
(1987) 11 PAT CK 0004

In the Patna High Court

Case No : C.W.J.C. No's. 1254, 1420, 2526 and 2833 of 1987

Bhagwat Prasad and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 27-11-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 234, 237

Citation : (1988) 36 BLJR 411 : (1988) PLJR 445

Hon'ble Judges : Syed Haider Shaukat Abidi, J; Prabha Shanker Mishra, J

Bench : Division Bench

Judgement

Prabha Shanker Mishra and Syed Haider Shaukat Abidi, JJ.—Controversies which hitherto were confined to administrative actions of the State have recently entered into its legislative functions. Even well known and organised services of the State have suffered erosion due to administrative vagaries. Article 309 of the Constitution of India provides for laws to be made to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State, yet its proviso to frame Rules is preferred by the state and in many cases even that is not resorted to, and the State administers its services by instruments in the shape of executive instructions. It is hard to believe that the State has not found time to contemplate and the legislature opportunity to enact a law, yet it has not been done is a fact.

2. Subordinate Education Service which existed in two separate cadres of the lower division and the upper division has ceased to have the lower division, and the upper division which had a certain characteristics of its own once found a group of teachers selected pursuant to a scheme known as Higher Secondary Scheme remained stark and agitated whether they formed part of the upper division of the service or not until settled by a pronouncement of this Court. One could think of the controversies coming to an end, but the State's action in framing Rules dividing service and the cadre of the upper division into one of the

teachers appointed directly to the service and other who are described as those belonging to the general cadre, the matter has come before this Court once again. This Court has to reiterate the facts once more. It has to enter into the questions already settled again and decided one way or the other.

3. Facts which stood concluded with the findings recorded by a Bench of this Court in C, W. J. C. No. 2956/75 are that the secondary education in the State of Bihar which was controlled by the examinations conducted by the Patna University until 1951 was transferred to the control of the secondary school examination Board, and a Higher Secondary Scheme was introduced by the order of the Government of the State dated 9-64958 converting a number of existing Government schools into Multipurpose Higher Secondary Schools and extending teaching in other subjects besides the existing subjects of study. According to the petitioners for the purpose of Multipurpose Higher Secondary Schools a large number of additional posts were created and while a number of teachers who were in the lower division of the service were promoted to in these new posts, the Government of the State also made direct recruitments to the service. The new appointees as also those promoted from the lower division were absorbed in the upper division of the service. The State Government, however, maintained a sort of separate existing cadre of the Multipurpose Higher Secondary School teachers until the Higher Secondary Scheme was withdrawn by the State Government in the year, 1971. That withdrawal caused a decision to absorb the teachers appointed under the Higher Secondary Scheme into the upper division of the Subordinate Education Service. When the Government formulated its principles and guide lines of determining inter se seniority of such teachers who were in the Multipurpose Higher Secondary Schools and the teachers who were in the general cadre, it circulated a gradation list inviting objections. The State Government, however, maintained that the Higher Secondary teachers were in no way different from those who were in the Subordinate Education Service upper division. Alleging that they were adversely affected and that their fundamental rights were violated. Some of the members of the Subordinate Education Service general cadre moved this Court in C.W.J.C. 3956/75.

4 Since the facts and the contentions raised in the said case stated in the judgment of this Court we can safely quote the conclusion that this Court recorded in its judgment. This Court noticed that it was neither asserted nor shown that the Subordinate Education Service upper division had been originally created by a Rule under Article 309 or a Government order under the proviso to the said Article (it seems created by a Rule under Article 309 is a mistake for created by an Act of legislature as envisaged under Article 300 and a Government order under the proviso is a mistake for the Rule framed under the said Article). The Bench rejected the contention that the Bihar Education Code which contained some reference to the provisions for appointment promotion etc. had statutory force and recorded its finding that the Code itself had no statutory force before 1960. It found no justification to the grievance of the petitioners in the said case that any prejudice or legal injury was caused to the members of

the Subordinate Education Service upper division general cadre by recruiting the teachers appointed under the Higher Secondary Scheme. After the judgment in the said case contending inter alia that this Court had erred in holding that the Bihar Education Code had no statutory force prior to 1960 and that there was an apparent error on the face of the record in holding that the Subordinate Education Service was not created by any Rule framed under the proviso to Article 309 of the Constitution of India, an application to review the said judgment was filed. A notification issued on behalf of the Governor of Bihar on 26-4-1950, to which we shall advert in our judgment, was also brought on the record to support the contention that the service was created by the Government by statutory Rules framed it under Article 309 of the Constitution of India. This Court, however, found no merit in the review application and the prayer to review the judgment was accordingly rejected. The petitioners of C.W.J.C. 2956/75 also preferred SLP being S. L. P. No. 8078/80 before the Supreme Court. The Supreme Court, however, dismissed the said application in limine.

5. To complete the history of the case one has to enter into the files in the Government Secretariate and the notings of the State Minister of Education. Petitioners have annexed a copy of the notings dated 7-2-1982 which narrate in short the existence of the Subordinate Education Service, its various branches, conditions of service and also state that teachers appointed under the Higher Secondary Scheme cannot be treated as members of the cadre of the teachers in the Subordinate Education Service general cadre until Article 806 of the Bihar Education Code was modified by a Rule framed under Article 300 of the Constitution of India and that the High Court committed error in coming to the conclusion that Articles 802 to 806 of the said Code were not statutory provisions and that they were statutory provisions in view of the Government order dated 26-1-1950. The Minister has stated that it would be proper to maintain two separate gradation lists one for the Higher Secondary Scheme teachers and the other for the general cadre as was done until 1973, There was some proceeding in the Bihar Legislative Council not framing an Act as Article 309 of the Constitution has envisaged but of a type which has no relevance in the legislative process. A certain member of the said Council asked a question and the Chairman of the Council called for the files from the State Government on the subject. On 8-7-1982 he recorded in the file that he had perused all the relevant records and that he had found the views of the State Minister of Education recorded therein proper for resolving the dispute. He thereafter added-"Wibhagiya Rajya Mantri Ki Ukta Tippani Ke Anusar Awashyak Karwai Karen". The petitioners have also brought on the record a communication to the Commissioner-cum-Secretary, Department of Education, dated 7-12-1985 from the Under Secretary of the Bihar Legislative Council on the subject of the question of one of the members of the Council. It states that the Council had appointed a committee which had gone into the controversy as to whether there should be one integrated cadre of the upper division Subordinate Education Service teachers or there should be separate cadres for the Higher Secondary

Scheme teachers and the general cadre teachers and has recorded its findings. The proceeding of the Legislative Council are more in the nature of a judgment reviewing the judgment of this Court than any recommendation to the State Government for its consideration. It has made a reference to the judgment of this Court saying that a perusal thereof may make it clear that the Court was not made aware of certain important documents and correct facts and added that the Committee was of the view that inclusion of the teachers appointed under the Higher Secondary Scheme in the gradation list of the upper division Subordinate Education Service teachers was not only improper but also unjust. Such integration of the cadre could have been done only after the amendment of the Bihar Education Code by the Legislature.

6. Some steps were taken by the Director of Education pursuant to the recommendation of the Committee of the Legislative Council Apprehending that the Government was intending not to implement the judgment of this Court, one Krishna Mohan Choudhary and others filed G. W. J. C. No. 2045/86 in this Court and when the said case was taken up for admission on 4-8-1986 certain members of the service who belonged to the general cadre intervened and appended to their intervention application a communication addressed by the Director of Secondary Education-cum-Joint Secretary to the Deputy Secretary, Bihar Legislative Council, dated 16-6-1986. The said letter of the Director pointed out that in view of the judgment of this Court which had been affirmed by the Supreme Court the recommendation of the implementation Committee could not be straightway implemented. For that purpose the learned Advocate General had been consulted who had given certain advice. This Court took notice of the said fact and observed:

In view of the fact that the State Government is itself considering the grievance of the petitioners and does not intend to circumvent the direction given by this Court as affirmed by the Supreme Court, there is no question at this stage of entertaining this writ application. It is accordingly permitted to be withdrawn.

When it was urged on behalf of the petitioners in the said case that because of the recommendation of the implementation committee of the Bihar Legislative Council the State Government was not considering the question of their promotion, this Court observed:

It is expected that any decision is taken as early as possible in accordance with law in respect of the grievance of the petitioners.

This Court's wish has been answered by the notification dated 18-11-1986 which states that it is issued in exercise of the powers conferred by the proviso to Article 809 of the Constitution of India and in cancellation of Education Department's letter No. 746 dated 20- 8-1975 as also in partial modification of Education Department's letter No. 458 dated 5-4-1977, the Rules called the Bihar Subordinate Education Service (Teaching Branch Determination of Seniority Rules, 1986 and it came into force with immediate effect. Rules 2 states-

Cadregisation:

- (i) There will be a separate cadre for the officers directly recruited in the upper division of Subordinate Education Service, namely the Subordinate Education Service (Higher Secondary) cadre; and
- (ii) There will also be a separate cadre for the officers of the Subordinate Education Service, general cadre namely the Subordinate Education Service (Teaching Branch), General Cadre.

Having thus fulfilled what could not be achieved by a writ application before this Court, a review application and SLP to the Supreme Court in keeping directly recruited Higher Secondary Scheme teachers in a separate cadre, Rule 3 states:

"Gradation Lists:

- (i) There will be a separate Gradation list for the officers directly recruited under the Higher Secondary Scheme to the upper division of Subordinate Education Service (including those directly recruited to the upper division of subordinate education service).
- (ii) There will also be separate gradation list for the officers of the general cadre of the subordinate education service (teaching branch).

7. We have already noticed above that the Higher Secondary Scheme was withdrawn in the year 1971. It took about four years for the State to decide how to absorb the Higher Secondary teachers who were appointed in the upper division of the Subordinate Service in the gradation list, about four and half years for this Court to decide C.W.J.C. No. 2956/75 and about 7 years again in the Secretariate of the Department of Education to do and undo what was done once given rise to a litigation, undone by the rules, the same cause has also given rise to another litigation.

8. We have no desire to begin our pronouncement with any preamble, yet we have done so, but since we do not desire to make this pronouncement cumbersome, we proceed straightway to deal with the contentions raised before us. Mr. Shrinath Singh learned Counsel appearing for the petitioners has contended, (1) that the Rules separating Higher Secondary teachers from other members of the service by creating separate gradation list and dividing the wholesome promotional avenue with the moiety reserved for the so called general cadre and left over for the Higher Secondary teachers is violative of Article 16(1) of the Constitution of India read with Article 14 thereof, (2) Rules are so prejudicial and obnoxious that they suffer the vice of unreasonableness and (3) the Rules are stricken by the malice in law that became evident once an application to review the judgment of this court was preferred followed by a SLP to the Supreme Court and when the judiciary declined, executive took on itself the duty to pronounce the judgments finding fault with the judgment of this Court and even the Supreme Court. Due procedure that protectively could forbid the State from going behind the judgment of this Court was ignored and the

method of listening to the commands of the State Minister and the Chairman of the Legislative Council and a certain recommendation of a committee of the legislative council was adopted.

9. Mr. Jagat Narain Prasad Sinha learned Government Advocate, Mr. Sarojendu Mukherjee learned Counsel for the respondents and Mr. Rajendra Prasad Singh learned Counsel for the intervenors have, however, contended that the State undoubtedly possessed the legislative competence in the absence of any act of the legislature to frame Rules and to provide for division of the upper division of the Subordinate Education Service into two cadres, to provide for separate gradation lists and channel of promotion. The State Government cannot be said to have violated Article 16(1) of the Constitution of India and 14 thereof merely because certain persons may lose their chance of promotion on account of less number of promotional posts available for them. The State's action is in no way unreasonable or obnoxious because the Higher Secondary Scheme teachers are recognised as a separate group and treated differently in keeping with their appointment in the service as a separate entity and identifying them for a separate gradation list and separate avenue of promotion. They have also contended that the State Government may receive counsel from any source whether it is from the Legislative Council or a Committee of experts or even members of the public and prepare itself and making laws suitable for promoting the cause of a service. According to them no malice of any kind can be noticed even in the act of the State Minister who could not shun his concern when absorption of the Higher Secondary Scheme teachers in the upper division of the Subordinate Education Service was likely to cause serious injury to the members of the general cadre,

10. Before, however, we take up the contentions and predicate, it may be pointed out that teachers of the non-Government schools, who were until taking over of such schools by the State Government were not Government employees are represented before us as intervenors, but since they have also filed separate writ applications and peculiar features of their service after the take over do not seriously concern the upper division of the Subordinate Education Service, their cases may be dealt with separately and disposed of except the contentions, which, either question the division of the Subordinate Education Service into two cadres or support it.

11. The courts in England have recognised a number of grounds for challenging the validity of the subordinate legislation, but three of them are invariably examined by the courts, firstly when it is alleged that power under which the legislation purports to have been made was not at the time operative because for example it was expressed to be exercisable in circumstances not then obtaining, or during a period which had by then expired or that it was not available to the particular person by whom the legislation was made ; secondly if alleged that the exercise of the power has been formally defective and thirdly if it is alleged that the legislation is defective in substance its provisions being ultra vires outside the

scope of the enabling power or not authorised by law. Courts in India have extended all the tests of the validity that attach to the laws framed by the legislature and gone further to say that in the case of subordinate legislation its being in excess of the delegated authority assigned, its reasonableness also is one of the tests. Until recently the courts were reluctant in going to the motive behind framing of a law and refrained from examining whether any due procedure has been followed or not or whether the Act or the Rule have been contrived to achieve a certain hidden object or not which is not genuine or clean. But social, economic and political considerations which have found their way into the process of making laws have forced courts to reject its refrain and examine whether a law has been framed to serve the interests of justice or not and whether any mala fide has infected it or not. This has indeed put a serious burden upon the courts. Since Judges also are not infallible and they may have their own philosophy when they go into such question, a lurking suspicion hangs around them whether they approach such contention with due constraints or not and whether they express themselves not taking the reasons that are germane to the interests of justice, but reasons which support their own views and philosophy. It is in this context that the courts while releasing the restraint of not entering into the due procedure of making a law or the reasons behind the law made cautious themselves to confine to the objects of the legislation and the purpose behind it. If the object is true and genuine whether liked by the judge or not he has to up-hold it,

12. Since the learned Counsel for the parties have taken us through the history of the case and we cannot miss to notice that this Court once found the Governmental action of integrating the posts held by the Higher Secondary Scheme teachers and other upper division Subordinate Education Service teachers because at no time posts created for the Multipurpose Higher Secondary schools were ever placed either higher or lower than the posts in the upper division of the Subordinate Education Service, we can safely proceed on the presumption that until the impugned Rules were brought into existence the State and all concerned acknowledged that the Higher Secondary Scheme teachers were members of the upper division of the Subordinate Education Service and the two together formed one cadre and thus fell in order of seniority reckoned with effect from their date of entering into the said service. A brief discussion on the question whether the Higher Secondary Scheme teachers were members of the Subordinate Service or not and whether they formed a common cadre with other members of the said service or not has, however, become necessary in view of straneous efforts of Mr. Mukherjee who has tried to persuade us to hold that Rules embodied in the Bihar Education Code which provided for appointments to the Subordinate Education Service, promotions etc. were the statutory Rules having so recognised to have been framed under Article 309 of the Constitution of India. The answer is available to the said contention of Mr. Mukherjee in the notification dated 18-11-1986 which contains the Rules itself. Rule 2 which we have already quoted has itself recognised that some officers were directly

recruited in the upper division of Subordinate Education Service who are given the nomenclature when organised in a separate cadre as the members of the Subordinate Education Service, Higher Secondary cadre. Had the Higher Secondary Scheme teachers not been appointed in the upper division of the Subordinate Education Service and formed a separate class the Rule could not have called them directly recruited in the upper division of the Subordinate Education Service. If there is any force in the contention of Mr. Mukherjee that in the case of the Higher Secondary teachers Rules as contained in the Bihar Education Code were not followed (assuming that Bihar Education Code Rules were statutory Rules) then all who were directly appointed in the Multipurpose Higher Secondary Schools were not appointed in the upper division of the Subordinate Education Service, why then the notification dated 18-11-1986 has said "the officers directly recruited in the upper division of Subordinate Education Service". Does it not mean that the Rule has been framed on a wrong premises. It is not then a valid conclusion that Mr. Mukherjee also suggests that the Rule be declared ultra vires.

13. We do not however, propose to be so dismissive in disposing of Mr. Mukherjee's contention in this regard. The sheet anchor of Mr. Mukherjee's submission that the Rules contained in the Bihar Education Code are statutory Rules is a notification of the State Government published in Part II of the Bihar Gazettes dated 26-4-1950. This notification issued on 15-4-1950 in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India states -

All enactments, rules and orders, whether made under any enactment or otherwise, which regulated the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs which are now the affairs of the State of Bihar and which were in force immediately before the 26th January, 1950, shall, until provision is made by or under an Act of the State Legislature to regulate such recruitment and conditions of service, be in force as if they had been made by virtue of the powers under the said proviso.

14. Mr. Mukherjee's contention precisely is that even if it is not shown that the Rules contained in the Bihar Education Code are enactments or statutory Rules or orders but are orders of the Government of the State otherwise issued which regulated the recruitment and condition of service of persons appointed to public services and posts in connection with the affair of the State of Bihar also because statutory Rules as if framed under Article 309 of the Constitution of India. Mr. Mukherjee is right in suggesting that this Court had not taken the said notification into consideration when it disposed of C. W. 3. C. No. 2956/75 but he cannot suggest that this Court did not at all take the said notification into consideration in considering whether the Bihar Education Code had statutory force or not. We have already noticed that an application to review the judgment was filed before this Court.

15. The review application was based primarily on the ground that the

notification dated 15-4-1950 was not taken into consideration by the court in deciding C.W.J.C. No. 2956 of 1975. This Court, however, found no merit in the said contention and even on consideration of the said notification could find no fault with its judgment in C.W.J.C. No. 2956 of 1975. The matter was then taken to the Supreme Court and before the Supreme Court, the said error was highlighted. The Supreme Court, however, dismissed the petition for special leave. Thus, the Supreme Court found no fault with the judgment of this Court in C.W.J.C. No. 2956 of 1975. Even otherwise on merits if we venture to say, it is not possible to agree with the contention of Mr. Mukherjee that notification dated 15-4-1950 can be extended to the rules in the Bihar Education Code Such executive orders of the State which governed is the service condition of its employees, including one in respect of which Mr. Mukherjee was sure to govern the order of the year, 1944. They were instruments of the Government of the State, duly authenticated and published to apply to the employees concerned. Rules, as engrafted in Article 838 however have nothing statutory, yet the fact that they are bodily included in 1944. Government order may make them statutory Rules 806 and 320 of 1961 edition of the Education Code corresponding to Rules 851 and 349 of the 1944 edition appear to exclusively speak about the subordinate education service, inasmuch as they together referred to the division of the service into the lower division and the upper division and Rules 802/318 of 1944/61 edition, which speak of the minimum qualification of a trained graduate for appointment in the subordinate education service do not apparently find mention in any Government instrument, some notes appended under them, however suggest that they are based on certain Government orders, something inferentially drawn or taken out from a certain Government instrument itself cannot take the place of the instrument of the Government, All orders, whether statutory or executive, have to be expressed and issued in the name of the Governor of the State and duly published. Mr. Mukharjee has not been able to show any such Government order to make the previous judgment of this Court suspect as to its correctness about the Bihar Education Code being not statutory until 1961. Moreover acceptance of the contention of Mr. Mukherjee shall land the subordinate education service in more difficulties than presently faced by it. If the statutory rules divided the service into the lower division and the upper division, the Government of the State could not by its executive action remove the lower division and make all lower division teachers upper division teachers. Since this is a fact duly established and acknowledged, acceptance of the contention of Mr. Mukherjee in this behalf shall send all those belonging to the lower division to the lower division and deny to them the advantages which the executive action of the State has given to them. We have no hesitation in holding that even If there was some semblance of a statutory character to the Bihar Education Code or the rules referred to above, today it is of no consequence and the service has been governed by the executive instructions of the State until the notification contained in the impugned rules has been issued.

16. Those who did not grumble when the lower division of the service was

abolished without framing any statutory rules or issuing any statutory instructions, cannot be heard to grumble against the executive act of the State in making appointments in the higher secondary scheme and merging such appointments into the upper division of the service.

17. We have already noticed that introduction of the multipurpose higher secondary posts was followed by selection of teachers for appointment to such posts. Such selection was made by inviting applications from qualified persons for recruitment. Those, who were in the lower division of the subordinate education service and were qualified for appointment to the posts created for the higher secondary scheme, were eligible to apply and it is asserted by the petitioner that quite a few teachers did apply and quite a few were selected and appointed in the higher secondary scheme. With their appointment in the higher secondary scheme they were given the appointment in the upper division of the subordinate education service. It is not difficult to visualise that some teachers who were senior to them in the subordinate education service lower division remained in the service as they were not selected for the higher secondary posts and some juniors to them in the lower division of the service by virtue of their selection in the scheme were made upper division teachers. Those, who lagged behind, because they were not so selected, came to the upper division later when the lower division of the service was abolished.

18. We shall dilate into this aspect of the matter a little later, while considering its effect on the first contention of learned Counsel for the petitioner, but cannot miss recording at this stage that those of the lower division subordinate education service teachers, who were selected in the higher secondary scheme and given the rank and status of the upper division subordinate education service teachers, could not be put below some of their seniors in the lower division of the subordinate education service when they later became upper division teachers on account of the abolition of the lower division of the service. In the upper division of the subordinate education service they ranked senior to those who came later by dint of their earlier appointment to the said rank.

19. Equality of status and opportunity in the preamble of the Constitution of India is guaranteed under Article 14 thereof in the words that the State shall not deny to any person equality before the law or the equal protection of the laws, and, in particular in Article 16(1) thereof opportunity in matters in public employment in the words that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Permissible exceptions to the guarantee are mentioned in Article 15 and Article 16 (3) (4) and (5) of the Constitution. Article 16(1) read with Article 16(2) ruled out any discrimination in matters relating to employment or appointment to any office under the State on grounds de hors those made available to the State under clauses (3), (4) and (5) of Article 16 of the Constitution. The State is obliged to maintain the equality of opportunity and respected it as the faith, Courts have given to the words "equality of

opportunity" a dynamic meaning to achieve real equality in the sense, that if need be, to extend to some one or a class of citizens denied the status equal to his worth and work, statutory protection even at cost of denying to some individuals or dominant groups benefits hitherto derived by them. When and how such equality is infringed varies from situation to situation and fact to fact. Discrimination of any kind for the said reason may not be in the teeth of Article 16(1) or Article 14, and even a little hostility to certain individual or a group of individuals may be permissible, if it is necessary to promote social justice. In a developing society prejudices counter act, welfare of the society may demand restriction to the activities of a certain individual or a certain group of individuals. States organisations are expanding and are burdened by the re-organisation of its services. Quite a few stale and out-dated lapse which have stood in the way of such expansion or development have been ignored and courts have shown due regard to the need of the day to either amend the laws or ignore them altogether if they arrest the progress and the welfare.

20. The thrust of the argument of Mr. J. N. P. Sinha, learned Government advocate, that the subordinate education service has also needed such changes and the State has every time taken notice of the adverse effects caused to one or the other section of the employees, viewed in the context of the governmental activities concerning the re-organisations of the services may be of some force. The difficulty, however, which has arisen in this case is not on account only of the State's taking steps to re-organise the service but its waxing and waning approach to it. It had no compulsion to fix higher secondary scheme teachers in the upper division of the subordinate education service when it did it, yet as a fact the higher secondary scheme teachers were appointed in the upper division. It could, before the lower division service was abolished, decide to keep the higher secondary scheme teachers in a separate group and then allow only the upper division of the service to come into existence, but instead it chose to integrate the higher secondary scheme teachers with the other upper division teachers. Having done so, it could not but accept the continuation of the higher secondary teachers with effect from their date of appointment in the upper division of the subordinate education service and reckon their seniority accordingly with the other members of the said service. One such integration became final in the stream flowing beyond they could not be separated and noticed as a separate entity, still, if it is only a division of the cadre without in any manner affecting the fundamental right of the petitioners and in any other manner unreasonable or obnoxious, the State may not be denied the power to pick up the higher secondary scheme teachers and organise them as a separate group. The test, therefore, in such a situation is to see, whether as contended by Mr. Shrinath Singh, the rules separating higher secondary teachers from other members of the service creating separate cadres and separate gradation list and then stating that in their separate cadre and in accordance with their seniority in their respective gradation lists, they shall be considered for promotion to the selection grade posts and other higher posts determined in accordance with their

respective cadre strength is in any way violative of Article 16(1) of the Constitution or not. In other words, it has to be considered whether as contended by Mr. J. N. P. Sinha, creation of the separate cadre and separate gradation lists and providing for promotion to higher grades of service, is nothing beyond somehow affecting the chance of promotion of the petitioners and not their right to be considered for promotion or not.

21. The above indeed is a vexing question, for which no full proof answer can be provided. In *State of Kerala Vs. M.K. Krishnan Nair and Others*, , the Supreme Court has considered the case of re-organisation of the judicial service of the State of Kerala and after stating the facts in some details has said-

It was not and cannot be disputed that it is open to the State Government to constitute as many cadres in any particular service as it may choose according to the administrative convenience and expediency and, therefore, if in February 1973, the State of Kerala thought of bifurcating its Judicial service into two wings Civil and Criminal and further thought of framing separate Statutory Rules governing the recruitment and conditions of service of the incumbents of each wing, no fault could be found with any decision taken by it in that behalf....

After stating the law in such words, the Supreme Court has proceeded to consider the main contention as one raised before us, stating that the gravamen of the original petitioner's complaint has been that an already integrated service that had come into existence in the State of Kerala prior to February 12, 1973 as a result of several Government Order, Statutory Directions and Rules issued under Articles 234 and 237 of the Constitution from time to time, has been disintegrated by the State under the two Government Orders dated February 12, 1973 and September 18, 1973 at Exhs. P-1 and P-2 respect likely by putting all the Magisterial posts alone into one category for a separate avenue of promotion, leaving the Officers and posts of Civil Judiciary to carve out a different channel of promotion, which bifurcation or classification would be irrational, discriminatory and violative of Articles 14 and 16 of the Constitution. The main thrust of the petitioner's arguments has been that the singling out of certain posts (Magisterial posts) from such integrated service for a separate avenue of promotion is discriminatory. The argument of hostile or unfavourable treatment to officers and posts on the Civil Side of the judicial service is based on the fact that the option to go over to the Criminal wing as contained in para 3 (i) of Exhibit P-1 is confined or restricted to only those officers who were "originally borne on the Magistracy." The basic postulate made by the petitioner while advancing these criticism against the Government Orders Exhs. P-1 and P-2 is that prior to February 12, 1973 a complete integrated Judicial Service had come into existence in the State of Kerala in which the posts of District Magistrates and Sub-Divisional Magistrates in the Criminal Side had been integrated with those of Sub-Judges and Munsiffs on the Civil Side respectively which postulate is strenuously disputed by the appellants before us."

22. The law has thereafter been stated by the Supreme Court in the following

words-

...It is obvious that unless a complete integrated Judicial Service in the manner suggested by the petitioner had come into existence in the State of Kerala there would be no question of invoking the concept of hostile discrimination under Articles 14 or 16 of the Constitution, for, it is well settled that a question of denial of equal treatment or opportunity can arise only as between members of the same class. In other words, Article 11 or Article 16 will not be attracted at all unless persons who are favourably treated form part of the same class as those who receive unfavorable treatment. Therefore, in our view, the principal question that arises for our determination in these appeals is whether, prior to the introduction of scheme of bifurcation as contained in Exhs. P1 and P-2 as a result of several Government Orders, Statutory Directions and Rules issued under Articles 234 and 237 of the Constitution from time to time, there had come into existence one contemplate integrated Judicial Service in the State of Kerala or not ? In other words, had there been an integration of the posts of District Magistrate and Sub-Divisional Magistrates with those of Sub-Judges and Munsiffs as contended by the original petitioner ?...

23. We have taken care before coming to this candidly stated principle of law by the Supreme Court to record our finding that the Higher Secondary scheme teachers stood clearly integrated in the upper division of the subordinate education service. That, therefore, will conclude one part as indicated by the Supreme Court that in case there is any hostile or unfavourable treatment given to the petitioners on account of bifurcation of the cadre. Articles 14 and 16(1) of the Constitution shall stand violated.

24. We asked the learned Government Advocate to enlighten us irrespective of certain statements in the notes of the Minister of State, the Chairman of the Bihar Legislative Council and the Committee of the Council about the subject of rules which, if not as suggested by the petitioners are framed for the reason of a mistake of law under which the Minister for State proceeded to doubt the correctness of the judgment of this Court in C.W.J.C. No. 2956 of 1975, which mistake of law found itself way in the notes of the Chairman of the Legislative Council as also the proceedings of the Committee of the Council, then something not stated anywhere, either in the writ application or the counter affidavits and other affidavits on the record. For learned Government Advocate took us to the history of the service and emphasised, as noticed above, that Higher Secondary Scheme was a fortuitous scheme which came under no statute whatsoever, but nonetheless introduced certain younger people in the service who blocked the prospect of promotions of several senior teachers, who for reasons of the rules came to the upper division of the service on promotion. According to the learned Government Advocate, the State was not unaware of their entry into the upper division of the Subordinate Education Service, but it intended to protect the interest of the members of the general cadre, without in any manner denying to the higher secondary scheme teachers prospect of promotion etc. in the service.

In short the learned Government Advocates endeavour before us has been to show that toe higher secondary scheme teachers, when organised in a separate cadre, are not in any way denied their rights under Articles 14 and 16(1) of the Constitution.

25. In the State of Mysore Vs. M.H. Krishna Murthy and Others, , it has been pointed out that inequality of opportunity of promotion, though not unconstitutional per se, must be justified on the strength of rational criteria correlated to the object for which the difference is made. In the case of Government servants, the object of such a difference must be presumed to be a selection of the most, competent from amongst those possessing qualifications and backgrounds entitling them to be considered as members of one class. In some cases, quotas may have to be fixed between what are different classes or sources for promotion on grounds of public policy. If, on the facts of a particular case, the classes to be considered are really different inequality of opportunity in promotional chances may be justifiable On the contrary, if the facts of a particular case disclose no such rational distinction between members of what is found to be really a single class no class distinctions can be made in selecting the best, Articles 14 and 16(1) of the Constitution must be held to be violated when members of one class are not even considered for promotion, The said case before the Supreme Court had arisen in a case, in which two persons, who had joined the Accounts Service in the, Comptroller" office of the former Mysore State as first and second Division clerks were asked to work as Accounts clerk under the Chief Engineer, P.W.D. After the Controller's office was abolished, and in the Chief Engineer's office Divisional Accounts cadre was created by the Mysore Government, the said two persons were allowed to appear in the prescribed examination and when they were found successful, were absorbed in the accounts cadre. In April, 1959, a Committee recommended transfer of the P.W.D. accounts branch to the newly set up Controller of State Accounts. In accordance with the said recommendation, the said two persons came under the administrative control of the Controller and redesignated as Accounts Superintendent. On 15th May, 1959 the accounts unit under the thief Engineer, P.W.D. and the Local Fund Audit unit, known also as "the State Accounts" Department came under the common administrative control of the Controller of State Accounts. On 26th May, 1959, the Mysore State Accounts Services" cadre and Recuitment Rules were issued and combined cadre strengths were fixed. The rules combining the cadre were challenged before the Mysore High Court after examining the rules held -

There cannot be the slightest doubt from these rules that a clear and complete integration was brought about between the two units". It then took notice of the facts and pointed out that the qualifications and status of the officers of the formerly separate units were identical, their work was of the same nature, the recruiting authorities were the same, the standards observed and tests prescribed for entry into the formerly separate units were identical, The result of the Rules of 1959 was that an artificial distinction based on mere separate

control had been abolished so that both units come under the legally single administrative control of the Accounts" Department in charge of the Controller of State Accounts. The petitioners became absorbed in what was legally a single permanent service regulated by uniform rules.

The High Court also took notice of the fact that while the said integration of service was final in the matter of promotion, those, who came from the erstwhile Mysore service and were put in the office of the Chief Engineer, P.W.D. in the divisional accounts cadre, were disintegrated against for the reason only that they came to the integrated service from the office of the Chief Engineer, P.W.D. The High Court concluded that the discrimination was in the teeth of Articles 14 and 16(1) of the Constitution and set aside the rule which envisaged separate promotional avenues and for those who belonged to the cadre of the Chief Engineer, P. W. D. before integration and those who were in Mysore accounts service. The Supreme Court in appeal had said after taking notice of these facts -

....The case before us falls, in our opinion, in the latter type of cases where the difference in promotional opportunities of those who were wrongly divided into two classes for this purpose only could not be justified on any rational grounds....

26. In a later judgment the Supreme Court has reiterated the same principle in a case in which upper division clerks who were drawn from the Audit Offices in the Savings Bank Control and internal check organisation were subjected to promotional avenues determined on the basis of the existing strength at any given time of such clerks in the particular circle. In *S.L. Sachdev and Ors. v. Union of India and Ors.* AIR 1981 S.C. 411, the Supreme Court has said :

It is difficult to appreciate the logic or the principle behind the direction that the Selection Grade Posts or the posts of Head Clerks which will be available to the U. D. Cs. drawn from the Audit Offices will be determined on the basis of the existing strength, at any given time, of such clerks in the particular circle. Since, under the impugned directions, the number of Selection Grade Posts/Head Clerks has to be 10% of the number of U. D. Cs. drawn from the Audit Offices no promotional opportunities at all will be available to them in certain circles in which less than 10 U. D. Cs. drawn from the Audit Offices are working. It is undisputable that, according to the impugned directive, there have to be at least ten persons drawn from the Audit Offices in a Circle, in order that at least one promotional post may become available to them. We are informed, which again is not disputed, that in some small Circles, less than 10 U. D. Cs. drawn from the Audit Offices are working in the new organisation. These persons, for a purely fortuitous reason, will be denied for ever all promotional opportunities. That seems to us wholly indefensible.

The Supreme Court has proceeded to take notice of the unpredictable and arbitrary nature of the governmental actions in some times bifurcating unified cadres for not apparently good reason and has said-

Apart from the injustice in specific cases where U. D. Cs. drawn from the Audit

Offices are attached to comparatively smaller Circles, the classification made for the purpose of determining the promotional opportunities seems to us unreasonable and arbitrary. It is contended by the learned Attorney General that persons drawn from different sources were not integrated into a common service to the instant case and therefore different rules of promotion can be applied to the two classes. We are unable to accept this contention. The duties, functions and responsibilities of all the U. D. Cs, in the new organisation are identical. They are all in the same cadre and they draw the same pay in the same grade. There is no reason then why different tests should be prescribed for determining their respective promotional opportunities, and that too solely with reference to the source from which they are drawn. The test of educational qualifications can conceivably be an intelligible differentia bearing nexus with the object of ensuring greater efficiency in public services. But once a cadre is formed by recruiting persons drawn from different departments of the Government, there would normally be no justification for discriminating between them by subjecting one class to more onerous terms in the matter of promotional chances. The impugned directive are therefore unconstitutional.

27. Both the counsel appearing for the parties have taken us through many other judgments of the Supreme Court as well as this Court and enlightened us in respect of the principles governing the administrative and legislative actions of the State. The above appear to us to guide almost every pronouncement on the subject and it is held, inter alia that the division of a service into more than one cadre per se may not be discriminatory so as to attract Articles 14 and 15(1) of the Constitution, but the division must possess intelligible and rational reasons based on predictable fair and justifiable reasons. These pronouncements have applied the rule of equality on different set of facts and either found fault with the rules dividing the cadre and providing separate promotional avenues or found no fault and sustained the bifurcation. We do not intend to deal with each one of such cases, but may refer to one in *Bombay Oil Industries Pvt. Ltd. Vs. Union of India (UOI) and Others*, . The Supreme Court has said-

...A Legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in *B.S. Yadav and Others Vs. State of Haryana and Others*, , Chandrachud C. J. speaking for the Court." Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But that date from which the rules are made to operate must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case". Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective. Constitutional

rights, constitutional obligations and constitutional consequences cannot be tempered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws....

The Supreme Court was dealing with a case in which several services were sought to be integrated and then again sub divided. Taking into account the service history and referring to the origin of the services at one point became unified or were attempted to be so made, the court in the context examined the constitutional validity of the Gujarat Panchayats (Third Amendment) Act (38 of 1978) which purported to give retrospective operation to certain provisions which created different set of services. The Supreme Court has said-

...We ate, therefore, firstly of the view that the Gujarat (Third Amendment) Act, 19/8 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable....

28. A judgment of the Supreme Court in the case of K. S. Vora and Ors. v. State of Gujarat and Ors. 1988 (56) F. L. R. 296, has also been brought to our notice which has dealt with a case in which prior to the bifurcation of the State of Bombay into two States, Maharashtra and Gujarat certain persons had joined Government service as clerks-cum-typists. The Subordinate Secretariat Service was then divided into four grades (i) Clerk-cum-typist, (ii) Junior Assistant (Hi) Senior Assistant and (iv) Superintendent. Promotions were available from the lower cadre to the upper one. When Gujarat became a separate State, the Government business in the Secretariat was divided into nine Departments, separate in every respect so far as the subordinate services were concerned. By a Government resolution, dated October 12, 1960 the cadre of Superintendents was made a common one covering all the Departments, in the Secretariat. Until then seniority was being determined departmentwise and promotions were being also made on the said basis. Under the new arrangement, promotion to the post of Superintendent was handled by General Administrative Department out of a common list of senior assistants. On September 25, 1964 under another resolution of Government, the grades of Junior Assistants and Senior Assistants were merged into one, known as Assistants with effect from October 1, 1964 and a common seniority list of Government servants working as Assistants was prepared, A quota system was introduced for recruitment of Assistants, At one stage the ratio was 3.1 and later it was changed to 2.1, On July 19, 1969 a seniority list of assistants was prepared on quota basis and taking into account continuous officiation in the cadre of assistants. The Supreme Court after considering the various provisions has said-

As we have already pointed out in the instant case the State decided at stages to switch over to the common cadre in respect of all the four grades of the Subordinate Service. Before common grades had been formed promotion was granted departmentwise. When ultimately a common cadre came into existence

and all that was done by 1974-it was realised that if seniority as given in the respective departments were taken as final for all purpose there would be prejudice. Undoubtedly the common cadre was for the purpose of increasing the efficiency by introducing a spirit of total competition by enlarging the field of choice for filling up the promotional posts and in the interest of discipline too. After a common cadre was formed, the general feeling of dissatisfaction on account of disparity of seniority become apparent. The 1977 Rules were introduced in this background to ease the situation....

The rule under challenge before the Supreme Court was one which laid down the principle for determining seniority by providing that seniority among promotees assistants inter se would be fixed on the basis of their length of service in the general cadre of clear-cum-typist for all departments for the Secretariat as a whole. Pronouncing its verdict the Supreme Court has said -

...In spite of the protection of Rules regarding the post then held, the Rules brought about a change in the inter se seniority by adopting the date of initial recruitment and the length of service became the basis for refixing seniority. Total length of service for such purpose is a well-known concept and could not be said to be arbitrary. Undoubtedly one of the consequences of the change in the basis was likely to effect prospects of promotion-a matter in future. Two aspects have to be borne in mind while considering the challenge of the appellants to this situation. It was a historical necessity and the peculiar situation that arose out of Government's decision to create a common cadre with four grades in the entire Secretariat. We would like to point out with appropriate emphasis that there was no challenge to creation of the common cadre which certainly Government was competent to do so. The second aspect to be borne in mind is that rules of seniority are a matter for the employer to frame and even though prospects of promotion in future were likely to be prejudiced by introduction of a new set of rules to regulate seniority, if the rules were made bona fide and to meet exigencies of the service, no entertainable grievance could be made. If these are the tests to apply, we do not think the appellants have indeed any grievance to make....

29. We have referred to the judgment of the Supreme Court in K.S. Vora's case (supra) only to illustrate that the courts have at no time ignored the interest of the employees and questioned the authority of the State to frame rules in terms of the proviso to Article 309 of the Constitution of India, but the courts have always taken notice of the fact that those who stood together and fell in line to proceed further have to be provided all opportunities in respect of their avenues of promotion alike without breaking that order, so that one who ranks higher in the grade may not go down in due course of service. It is in this context that we have no hesitation in holding that rules in the notification dated 18-11-1986 are ultra vires Articles 16(1) and 14 of the Constitution.

30. We do not propose to predicate into what is alleged to be the mala fide of the respondent-State inasmuch as after the judgment of this Court in C.W.J.C. No.

2956/75, the Minister of State decided to find means to disintegrate the already integrated cadre or the Chairman of the Legislative Council, having no apparent role in the process of making rules in terms of proviso to Article 309 of the Constitution appealed and influenced the process. We refrain from going into this aspect, for we think, with our conclusion as above, the upper division of the Subordinate Education Service shall continue to have the same respect as it got from the judgment of this Court in C.W.J.C. No. 2956/75 and no one in the Government shall in future again attempt to deny to the members of the said service their due rights for promotion to the selection grade and other higher posts.

31. Before we part with this judgment, however, we may briefly refer to the other cases heard alongwith it and the cases of the interveners who were initially working as teachers in non-Government High School and have now become the employees of the Government of the State. In their case the dispute as to the integration of service separate from the Subordinate Education Service and inter se seniority, has already been settled by a judgment of this Court in *Mateshwar Singh and Ors. v. The State of Bihar and Ors.* 1985 P.L.J.R. 416. We are in respectful agreement with the views in the said judgment, but feel that in their case the position is not that settled as is in the cases of the member of the Subordinate Education Service upper division. Before they are organised into one integrated cadre, as referred to in the judgment of this Court in C.W.J.C. 4121 and other cases of 1984, their seniority shall reason with reference to the length of service irrespective of cue given the scale of pay of a particular post held by him for the purpose of appointment as Assistant Headmaster and Headmaster. There was no uniform pattern for granting scale of M. A, trained or the scale of pay of a trained graduate. There were schools in which such scales were provided to the extent of the limits prescribed in the notification creating such scale of pay. In some schools there were no such grade available at all. The respondents-State may in the interest of the employees in such schools attend to the grievance of such teachers and see, whether in terms of the rules under which their services are now governed any discrimination is done to them or not. We cannot, however, give to them at this stage anything beyond our pious wishes for the reason of the pronouncement in C.W.J.C. No. 4121 and other cases of 1984, but draw the attention of the State Government to the judgment of the Supreme Court in the case of *K. S. Vora* (supra).

32. Having considered the case, as above, to conclude we hold that the rules as contained in the notification dated 18-11-1986 are ultra vires and accordingly fit to be quashed.

33. In the result the application is allowed. The notification dated 18-11-19(56 (Annexure 16) is quashed. There shall be no order as to costs.

34. In view of the observations in C.W.J.C. No. 1254/87, as prayed for, C.W.J.C. Nos. 1420, (sic)226 and 2833 of 1987 are dismissed as withdrawn.