

(2006) 04 OHC CK 0055
In the Orissa High Court
Case No : Writ Petition (C) No. 2025 of 2005

Jagannath Patel and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 26-04-2006

Acts Referred:

Constitution of India, 1950 — Article 166, 223(2), 226, 309, 323
Essential Commodities Act, 1955 — Section 3, 3(6), 4
Orissa Civil Services (Criteria for Promotion) Rules, 1992 — Rule 5
Orissa Service of Engineers (Amendment) Rules, 1989 — Rule 3, 3(1), 4, 5, 8(1)
Parks Regulations Act, 1872 — Section 9

Citation : (2006) 102 CLT 746 : (2006) 1 OLR 628 Supp

Hon'ble Judges : N. Prusty, J; I.M. Quddusi, J

Bench : Division Bench

Advocate : R.K. Rath, Addl Government Advocate, for the Appellant; Patnaik and J.K. Rath, for the Respondent

Final Decision : Dismissed

Judgement

I.M. Quddusi, J.—This writ application has been filed against the judgment and order dated 18.1.2005 passed by the Orissa Administrative Tribunal, Cuttack Bench in Original Application No. 1676(C) of 2004 dismissing the O.A. filed by the instant petitioners.

2. The brief facts of the case are that the petitioners and opposite party Nos. 3 and 4, namely, Nalin Kanta Pradhan and Pradeep Chandra Sahu were selected by the Orissa Public Service commission (for short, "the OPSC") for the posts of Assistant Engineer in the year 1982. A merit list was prepared by the OPSC in which opposite parties 3 and 4 were shown below the petitioners and as such they were shown juniors to the petitioners in the inter se seniority. On the basis of the merit list determined by the OPSC, the petitioners and opposite parties 3 and 4 were promoted to the posts of the Assistant Executive Engineer and their inter se seniority remained undisturbed till the year 1999. In the year 1999 when the promotion to the post of Executive Engineer on ad hoc basis was considered

by the D.P.C., opposite party No. 3 was shown above the petitioners in the merit list, and accordingly recommendation was made by D.P.C. to the OPSC for promotion of opposite party No. 3 on out of turn basis. However the OPSC did not agree with the same and sent its opinion to the State Government separately in which opposite party No. 3 was shown below in merit to the petitioners. The State Government according to its Rules of Business referred the matter to the Chief Minister who directed the same to be placed before the Cabinet Meeting. The same was accordingly placed and opposite party No. 3 was found to be of exceptional merit. Opposite party no 4 was also given the benefit of out of turn promotion. Consequently, opposite parties 3 and 4 both were promoted to the rank of Executive Engineer. Thereafter while considering the promotion to the post of Superintending Engineer Level-II, opposite parties 3 and 4 were considered treating them to be senior to the petitioners and consequently were given promotion to the rank of Superintending Engineer Level II.

3. Being aggrieved, the petitioners approached the Tribunal by filing the above mentioned O.A., inter alia, alleging therein that the promotion to the rank of Superintending Engineer, Level-I was being considered ignoring the names of the petitioners, that in order to favour opposite parties 3 and 4 the recommendation of the OPSC was not followed, that without sufficient materials the recommendation was negatived in the Cabinet meeting and that though recommendation of the OPSC was not accepted the same was not placed before the Assembly in its next session for which the action of the State Government was arbitrary and mala fide.

4. In O.A. the petitioners had prayed for declaring them senior to opposite parties 3 and 4 and for directing the official opposite parties not to implement the D.P.C. recommendation for promotion to the rank of Superintending Engineer, Level-I until disposal of the O.A. and further prayed that all the orders declaring opposite parties 3 and 4 as Executive Engineer & Superintending Engineer Level-II may be quashed and promotion may be given according to the merit list prepared by the OPSC.

5. The stand of the State Government in the counter affidavit before the Tribunal was that though the petitioners were senior to opposite parties 3 and 4, but at the time of consideration of the C.C.Rs. , the C.C.Rs. of opposite parties 3 and 4 were found to be outstanding. Therefore, they were recommended by the D.P.C for promotion to the rank of Executive Engineer superseding the petitioners and thereafter the D.P.C. again found opposite party Nos. 3 and 4 suitable for promotion to the rank of Superintending Engineer Level-II, maintaining the seniority on the basis of promotion to the post of Executive Engineer and. placing them at a level higher than the petitioners, recommended for their promotion to the rank of Superintending Engineer level-II. Consequently, they were again recommended for promotion to the post of Superintending Engineer Level-I . It is not disputed that by a cabinet decision, the recommendation of the OPSC was negatived and the recommendation of the DPC was up- held.

6. Before proceeding further, it is necessary to peruse the provisions of the relevant Rules applicable in the case in hand. Vide notification dated 8th March 1989 of the State Government in the Irrigation and Power Department, the Governor of Orissa amended the existing rule namely, "The Orissa Service of Engineers" Rules, 1941" as "The Orissa Service of Engineers" (Amendment) Rules, 1989 (in short "Amended Rules 1989"). The relevant portion of the amended Rules, 1989 are quoted hereunder:

IRRIGATION AND POWER DEPARTMENT NOTIFICATION

The 8th March 1989

S.R.O. No. 226/ /89-In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa hereby makes the following rules further to amend the Orissa Service of Engineers" Rules, 1941; namely:

1. (1) These rules may be called the Orissa Service of Engineers" (Amendment) Rules, 1989.

(2) They shall be deemed to have come into force with effect from 15th May, 1982 except this rule and Rule 3 and Rule 4 which shall come into force from the date of publication of this rule in the Official Gazette.

2. In the Orissa Service of Engineers" Rules 1941 (hereinafter referred to as the said rules), in Rule 3(1) for Clause (b), the following clause shall be substituted, namely:

(b) "Promoted Officer" means an Officer promoted to the service from among the Junior Engineers".

(2) after Clause (f), the following clause shall be added, namely:

(g) "Engineer-in-Chief" means the Engineer-in-Chief appointed by Government in the Irrigation & Power Department.

3. In the said rules, for Rule 4, the following rule shall be substituted, namely:

4. Strength of the Cadre:

From the date on which the Orissa Service of Engineers" (Amendment) Rules, 1989 come into force the existing Orissa Engineering Service shall cease to exist and the new service shall include all posts in the existing service and the posts in the State borne in the cadre of the Orissa Engineering Service consisting of the following categories of Class II and Class I posts and such other categories of posts as may be decided by the Government. The number of such posts both permanent and temporary and their pay scales shall be as may be decided by the Government from time to time. Class I posts (a) Assistant Executive Engineer (Junior Class I).

(b) Executive Engineer

(c) Superintending Engineer, Level-II

(d) Superintending Engineer, Level-I

(e) Chief Engineer

Class-II Posts: Assistant Engineer

4) In the said rules, for Rule 5, the following rule shall be substituted namely:

5. Recruitment to the Service:

(1) First appointment to the Service shall ordinarily be made to the rank of Assistant Engineer.

(2) Appointment to the rank of Chief Engineer, Superintending Engineer, Level-I, (Superintending Engineer, Level-II, Executive Engineer, Assistant Executive Engineer (Junior Class-I) shall be made by the Government, in consultation with the Commission by promotion from the rank of Superintending engineer, Level-I, Superintending Engineer, Level-II, Executive Engineer, "Assistant Executive Engineer(Junior Class-I) and Assistant Engineer respectively.

(3) The promotion shall be made by selection on the basis of merit and suitability of the Officer in all respects with due regard to seniority:"

Provided that any junior officer who in the opinion of the Departmental Promotion Committee is of exceptional merit and suitability may be assigned a place higher than that of the officers senior to him.

7. Thereafter the rules, namely, Orissa Civil Services (Criteria for Promotion) Rules, 1992 (for short "the Rules, 1992) came into force with effect from 24.7.1992 which had over-riding effect to the existing rules. The relevant parts of the same are quoted as under.

Government of Orissa General Administration Department.

NOTIFICATION

Bhubaneswar, dated the 24th July, 1992.

No. 2R/1-60/92. 29904 / Gen., In exercise of the powers conferred by the proviso to article 309 of the Constitution of India, the Governor of Orissa is pleased to make the following rules to regulate the Criteria for promotion to the State Civil Services and Posts, namely:

1. (1) These rules may be called the Orissa Civil Services (Criteria for promotion) Rules, 1992.

(2) They shall come into force on the date of their publication in the Orissa Gazette and shall apply to all cases of promotion made to the State Civil Services and Posts including the cases pending on the date of such publication.

2. In these rules, unless the context otherwise requires

(a) "Government" means the Government of Orissa; "

(b) "Recruitment. Rules" means the rules framed under the proviso to Article 309 of the Constitution of India regulating promotions to different State Civil Services and Posts and includes executive Orders and instruction issued by the competent authority in this regard from time to time; and

(c) "Selection List" means the list approved by the Government or the appointing authority, as the case may be containing the names of Officers considered suitable for promotion.

3. Notwithstanding anything contained in the Recruitment Rules.

(a) All promotions to the posts or grades of different services/ Civil Posts under the State Government shall be made by selection;

(b) Selection for such promotion shall be made on the basis of merit and suitability in all respects with due regard to seniority and the names of persons included in the Select List shall be arranged in order of seniority in the feeder service or grade;

Provided that any Junior Officer of exceptional merit and suitability may be assigned a place higher than his seniors and in such cases the assignment of higher position to the Junior Officer shall be limited to the same batch or year of allotment except where an Officer of the earlier by or year of allotment is found unsuitable for promotion:

Provided further that where promotion is meant from different services or posts and no common seniority among such Officers exists, their names in the select list shall be arranged on the basis of their merit adjudged during selection.

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(c) In order to judge the suitability of an Officer for promotion, the Orissa Public Service Commission or the Departmental Promotion Committee, the Selection Committee or the Selection Board, as the case may be, shall scrutinize the confidential character rolls and other documents, if any, have a bearing on the performance and conduct of all eligible officers of the preceding five years only unless, for reasons to be recorded, it is considered necessary to refer any earlier record to adjudge an officer Suitability.

Note: The expression "preceding five years" means the years preceding the year in which the Officer's performance is, in accordance with the relevant Recruitment Rules, first evaluated.

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5. The provisions of these rules shall have over riding effect notwithstanding anything to the contrary contained in any other Recruitment Rules or any other orders of instructions for the time being in force.

8. According to Rule 5 of the Rules 1992, the provisions contrary to the rules contained in the Orissa Service of Engineers Rules would have no application. However, the provisions of the rules, which are not contrary were applicable.

Further, it is also necessary to peruse the Orissa Government Rules of Business made by the Government of Orissa in exercise of powers conferred by Clause (3) of Article 166 of the Constitution of India vide notification dated 14.12 .1956 and the second schedule given along with the same. The relevant portion of the same for the purpose of this case are quoted as under:

THE ORISSA GOVERNMENT RULES OF BUSINESS MADE UNDER ARTICLE 166 OF THE CONSTITUTION OF INDIA

Bhubaneswar, the 14th December. 1956

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8. (1) All cases referred to in the Second Schedule shall be brought before the Cabinet by the direction of

(II) the Chief Minister or the Minister-in-charge or the Minister of State in-charge of the case with the consent of the Chief Minister.

SECOND SCHEDULE (See Rule 8(1)) XX XX XX

22. Proposals for appointments inconsistent with the recommendation of the Public Service Commission.

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9. The relief as prayed for by the petitioners in the instant writ petition is quoted hereunder:

Prayer

It is therefore humbly prayed that your Lordships be pleased to issue Rule NISI calling upon the opposite parties to show cause and if they fail to show cause or show insufficient cause quash Annexures 9 and 10 and further declare that the petitioners are seniors to above opposite party Nos. 3 and 4 in the rank of Executive Engineer, quash all actions taken in pursuance of the order at Annexure 10 in giving further promotions to opposite parties 3 and 4 and quash all promotions made in favour of opposite parties Nos. 3 and 4 above the rank of Executive Engineer and grant all consequential benefits to-the petitioners including promotion w.e.f. from the date opposite party Nos. 3 and 4 got the same by protecting the seniority of the petitioners above them;

And pass such other or further order/orders as are deemed fit and proper.

10. The scope of judicial review is being expanded day by day and now has been expanded to the extent of errors of facts. However, in the case of Manager, R.B.I., Bangalore Vs. S. Mani and Others, , it has been laid down by the Apex

Court that the judicial review is permissible when the findings of the Tribunal are found to be wholly perverse or the decision of the Tribunal is based upon irrelevant factors not germane for the purpose of arriving at a correct finding of fact. But in the case where there is exercise of power by an Executive or a quasi judicial authority in accordance with the statute or subordinate legislation and not on extraneous consideration, there is hardly any scope, for judicial review . The principles laid down in some of the cases in this regard by the Hon''ble Apex Court are discussed below.

11. In the case of Asif Hameed and others Vs. State of Jammu and Kashmir and Others, , it has been held that while exercising power of judicial review of administrative action, the Court is not an Appellate Authority. The Constitution does not permit the Court to direct or advise the Executive in matters of policy or to sermonize qua any matter, which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory power .

12. In the case of Smt. Nutan Arvind Vs. Union of India and another, ., it has been held by the Apex Court that when a High Level Committee had considered the respective merits of the candidates, assessed the grading and considered their cases of promotion, the Supreme Court cannot sit over the assessment made by the D.P.C. as an Appellate Authority.

13. In the case of Union of India (UOI) and Another Vs. Samar Singh and Others, the Apex Court relying upon the decision in the case of Dr. Jai Narain Misra Vs. State of Bihar and Others, held as under:

So far as the question of suitability is concerned, the decision entirely rested with the Government. In other words the Government is the sole Judge to decide as to who is the most suitable candidate for being appointed as Director of Agriculture. For discharging that responsibility it was open to the Government to seek the assistance of the Public Service Commission. In our judgment the High Court was not justified in calling for records of the Public Service Commission and going through the noting made by various officers in the Commission as well as the correspondence that passed between the Commission and the Government. The High Court overlooked the fact that the Government sought the assistance of the Commission and not that of the High Court for finding out the most suitable candidate. In this case there was no complaint of mala fides either on the part of the Government or the Commission. That being so the interference of the High Court in the matter of selection made by the Government was not called for.

14. In the case of Union of India (UOI) and Another Vs. S.B. Vohra and Others, referring to an earlier decision, it has been held that by way of judicial review the Court is not expected to act as a Court of appeal while examining an administrative decision and to record its finding whether such decision could have been taken otherwise in the facts and circumstances of the case.

15. Further, it is necessary to peruse the following portion of the judgment of the Apex Court in the case of Union of India and Anr. v. S.B. Vohra and Ors. (supra)

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There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercise its discretion."

16. In the case of Chief Constable of North Wales Police v. Evans reported in (1982) 3 ALLER 141, which has been referred to by the Apex Court in the above decision, in which the purpose of judicial review was discussed, it has been observed that the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after affording fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eye of law .

17. Learned Counsel for the petitioners has contended that in the instant case the State Government has accepted the recommendation of the P.S.C. in part and rejected a part thereof, though it is not permissible in law for the decision making authority to accept the recommendation in part only. He has relied upon the case law laid down by the Apex Court in the case of Jatinder Kumar and Others Vs. State of Punjab and Others, , in which it has been held that the selected persons cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz., bad conduct or character.

18. Mr. P.K. Mohanty, the Learned Addl. Government Advocate has submitted that the meeting of the D.P.C. for selection of the post of Executive Engineer for the Calendar year 1999 was held on 11.6.1999. Among others, the petitioners

and O.P. Nos. 3 and 4 figured in the zone of consideration. After going through the C.C.Rs. and other service records of eligible officers for the years from 1993-94 to 1997-98, the D.P.C. opined that O.P. No. 3 was of exceptional merit and more suitable, and accordingly placed him above the senior officers (AEE) of his batch. Accordingly, ad hoc promotion to the rank of Executive Engineer was given to all of them vide notification dated 2.12.1999 in which opposite party No. 3 was placed at Serial No. 2 and petitioner Nos. 1 & 2 were placed below him. Opposite Party No. 4 was placed below them.

The recommendation of the D.P.C. was then sent to Orissa Public Service Commission along with relevant records. The Commission formulated their views contrary to the recommendation made by the D.P.C. When the matter was considered by the State Government, it was found that the Commission acted contrary to what has been done by the Countersigning Officer and Accepting Officer in the C.C.Rs. of the Officers for the relevant years. The ultimate decision making authority was the State Government and the Commission was only a recommendatory body. As such, the State Government was quite competent to disagree with the recommendation of the Commission for good and sound reasons on the basis of the records and accordingly the recommendation of the Public Service Commission was not accepted. It is not a case that the recommendation was accepted in part or rejected in part, rather the "State Government had rejected the recommendation of the O.P.S.C. and took a decision to assign a higher position to opposite party No. 3 over his seniors or the same batch in accordance with the proviso to Rule-5 of the Orissa Service of Engineers (Amendment) Rules, 1989. As per the Orissa Rules of Business the matter was put up before the Cabinet which approved the same and as such there is absolutely no illegality committed by the State Government. Further the Tribunal also examined the record and after thorough consideration, the O.A. was dismissed. The meeting of the D.P.C. for selection of Superintending Engineer, Level-II was held on 13.2.2002. The petitioners as well as opposite party Nos. 3 and 4 were kept within the zone of consideration. Opposite party Nos. 3 and 4 were again found to be exceptional merit and more suitable by the D.P.C., which had taken the C.C.Rs. into consideration from the period 1996-97 to 2000-2001. Further meeting of the D.P.C. for selection of Superintending Engineer Level-I was held on 15.4.2004. Petitioner No. 1 and opposite party Nos. 3 and 4 figured in the zone of consideration. Petitioner No. 2 was not kept in the zone of consideration as he had not joined the post of S.E. Level -II. Opposite party Nos. 3 and 4 were found more suitable and given ad hoc promotion to the post of Superintending Engineer Level-I. The case of petitioner No. 1 was kept in a sealed cover due to pendency of the departmental proceeding against him.

19. Since the matter in question is not a challenge to the selection of the post of Superintending Engineer Level-I, as the same was not made at the time of filing of the O.A., this Court declines to make any comment on the same. This Court confines its consideration only to the prayers made by the petitioners before the Tribunal in the O.A. in question, which were to the extent of a declaration that

the petitioners are seniors to opposite party Nos. 3 and 4, not to implement the recommendation of the D.P.C. in respect of the promotion to the post of Superintending Engineer Level-I, for quashing of all the orders declaring respondents 3 and 4 as Executive Engineer and Superintending Engineer Level-II and for a direction to give promotion to the persons according to the merit list prepared by the OPSC .

20. Learned Counsel for the petitioners has further urged that the Tribunal has completely lost sight of the legal position that in the present case, the matter was not referred to the Legislative Assembly as required under Article 223(2) of the Constitution of India and the Tribunal has side tracked the issue in paragraph 8 of the impugned judgment.

In view of the above, it is necessary to peruse the provisions of Article 323(2) of the Constitution of India which is quoted below:

323(2) It shall be the duty of a State Commission to present annually to the Governor of the State a report as to the work done by the Commission, and it shall be the duty of a joint commission to present annually to the Governor of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

21. There is catena of decisions of the Hon''ble Apex Court in which it has been held that the above quoted provisions are directory and not mandatory in nature and non-compliance of the same by the State Government not accepting the recommendation of the Commission would not render its decision as a nullity . Some of the decisions are being discussed below.

22. In the case of Asha Kaul (Mrs) and Another Vs. State of Jammu and Kashmir and Others, , the Apex Court has held that the Government cannot pick and choose the candidates out of the list recommended by the Commission. But it has been held that the Government is bound to record the reasons for its action, and produce the same before a Court, if and when summoned to do so, apart from placing the same before the legislature as required by Clause (2) of Article 323. Indeed Clause (2) of Article 323 obliges the Governor of a State to lay a copy of the annual report received from the Commission before the legislature "together with a memorandum explaining, as respects the cases, if any where the advice of the Commission was not accepted and the reasons for such non-acceptance". Evidently, this is meant as a check upon the power of the Government. This provision too militates against the theory of absolute power in the Government to disapprove or reject the recommendations of the commission .

23. In the case of Atlas Cycle Industries Ltd. and Ors. v. State of Haryana reported in AIR 1979 SC 1149, the Hon''ble Apex Court held that requirement of

laying before both the Houses of Parliament of any order u/s 3(6) of the Essential Commodities Act is only directory and not mandatory.

The further discussion, it is necessary to quote the provisions of Sub-section 6 of Section 3 of the Essential Commodities Act, which is reproduced as under:

Every order made under this Section by the Central Government or by any Officer or Authority of the Central Government shall be laid before both the Houses of Parliament as soon as may be after it is made.

Apex Court in the above case held that there are two considerations for regarding a provision as directory. They are: (i) absence of any provision for the contingency of a particular provision not being complied with or followed and (ii) serious general inconvenience "and prejudice that would result to the general public if the act of the Government or an instrumentality is declared invalid for non-compliance with the particular provision. The observations made at page 305 to 307 of the 7th edition of Craies on Statute Law were noticed with approval in *Hukam Chand etc. Vs. Union of India (UOI) and Others*, wherein these three kinds of laying are described and dealt with in Craies on Statute Law as under:

- (i) Laying without further procedure,
- (ii) Laying subject to negative resolution,
- (iii) Laying subject to affirmative resolution.

Further the Apex Court in dealing with the question whether direction to lay the rules before Parliament is mandatory or merely directory and whether laying is a condition precedent to their operation or may be neglected without prejudice to the effect of the rules referred to Page 317 of the aforesaid edition of Craies on Statute Law answered as under:

Each case must depend on its own circumstances or the wording of the statute under which the rules are made.

In Sub-section (6) of Section 3 of Essential Commodities Act, it has been provided that every order made u/s 3 by the Central Government or by any officer or authority of the Central Govt. shall be laid before both Houses of Parliament, as soon as may be, after it is made. It does not provide that it shall be subject to the negative or the affirmative resolution by either House of Parliament. It also does not provide that it shall be open to the Parliament to approve or disapprove the order made u/s 3 of the Act. It does not even say that it shall be subject to any modification, which either House" of Parliament may in its wisdom think it necessary to provide. It does not even specify the period for which the order is to be laid before both Houses of Parliament nor does it provide any penalty for non-observance of or non-compliance with the direction as to the laying of the order before both Houses of Parliament. The Apex Court further observed that the requirement as to the laying of the order before both Houses

of Parliament is not a condition precedent but subsequent to the making of the order. In other words, there is no prohibition to the making of the orders without the approval of both Houses of Parliament. In these circumstances, the requirement as to laying contained in Sub-section (6) of Section 3 of the Act falls within the first category i.e. "simple laying" and is directory, not mandatory.

24. In the aforesaid case the Apex Court also referred the case of *Bailey v. Williamson* (1873) 8 QB 118 in which the nature of laying provision u/s 9 of the Parks Regulations Act, 1872, providing that any rules made in pursuance of the first schedule to the Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament, and if any such rules shall be disapproved by either House of Parliament within one month of the laying, such rules, or such parts thereof as shall be disapproved shall not be enforced was examined. The Rules for Hyde Park were made and published on September 30, 1872 when Parliament was not sitting. On November 18, 1872, the appellant was convicted u/s 4 of the Act as he did unlawful act in contravention of Regulation 8 contained in the first Schedule annexed thereto by delivering a public address not in accordance with the rules of the said Park but contrary to the statute, and it was inter alia contended on his behalf that in the absence of distinct words in the statute stating that the rules would be operative in the interval from the time they were made to the time when Parliament should meet next or if Parliament was sitting then during the month during which Parliament had an opportunity of expressing its opinion upon them, no rule made as supplementing the schedule could be operative so as to render a person liable to be convicted for infraction thereof unless the same had been laid before the Parliament. It was held, overruling the contention, that the Rules became effective from the time they were made and it could not be the intention of the Legislature that the laying of the rules before Parliament should be made a condition precedent to their acquiring validity and that they should not take effect until they are laid before and approved by Parliament. If the Legislature had intended that the rules should not take effect until they had the sanction of the Parliament, it would have expressly said so by employing negative language.

In paragraphs 23 & 24, of the aforesaid decision, the Court further observed as under:

23. In *Starey v. Graham* (1899)1 QB 406 where it was contended that the Register of Patent Agents Rules 1889 which had been repealed; by Rules of 1890 could not be reenacted by mere reference without complying with the provisions of Section 101, Sub-section (4) of 46 & 47 Viet. C. 57 according to which, a copy of the Rules of 1889 should also have been laid before both Houses of Parliament in order to make them valid, Channell, J. said.

"I somewhat doubt whether the provisions of Section 101 are more than directory and whether it is necessary in any particular case where reliance is placed on such rules to prove that in fact its provisions had been complied with."

24. In *Jan Mohammad Noor Mohammad Begban Vs. State of Gujarat and Another*, where it was urged by the petitioner that the rules framed by the Provincial Government in 1941 in exercise of the powers conferred on it u/s 26(1) of the Bombay Agricultural Produce Markets Act (22 of 1939) had no legal validity as they were not laid before each of the House of the Provincial Legislature at the session thereof next following as provided by Sub-section (5) of Section 26 of the act, this Court rejected the contention and upheld the validity of the said rules. The following observations made in that case by Shah, J. (as he then was) on behalf of the Constitution Bench are apposite (at pp. 394. 395):

The rules under Act 22 of 1939 were framed by the Provincial Government of Bombay in 1941. At that time there was no Legislature in session, the Legislature having been suspended during the emergency arising out of World War II. The session of the Bombay Legislative Assembly was convened for the first time after 1941 on May 20, 1946 and that session was prorogued on May 24, 1946. The second session of the Bombay Legislative Assembly was convened on July 15, 1946 and that of the Bombay Legislative Council on September 3, 1946 and the rules were placed on the Assembly Table in the second session before the Legislative Assembly on September 1, 1946 and before the Legislative Council on September 13, 1946. Section 26(5) of Bombay Act 22 of 1939 does not prescribe that the rules acquired validity only from the date on which they were placed before the Houses of Legislature. The rules are valid from the date on which they are made u/s 26(1). It is true that the Legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules, merely because they have not been placed before the Houses of the Legislature. Granting that the provisions of Sub-section (5) of Section 26 by reason of the failure to place the rules before the Houses of Legislature were violated, we are of the view that Sub-section (5) of Section 26 having regard to the purposes for which it is made, and in the context in which it occurs, cannot be regarded as mandatory. The rules have been in operation since the year 1941 and by virtue of Section 64 of the Gujarat Act 20 of 1964 they continue to remain in operation.

25. In the instant matter also it has not been provided in Article 323 of the Constitution that the reason for non-acceptance of advice of the Public Service Commission shall be subject to negative or affirmative resolution by the Legislature of the State. It has also not been provided therein that it shall be open for the Legislature of the State to approve or disapprove or modify the decision regarding non-acceptance of the advice of the commission.

26. Thus in the instant case it is clear that by the order of the Chief Minister, the matter in question was brought before the Cabinet. Since the proposal for appointments was inconsistent with the recommendation of Public Service Commission, the cabinet negatived the recommendation of the P.S.C. and granted promotion to opposite party Nos. 3 & 4 on the recommendation of the

D.P.C.. Therefore, it cannot be said that turning down of the recommendation of the P.S.C. by the Cabinet was beyond the jurisdiction or otherwise illegal.

27. It has also been submitted by the Learned Counsel for the petitioners that as the Public Service Commission had made recommendation mentioning the names of opposite parties 3 and 4 below the petitioners, the State Govt. could not have rejected the recommendation of the P.S.C. in part. In this regard, we are of the view that the State Govt. have not rejected the recommendation of the P.S.C. in part, but rejected the recommendation in toto and the Cabinet decision was taken in accordance with the Rules of Business of the Government and the recommendation of the DPC was accepted.

28. In view of the above-mentioned facts and circumstances of the case, this Court is of the view that it was beyond the scope of judicial review of the Tribunal to substitute its own decision in place of the decision taken by the State Government through the Cabinet. Therefore, we find no illegality, impropriety or manifest error of law in the impugned judgment and order passed by the Tribunal in dismissing the O.A.

The writ petition is devoid of merit and therefore, the same is dismissed. However, there would be no order as to costs.

N. Prusty, J.

29. I agree.