
(1970) 09 GUJ CK 0014
In the Gujarat High Court
Case No : Special C.A. No. 884 of 1969

K.A. Patel and Others

APPELLANT

Vs

The State of Gujarat and Others

RESPONDENT

Date of Decision : 21-09-1970

Acts Referred:

Bombay Civil Services (Classification and Recruitment) Rules, 1939 — Rule 2, 3, 4, 7
Constitution of India, 1950 — Article 226, 309
Government of India Act, 1935 — Section 241

Citation : (1971) 1 LLJ 469

Hon'ble Judges : B.J. Diwan, J

Bench : Single Bench

Judgement

1. In the special petition under Art. 226 of the Constitution of India, all the 16 petitioners who have been working as "Aval Karkuns" in the Revenue Department of the State of Gujarat, have approached this High Court for a writ of mandamus against the State of Gujarat and the Collector of Ahmedabad to treat the circular at annexure C to the petition as invalid and inoperative and they have asked for an order, direction or writ, directing the Collector of Ahmedabad to forbear from acting upon or implementing the circular at annexure C. They have further prayed for an order directing the respondent No. 2, the Collector, to forbear making orders of reversion against the petitioners merely on the grounds that they have not passed Revenue Qualifying Examination.

2. The facts leading to this petition may be shortly stated. All the petitioners joined the service of the State Government as clerks in the then State of Bombay and their periods of service vary from 16 to 24 years. All the petitioners have been working as Aval Karkuns under the Collectorate of Ahmedabad in the pay scale of Rs. 145-215. As shown in the annexure A to the petition, the petitioners have been working as Aval Karkuns for periods varying from 4 to 10 years. On March 1, 1969 the Collector of Ahmedabad published the seniority list permanent clerks and in the list different ranks were assigned to the petitioners as shown in column 4 of the list annexure A to the petition. Accordingly to the petitioners,

there was no rule which required that clerks should pass Revenue Qualifying Examination to be eligible for promotion to the grade of Aval Karkun. According to the petitioners, prior to 1956 the position was that the recruitment for Aval Karkuns provided for appointments by promotion to the post of Aval Karkuns from amongst clerks but the rules did not lay down passing of the Revenue Qualifying Examination as a condition for promotion. According to the petitioners, this position which prevailed before 1956 continued thereafter and even at the time of filing of this petition in 1969, the Government had not made any recruitment rule which lays down that a clerk should pass Revenue Qualifying Examination in order to qualify for promotion to the post of Aval Karkun. The recruitment rules for Aval Karkuns were revised and new rules under the proviso of Art. 309 of the Constitution of India were made on July 22, 1966 as shown in annexure B to the petition and even these rules do not provide for passing a Revenue Qualifying Examination by the clerk as a condition for promotion to Aval Karkun's post. The grievance of the petitioners is that even though there is no rule having the force of law, which requires passing of the Revenue Qualifying Examination as a condition to the promotion to the post of Aval Karkun the Collector Ahmedabad, the second respondent herein, took the view that success at the Revenue Qualifying Examination was necessary for promotion to the post of Aval Karkun. He further held the view that those persons who are already promoted to Aval Karkun's posts should not continued in the said posts if they have not passed the Revenue Qualifying Examination. In July and August, 1969, the second respondent passed orders of reversion against petitioners Nos. 9, 13, 14 and 15 reverting them to the posts of clerks from the posts of Aval Karkuns, only on the grounds that those persons had not passed the Revenue Qualifying Examination. However, because some other vacancies arose in the posts of Aval Karkuns, even petitioners Nos. 9, 13, 14 and 15 were not reverted to the posts of clerks and were continued as Aval Karkuns. The grievance of the petitioners is that the Collector of Ahmedabad was contemplating reversion from the post of Aval Karkuns of all those persons who have not passed the Revenue Qualifying Examination. According to the petitioners by the end of the month of June, 1969, 15 posts of Aval Karkuns were to come to an end and the Collector was contemplating reversion of the petitioners and others who had not passed the Revenue Qualifying Examination to the posts of clerks. The petitioners contend that there are large number of persons in Aval Karkun's posts juniors to the petitioners and yet those juniors were sought to retained on the ground that they have passed the Revenue Qualifying Examination, and those apprehended actions of the Collector have been challenged in the present proceedings. The Special Civil Application was filed on 24th June, 1969 and on June 25, 1969, the matter was admitted this Court. The rule was directed to be issued and ad interim injunction in terms of para. 19 was granted so that pending the hearing and final disposal of the petition respondent No. 3, the Collector of Ahmedabad, was restrained from making the orders of reversion against the petitioners merely on the ground that they had not passed the Revenue Qualifying Examination. After the petition was filed and rule was issued 23 persons who are

now joined as respondents Nos. 3 to 25 applied to the High Court to be joined as respondents to the petition and they also applied that the interim relief granted on June 25, 1969 should be vacated. Their Civil applications were granted on October 20, 1969 only as regards to the prayer to join them as parties and no other relief was granted on the said application. On this special application, therefore, I have heard both the learned advocates for the petitioners as well as for the respondents Nos. 3 to 25 besides the learned Assistant Government Pleader appearing on behalf of the State of Gujarat and the Collector of Ahmedabad.

3. In order to appreciate the rival contentions it is necessary to set out the history of the posts of Aval Karkuns. As far back as 1925, rules appear to have been made under the relevant section of the Government of India Act, 1915 as amended by the Government of India Act 1919 for classification and recruitment of Bombay Civil Service. Thereafter under S. 241 of the Government of India Act, 1935, Bombay Civil Services Classification and Recruitment Rules were formulated and so far as Revenue Department was concerned, a distinction was made between the provincial services and the subordinate service in the Revenue Department. Under the heading Bombay Provincial Services under the control of the Revenue Department there was an upper division of Deputy Collectors and the lower divisions of Mamlatdars. The scheme of these classification and recruitment rules was that under Rule 7, the Government was empowered to prescribe the qualifications in respect of age and education required to be possessed by the candidate for the purpose of promotion and for joining subordinate service and the qualifications are set out in appendices C and D. It is important to note that Rule 4 of the rules in appendix C prescribes the qualifications of the candidates for the posts of Mamlatdars : the members of the Subordinate Revenue Services must have passed the qualifying examination unless specially exempted by the Commissioner and must also have previously served for at least one year as Aval Karkun. Period during which an officer has acted as Mamlatdar and/or Mahalkari will count towards the prescribed period of one year. As regards the Subordinate Revenue Service, Appendix D only mentions the posts of Talatias and no other posts. The posts of Aval Karkuns and that of Mahalkari are not mentioned in appendix C. However, on 6th April, 1940, a resolution was issued by the then Government of Bombay laying down instructions concerning appointments and promotion in the Subordinate Revenue Service of Province of Bombay excluding the town of Bombay. The resolution of the Government is in these terms :

"The Subordinate Revenue Service Rules published in Government notification No. 1144/24 dated 1st October, 1925, and amended from time to time, are hereby cancelled. The rules dealing with first appointments to posts in that service have been included in the Bombay Civil Services Classification and Recruitment Rules. The instructions embodied in the rules of 1925 have been revised and are appended to this resolution."

The remaining portion of the resolution is not material for the purpose of this

judgment. In the instructions which accompanied the resolution of 6th, April, 1940, clause (1) provided that the instructions were to apply to different classes of Government service in the Subordinate Revenue Service and Mahalkari was one of the posts mentioned in instruction No. 1. In clause (2) of these instructions, scales of pay in the Subordinate Revenue Service were laid down and so far as Subordinate Revenue Service was concerned, there was an upper division prescribing one scale and lower division prescribing another scale. By subsequent instructions which were properly issued by the Government, it was made clear that Aval Karkun's posts was in the upper division. In clause (4) of these instructions it is laid down that no clerk shall be entitled to promotion from the lower to the upper division unless he is regarded as having character and ability required to hold executive posts involving the exercise of magisterial powers or the assumption of duties of supervision and control over subordinate village and office establishments. It was further provided by sub-clause (b) of clause (4) that promotion from lower to a higher grade shall ordinarily be made by selection according to seniority and efficiency from among those who are regarded as generally qualified by reason of good character and intellectual attainments and who are not barred by special faults or bad record. Under clause (12) a candidate selected for the lower division shall be required to pass the Sub-Service Departmental Examination within three years of the date of his enlistment as candidate, and except as provided in clause (b), failure to pass the examination within the prescribed period will entail loss of appointment. Clause (15) of these instructions is very much material for the purpose of the judgment and is as under :

"15. (a) No subordinate shall be confirmed in the upper division unless he has passed the Revenue Qualifying Examination.

(b) The Collector shall, from time to time, grant permission to clerks specially selected by him appear for the examination. Such permission shall not ordinarily be granted to clerks unless they have completed five years' continuous service in the case of graduates and seven years in the case of others. The number of clerks to be selected will depend on the number of prospective vacancies in the upper division, due allowance being made for proportion of ultimate failures in the examination.

(c) The Collector shall exercise great care in granting permission and allow only such candidates to appear as show good promise and have a good chance of passing the examination. Permission should be given for a specific examination in a specific year one year in advance, and, before a candidate is allowed to re-appear, the results of the first examination should be carefully considered. Candidates who apply for it should be granted leave to prepare themselves for the examination.

(d) A clerk permitted to appear for the examination shall be required to pass it before he has completed seventeen years of pensionable service and before he is forty years of age. The date of passing the examination shall not affect his

seniority but failure to pass within the prescribed limits will involve permanent relegation to the lower division."

It appears that these instructions of April 6, 1940 were amended and revised from time to time and ultimately on June 14, 1966, a notification was issued by the Gujarat Government laying down rules for Revenue Qualifying Examination. Under those rules, which necessarily superseded the earlier rules, it was provided by Rule 1 that the subordinates of the lower division of the Subordinate Revenue Service will required to pass the Revenue Qualifying Examination to be held by the Gujarat Public Service Commission. Clause (2) of these rules stated that no subordinate of the lower division of the Subordinate Revenue Service shall be confirmed in the upper division unless he had passed the Revenue Qualifying Examination. A subordinate who has been provisionally promoted to the upper division for want of qualified candidates would be reverted to the lower division on the availability of the qualified candidates. Officiating promotions to the upper division will not be given to any person, who has not passed the examination, if there is any other person, even junior to him, who has passed the examination and is considered suitable for promotion.

4. After these rules for the Revenue Qualifying Examination were made on June 14, 1966, the Governor of Gujarat made Recruitment Rules for the post of Aval Karkuns for the Collectorates and these Recruitment Rules were made in exercise of the powers conferred upon the Governor by proviso to Art. 309 of the Constitution of India. The relevant portion of these rules is Rule 1 and it is in these terms :

"Appointment to the posts of Aval Karkuns shall be made :

(a) by direct selection on the result of a competitive examination held by the Gujarat Public Service Commission in accordance with the scheme hereto annexed or;

(b) by promotion from amongst clerks of the Subordinate Revenue Service.

The ratio of direct recruitment and promotion will be 1 : 2." Rule 2 lays down conditions for appointment by direct selection and Rule 3 which has some relevance provides that a candidate appointed by direct selection will be on probation for a period of two years, and will have to undergo theoretical and practical training as may be prescribed by Government during the period of probation. He will have to pass the Revenue Qualifying Examination during the probation period as provided in the scheme of training. He will be discharged from service if he fails to pass the examination within two chances. After probation period is over, the direct recruit will, if found fit, be appointed to officiate as Aval Karkun, provided Government may at its discretion extend the probationary period of a candidate who has not passed Revenue Qualifying Examination or completed the course of training satisfactorily or whose work is not found to be satisfactory. Confirmation will follow in due course when substantive vacancies are available. After appointment the direct recruits are

required to pass the examination in Hindi according to the rules and a candidate whose mother-tongue is not Gujarat, shall have to pass the Gujarati language examination according to the rules prescribed by the Government. Annexures to these rules set out the scheme for holding competitive examination for direct recruitment to the post of Aval Karkuns in the Collectorates.

5. The main question that I have to consider is whether after the making of these rules for recruitment to the post of Aval Karkuns by the Governor of Gujarat under proviso to Art. 309, it is permissible for the Government authorities to insist that a clerk who has already been promoted to the post of Aval Karkun even though he had not passed the Revenue Qualifying Examination, is liable to be reverted merely because he has not passed the Revenue Qualifying Examination. My learned brother D. A. Desai, J., has set out the history of the post of Aval Karkun and the relevant rules pertaining thereto in his judgment delivered in Spl. C.A. No. 1430 of 1968, on date 20-8-1969 (Guj.). My learned brother has pointed out that the Government of Bombay issued instruction concerning appointments and promotion in the Subordinate Revenue Service in the Province of Bombay. Subordinate Revenue Service was divided into two divisions, namely, Upper Division and Lower Division. Aval Karkuns belong to the Upper Division. One of the conditions for earning promotion from the Lower Division to the Upper Division was passing Revenue Qualifying Examination. It further provided that no one promoted Upper Division shall be confirmed unless he has passed the Revenue Qualifying Examination. Then my learned brother summarised the position and rightly pointed out that a clerk recruited in the Lower Division could be promoted to the Upper Division as Aval Karkun but he would not be confirmed as an Aval Karkun unless he passed Revenue Qualifying Examination. But the question which has arisen before me, namely, the position prevailing after the making of the Recruitment Rules for the post of Aval Karkun under the proviso to Art. 309 of the Constitution, did not arise for consideration before my learned brother.

6. The legal position of administrative rules or Government instruction or Government rules made on the administrative side, as compared with rules made under proviso to Art. 309, has now been clarified. In *B.N. Nagarajan and Others Vs. State of Mysore and Others*, , the Supreme Court pointed out the position as regards the instructions or rules made by the Government on administrative side without the making of rules under the proviso to Art. 309, of the Constitution. Sikri J., delivering judgment of the Supreme Court pointed out that it was not obligatory under proviso to Art. 309 to make rules of recruitment, etc., before a service can be constituted or a post created or filled. Moreover, the Supreme Court pointed out that the Legislature of the State has power to make laws, and hence the State Government will exercise power in respect List II, Entry 41, State Public Services. The Supreme Court held in that case that there was nothing in the terms of Art. 309 of the Constitution which abridges the power of the executive to act under Art. 162 of the Constitution without a law, and in this connection the earlier decision of the Supreme Court in *Rai Sahib Ram Jawaya*

Kapur and Others Vs. The State of Punjab, , was relied upon. In the decision in Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, , it was held by the Supreme Court that it is not necessary that there must be a law already in existence before the executive is able to function and the power of the executive are limited merely to the carrying out of these laws. This decision of the Supreme Court was thus summarised in the subsequent decision of the Supreme Court in Sant Ram Sharma Vs. State of Rajasthan and Another, . In paragraph 7 at page 1914, (of A.I.R.) Ramaswami, J., delivering judgment of Supreme Court observed :

"It is true that there specific provision in the rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf, the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officer concerned to selection grade post. It is true that Government cannot amend or supersede statutory Rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rule already framed."

It is to be emphasised at this stage that the instructions issued by the Government will prevail if they are not inconsistent with the rules already framed. In para 8, B.N. Nagarajan and Others Vs. State of Mysore and Others, , was summarised as pointing out that it is not obligatory under the proviso to Art. 309 of the Constitution to make rules of recruitment, etc., before a service can be constituted or a post created or filled and, secondly, the State Government has executive power in relation to all matters with respect to which the Legislature of the State has power to make laws.

7. In K.P. Krishnankutty Menon and Others Vs. State of Kerala, , a Division Bench of the Kerala High Court, following the decision in B. N. Nagarajan [1967 - I L.L.J. 698], held that there is a distinction between a rule framed by the Governor under the Proviso to Art. 309 of the Constitution and an executive order passed by Government. Both are not the same; though ever order passed by Government is required to be expressed in the name of the Governor, it does not follow that because an executive order is required to be expressed in the name of the Governor it can be considered to be a rule under the proviso to Art. 309. It was further held by the Kerala High Court that the conditions of service of Government employees can be prescribed either by rules framed under the proviso to Art. 309 or in their absence by executive orders. If there are no rules covering the subject, there is no objection in Government passing executive orders regulating it. But once the rules are framed under the proviso to Art. 309 covering the subject the rules cannot be varied or modified by executive orders as the field is already covered by the rules. An executive order purporting to alter or modify an already existing rule under Art. 309 has no legal validity and is inoperative and no legal rights can be based on such orders.

8. In Spl. C.A. No. 31 of 1961, dated 13-8-1964 (Guj.), a Division Bench of this High Court consisting of Shelat, C.J. and Bakshi, J. considered this point regarding statutory rules and Government instructions. There the Bombay Civil Services Classification and Recruitment Rules came up for consideration before the Division Bench. It was contended that the rules contained in Chapter V of the Manual of Department and Language Examination Rules, have statutory force and govern the conditions of service of the employees in the Land Records Department and, therefore, the Government was not competent to relax any of the qualifications necessary under Rule 3 of that chapter. The Division Bench observed :

"It is well-known rule that once Government has framed rules under a statutory power, it would not be open to the Government to depart from such rules in any particular case, on an ad hoc basis, even though it has the power to change or vary the rules at any time under the procedure laid down by the statute. The reason is that statutory rules are as much binding upon the Government as upon the individual and in the case of non-compliance they may be enforced by mandamus. But this does not mean that all the existing body of rules have statutory force. There are several rules which have neither been framed under the authority conferred by the Constitution or any previous Constitution Act or by any specific Act, but which are incorporated in the Government manuals or circulars or orders having no statutory authority. Such rules must be distinguished from service rules which have a statutory force. Therefore, whenever a question arises whether any particular service rule has statutory force or not, the Court has to inquire into the source of the power or the authority under which the rule has been made and distinction has always been made between rules which are non-statutory in origin and rules which have a statutory origin."

9. In Special C.A. No. 760 of 1967 (Guj), which was decided along with several other matters on January 30, 1969 by a Division Bench of this High Court consisting of Bhagwati C.J., and Vakil, J., the same principles were laid down.

"Now there are several factors which clearly to the inference that the Rules of 1960 were not statutory rules made by the Government under the proviso of Art. 309 of the Constitution but were administrative rules made by the Governor in exercise of the executive powers of the State Government. In the first place, the Rules of 1960 are styled as a resolution of the Government of Bombay, Public Works Department, and the body of the resolution and particularly the words "after careful consideration of the recommendations of the committee the Government is now pleased to issue the following orders in the matter" also show that it is the Government which is passing the order in exercise of its executive power and not the Governor in the exercise of his power under the proviso to Art. 309. Secondly, there is no recital anywhere in the Rules of 1960 that they are been made by the Governor in exercise of the power conferred upon him under the proviso to Art. 309 as we find in the Rules of 1939. The

contrast between the language of the Rules of 1939 and particularly the preamble of those rules and the language of the Rules of 1960 clearly brings out the difference in the nature of the power purported to be exercised. The very form of the words in which the Rules of 1960 are couched shows that they are conveying an executive decision of the State Government and are not intended to be rules issued under proviso to Art. 309. Then again, the resolution embodying the Rules of 1960 is addressed various departments of the Government and officers of the Public Works Department up to the level of Executive Engineers and it is not published in the Official Gazette unlike the Rules of 1939 which were admittedly published in the Official Gazette. It is a little surprising that if the Rules of 1960 were statutory rules intended to be made binding rules of conduct, they should not have been published in the Official Gazette like any other legislation which intended to have a statutory binding effect. It is also significant to note that the Rules of 1960 were, as admitted by the State in paragraph 11 of the affidavit in reply filed by S. M. Desai, Under Secretary to the Government, Public Works Departments in Special Civil Application No. 760 of 1966 passed by the Government of Bombay in the Public Works Departments."

It was pointed out by the Division Bench that the subject of "Classification and Recruitment Rules" was one of the subject allotted to the Political and Services Department under Rule 4 of the Rules of the Business and that it is therefore apparent that if the Governor was making the Rules of 1960 in exercise of his power under the proviso to Art. 309, that business would have been transacted in the Political and Services Department and not in the Public Works Department, and on consideration of all these different factors the Division Bench held that the Rules of 1960 were not made by the Governor under the proviso the Art. 309 but they embodied an executive decision of the Government in the Public Works Department.

10. Applying these principles laid down by the Division Bench in Spl. C.A. No. 760 of 1967, dated 30-1-1969 (Guj.) and several other matters, it is clear that the resolution of April 6, 1940, as amended from time to time and the resolution of June 14, 1966, laying down the rules for Revenue Qualifying Examination, were issued by the Government in exercise of the executive function as distinguished from statutory rules made under proviso to Art. 309 of the Constitution or under S. 241 of the Government of India Act, 1935. It is true, as the Supreme Court has pointed out in B. N. Nagarajan's case, [1967 - I L.L.J. 698], referred to above, and also as pointed out by the Kerala High Court, before the Governor frames the rules in exercise of the power under proviso to Art. 309 of the Constitution, the State Government by executive action can lay down rules and qualifications for recruitment to different services. But once the statutory rules under proviso to Art. 309 have been made, those statutory rules must hold the field, and all the previous instructions and other rules which are inconsistent with those statutory rules must be deemed to have been abrogated or superseded by the statutory rules.

11. In the instant case, therefore, the question that I have ask myself is whether there is any inconsistency between the statutory rules made by the Governor on July 22, 1966 for recruitment to the post of Aval Karkuns in the Collectorates in exercise of the powers conferred by proviso to Art. 309 of the Constitution and the previous departmental instructions which prescribed rules for promotion to the post of Aval Karkuns, from the ranks of subordinate clerks. It is not disputed before me that these recruitment rules of 1966 were made by the Government of Gujarat, there was only one source of recruitment for post of Aval Karkun, namely the promotion from clerks in the lower division, and the instructions issued by the Governor resolution of April 6, 1940 as amended from time to time and the rules for the Revenue Qualifying Examination issued on June 14, 1966, provided the different rules and conditions for promotion to the posts of Aval Karkuns. By the rules made on July 22, 1966 by the Governor of Gujarat for the first time provision was made for recruitment to the posts of Aval Karkuns by direct recruitment on the results of the competitive examination held by the Gujarat Public Service Commission in accordance with the scheme annexed to the rules. These recruitment rules for the first time provided for the direct recruitment by sub-clause (b) of Rule 1. It was provided that 2/3rd of the posts of Aval Karkuns should be filled by promotion from amongst the clerks in the Subordinate Revenue Service. These statutory rules nowhere prescribe that those clerks of the Subordinate Revenue Service who are promoted to the posts of Aval Karkuns should have passed the Revenue Qualifying Examination. Rule 3 of these rules of 1966 clearly indicates that the existence of the Revenue Qualifying Examination was present to the mind of the authority making the rules, because Rule 3 of these rules clearly lays down that a direct recruit must pass the Revenue Qualifying Examination during the probation period as provided in scheme of the rules and unless he passes Revenue Qualifying Examination, his period of probation cannot be said to have been properly completed. In spite of the fact that for one source of recruitment, namely direct recruitment, the necessity for passing Revenue Qualifying Examination was in terms laid down in those rules as a condition of recruitment, no such condition was prescribed for the promotees from amongst the clerks of the Subordinate Revenue Service who were promoted to the post of Aval Karkuns.

12. In the Chief Secy., to the Govt. of Mysore v. S. C. Chandraiah,, Civil Appeals Nos. 1942 to 1950 of 1966, decided by the Supreme Court on 14-9-1966, the facts were that the new State of Mysore came into existence on November 1, 1956 under the provisions of the State's Reorganization Act. In the former State of Mysore there were two categories of clerks in the Mysore Secretariat Service, namely, first division clerks and second division clerks. After the reorganization of the State, the former were designated as assistants and the latter as junior assistants. After the reorganization of the State, clerks discharging similar function in those parts of Madras, Hyderabad and Bombay States which were merged in the Mysore State had to be integrated with those working in the Mysore Secretariat. The respondents were temporarily promoted as assistants on

different dates between December 21, 1957 and January 19, 1965, pending finalisation of the inter-State seniority list. On September 15, 1965, the Government of Mysore purporting to act under Rule 10A of the Mysore State Civil Services (Kannada Language Test and Departmental Examinations) Rules, 1962, (hereinafter called the 1962 Rules), ordered reversion of the respondents to the post of junior assistants on the ground that they had not passed the prescribed departmental examinations within the time fixed. The respondent filed petitions in the High Court of Mysore under Art. 226 of the Constitution challenging the said orders of the Mysore Government. The High Court quashed the orders of the Mysore Government reverting the respondents, mainly on the ground that the respondents were not promoted subject to the said condition and that was not a condition of service prescribed by any of the rules governing their service. In appeal before the Supreme Court also the very same two conditions were taken up for consideration, viz., whether the respondent were promoted subject to the passing of the prescribed departmental examination and whether the condition was a condition of service prescribed by any of the rules governing their service. After examining the materials on record, the Supreme Court came to the conclusion that the executive orders passed before October 31, 1957, were superseded by the Mysore, Secretariat Services Recruitment Rules, 1957. Neither under the 1957 rules nor under the 1962 rules the passing of departmental examinations and tests was made a condition for promotion of junior assistants as assistants. No such condition was imposed on the respondents in the orders issued by the Government promoting them as assistants. If so, in terms of S. 10A of the 1962, Rules, they could not be reverted to the grade from which they were promoted, as their promotions were not subject to condition that they pass the departmental examinations and the language test; and the Supreme Court held that the decision of the Mysore High Court was correct.

13. In Mohammed Bhakar v. Krishna Reddy, Civil Appeal No. 811 of 1968, decided by the Supreme Court on 15-4-1968, the Supreme Court had occasion to refer to H. G. Chandraiah's case, Civil Appeals Nos. 1942 to 1950 of 1966, dated 14-9-1966 (S.C.) and while pointing out the history of the different rules regarding the Secretarial Services, it was pointed out that after the decision in Chandraiah's case, Civil Appeals Nos. 1942 to 1950 of 1966, D/- 14-9-1966 (S.C.), rules were amended in 1966; and rules as to departmental examinations were laid down and the question before the Supreme Court in Mahommed Bhakar's case, Civil Appeal No. 811 of 1968, D/- 15-4-1968 (S.C.) was whether an allottee from the ex-State can be asked to pass a departmental examination as a condition of promotion without obtaining the approval of the Central Government as required by the provisions of the States Reorganization Act.

14. In the instant case before me, at the time when the different petitioners were promoted to the post of Aval Karkuns, passing of the Revenue Qualifying Examination was not a condition of promotion; it was a condition for confirmation the higher post but not a condition for promotion; and passing Revenue Qualifying Examination also was not one of the conditions of service. At all

relevant times, as I have already pointed out in the course of this judgment, passing of the Revenue Qualifying Examination helped the Government servant concerned in getting confirmation to one of the posts in the upper division if he passed the examination and if because of exigencies of service any such person was promoted without passing the Revenue Qualifying Examination he was liable to be reverted on the availability of a qualified candidate. But the position under the rules, which were in force, prior to June 14, 1966, was that no confirmation would be given and he was not to be eligible for being included in the select list prepared for Mamlatdar's post. The rules made under Art. 309 on July 22, 1966 do not mention any qualification for promotion to the post of Aval Karkun, when it mentions promotion as one of the sources of recruitment. It was contended before me on behalf of the respondent that promotion referred to in rule 1(b) of the Rules of Recruitment, 1966, means promotion under the rules which were in existence prior to July 22, 1966. In my opinion, the departmental instructions which were force prior to July 22, 1966 must be deemed to have been superseded by the recruitment rules made under proviso to Art. 309 on July 22, 1966. Since these rules do not lay down any qualification by way of passing the Revenue Qualifying Examination as a condition for promotions it must be held that after the recruitment rules came into force, those clerks in the Subordinate Revenue Service, who were promoted to the post of Aval Karkun were not required to pass the Revenue Qualifying Examination as a condition of promotion. Under these circumstances, the reversion of the different petitioners from the post Aval Karkun to the post of clerk merely because they had not passed the Revenue Qualifying Examination would be contrary to the scheme and provisions of the recruitment rules dated July 22, 1966, made by the Governor of Gujarat under proviso to Art. 309 of the Constitution and hence the orders of reversion passed against the petitioners or any one of them merely on the ground that they had not passed the Revenue Qualifying Examination must be quashed and set aside.

15. Though in prayers (a) and (b) of the petition, challenge is to the resolution of the Government, dated December 28, 1962, arguments at the ultimate stage were based on the recruitment rules made on July 22, 1966; and in the course of the arguments before me the circular, annexure C to the petition, was not brought under attack at all.

16. In view of the above conclusions, this special civil application is allowed and the rule is made absolute with no order as to costs. I direct that a writ mandamus be issued against respondent No. 2 Collector of Ahmedabad restraining him from reverting any of the petitioners from the post of Aval Karkun to the post of clerk in the Subordinate Revenue Service merely on the ground that they had not passed the Revenue Qualifying Examination. I wish to make it clear that nothing that I have stated in this judgment should be considered as preventing the authorities concerned from reverting any of the petitioners on merits or on the ground of any administrative considerations other than the passing of the Revenue Qualifying Examination.