to indicate that prior approval was taken and this has been noted by the High Court;
 - (x) The appellant is estopped from denying the applicability of the DACP Scheme to the contesting respondents since they made such a representation in their recruitment advertisements. The contesting respondents have acted on such representations to quit their existing jobs.

Reliance is placed on a decision of this Court in **Y V Rangaiah v. J Sreenivasa Rao**¹⁴;

- (xi) Even if the ESIC Recruitment Regulations 2015 were held to be validly issued, the contesting respondents had already completed two years of service before they came into effect, on 5 July 2015. Therefore, the contesting respondents should be considered for promotion in accordance with the DACP Scheme, in view of the decisions of this Court in **State of UP v. Mukesh Narain**¹⁵ and **B L Gupta v. MCD**¹⁶;
- (xii) All the contesting respondents had three or more years of teaching experience before they joined the appellant as Assistant Professors. The qualifying service of five years under the ESIC Recruitment Regulations 2015 should be given a reasonable interpretation and the cumulative experience of more than five years should be held sufficient for promotion;
- (xiii) The doctors and medical teaching staff in the Central Government are being promoted in accordance with the DACP Scheme. The arbitrary denial of the DACP Scheme to the contesting respondents' Teaching Cadre of the appellant violates Article 14, especially when they are also discharging functions of attending to patients and performing specialised clinical work; and

¹⁴ 1983 (3) SCC 284, para 9

¹⁵ (2013) 4 SCC 169

¹⁶ (1998) 9 SCC 223

(xiv) In other legal proceedings, the appellant has taken the stance that the DACP scheme is applicable to its employees with effect from 01 March 2008 itself.

8 The rival submissions will now be analysed.

C Analysis

9 The crux of the dispute is about determining the applicable rules/regulations for promotion of the contesting respondents from the post of Assistant Professor to Associate Professor namely, the ESIC Recruitment Regulations 2008, the DACP Scheme or the ESIC Recruitment Regulations 2015. On 29 October 2008, the Sixth Central Pay Commission recommended the extension of the DACP Scheme to all doctors in employment of the Central Government. The recommendations were accepted by the Union Ministry of Health and Family Welfare through an Office Memorandum dated 29 October 2008 which extended the DACP Scheme to Medical and Dental Doctors in the Central Government. In continuation of the Office Memorandum, the Government of India issued another Office Memorandum dated 29 October 2008 detailing promotion under DACP in various cadres under the Ministry of Health and Welfare. The Scheme enabled promotion from the post of Assistant Professor to Associate Professor after two years of service:

“B. Teaching Sub Cadre

Promotions under the DACP Scheme		No. of years of regular works required for promotion
From	To	
Assistant	Associate Professor	2 years in Grade

Professor (Grade Pay Rs. 6600 in PB-3)	(Grade Pay Rs. 7600 in PB-3)	Pay of Rs. 6600 in PB-3 including service rendered in the pre-revised scale of Rs. 10000- 15200.
Associate Professor (Grade Pay Rs. 7600 in PB-3)	Professor (Grade Pay Rs.8700 in PB-4)	4 years in Grade Pay of Rs. 7600 in PB-3 including service rendered in the pre-revised scale of Rs. 12000- 16500.
Professor (Grade Pay Rs. 8700 in PB-4)	Director Professor (Grade Pay Rs.10000 in PB-4)	7 years in Grade Pay of Rs. 8700 in PB-4 including service rendered in the pre-revised scale of Rs. 14300- 18300.”

(emphasis supplied)

10 The controversy in the present appeal arises out of the interpretation of Section 17(2)(a) of the ESIC Act 1948 and the applicability of the Office Memorandum dated 29 October 2008 against the ESIC Recruitment Regulations 2008 and the subsequently issued ESIC Recruitment Regulations 2015. Section 17 of the ESI Act 1948 provides as follows:

“17. Staff.—(1) The Corporation may employ such other staff of officers and servants as may be necessary for the efficient transaction of its business, provided that the sanction of the Central Government shall be obtained for the creation of any post the maximum monthly salary of which exceeds such salary as may be prescribed by the Central Government.

(2)(a) The method of recruitment, salary and allowances, discipline and other conditions of service of the members of the staff of the Corporation shall be such as may be specified in the regulations made by the Corporation in accordance with the rules and orders applicable to the officers and employees of the Central Government drawing corresponding scales of pay:

Provided that where the Corporation is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters aforesaid, it shall obtain the prior approval of the Central Government:

Provided further that this sub-section shall not apply to appointment of consultants and specialists in various fields appointed on contract basis,

(b) In determining the corresponding scales of pay of the members of the staff under clause (a), the Corporation shall have regard to the educational qualifications, method of recruitment, duties and responsibilities of such officers and employees under the Central Government and in case of any doubt, the Corporation shall refer the matter to the Central Government whose decision thereon shall be final.....”

(emphasis supplied)

11 Section 97 of the ESI Act empowers the ESIC to frame regulations. The regulations are deemed to have the same effect as statutory provisions:

“97. Power of Corporation to make regulations.—(1) **The Corporation may, subject to the condition of previous publication, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation and for carrying into effect the provisions of this Act.**

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely—

[.....]

(xvi) the appointment of medical practitioners for the purposes of this Act, the duties of such practitioners and the form of medical certificates;

[.....]

(xxi) the method of recruitment, pay and allowances, discipline, superannuation benefits and other conditions of service of the officers and servants of the Corporation other than the [Director General and Financial Commissioner;

[.....]

(xxiii) any matter in respect of which regulations are required or permitted to be made by this Act.

(2-A) The condition of previous publication shall not apply to any regulations of the nature specified in clause (xxi) of sub-section (2).

(3) Regulations made by the Corporation shall be published in the Gazette of India and thereupon shall have effect as if enacted in this Act.

(4) Every regulation shall, as soon as may be, after it is made by the Corporation, be forwarded to the Central Government and that Government shall cause a copy of the same to be laid before each House of Parliament, while it is in session for a total period

of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.”

(emphasis supplied)

12 The ESIC Recruitment Regulations 2008 were issued by the ESIC in the exercise of its powers under Section 97(1) and Section 17(3) of the ESI Act. These regulations introduced the cadre of Specialist (Teaching) in the ESIC and governed all appointments to the teaching faculty posts in ESIC Medical Colleges. The ESIC Recruitment Regulations 2008 embodied a requirement of four years' service as Assistant Professor for promotion as an Associate Professor. The ESIC Recruitment Regulations 2015 which were made on 5 July 2015 stipulated a requirement of five years' service as Assistant Professor for promotion to the post of Associate Professor. The preamble of the ESIC Recruitment Regulations 2015 notes that these regulations were to supersede the ESIC Recruitment Regulations 2008 and were made with the approval of the Central Government:

“...In exercise of the powers conferred by sub-section (1) of Section 97, read with clause(xxi) of sub-section (2) and sub-section (2A) of the said section and sub-section (3) of section 17 of the Employees' State Insurance Act, 1948 (34 of 1948) and in supersession of the Employees State Insurance Corporation (Medical Teaching Faculty posts) Recruitment Regulations, 2008 published in the Gazette of India vide No.A-12(11)11/2008-Med.-IV dated the 2nd May, 2009, except as respects things done or omitted to be done before such supersession, **the Employees' State Insurance Corporation hereby makes, with the**

approval of the Central Government, the following regulations for regulating the method of recruitment to the medical teaching faculty posts in the Employees' State Insurance Corporation's medical colleges, namely:- ...”
(emphasis supplied)

13 The ESIC Recruitment Regulations 2008 and ESIC Recruitment Regulations 2015 have statutory effect by virtue of Section 97(3) of the ESI Act. It is settled law that regulations framed by statutory authorities have the force of enacted law. A Constitution Bench in **Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi**¹⁷ considered the regulations framed by several statutory authorities considered as “State” within the terms of Article 12. Chief Justice A N Ray held that the regulations have the same effect of law and bind the statutory authorities:

“21. The characteristic of law is the manner and procedure adopted in many forms of subordinate legislation. The authority making rules and regulation must specify the source of the rule and regulation making authority. To illustrate, rules are always framed in exercise of the specific power conferred by the statute to make rules. Similarly, regulations are framed in exercise of specific power conferred by the statute to make regulations. The essence of law is that it is made by the law-makers in exercise of specific authority. The vires of law is capable of being challenged if the power is absent or has been exceeded by the authority making rules or regulations.

[...]

23. The noticeable feature is that these statutory bodies have no free hand in framing the conditions and terms of service of their employees. These statutory bodies are bound to apply the terms and conditions as laid down in the regulations. The statutory bodies are not free to make such terms as they think fit and proper. Regulations prescribe the terms of appointment, conditions of service and procedure for dismissing employees. These regulations in the statutes are described as “status fetters on freedom of contract”. The Oil and Natural Gas Commission Act in Section 12 specifically enacts that the terms and conditions of the employees may be such as may be provided by

¹⁷ (1975) 1 SCC 421

regulations. **There is a legal compulsion on the Commission to comply with the regulations. Any breach of such compliance would be a breach of the regulations which are statutory provisions. In other statutes under consideration viz. the Life Insurance Corporation Act and the Industrial Finance Corporation Act though there is no specific provision comparable to Section 12 of the 1959 Act the terms and conditions of employment and conditions of service are provided for by regulations. These regulations are not only binding on the authorities but also on the public.**"

(emphasis supplied)

14 A two-judge Bench of this Court in **Pepsu Road Transport Corporation, Patiala v. Mangal Singh and Others**¹⁸ interpreted a similar power to frame regulations under the Road Transport Corporations Act 1950. This Court held that regulations made under the statute have the force of law:

"29. It is well-settled law that the regulations made under the statute laying down the terms and conditions of service of the employees, including the grant of retirement benefits, have the force of law. The regulations validly made under the statutory powers are binding and effective as the enactment of the competent legislature. The statutory bodies as well as general public are bound to comply with the terms and conditions laid down in the regulations as a legal compulsion. Any action or order in breach of the terms and conditions of the regulations shall amount to violation of the regulations which are in the nature of statutory provisions and shall render such action or order illegal and invalid."

15 Respondent 3 to 25 joined the service of the ESIC Model Hospital, Rajajinagar, Bengaluru as Assistant Professors on different dates, between 07 February 2014 and 26 June 2016. On completing two years in the post of Assistant Professor, Respondent 3 to 25 made representations to the appellant seeking

¹⁸ (2011) 11 SCC 702

promotion to the grade of Associate Professor, claiming the benefit of the DACP Scheme. The Preamble to the ESIC Recruitment Regulations 2015, recites that the prior approval of the Central Government, as necessitated by Section 17(2) of the ESI Act was duly sought. In the event of a conflict between an executive instruction, an office memorandum in this case, and statutory regulations – the latter prevail. A Constitution Bench in **Sant Ram Sharma v. State of Rajasthan**¹⁹ considered the applicability of the letters issued by the Government of India detailing the administrative practice for promotions, against the Indian Police Service (Regulation of Seniority) Rules, 1954. The Constitution Bench held that:

7. We proceed to consider the next contention of Mr N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. **It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.**”
(emphasis supplied)

¹⁹ AIR 1967 SC 1910

16 In **Union of India v. Ashok Kumar Aggarwal**²⁰ a two judge Bench of this Court speaking in the context of service regulations governing a departmental enquiry re-iterated that an office order or office memorandum cannot contravene statutory rules. Justice B S Chauhan noted the position in law in the following terms:

“59. The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide *Union of India v. Majji Jangamayya* [(1977) 1 SCC 606 : 1977 SCC (L&S) 191] , *P.D. Aggarwal v. State of U.P.* [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 272] , *Paluru Ramkrishnaiah v. Union of India* [(1989) 2 SCC 541 : 1989 SCC (L&S) 375 : (1989) 10 ATC 378 : AIR 1990 SC 166] , *C. Rangaswamaiah v. Karnataka Lokayukta* [(1998) 6 SCC 66 : 1998 SCC (L&S) 1448] and *Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation* [(2011) 5 SCC 435 : AIR 2011 SC 2220].)”

(emphasis supplied)

17 In **P D Aggarwal v. State of U.P.**²¹ a two judge Bench of this Court declined to grant primacy to an Office Memorandum issued by the Government of Uttar Pradesh which purportedly amended the method of recruitment of Assistant Civil Engineers in the U.P. Public Service Commission without amending the relevant regulations. The Court held:

“20. The office memorandum dated December 7, 1961 which purports to amend the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 in our opinion cannot override, amend or supersede

²⁰ (2013) 16 SCC 147

²¹ (1987) 3 SCC 622

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

(emphasis supplied)

18 The contesting respondents have referred to certain letters and to an internal communication of the appellant to urge that the DACP Scheme was to be implemented for promotions at the appellant. However, these letters, similar to the Office Memorandum dated 29 October 2008 implementing the DACP Scheme, would not have the force of law until they were enforced through an amendment to the recruitment regulations. In considering a similar factual situation, a three-judge Bench of this Court in **Union of India v. Majji Jangamayya**²² held that:

“31. The second question is whether the requirement of 10 years' experience was a statutory rule. The High Court held that the requirement of 10 years' experience is not a statutory rule. **Counsel for the respondents contended that the requirement of 10 years' experience is statutory because the letter dated January 16, 1950 is by the Government of India and the Government of India has authority to frame rules and one of the letters dated July 21, 1950 referred to it as a formal rule. The contention is erroneous because there is a distinction between statutory orders and administrative instructions of the Government. This Court has held that in the absence of**

²² (1977) 1 SCC 606

statutory rules, executive orders or administrative instructions may be made. (See *CIT v. A. Raman & Company* [AIR 1968 SC 49 : (1968) 1 SCR 10 : 67 ITR 11])

[...]

34. Counsel on behalf of the respondents contended that the requirement of 10 years' experience laid down in the letter dated January 16, 1950 had the force of law because of Article 313. Article 313 does not change the legal character of a document. Article 313 refers to laws in force which mean statutory laws. An administrative instruction or order is not a statutory rule. The administrative instructions can be changed by the Government by reason of Article 73(1)(a) itself.

[...]

36. The expression "ordinarily" in the requirement of 10 years' experience shows that there can be a deviation from the requirement and such deviation can be justified by reasons. **Administrative instructions if not carried into effect for good reasons cannot confer a right.** (See *P.C. Sethi v. Union of India* [(1975) 4 SCC 67 : 1975 SCC (L&S) 203 : (1975) 3 SCR 201] .)...."

(emphasis supplied)

19 On the dates when the contesting respondents joined the service of the appellant - 07 February 2014 till 26 June 2016 - their promotions were governed by the ESIC Recruitment Regulations 2008 which came into effect on 2 May 2009 and mandated four years of qualifying service for promotion from Assistant Professor to Associate Professor. When the contesting respondents had completed two years of service, they were governed by the ESIC Recruitment Regulations 2015 which came into effect on 5 July 2015 and mandated five years of qualifying service for promotion from Assistant Professor to Associate Professor. Thus, the DACP Scheme facilitating promotion on the completion of two years of service is not applicable to the contesting respondents, when the regulations have a statutory

effect that overrides the Office Memorandum dated 29 October 2008 which implemented the DACP Scheme.

20 The advertisements issued by the appellant mentioned that the DACP Scheme would be applicable for its recruits. However, it is a settled principle of service jurisprudence that in the event of a conflict between a statement in an advertisement and service regulations, the latter shall prevail. In **Malik Mazhar Sultan v. U.P. Public Service Commission**²³ a two-judge Bench of this Court clarified that an erroneous advertisement would not create a right in favour of applicants who act on such representation. The Court considered the eligibility criteria for the post of Civil Judge (Junior Division) under the U.P. Judicial Service Rules, 2001 against an erroneous advertisement issued by the U.P. Public Service Commission and held:

“21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1-7-2001 and 1-7-2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules.”

²³ (2006) 9 SCC 507 [“**Malik Mazhar Sultan**”]

21 In **Ashish Kumar v. State of Uttar Pradesh**²⁴ a two-judge Bench of this Court followed the decision in **Malik Mazhar Sultan** (supra) in interpreting an advertisement issued by the Director, Social Welfare Department, Uttar Pradesh for the position of a psychologist. This Court declined to give precedence to the erroneous qualifications prescribed in the advertisement against the relevant recruitment rules and held:

“27. Any part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescription. Thus, looking to the qualification prescribed in the statutory rules, the appellant fulfils the qualification and after being selected for the post denying appointment to him is arbitrary and illegal. It is well settled that when there is variance in the advertisement and in the statutory rules, it is the statutory rules which take precedence....”

22 The contesting respondents urged that the advertisements indicated the applicability of the DACP Scheme before the ESIC Recruitment Regulations 2015 were issued. However, a subsequent amendment to recruitment regulations would override the conditions prescribed in the advertisement. In **Rajasthan Public Service Commission v. Chanan Ram**²⁵ a two-judge Bench of this Court held that an earlier advertisement becomes infructuous after a subsequent amendment to the service rules:

“13. Under these circumstances, therefore, it is difficult to appreciate how the Division Bench of the High Court could persuade itself in agreeing with the submission of the learned counsel for the respondent-writ petitioner that despite this change of cadres and the provision for recruitment on new posts the old advertisement of 5-11-1993 Annexure P-1 seeking to consider

²⁴ (2018) 3 SCC 55

²⁵ (1998) 4 SCC 202

the candidature of applicants for erstwhile 23 advertised vacancies in the posts of Assistant Directors (Junior) in the Agricultural Marketing Service of the State of Rajasthan would still be pursued further and recruitment should be effected for these 23 erstwhile vacancies as per the old advertisement. It is easy to visualise that even if such an earlier advertisement of 5-11-1993 was proceeded with further it would have resulted into a stalemate and an exercise in futility. **No appointment could have been given to the selected candidates to the posts of Assistant Directors (Junior) after 1995 amendment of Rules as there were no such posts in the hierarchy of State Service. Consequently it must be held that on account of the amendments to the Rajasthan Agricultural Marketing Service Rules the earlier advertisement dated 5-11-1993 had become infructuous and otiose.** Only on this short ground the writ petition of the respondent-writ petitioner should have been dismissed by confirming the order of dismissal of the writ petition earlier passed by the learned Single Judge.....”

(emphasis supplied)

23 The contesting respondents submitted that the appellant is estopped from urging that the DACP Scheme is not applicable to the Teaching Cadre at the ESIC since they have taken this stance before the CAT and in its writ petition before the High Court. While this Court expresses its disapproval at the lack of proper instructions being tendered to the Counsel of the appellant, there can be no estoppel against a statute or regulations having a statutory effect. In **Nedunuri Kameswaramma v. Sampati Subba Rao**²⁶ a three-judge Bench of this Court decided a central point of the dispute in favour of a party, irrespective of the concession of its Counsel since it was on a point of law. Justice M Hidayatullah (as the learned Chief Justice then was), speaking on behalf of the Court observed:

“20. From the above analysis of the documents, it is quite clear that the documents on the side of the appellant established that

²⁶ AIR 1963 SC 884

this was a *Karnikam* service inam, and the action of the Zamindar in resuming it as such, which again has a presumption of correctness attaching to it, clearly established the appellant's case. **Much cannot be made of a concession by counsel that this was a *Dharmilainam*, in the trial court, because it was a concession on a point of law, and it was withdrawn. Indeed, the central point in the dispute was this, and the concession appears to us to be due to some mistake or possibly ignorance not binding on the client.** We are thus of opinion that the decision of the two courts below which had concurrently held this to be *jeroyti* land after resumption of the *Karnikam* service inam, was correct in the circumstances of the case, and the High Court was not justified in reversing it.”

(emphasis supplied)

24 In **Himalayan Coop. Group Housing Society v. Balwan Singh**²⁷ a three-judge Bench of this Court clarified the law of agency with respect to client-lawyer relationships. The Court held that while generally admissions of fact by counsel are binding, neither the client nor the court is bound by admissions as to matters of law or legal conclusions:

“32. Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. **A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions.** Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add

²⁷ (2015) 7 SCC 373

that in some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights.”

(emphasis supplied)

25 Recently, a two-judge Bench of this Court in **Director of Elementary Education, Odisha v. Pramod Kumar Sahoo**²⁸ observed that a concession on a question of law concerning service rules would not bind the State:

“11. The concession given by the learned State Counsel before the Tribunal was a concession in law and contrary to the statutory rules. Such concession is not binding on the State for the reason that there cannot be any estoppel against law. The rules provide for a specific grade of pay, therefore, the concession given by the learned State Counsel before the Tribunal is not binding on the appellant.”

The concession of the Counsel for the appellant before the CAT does not preclude the finding on the law that is arrived at by this Court.

D Conclusion

26 The CAT and the High Court failed to notice the applicability of the ESIC Recruitment Regulations 2015 to the promotions of the Teaching Cadre in the appellant corporation. The ESIC Recruitment Regulations 2015 have precedence over the Office Memorandum dated 29 October 2008 which implemented the DACP Scheme in respect of officers of the Central Health Service under the Union Ministry of Health and Family Welfare. The concession by the Counsel of the appellant

²⁸ (2019) 10 SCC 674

before the CAT does not stand in the way of the appellant supporting the correct position of law before this Court.

27 The contesting respondents did not challenge the ESIC Recruitment Regulations 2008 or the ESIC Recruitment Regulations 2015 before the CAT or the High Court. The argument on lack of prior approval as per Section 17(2) of the ESI Act is obviated by the preamble to the ESIC Recruitment Regulations 2015. The contesting respondents have only supported the applicability of the DACP Scheme to claim promotion as Associate Professor after two years of service. The advertisements for recruitment mentioning the DACP Scheme would have no effect since they were in contravention of the applicable recruitment regulations. Therefore, for the above reasons, we are of the view that the appeal should be allowed.

28 The appeal is accordingly allowed and the impugned judgement and order of the Division Bench of the Karnataka High Court dated 5 September 2019 is set aside. As a consequence, the revised seniority list of the Teaching Cadre at the appellant corporation should reflect the promotions of the contesting respondents in accordance with the ESIC Recruitment Regulations 2015 and not the DACP Scheme.

- 29 The appeal is disposed of in the above terms.
- 30 Pending application(s), if any, shall stand disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[A S Bopanna]

New Delhi;
January 20, 2022