

(2010) 12 KAR CK 0021

In the Karnataka High Court

Case No : Writ Petition No's. 3788-3789, 6416-6417, 6418-6419, 6500-6508, 6510-6513, 13191, 23682 and 23683 of 2009

Karnataka Public Service Commission and Others

APPELLANT

Vs

K. Sharada and Others

RESPONDENT

Date of Decision : 15-12-2010

Acts Referred:

Constitution of India, 1950 — Article 15 (4), 16, 16 (4)
Rural Candidates Act, 2000 — Section 3, 5

Citation : (2010) 12 KAR CK 0021

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : Nanjunda Reddy for Reuben Jacob, in Writ Petition Nos. 6500-6508, 6416-6417, 6418-6419, 6510-6513 of 2009, Subramanya Jois and B.S. Vijayalakshmi, in Writ Petition Nos. 3788-3789 of 2009, S.V. Narasimhan for P. Changalaraya Reddy, in Writ Petition No. 13191 of 2009 and S.V. Narsimhan in Writ Petition No. 23682, 23683 of 2009 and M. Narayan Bhat, in Misc. W. No. 6194/2010 in writ Petition Nos. 6500-6508 of 2009, for the Appellant; Ravivarma Kumar for Ravivarma Kumar, Associates for R1, 3, 5, 7 and 8, K. varaprasad, for R2 and R4, Ranganatha S. Jois, for R6, Basavaprabhu S. Patil Associates, for R9, Sheela krishnan, AGA for R10, 11 and 12, Subbarao and Company and Sanjeev Angadi and Associates for R1 and R2 in Writ Petition Nos. 3788-3789 of 2009, K. Subba Rao for Subba Rao and Company for R1, P.S. Rajagopal for P.S. Rajagopal, Associates for R2 and Sheela Krishnan, AGA for R3 and R4 in Writ Petition Nos. 6416-6417 of 2009, M.R. Shailendra, for R1, Jois Associates and G.K. Basavaraja Patil, for R2 and Sheela Krishnan, AGA for R3 and R4 in Writ Petition Nos. 6418-6419 of 2009, Ranganath S. Jois, for R1 and R2, S.G. Pandit, for R3, P.S. Rajagopal for P.S. Rajagopal Associates, M.N. Prasanna and K. Puttegowda, for R4 and Sheela Krishnan, AGA for R5 and R6 in Writ Petition Nos. 6510-6513 of 2009, Sheela Krishnan, for R1, Sanjeev Angadi Associates for R2, Pandith Associates, for R3 and R5, Respondent-5 Served Basavaprabhu S. Patil for Basavaprabhu S. Patil Associates, A. Niranjankumar, for R6, Ranganatha S. Jois, for R7 and M.R. Shailendra, for R8 in Writ Petition No. 13191 of 2009 and Sheela krishnan, for R1, Nanjunda Reddy for Reuben Jacob, for R2, S.G. Angadi, for R3, Respondents 4, 5 and 6, P.S. Rajagopal Associates, M.N. Prasanna and K. Puttegowda, for R8 in Writ Petition No. 23682 of 2009, Shella Krishnan, for R1, Nanjunda Reddy for Reuben Jacob, for R2, S.G. Angadi, for R3, R4 Steps not taken R-5 and 6 and P.S. Rajagopal for Rajagopal Associates for R8 in Writ

Judgement

N. Kumar, J.—In all these writ petitions, the order dated 19.12.2008 passed by the Karnataka Administrative Tribunal is challenged. Therefore, all these petitions are taken up for consideration together and disposed of by this common order.

W.P. Nos. 6500 to 6508/2009:

2. The Karnataka Public Service Commission (for short hereinafter referred to as the "Commission"), issued a notification dated 17-4-07 inviting applications for recruitment to the posts of Assistant Executive Engineers in the Public Works Department. The number of posts notified was 52 in the said notification, which comprised 42 from amongst open competition candidates and 10 from in-service candidates. The last date for receipt of applications was 26.05.2007. Subsequently, the Commission issued another notification dated 08-08-2007, by which the number of posts was enhanced. The number of posts notified in total was 104, out of which, 84 posts were earmarked for open competition candidates and 20 for in-service candidates.

3. The Government of Karnataka issued a Government Order dated 30.03.02 regarding the reservation policy under Articles 15(4) and 16(4) of the Constitution of India, laying down the comprehensive creamy layer policy. The said Annexure-11 to the said Government Order provides a list of persons who are not eligible to claim reservation under category II-A, II-B, III-A and III-B of the Backward classes. Note 2(2) of the said Annexure provides that a candidate who is a Group-B officer in the services of the Government is not eligible for reservation under the said category of backward classes.

4. The Karnataka Reservation of Appointments of Posts (in the Civil Services of the State) for Rural Candidates Act, 2000, for short the Act", was brought into force on 16th February, 2001. Section 3 of the said Act provided that 25% of the vacancies earmarked for direct recruitment in each of the categories of general merit, Scheduled Castes and Scheduled Tribes and each of the categories of other Backward Classes shall be reserved for rural candidates. The term "rural candidate" had been defined in the said Act. Proviso to Section 3 of the said Act provided that the concept of creamy layer made applicable as per the order of the Government with regard to reservation issued under Clause 4 of Article 16 of the Constitution shall apply mutatis mutandis to the case of a rural candidate belonging to General Merit or other Backward Classes, except category I. Exercising power u/s 5 of the said Act, the State Government has issued a Government Order dated 13.02.01 which clarifies certain aspects with regard to reservation of rural candidates. The said Government Order also provides for the authorities who are competent to issue certificates for the said purpose and

prescribes forms thereto. Clause I of the said Government Order provides that the concept of creamy layer shall apply to candidates belonging to general category and categories II-A, II-B, III-A and III-B of Backward Classes.

5. The Respondents 1 to 9 in application No. 1770/08, 1792/08, 1794/08, 1801/08, 1949/08. 3403/08, 4795/08, 4796/08 and 4797/08 are presently working in the Public Works Dept. (PWD) and the Water Resources Development Dept. (WRDD) as Assistant Engineers. They applied in pursuance of the said notification. They are all eligible to be considered under the in-service quota. The Respondents have claimed the benefit of belonging to different group i.e. II-A, II-B, III-A and III-B of the Backward Classes categories, in favour of which categories, certain posts are reserved as per the reservation policy of the Government.

6. Respondents 1 to 9 are admittedly Group-B officers. Except Respondents 2 and 4, the rest of the Respondents have produced certificates issued by the Tahsildar in Form-F which is a caste certificate issued to persons belonging to Backward classes categories other than for category I. The said certificate certifies that the persons in whose favour it is issued does not come within the creamy layer as prescribed by Government of Karnataka. In respect of Respondents 2 and 4, the concerned Tahsildars have refused to issue such a certificate in Form-F on the ground that they hold Group-B posts and consequently, come within the creamy layer as described in the said Govt. Order. Noticing the said anomaly and certificates issued by the Tahsildar and taking into consideration of the Government Order and the further admitted position that the Respondents No. 1 to 9 hold Group-B posts in the Govt., the Commission informed the said Respondents that their cases cannot be considered under the categories II-A, II-B, III-A and III-B of the Backward classes.

7. Aggrieved by the said action of the Commission, Respondents 1 to 9 have individually filed applications before the Tribunal. The Respondents No. 2 and 4 in whose favour caste certificates have not been issued by the concerned Tahsildars sought a direction to the Commission to consider their claim under the concerned category of Backward classes and consequently for a direction to call them for personality test under the said category for selection and appointment to the post of Assistant Executive Engineers. The other Respondents, Respondents 1, 3 and 5 to 9 have sought for a direction to the Commission not to ignore the claim of the said Respondents for selection under the respective categories of Backward Classes. In addition to the aforesaid applications, several other applications had been filed and pending before the Tribunal.

In W.P. Nos. 6418 and 6419:

8. The Respondents 1 and 2 in application Nos. 1753/08 and 1546/09 are similarly placed as that of Respondents 1 to 9 in the aforesaid writ petitions and were not interviewed on the ground that they are claiming reservation on the basis of false caste certificates. Challenging the said action of the Commission,

Application No. 1753/08 and 1746/08 were filed.

W.P. No. 6510 to 6513/2009:

9. The Respondents No. 1 to 4 in Application Nos. 1756, 1757, 1758 and 1759 of 2008 are all working as Assistant Engineers in the Department of Public Works. They applied under the general category in pursuance of the notification issued by the Commission for recruitment of Assistant Executive Engineers under the "in service" quota. The Respondents also claimed the benefit of reservation under General Merit (rural) category. In support of their claim, they have produced certificates in Form 2 issued by the concerned authorities. The Respondents were issued interview letters requiring them to appear for the personality test by the KPSC. The said Respondents were called for interview under the General Merit (rural) category as they were eligible under the same. The Respondents were not eligible to be called for interview if their candidature were to be considered under the general category. The Respondents are admittedly Group "B" officers in the services of the State. On the ground that they come within the creamy layer as prescribed in the Govt. order dt. 30-3-02. They were not interviewed. If they are not considered under General merit (rural) category they were not eligible to be interviewed. Aggrieved by the action of the Commission in not extending the benefit of General Merit (Rural) category, the said Respondents filed applications before the Tribunal seeking for a direction to the KPSC to permit them to participate in the personality test. In the said applications, they also sought for a declaration that portion of the Government Order dated 30-3-02 bringing the General Merit (rural) category under creamy layer concept and prescribing Form 1 as illegal and invalid.

10. The Applicants in Application No. 5013/07 corresponding to WP No. 6416/07 - R. Ravichandra and Application No. 5015/07 corresponding to WP No. 6417/07 - K.C. Shivakumar, working in other Government Departments. They have not been interviewed by the KPSC on the ground that they are over aged. They contended that Rule 6(3)(b) of the General Recruitment Rules applies to the case and they are entitled for the benefit of age relaxation as contained therein, in which event, the KPSC committed a grave illegality in not calling them for interview.

11. The Petitioner-G. Kumar is working as an Assistant Engineer, presently on deputation in Bangalore Development Authority. He was appointed as an Assistant Engineer in Public Works Department during 1991. His recruitment was in terms of the Rules called the Karnataka Public Works Engineering Department Services (Recruitment) Rules, 1988 which came into force from 17.8.1989. It is stated that the Karnataka Public Works (Irrigation Services) (Recruitment) Rules, 1988 also came to be framed simultaneously. Thus there were separate and distinct recruitment rules pertaining to Karnataka Public Works Engineering Department and Karnataka Public Works Irrigation Department. By a notification dated 22.2.2007 the Karnataka Public Works Engineering Department Services (Recruitment of Assistant Executive Engineers Division-1 by Competitive

Examination) Rules, 2007 prescribing the method of recruitment to the post of the Assistant Executive Engineer (Division-1), mode of conducting competitive examination, preparation of select list, etc., was issued. The Public Works Commission vide their notification dated 17.4.2007 invited applications from eligible candidates for filling up 52 posts of Assistant Executive Engineer (Division-1) out of which 10 posts are earmarked for in-service candidates in KPWD. Petitioner submitted his application as against the said notification. In the format of the application at Sl. No. 7, it is specifically stated as under:

Do you claim in-service quota?: Yes ☐ No. ☐ For PWD employees only. If so, shade the appropriate circle

12. On 8.8.2007 yet another notification came to be issued enhancing the number of posts from 52 to 104 out of which 84 posts were earmarked for open competition candidates and 20 posts for in-service candidates. Petitioner who belongs to category 2A claimed reservation under 2A. Respondents 3 to 8 have been selected and appointed in Water Resources Department (for short WRD) during the year 2002-2003. The Petitioner contends that the two departments are separate entities having separate recruitment rules. On 14.1.1999 KPW (Irrigation Services) (Recruitment of Assistant Engineers and Junior Engineers) Special Rules, 1998 was issued. Rule 7(2)(b) of the said Rules specifically provides the grace marks of 5% for each year of service subject to maximum of 30% shall be added to the percentage of total marks secured by a candidate in the qualifying examination, if such candidate has served on contract basis as Assistant Engineer or Junior Engineer as the case may be in the Irrigation Department of the State. A candidate who is working on contract basis in PWD is not eligible for such weightage of 5% for each year of service like a contract engineer in the Irrigation Department. Thus, the recruitment rules of two departments operate in separate fields and departments are separate. It is only after the publication of marks list and eligibility list with reference to register number the Petitioner learnt that ineligible WRD Engineer candidates have been considered under in-service post. The Petitioner was not aware of the said fact at the time of participating in the written examination. It is only after coming to know of the same he has preferred this Writ Petition challenging their selection among other grounds.

13. The Public Service Commission in the reply before the Tribunal traversing the aforesaid allegations stated that after receipt of applications from officials working in Water Resources Department including Respondents 3 to 8 clarification has been sought from PWD in this regard. PWD as per letter dated 31-1-2008 a photocopy of which is enclosed as Annexure-R1 has informed that the applications forwarded by the Applicants through the Chief Engineer, PWD (Communication & Buildings) or Chief Engineer, Water Resources Development Organisation only should be treated as applications from in-service candidates. Accordingly, applications of in-service candidates including Respondents 3 to 8 forwarded through the Chief Engineer, PWD (Communication & Buildings) or

Chief Engineer Water Resources Development Organisation only have been entertained. It is learnt that though PWD and Water Resources Development Organisation are bifurcated the separation of the two departments is not fully complete and that common seniority/gradation list of Assistant Engineers is being operated for the purpose of promotion. It is in this circumstance, Respondents 3 to 8 have been permitted to apply for the post. Any way, as far as this contention of the Applicant is concerned the same has to be traversed by Respondent No. 1 State of Karnataka.

14. The State at para 6 of the statement of objections have made their position clear. They submitted that, they have instructed the KPSC not to consider a person working in the Government as in-service candidate, except the Department of Public Works and Irrigation. This instruction came to be issued by this Respondent considering the fact that Public Works Department has issued a common seniority list of Assistant Engineers of Public Works Department and Irrigation Department vide Notification dated 29-3-2003. Vertical bifurcation of both Public Works Department and Irrigation Department has not yet taken place. In other words, it is submitted that the process of bifurcation of two services namely, Public Works Department and Irrigation Department is yet to complete. In fact, the process of bifurcating the Public Works Service and Irrigation service is being taken up. In the process, it is found that many officers who exercise their option at one point of time came to be promoted to the next higher cadre or retired from service and consequently, the said option exercised by them has become infructuous. In view of this necessary steps are being taken up to invite fresh option from among the officers in various cadres. By taking into account of this fact, and considering the fact that Assistant Engineers appointed in Irrigation Department are also being considered for promotion along with Engineers appointed in the Public Works Department, the Engineers appointed in the Irrigation Department are entitled to have the equal benefit in respect of the recruitment to the post of Assistant Executive Engineers Division-I in Public Works Department and accordingly, the KPSC was instructed to consider the Irrigation personnel as in-service candidates.

15. The State has preferred a detailed counter before the Karnataka Administrative Tribunal making their stand very clear in so far as the concept of creamy layer and the Govt. Orders giving effect to the said creamy layer policy. They contend that a person who falls within the creamy layer is a person reaching advanced level or status. A person who does not belong to either SC or ST or any of the Backward classes notified by virtue of the provisions contained under Article 16(4) of the Constitution is deemed to have reached advance social level or status and therefore is ineligible for reservation as a rural candidate. To determine whether a person who reached an advance social level or status falls within the creamy layer, economic status, namely the income limit and properties held either belonging to him or his family is also to be taken into account. As such, considering this aspect and by referring to these facts and also following a decision of the Hon'ble Supreme Court relating to the concept of creamy layer,

the Govt. Order dated 13.02.2001 (Annexure-5) came to be issued. It is just and proper and is in accordance with the law laid down by the Supreme Court.

16. It is further submitted that it is a settled position of law that the very object/concept of reservation is to revise the status of a group of persons to reach the level of persons who are at the higher level. That being the position, it is to be noted that admittedly, the persons who belong to other Backward Classes under Article 16(4) of the Constitution are deemed to have reached advanced social level or status than that of the persons who do not belong to the categories specified under Article 16(4). Thus, the impugned Government Order while insisting the concept of creamy layer for persons belonging to other backward classes under Article 16(4) of the Constitution prescribes the creamy layer to the candidates belonging to general merit. The claim of the candidates could be extended provided it is their case that the persons belonging to Backward Classes under Article 16(4) of the Constitution and general merit candidates are equal in status. Such plea cannot be entertained for the simple reason that under Article 16(4) the power is conferred upon the Govt., to identify Backward Classes. In view of the settled position, the Applicants are not entitled to the benefit of the Government Order vide Annexure-5. The above narrated facts, position of law unmistakably demonstrate that the Applicants have not made out any case which warrants interference in the impugned order and hence, they are liable to be dismissed in law.

17. The Respondent No. 2, 4, 6, and 9 have filed separate objections. They contend, by virtue of note 1 in the Govt, order, rule for reservation does not apply to direct recruitment of posts which insists on a prescribed period of service in a lower post or experience in a post as a qualification or eligibility. In the instant case, pursuant to notification dt. 17-4-07 and 8-8-07, the Respondents have applied for appointment as in service candidates, i.e. by virtue of having experience in the post of Assistant Engineer. Therefore, these Respondents fall under the exempted category and the Rule contained is inapplicable. Secondly, it was contended, the State Govt., has accepted the order of the KAT in terms of the direction dated 02-03-04 issued by the Principal Secretary, PWD. PWD has directed KPSC to implement the order of the KAT dated 19-12-08. A copy of the said direction is produced as Annexure 2. KPSC is only a recruiting body which is required to make recruitment in accordance with Rules and Regulations laid down by the Legislation and the Govt. It lacks any locus whatsoever to maintain the above writ petition when the decision of the KAT has been accepted by the State Government. On that ground they want the writ petitions to be dismissed. Even in the other batch of writ petitions the Respondents have filed counter raising the very same grounds.

18. The challenge in these applications was for applying the concept of creamy layer to candidates belonging to general category on the ground that the same is in violation of Section 3 of the Act. The Respondents claim, as per the Kannada version of the Act, proviso to Section 3 provided that the concept of creamy layer

is not applicable to General Merit and category I of Backward Classes. Therefore, the Govt. Order dated 13-2-01 would not have prescribed that creamy layer is applicable to General Merit and hence the Govt., order is in violation of Section 3 of the Act.

19. By the impugned order, the Tribunal has disposed of 40 applications including the applications of the said Respondents 1 to 4. The applications are allowed by holding that the Govt. Order dated 13-02-01 which brings the General Merit (Rural) candidates under creamy layer and prescribes Form 1 is in violation of Section 3 of the said Act. The Tribunal also held that Rule 6(3)(b) of the General Recruitment Rules applies and age relaxation is permissible. There is no complete bifurcation of Public Works Department and Irrigation Department and therefore persons working in both the departments are eligible to apply for the posts in pursuance of the notification. Aggrieved by the said common order dated 19-12-08, the Petitioner - Commission has preferred this batch of writ petitions. One petition is preferred by the employees of Public Works Engineering Department.

20. The points that arise for consideration in these writ petitions are as under:

(1) Whether the Karnataka Public Service Commission has locus standi to challenge the order of the Karnataka Administrative Tribunal when the Government has accepted the said judgment and is seeking to implement the same.

(2) Whether the Applicants are entitled to the benefit of relaxation of age provided under Rule 6(3b) of the General Recruitment Rules?

(3) Whether the creamy layer policy is applicable to inservice candidates?

(4) Whether the employees who are working in WRDO are eligible to apply against in-service post notified in terms of the notification.

Point No. 1

Locus Standi of KPSC

Whether the KPSC has locus standi to challenge the order of the Karnataka Administrative Tribunal when the Government has accepted its judgment and seek to implement the same?

21. Sri K. Subba Rao, learned Senior Counsel contended that the Karnataka Public Service Commission has no locus standi to prefer these petitions against the order passed by the Tribunal on merits as it cannot be said to be an aggrieved person. If in course of the order, the Tribunal alleged malafides against the KPSC and had passed any strictures to that extent, only the KPSC can be said to be an aggrieved person and they are entitled to challenge the same before this Court. On the question of interpretation of a provision of law, or a Government Order, when the Tribunal has found fault with the interpretation by the KPSC and has rejected the said interpretation of the rules and law and

thereafter, the Government did not challenge the same and on the contrary accepted the same, the KPSC has no locus standi to challenge the order of the Tribunal. In support of his contention, he relied on several judgments of the Apex Court.

22. Per contra, Sri Nanjunda Reddy, learned Senior Counsel appearing for the KPSC contended that, not only the KPSC has a right to challenge the order of the Tribunal if any adverse remarks are made against the KPSC but also on merits, if the interpretation placed by the KPSC is not accepted by the Tribunal. He further contends that the KPSC is an Authority constituted under the Constitution and it is expected to scrupulously follow the statutory rules operating in the field and if the interpretation placed by the Government or the authorities concerned is contrary to the statutory provisions, they have a right to challenge the said order before this Court and in support of his contention he relies on the of the Apex Court in the case of Andhra Pradesh Public Service Commission v. Baloji Badhavath and Ors. (2009) 1 SCC (L and S) 999.

23. Chapter II of Part-XIV of the Constitution deals with the Public Service Commission. Article 315 deals with the establishment of Public Service Commission for the Union as well as the State and Article 320 deals with the functions of the Public Service Commission which reads as under:

320. Functions of Public Service Commissions

(1) It shall be the duty of the Union and the State Public Service Commission to conduct examinations for appointments to the services of the Union and the services of the State respectively

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more State so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any

costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor, of the State, may refer to them:

Provided that the President as respects the all India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted

(4) Nothing in Clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in Clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335

(5) All regulations made under the proviso to Clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the

24. The Apex Court, in the case of *State of U.P. v. Rafiquddin* AIR 87 Supp SCC 401, dealing with the functioning of the Public Service Commission has held as under:

30. The Commission is an independent expert body. It has to act in an independent manner in making the selection on the prescribed norms. It may consult the State Government and the High Court in prescribing the norms for judging the suitability of candidates if no norms are prescribed in the Rules. Once the Commission determines the norms and makes selection on the conclusion of the competitive examination and submits list of the suitable candidates to the Government it should not reopen the selection by lowering down the norms at the instance of the Government. If the practice of revising the result of competitive examination by changing norms is followed there will be confusion and the people will lose faith in the institution of Public Service Commission and

the authenticity of selection.... We are of the opinion that the Commission should take firm stand in these matters in making the selection in accordance with the norms fixed by law or fixed by it in accordance with law uninfluenced by the directions of the State Government unsupported by the Rules

Again the Apex Court, in the case of *Inder Parkash Gupta Vs. State of Jammu and Kashmir and Others*, held as under:

The Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the constitutional requirement for the purpose of discharging its duties under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Article 133 of the Constitution imposes duty upon the State to conduct examination for the appointment to the service of the State. The Public Service Commission is also required to be consulted on the matters enumerated u/s 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of shortlisting, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It cannot take any action which per se would be violative of the statutory rules or makes the same inoperative for all intent and purport. Even for the purpose of shortlisting, the Commission cannot fix any kind of cut-off marks.

Again in the case of *State of Punjab and Others Vs. Manjit Singh and Others*, it is held as under:

11. The Commission derives its powers under Article 320 of the Constitution as well as its limits too. Independent and fair working of the Commission is of utmost importance. It is also not supposed to function under any pressure of the Government as submitted on behalf of the Appellant Commission. But at the same time it has to conform to the provisions of the law and has also to abide by the rules and regulations on the subject and to take into account the policy decisions which are within the domain of the State Government. It cannot impose its own policy decision in a matter beyond its purview.

Again, it is stated as under:

It is to be noted that under Clause (3) of Article 320, the Union Public Service Commission or the State Public Service Commission, has to be consulted by the Government relating to methods of recruitment in civil services and for civil posts, promotions and transfers as well as about suitability of candidates etc.. The consultation may also be in regard to disciplinary matters affecting a person serving under the Government We then find that Clause (4) particularly provides that nothing in Clause (3) shall require consultation of the Commission in respect to the manner in which any provisions referred to in Article 16(4) may be made or the manner in which the effect may be given to the provisions of Article 335.

Article 16(4) deals with reservations and Article 335 pertains to consideration of reservation consistent with the maintenance of efficiency of the administration. As indicated earlier, Clause (4) of Article 320 clearly provides that consultation of the Commission would not be necessary in the matters relating to Articles 16(4) and 335. Therefore, it would be a matter of policy to be decided by the State Government as to what measures, if necessary, may be provided regarding reservations vis-a-vis maintenance of efficiency in services. Where no special qualification or any prescribed standard of efficiency over and above the eligibility criteria is provided by the Rules or the State, it would not be for the Commission to impose any extra qualification/standard separately for maintaining minimum efficiency which, it thinks, may be necessary. No consultation with the Commission, in such matters, is envisaged in view of Clause (4) of Article 320 of the Constitution

25. Therefore, the Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the constitutional requirement for the purpose of discharging its duties under the Constitution. The Commission derives its powers under Article 320 of the Constitution as well as its limits too. The Commission is an independent expert body. It has to act in an independent manner in making the selection on the prescribed norms. Independent and fair working of the Commission is of utmost importance. It is not supposed to function under any pressure of the Government. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. The Commission should take firm stand in making the selection in accordance with the norms fixed by law or fixed by it in accordance with law uninfluenced by the directions of the State Government and unsupported by the Rules.

26. The Karnataka State Legislature has enacted the Karnataka Public Service Commission (Conduct of Business and Additional Functions) Act, 1959 for the performance of its functions and to provide for the exercise of certain additional functions by the Commission. The said enactment was passed for the performance of the functions of the Commission under the Constitution or under any law for the time being in force. Chapter III deals with additional functions of the Commission. One such additional function as contained in Section 16 is the conduct of service examinations. Such examinations which persons serving in connection with the affairs of the State are required to pass under the conditions of recruitment of service are applicable to them and which may be notified by Government under this Section, and such other examinations as may be notified by Government from time to time shall, with effect from such date as the Government may appoint, be conducted by the Commission in accordance with such rules as may be prescribed. Similarly, the Commission is also empowered u/

s 17 as the authority competent to conduct examinations for appointments to the services of local authorities and it shall be the duty of the Commission to conduct such examinations. Section 18 of the said Act empowers the Government to make Rules for carrying out the purposes of the Act in consultation with the Commission by notification in the official gazette. Accordingly, the Government in exercise of the powers conferred by Sections 15 and 18 of the Act after consultation with the Karnataka Public Service Commission has made the Rules called "The Karnataka Public Service Commission (Functions) Rules, 1973". Rule 3 of the said Rules provides that, when the Commission is consulted in regard to the making of rules of recruitment relating to any service the Commission shall advise on all matters relating to recruitment including the methods of recruitment, minimum qualifications, syllabus for written examination if any, principles to be followed in recruitment and such other matters. Rule 4 deals with direct recruitment by examination whereas Rule 5 deals with recruitment by selection. In both the cases the Commission shall scrutinize the applications received and issue admission certificate to such of those whose applications are in order and who fulfill the required conditions. In case of direct recruitment by selection, it shall scrutinize the applications received and make selections in accordance with the Karnataka State Civil Services (Direct recruitment by Selection) Rules, 1973 when the Commission is consulted in regard to the suitability of any candidate or candidates for promotion. Rule 6 empowers the Commission for recruitment by promotion. The said promotion may be by selection or on the basis of seniority-cum-merit. Thus, a free hand is given to the Commission and it is the Government which has to consult the Commission and not the vice versa.

27. From the aforesaid statutory provisions and the law laid down by the Apex Court it is clear that, when once the assistance of the Commission is sought for in the matter of recruitment either by direct recruitment by examination or direct recruitment by selection or recruitment by promotion, the authority has to independently act in accordance with the Rules and make the selection. It is not obliged to act as per the dictate of the executive in these matters. That is the reason why an independent authority like the Commission was provided under the Indian Constitution. State Legislatures have passed enactments giving effect to the aforesaid constitutional provisions. It is the Government, which has to consult the Commission. The Commission is under no statutory obligation to consult the Government. The recruitment to be made by the Commission should be in consonance with the constitutional provisions and the Acts and Rules governing the same. In fact Rule 11 categorically states appointments, promotions and transfers, made by any Appointing Authority in contravention of the relevant rules of recruitment and the Karnataka Public Service Commission (Consultation) Regulations, 1958 shall be reported to the Government by the Commission. The Government shall furnish to the Commission any information which the Commission considers it necessary for consideration of any matter referred to it for consultation unless it is certified by the Chief Secretary to

Government that same cannot be furnished without undue labour or should be withheld in the public interest.

28. It is in the background of the scheme of the Act and the Rules, the locus standi of the Commission to challenge the orders passed by the judicial authorities finding fault with the selections made by it, is to be considered.

29. The Supreme Court in the case of Andhra Pradesh Public Service Commission Vs. P. Chandra Moulesware Reddy and Others, dealing with a case where the Andhra Pradesh Public Service Commission which had challenged the judgment of the Division Bench of the High Court of Judicature of Andhra Pradesh which had upheld the order passed by the Andhra Pradesh State Administrative Tribunal held as under:

20. Rule 6 of the Public Service Commission Rules, whereupon Mr. Prabhakar placed reliance is not of much significance. It operates in a different field. It will have no application in a case of this nature. The law cannot be permitted to act unfairly. It cannot be arbitrary. The country is governed by a rule of law and not by men. Thus, although a mistake had been committed by the State, the same cannot be directed to be perpetrated only because the Commission will have to undertake the selection process again and particularly, in view of the fact that the State of Andhra Pradesh did not question the order passed by the Tribunal.

30. Relying on this judgment it was contended firstly that, the Public Service Commission had no right to challenge the order passed by the Tribunal as well as the High Court. Secondly it was contended that, when the State Government has accepted the order of the Tribunal as well as the High Court, the Commission has no locus standi to challenge the same before the Apex Court. Though the question of locus standi was not decided expressly in the aforesaid judgment, in the facts of that particular case, the Apex Court held the grievance of the Commission that it has to undertake the selection process again if the order passed by the High Court as well as the Tribunal stands was not a good reason for interfering with the said order. In that context it was held that the person who committed the mistake was the Government and the Government has accepted the judgment, the appeal preferred by the Commission to the Supreme Court lacks merit. Therefore, by no stretch of imagination it could be said that the said judgment lays down the proposition of law that the Commission has no locus standi to challenge an order passed by a judicial Tribunal. In fact, the learned Judge who passed the said judgment in the Apex Court, had an occasion to consider the said question specifically in a subsequent judgment where the said portion of the earlier judgment was brought to his notice. After noticing the same, the learned Judge has specifically clarified the legal position in the case of Andhra Pradesh Public Service Commission v. Balaji Badhavath and Ors. (2009) 1 SCC (L and S) 999. Dealing with the question of locus standi of the Public Service Commission to challenge the orders it was held as under:

46. So far as the question of locus standi of the Appellant to file this SLP is

concerned, we are of the opinion that it has the locus standi. The High Court not only has set aside GO Ms dated 31-12-1997 but it has also set aside Notification dated 27-12-2007. If the High Court's judgment is to be implemented, afresh selection procedure has to be undertaken by the Appellant. Furthermore, in terms of Order 41 Rule 4 of the Code of Civil Procedure, the appellate court, in the event, finds merit in the appeal at the instance of one of the Respondents may set aside the entire judgment although another Respondent had not appealed there against. The Commission had undertaken the task of holding preliminary examination. It had followed the procedure laid down in its notification issued in this behalf and the GO Ms issued by the State. It, therefore, could maintain a writ petition.

31. While referring to the aforesaid judgment in P Chandra Mouleesware Reddy's case, the Apex Court held as under:

48.... In Chandra Mouleswara Reddy case, the State had accepted the judgment of the High Court. A mistake on the part of the State to issue the impugned direction was in question therein. It was in that context the aforementioned observations had been made. Therein 19 posts were to be filled up whereas a direction was issued to fill up only ten posts. The Tribunal directed the State to fill up all 19 Posts. The State of Andhra Pradesh did not question the order of the Tribunal. Even the commission was not required to carry out any fresh exercise to comply with the direction of the Tribunal. As the order of the Tribunal was not found to be unjustified, the High Court refused to interfere therewith. The observations were made only in the aforementioned context.

32. Therefore, it is clear in P. Chandra Mouleesware Reddy's case, in pursuance of the direction issued by the Tribunal, the Commission was not required to carry out any fresh exercise to comply with the direction of the Tribunal. However, in Balaji Badhavath's case, if the order of the High Court is to be implemented, the Commission had to undertake the task of preliminary examination which had been set aside by the High Court. It is in that context it was held that, if the recruitment process conducted by the Commission, if it is found fault with and set aside the same and if the Commission because of that order is compelled to redo the whole thing, then the Commission is an aggrieved person.

33. The Commission is a constitutional authority created under the Constitution. It has to function in terms of the constitutional provisions giving effect to the object with which it is constituted under the Constitution and the State Legislature defines its functions, passes a law and specific functions are assigned to it under the statute, the Commission has to work strictly in accordance with the statutory provisions. When in the course of discharging its functions it is of the opinion that these actions are in accordance with the statutory provisions and if it feels the recruitment done by them is unnecessarily found fault with by a judicial body whose decision is contrary to the statutory provisions certainly they have a right to challenge the said order passed by the judicial authority. The reason for setting at naught the recruitment process is not the criteria. It is the

ultimate result. If any action of the Commission is found fault with and the Commission has to redo the thing over again and if the Commission feels their action is strictly in accordance with law, they have a right to challenge the judgment of a judicial body which has found fault with their action. It is immaterial whether the action of the Commission is found fault with by making any allegations against the Commission or attributing mala fides or purely on procedural irregularity or being contrary to law. The contention that the Commission has nothing to do with the appointment in any particular department after the selection process is over and if the selection is set aside, they cannot be held to be aggrieved persons, cannot be accepted. Though the Commission has no personal interest in any of these recruitment, as a constitutional authority when it has conducted the selection in accordance with the statutory provisions and if such selection is found fault which as improper or illegal, the Commission being an independent authority, if it wants to justify its actions and show that their actions are strictly in accordance with law, that can be done only by challenging that order in the superior Court. Therefore, their right to challenge the order finding fault with the selection process cannot be taken away. In that view of the matter, we hold that the Commission has the locus standi to challenge the order of a judicial authority, or a quasi judicial authority if their selections are set at naught by them not only on the ground of mala fides but even being contrary to law. It is open to them to show to the superior Courts that the recruitment or selection process which they have done is strictly in accordance with law and it has been unnecessarily interfered by a judicial or quasi judicial authority.

Point No. 2

Age Relaxation

Whether Rule 6(3)(b) of the General Recruitment Rules has got over-riding effect over Rule 1 of the General Recruitment Rules and 2007 Rules?

34. The learned Counsel for the KPSC Sri Nanjunda Reddy, submits that these recruitments are done under a special law, namely, the Karnataka Public Works Engineering Department Services (Recruitment of Assistant Engineers, Division I by Competent Examination) Rules, 2007. Rule 5 of the said Rules provides for age and academic qualification of the candidates. It also provides that there is no maximum age limit for candidates competent under in-service quota, which in itself is relaxation in age. Therefore, the provisions of General Recruitment Rules providing for relaxation of age is not applicable.

35. The Karnataka Public Works Engineering Department Service (Recruitment of Assistant Executive Engineers, Division-1 by Competitive Examination) Rules 2007 deals with recruitment to the post of Assist Executive Engineer. Rule 5 deals with age, academic qualification of candidates which reads as under:

5. Age and academic qualification of candidates:-Every person who has attained the age of 21 years but not attained 40 years in the case of candidates belonging

to the Scheduled Castes/Scheduled Tribes/Cat-1; 38 years in case of candidates belonging to category 2A/2B/3A/3B/35 years in case of any other candidates as on the last date fixed for receipt of applications shall be eligible to apply for recruitment under these rules.

Provided that there is no maximum age limit for candidates competing under in service quota.

Candidates must be holder of a Degree in Civil Engineering or Construction Technology & Management granted by a University established by Law in India and from an Institute approved by the AICTE, or a Diploma Certificate from the Institution of Engineers (India) that he has passed Parts A & B of the Associate Membership Examination of the Institution of Engineers (India).

36. Rule 13 deals with application of application of General Recruitment Rules and it reads as under:

13. Application of General Recruitment Rule:-Except in respect of matters for which provision is made in these rules, the provisions of the Karnataka State Civil Services (General Recruitment) Rules, 1977 for the time being in force, shall be applicable for purposes of recruitment under these rules.

37. Rule 14 deals with application of other Rules which reads as under:

14. Application of other rules:-The Karnataka Civil Services Rules, the Karnataka Civil Services (Conduct) Rules, 1966 and all other rules for the time being in force regulating the conditions of service of Government servants made under the proviso to Article 309 of the Constitution of India, in so far as such, rules are not consistent with the provisions of those rules, shall be applicable to persons appointed under these rules.

38. In support of his contention, the learned Senior Counsel relied on two judgments of the Apex Court which is reported in *The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others*, where in paragraph 9 and 10 it has been held as under:

9. There will be complete harmony however if we hold instead that Clause 5(a) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of Clause 23. We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to

only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty v. Solly* 1859 53 ER 1032 quoted in *Crates on Statute Law* at p.206, 6th Edition) Romilly. M.R. mentioned the rule thus: "The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply

The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned; *De Winton v. Crease* (1828) 5 Bing 177. *United States v. Chase* (1889) 135 US 225 and *Carroll v. Greenwich Ins. Co.* (1905) 199 U.S. 401.

10. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that Clause 5(a) has no application in a case where the special provisions of Clause 23 are applicable.

39. Again the Apex Court in the case of *State of Rajasthan Vs. Gopi Kishan Sen*, at paragraph 6 has held as under:

6. Another argument which has been advanced on behalf of the Respondent is on the basis of Rule 29 of the Rajasthan Services Rules 1951 declaring that "an increment shall ordinarily be drawn as a matter of course". It is argued that since this Rule does not allow the impugned provisions fixing a fixed rate of pay for the untrained teachers as an exception, the latter cannot be given effect to. There is no merit in this argument either. The rule of harmonious construction of apparently conflicting statutory provisions is well established for upholding and giving effect to all the provisions as far as it may be possible, and for avoiding the interpretation which may render any of them ineffective or otiose. In the present case Rule 29 dealing with payment of increment is in general terms while the Schedule in the 1969 Rules makes a special provision governing the untrained teachers, attracting the maxim "*generalibus specialia derogant*", i.e., if a special provision is made on a certain subject, that subject is excluded from the general provision. The Schedule in the 1969 Rules, therefore, must be held to prevail over the general provisions of 1951 Rules.

40. From the aforesaid Judgments, it is clear that general provisions should yield to specific provisions. It is not an arbitrary principle made by lawyers and judges, but spills from the common understanding of men and women. The Rule is that, whenever there is a particular enactment and a general enactment in the same statute and the latter taken in its more comprehensive sense would over-rule the former. The particular enactment must be operative and the general enactment must be taken into affect only to the other parts of the statute to which it may

properly apply. In case of conflict between specific provision and general provision, the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the specific provision. If a special provision is made on a certain subject, that subject is excluded from the general provision.

41. It is in this background when we look at the provisions of these rules, in so far as recruitment to the Karnataka Public Works Engineering Department service in particular to the Assistant Executive Engineers, Division I by Competitive Examinations Rules, 2007. The Rules of 1977 provide for age limit for appointment. It is contained in Rule 6. Similarly, Rule 5 of the Rules, 2007 provides for age and academic qualification of candidates. Therefore, when the special rules specifically provide for age and academic qualification of candidates, it over rides Rule 6(1) which deals with the same aspect. Rule 5 of the rules of 2007 declares that the said Rule 5 has no application to the service quota i.e. in so far as in-service candidates competing for posts earmarked for service quota. In respect of them, no maximum age is prescribed. Therefore, it is not a case of relaxation of age prescribed in Rule 5 for persons other than the in-service candidates. The said 2007 Rules do not provide for relaxation of age limit prescribed in Rule 5. However, Rule 13 makes it clear that except in respect of matters for which provisions are made in these Rules, the provisions of the Karnataka State civil Services (General Recruitment) Rules, 1977, for the time being in force shall be applicable for the purpose of recruitment under these Rules. Rule 14 also amplifies this aspect. Therefore, when the Rules of 2007 do not provide for relaxation of age as contained in Sub-rule (3) of Rule 6, the said Sub-rule (3) has to be read into the Rules of 2007, so that the age limit prescribed in the said Rule 5 stands relaxed if the conditions prescribed in Sub-rule (3) of Rule 6 is attracted. Sub-rule (3) of Rule 6 reads as under:

(3) Notwithstanding anything contained in Sub-rule (1) the maximum age limit for appointment shall be deemed to be enhanced in the following cases to the extent mentioned namely;-

(a) in the case of a candidate for appointment to a Class IV post on the personal establishment of a Minister, Minister of State or Deputy Minister, by five years, if such appointment is only for the duration of the term of office of such Minister, Minister of State or Deputy Minister:

(b) in the case of a candidate who is or was holding a post under the Government or a local authority or (a) corporation established by a State Act or a Central Act or established by the Government under a State Act or Central act and owned or controlled by the Govt., by the number of years during which he is or was holding such post or (ten years) whichever is less;

42. So if a candidate who applies for recruitment under the Rule 2007 though he does not possess the age as required under Rule 5, if he satisfies requirement of Clause (b) of Rule (3) of Rule 6 of Rules, 1977, he would be entitled to age

relaxation as contained in the said proviso. Merely because in Rule 5 at the fag end, no maximum age limit for candidates competing under in-service quota is mentioned, that is not a case of age relaxation to others and that does not come in the way of application of Rule 6(3)(b) and it would not have the effect of overriding the said provision.

43. In fact, the Tribunal on an earlier occasion also took a similar view, which view has been affirmed by a Division Bench of this Court in the W.P. No. 26021-31/97, where it was held, the Karnataka civil Services (General Recruitment) Rules, 1977 as amended would squarely apply to the in service candidates and as such the finding of the Administrative Tribunal in respect of those candidates is just and proper and needs no interference. Thus, a similar contention raised by KPSC was negatived in the said decision. In that view of the matter, the Tribunal was justified in holding that the aforesaid two Applicants are entitled to age relaxation and the KPSC was not justified in not calling them for interview on the ground that they are age barred. It is not in dispute that if the relaxation is extended to these two Applicants, then they would satisfy the requirement of age and thus eligible not only to take the examination, but also to be called for interview. In that view of the matter, we hereby hold that Rule 6(3) (b) of the Rules of 1977 applies and the age prescribed under Rule 5 stands relaxed to that extent.

Point NO: 3

Creamy Layer Policy

Whether New Comprehensive Creamy Layer Policy dated 30th March 2002 is applicable to in-service candidates who have applied for direct recruitment wider 5% category?

44. Sri. Nanjunda Reddy, learned Senior Counsel contended that in so far as recruitment of 5% in-service candidate is concerned, no period of service in the lower post or experience in such post is prescribed. Every person who has attained the age of 21 years, who has not attained the age of 38 years, is eligible to apply. But in so far as in-service quota is concerned, no maximum age limit is prescribed. All that he has to satisfy is, the educational qualification under the Rules. Therefore, when a prescribed period of service in the lower post or experience in a post, is not a condition precedent for applying, the Comprehensive Creamy Layer of 2002 is applicable to the said post.

45. The Tribunal has categorically recorded a finding to the effect that no specific period of service is needed to be prescribed in order to become eligible to apply as an in-service candidate. The candidate must have put in some service and he should continue to be in service to be eligible to apply and that is sufficient to attract the Creamy Layer Policy. The learned Counsel submits that the said view of the Tribunal is contrary to the object with which this Comprehensive Creamy Layer Policy was unfolded by the Government.

46. From the facts set out above it is clear that KPSC issued two notifications for recruitment of 104 Assistant Engineers (Division-1). Out of the 104 posts to be filled up, 75% is earmarked for being filled up by way of promotion. In the remaining 25%, 20% is to be filled up by direct recruitment which is open to everyone including the persons who are in service, whereas the remaining 5% of posts have to be filled up only from persons who are inservice. It is in that context in that 5% meant for inservice candidates again those posts have to be filled up according to the reservation policy of the Government In which event persons who fall under categories IIA, IIB, IIIA and IIIB are entitled to reservation. It is not in dispute that the Applicants who claim reservation all belong to backward community and that they are Group "B" officers. The question is because they are Group "B" officers drawing a pay scale of Rs. 6,000/- to Rs. 11,200/- do they fall under New Comprehensive Creamy Layer Policy and thus excluded from applying for posts meant for inservice candidates and claim reservation among them.

47. It is also not in dispute that all these persons filed applications, they were called for the written examination, all of them have passed in the written examination, thereafter intimations were sent to them to attend the interview based on the merit. They did attend the interview. But, they were not allowed to get inside the interview hall on the ground that they are not eligible and they are excluded because of New Comprehensive Creamy Layer Policy. It is in that context they approached the Tribunal. The reasons assigned by the KPSC as is clear from the statement of objections is. Note 1 to the New Comprehensive Creamy Layer Policy excludes these Group "B" officers belonging to the backward community. In order to appreciate that contention it is necessary to have a look at the said policy contained in Annexure-II.

Annexcreu to P.O. No. Swd 225 BCA 2000 dated 30th March 2002 New Comprehensive Creamy Layer

Under Article 15(4) and 16(4) of the Constitution of India, the following persons shall not be eligible for reservation of seats of posts categorised under IIA, IIB, IIIA and IIIB. Note.

1. This rule will not apply to direct recruitments to posts which insist on a prescribed period of service in a lower post or experience in a post, profession or occupation as a qualification or eligibility.

2. This rule applies to son(s) or daughter(s) of the persons specified below:

1 (a) President of India (b) Vice President of India (c) All functionaries holding Cabinet rank In Government of India or Government of any State or Union Territory. (d) Chairmen of Council of States and the State Legislative Councils. (e) Governors of States. (f) Speakers of Lok Sabha and Legislative Assemblies. (g) Judges of Supreme Court and High Courts. (h) Chairmen of Public Service Commission. (i) Attorney General of India. (j) Advocate General. (k) Chief Election Commissioner. (l) Comptroller and Auditor General of India (m) Members

of Parliament atleast for a period of five years - during the period of their office.
(n) Members of State Legislature atleast for a period of five years - during the period of their office.

2 The Candidate and either of whose parents/guardian is a Group-A or Group B officer in the services of the Government or holds an equivalent post in public sector undertakings or an employee of a private industry/Institution and draws a salary which is not less than that of a group B Officer (Pay Scale Rs. 6000-11200).

3 The Candidate and his/her father's mother's/Guardian Gross Annual income exceeds Rs. 2.00 lakhs.

4 The candidate and his/her father, mother/guardian holding 10 units of Agricultural Land as Specified in the Karnataka Land Reforms Act 1961, and such of those holding more than 20 acres of plantation land.

DM. AGA Deputy Secretary to Government Social Welfare Department

48. The Government Order dated 30.3.2002 revised the list of backward classes incorporating recommendations of the Backward Commission and it was brought into force with immediate effect. Clause (3) of the said Government Order categorically states that, a New Comprehensive Creamy Layer Policy as detailed in Annexure-II to this Government Order is brought into force with immediate effect. This Creamy Layer Policy does not apply to S Cs/S Ts and Category-1 of the Backward Classes. Candidates belonging to Category-II(A), 11(B), 111(A) and III(B) shall be entitled to reservation in the manner specified in the New Comprehensive Creamy Layer Policy. Annexure-II to the said Government Order which is already extracted above lays down a New Comprehensive Creamy Layer Policy of the Government. As the opening words of Annexure-II makes it clear, the persons mentioned in the said Order are not eligible for reservation of seats of posts categorized under IIA, IIB. IIIA and IIIB. In other words, the persons mentioned in the said Order fall within the New Comprehensive Creamy Layer Policy and are not entitled to reservation though they belong to the backward communities. The person to whom that policy applies is set out in clauses 1, 2, 3 and 4 under Note 2. However, Note 1 which falls for interpretation in this case reads as under:

1. This rule will not apply to direct recruitment to posts which insist on a prescribed period of service in a lower post or experience in a post profession or occupation as a qualification or eligibility.

49. A careful reading of the aforesaid Note 1 makes it clear that, the intention of the Government was not to apply this New Comprehensive Creamy Layer Policy to two classes of persons, (1) to direct recruitment and to posts which insist on a prescribed period of service in a lower post or (2) to direct recruitment and to posts which insist on a prescribed experience in a post, profession or occupation as a qualification or eligibility. Therefore, the intention is clear. In the case of

direct recruitment and to posts if the period of service in a lower post is a qualification or experience in a post, profession or occupation is a qualification, then they go out of the New Comprehensive Creamy Layer Policy as per Annexure-II. If those two conditions are not prescribed for eligibility then the candidates who fall under Group "B" in the service of the Government or holds an equivalent post in a Public Sector fall within the Creamy Layer Policy and are not entitled to reservation.

50. Interpreting this provision, the Tribunal has held as under:

The Government Order dated 30.3.2002 in its Note (1) has clearly ruled out the applicability of the Creamy Layer principle to direct recruitments prescribing the service or experience as a qualification of eligibility. Though no specific period of service is prescribed, in order to become eligible to apply as an in-service candidate the candidate must have put in some service and he should continue to be in service to be eligible to apply. A person who has not put in any service cannot claim to be an in-service candidate. Merely because no definite period of service or experience is spelt out, it does not mean that the person without experience or service will become eligible. In the circumstances, it is implied in Note (1) that only a person who is already in the service and who continues to be in service alone will become eligible

51. Assailing this reasoning of the Tribunal it was contended that, the recruitment in question is solely for the in-service candidates in question. Therefore, the first condition to be specified is he must be in service on the day he makes an application. Then we have to find out the application of Note (1) to such a person. Rule 1 categorically states it will not apply to direct recruitment and to posts which insist on (1) a prescribed period of service in a lower post or (2) experience in a post, profession or occupation as a qualification of eligibility. Merely because a person is in service he is not eligible to apply to the notified post. He must be in service, he must possess the requisite qualification prescribed under the Rules.

52. Rule 5 of the Karnataka Public Works Engineering Department Services (Recruitment of Assistant Executive Engineers Division-1 by Competitive Examination) Rules, 2007 prescribes the following qualification to be eligible to apply for the post of Assistant Executive Engineers Division-1:

5. Age and academic Qualification of candidates:-Every person who has attained the age of 21 years but not attained 40 years in the case of candidates belonging to the Scheduled Castes/Scheduled Tribes/Cat-1; 38 years in case of candidates belonging to category 2A/2B/3A/3B/35 years in case of any other candidates as on the last date fixed for receipt of applications shall be eligible to apply for recruitment under these rules.

Provided that there is no maximum age limit for candidates competing under in service quota.

Candidates must be holder of a Degree in Civil Engineering or Construction Technology & Management granted by a University established by Law in India and from an Institute approved by the AICTE, or a Diploma Certificate from the Institution of Engineers (India) that he has passed Parts A & B of the Associate Membership Examination of the Institution of Engineers (India).

53. No doubt the recruitment is a direct recruitment. Any person who is possessing the aforesaid qualification is eligible to apply to the said post. As is clear from the aforesaid provision no period of service in a lower post in the case of in-service candidates or experience in a post/profession or occupation is prescribed as qualification or eligibility criteria.

54. In order to appreciate the aforesaid Government order what has to be seen is the provisions contained in the Karnataka Public Works Engineering Department Service (Recruitment) Rules, 1988. Rule 2 provides the method of recruitment and minimum qualification etc.

Sl.

No.

Category Of post

Method of recruitment

Minimum

Qualifications

xx

Xx

Xx

Xx

5

Assistant Executive Engineer Division-I

Seventy five per cent by

For promotion:

promotion from the cadre

of Assistant Engineers;

and Twenty per cent by

direct recruitment in

accordance with the

Karnataka Public Works
Engineering Department
Service (Recruitment of
Assistant Executive Engineers, Division-I by
competitive Examination)
Rules, 1973;

(i) Must be holder
of a degree in
Civil/

Mechanical
Engineering as
the case may be.

(ii) Must have put
in a service.
of not less than five
Years as Assistant Engineer.

Five percent by direct
recruitment from among
persons (in service)
belonging to Karnataka
Public Works

Engineering Department
who possess the
qualifications prescribed
for direct recruitment in
accordance with the

Karnataka Public Works Engineering Department Service (Recruitment of
Assistant Executive Engineers Division-I by competitive Examination)
Rules 1973.

Provided that if

officers who have
put in a minimum
service of five years
are not available,
an officer who has
put in three years
of service may be
considered for
promotion.

55. It states that, in respect of each category of posts specified in column (2) of the Schedule below, the method of recruitment and the minimum qualification if any shall be as specified in the corresponding entries in columns (3) and (4) thereof. The schedule contains at column No. 1-Sl. No. column No. 2-category of post, column No. 3-method of recruitment and at column No. 4 minimum qualification. The recruitment to Assistant Executive Engineer Division-1 is provided at Sl. No. 5. The method of recruitment provides that 75% by promotion from the cadre of Assistant Engineers; and 25% by direct recruitment in accordance with the Karnataka Public Works Engineering Department Service (Recruitment of Assistant Executive Engineers, Division-I by Competitive Examination) Rules, 1973 which is replaced by 2007 Rules and 5% by direct recruitment from among the persons (in service) belonging to Karnataka Public Works Engineering Department who possesses the qualifications prescribed for direct recruitment in accordance with the Karnataka Public Works Engineering Department Service (Recruitment of Assistant Executive Engineers Division-1 by Competitive Examination) Rules, 1973 which is now replaced by Rules of 2007.

56. The aforesaid Government Order sets out to whom the said policy shall not be applicable for reservation of seats of posts categorised under IIA, IIB, IIIA and IIIB. Note 2(2) is one such category. It reads as under:

The candidate and either of whose parents/guardian is a Group-A or Group B officer in the services of the Government or holds an equivalent post in public sector undertakings or an employee of a private industry/Institution and draws a salary which is not less than that of a Group B officer (pay scale Rs. 6000-11200).

57. Relying on the aforesaid provision in the Government Order it was contended that, though a person belongs to the castes enumerated under 2A, 2B, 3A and 3B to the Annexure to the Government Order dated 30.3.2002. If such a candidate is a Group "A" or Group "B" officer then he will not be entitled for reservation and the Government Order dated 30.3.2002 excludes such persons from the benefit of reservation.

58. Per contra, it was contended that to decide whether a candidate is eligible for the benefit of the said Government Order or not, is the Tahsildar constituted under the provisions of the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation) of Appointments, Etc.) Act, 1990 and not the Commission and therefore the Commission exceeded its power.

59. Section 4 of the said Act provides for reservation of appointment or posts, etc. Section 4A provides for issue of a caste certificate and income and caste certificate. Sub-section (2) of Section 4A provides that, any candidate or his parent or guardian belonging to other backward classes may, in order to claim benefit of reservation u/s 4, either for appointment to any service or post or for admission to a course of study in University or any Educational Institution, make an application to the Tahsildar in such form and in such manner as may be prescribed for issue of an income and caste certificate. Sub-section (3) provides that, the Tahsildar may on receipt of an application under Sub-section (1) or (2), and after holding such enquiry as he deems fit and satisfying himself regarding the genuineness of the claim made by the Applicant pass an order issuing a caste certificate or, as the case may be, an income and caste certificate in such form as may be prescribed, or rejecting the application. The Rules framed under the aforesaid Act, in particular Rule 3-C declares that the caste certificate issued u/s 4-A shall be valid until it is cancelled. Sub-rule (2) provides that the income and caste certificate issued u/s 4-A shall be valid for a period of five years. Any person aggrieved by the order of the Tahsildar u/s 4A is given the right of preferring an appeal u/s 4-B. Section 4-C provides for constitution of Committees for verification of income and caste certificate. Rule 5A provides for the validity of certificate issued by the Caste Verification Committee. Rule 6 provides for application for validity certificate and Rule 6A provides for verification by the Caste and Income Verification Committee and Rule 7 provides for issue of Validity Certificate. Rule 9 makes it obligatory on the person who has been successful in securing appointment under a reserved category to obtain validity certificate, for which he would not be entitled to the benefit of reservation. The certificate issued by the Tahsildar in the prescribed form clearly mentions that the policy of the Government in so far as creamy layer is concerned, is not applicable to them. The correctness of a caste and income certificate issued under the Act or the reservation certificate cannot be gone into by the Commission, the reason being, the Act is a self contained enactment which provides for an appeal against the order granting the certificate. It also provides for a comprehensive method for verifying the correctness and for issue of certificate before appointment, which is a condition precedent and therefore, Commission has no jurisdiction to sit in judgment over the certificate issued by the authority under the Act. It has to simply receive the certificate and to act upon it. What cannot be done directly cannot be done by the Commission under the guise of interpreting the Government Order. Though prima facie the Government Order excludes reservation to Group B" employees when once the Tahsildar issues a caste and income certificate, it is issued on the assumption that the reservation is

applicable to Group B" employees and they do not belong to the creamy layer. Commission cannot exclude them for consideration under the reserved category by interpreting such interpretation in the said Government order. It amounts to sitting in judgment over the certificate issued by a competent authority under the Act.

60. The contention of KPSC is that if a candidate is merely in service it is not sufficient to claim exemption from creamy layer. The further condition prescribed to be satisfied for recruitment is the prescribed period of service. If he satisfies the said condition, then will go out of this Creamy Layer Policy. In the instant case even though 5% is to be filled up by inservice candidates, there is no prescription of any period of service. Therefore, they will not go out of the Creamy Layer Policy and they are not eligible. By mistake, they were permitted to take the examination and also called for the interview. It is at that juncture when it was realized that they were all Group "B" Officers in the very same department to whom this Creamy Layer Policy applies, they were not eligible for that 5% inservice quota and, therefore, they were not permitted to enter the interview hall.

61. Though the said argument appears to be attractive, if we look into Note 1 in the background of the recommendations of the Backward Commission which was considered before formulating the Creamy Layer Policy and the principle behind this legislation, it is difficult to uphold the said argument. In the recommendation of the Karnataka Service Commission for Scheduled Caste which submitted its report on 2000, it is observed as under:

For direct recruitment to certain posts long period of continuous service or experience is prescribed for eligibility. But in view of the operation of the Creamy Layer principle, all those who are eligible because they are working in subordinate post are screened out of the backward classes. Therefore it was suggested that, since long and continuous service in a lower post is a condition precedent to get eligible for such post, the application of Creamy Layer to such post would result in taking away in one hand what is given by the other. Applying Creamy Layer would frustrate the very object of reservation in such posts.

62. Therefore from the said report it is clear that persons who have put in long period of continuous service or experience should not be denied the benefit of reservation on the ground that they belong to Creamy Layer. It is after considering the said report, the policy is laid down. In other words, the persons belonging to these backward classes, if they have put in continuous service or experience, they should not be denied the opportunity of occupying higher post by way of direct recruitment by application of Creamy Layer. But if they do not possess the requisite experience or not in continuous service and if they belong to the Creamy Layer, the Policy applies.

63. In order to find out what is the qualification prescribed by way of prescribed period of service or experience, what is to be seen is the recruitment rules under

which recruitment is made.

64. The Government of Karnataka has provided for horizontal reservation for rural candidates by enacting Karnataka Reservation of Appointment (Posts in Civil Services of the State) for Rural Candidates Act, 2000. Section 3 of the said enactment provides for 25% of the vacancies earmarked for direct recruitment in each of the categories of General Merit, Scheduled Castes, Scheduled Tribes and each of the categories of other backward classes shall be reserved for rural candidates. The concept of Creamy Layer is made applicable in the case of rural candidates belonging to General Merit or the other backward classes except Category-I under Clause (4) of Article 16 of the Constitution and the policy in Creamy Layer as evidenced by the order dated 30th March 2002 is made applicable to these rural candidates also.

65. In the 25% posts earmarked for recruitment other than by way of promotion 20% is earmarked for direct recruitment in the open category. In that open category even persons who belong to Group "B" officers who are in service are eligible to compete. However, because of the Creamy Layer Policy they would not be eligible to seek for reservation out of that 20% posts. Because in so far as 20% direct recruitment in open category is concerned, though they satisfy the contention that they belong to backward classes, they fall within the Creamy Layer Policy and, therefore, though they are eligible to compete in that category, but they will not be entitled to reservation. As opposed to that in so far as recruitment to 5% which is exclusively earmarked for inservice candidates is concerned, again among that 5% posts have to be filled up according to the reservation policy of the Government. It is here Note 1 is attracted. When the direct recruitment to posts insist on a prescribed period of service in a lower post then the said policy is not attracted. Though in the instant case no prescribed period of service in the lower post is prescribed, unless he is in service he cannot apply as against that 5% posts reserved for inservice. Even a person who has put in one day of service, would be an "in service candidate". In other words, the qualification prescribed or the eligibility criteria prescribed for applying against this 5% post is, he must be inservice. It is immaterial the period of service in the lower post he has completed. Any other interpretation would lead to a situation where the posts earmarked for backward community among this 5% and rural candidates cannot be filled up from the cadre of Assistant Engineers as all Assistant Engineers are Group "B" officers. The word prescribed period of service" in the Government Order if it is not understood to mean as person in service", the very object of reservation made to backward classes belonging to II-A, II-B, III-A and III-B would be frustrated. As is clear from what has transpired after the selection, in category II-A 2 posts, category II-B 2 posts category III-A 1 post and category III-B 1 post were reserved. As there were no Applicants at all in these categories, they have been converted into general merit. Only in case of III-B there was one candidate available. Therefore out of 8 posts which are marked for backward caste and GM, only one candidate has been selected in the said category and the remaining 7 posts are sought to be filled up by general

merit category. Therefore, the Court should place such interpretation of this Government Order which contains the policy of the Government, so that the real object is achieved and what is sought to be given in one hand should not be taken away in the other hand. If a purposeful construction is not given to the words prescribed period of service" in the Govt., order and a literal meaning is given, it would defeat the very object of reservation. Therefore, as rightly held by the Tribunal any interpretation that would lead to absurdity is to be avoided and if two interpretations are possible, that interpretation which would advance the cause of justice and extend the benefit of reservation, is to be preferred, keeping in mind the doctrine of purposive construction and the recommendations of the Backward Class Commission and the principle underlining this reservation coupled with the fact that there are sufficient number of backward community candidates are in the services it would be just and proper for us to accept the interpretation placed by the Tribunal as against the interpretation sought to be placed by the KPSC. That would serve the cause of justice. In fact after the order is passed by the Tribunal, the Government has accepted the interpretation. They are not aggrieved. They are not challenging the same. Under these circumstances, we are of the view that no exception could be taken to the finding recorded by the Tribunal on this question.

Point No. 4

Bifurcation of P.W.D & Irrigation Department

66. Sri. Padmanabha Mahale, learned Senior Counsel contended that the notification issued and the correspondence which is produced before the Court clearly shows that the recruitment was done to the P.W.D. Department under the Rules governing the P.W.D. employees. However, applications of all persons who are working in the Irrigation Department have been entertained and they have been selected. Therefore all those persons who were working in Irrigation Department who have been selected as against this advertisement, their selections are illegal and are liable to be set aside. The Tribunal has not properly appreciated the case put forth and was in total error in rejecting the said contention. Even before the said notification calling for applications, the Petitioner has been giving representations and has challenged the endorsement issued earlier before the Tribunal. Therefore, merely because he applied against the said advertisement, it should not be said that he is estopped from challenging the said Creamy Layer after acquiescing in filing the application. Lastly it was contended that the application of the writ Petitioners were entertained, they were permitted to take the examination, they were called for the interview and on the basis that the Creamy Layer is not applicable to the in-service candidates on the date of the interview, they were sent back saying that they did not possess the eligibility criteria, which is improper.

67. Per contra it is contended by Sri. P.S. Rajagopal, the learned Senior Counsel that, after the recruitment under the separate Rules meant for Irrigation Department, while preparing the seniority list, persons who are recruited under

both the departments are considered and a common seniority list is prepared. In some cases, on the basis of the aforesaid seniority list, promotions are also given. Therefore, it is clear that the practice prevalent in this department makes it clear that persons working in both these departments are treated as belonging to one cadre, common seniority is prepared, promotion is given based on the said seniority. Till today the two cadres are not completely separated and they are treated as belonging to the same department. Therefore the persons working in the irrigation department are also entitled to apply against the notification as they continue to belong to P.W.D Department.

68. The Governor of Karnataka sanctioned the establishment of State Civil Services in respect of Karnataka Irrigation Dept. Service. A notification came to be issued on 5th July, 1989, prescribing the strength of each of the said categories and the number and category of posts borne thereon. It came into effect on 17th August, 1989 when it was published in the Karnataka Gazette. On the same day, in exercise of the powers conferred under Article 309 of the Constitution of India, the Governor of Karnataka made the Karnataka Public Works (Irrigation Services) (Recruitment) Rules, 1988, providing for method of recruitment and minimum qualification, etc. Rule 3 of the said Rules dealt with constitution of the service which reads as under:

The Karnataka Irrigation Service shall consist of: -Notwithstanding anything contained in Rule 2 and the schedule thereunder, in its initial constitution the categories of posts in the cadre of Group A, B, C and D persons appointed from among persons holding identical posts in the Karnataka Public Works Engineering Dept. Service, immediately before the date of commencement of these Rules.

Provided that no person shall be so appointed unless he has expressed in writing within the time to be specified by Government by a separate notification in this regard, his willingness to be so appointed. If any person has already expressed his willingness before the commencement of these rules, it shall not be necessary for him to express his willingness once again. The decision of the Government on the willingness shall be final.

Provided further that until persons are so appointed, persons holding the posts transferred to the Karnataka Irrigation Dept. service from the Karnataka Public Works Engineering service shall hold the same on the deputation basis. The service rendered in the existing identical posts in the Public Works Engineering Dept. shall be taken as qualifying service for the purpose of promotion, seniority, pay and pension under these Rules.

69. Rule 5 was a saving clause. It is made clear, that notwithstanding, anything contained in these Rules, action already initiated for recruitment to the post of Assistant Executive Engineers, Division-I, Tracers, Junior Engineers (Civil) and Draughtman (Civil) in accordance with the Karnataka Public Works Engineering Dept. Service (Recruitment) Rules, 1960, before the commencement of those rules shall be continued and disposed of under the Karnataka Public Works

Engineering Dept. Service (Recruitment) Rules, 1960, as if these rules have not come into force.

70. Subsequently, in exercise of the powers conferred by Sub-section 1 of Section 3 read with Section 8 of the Karnataka Civil Services Act, 1978 (Karnataka Act 14 of 1978), the Government of Karnataka made the Kar. Public Works (Irrigation Services) (Recruitment) and certain other Rules (Amendment) Rules, 1985. It came into force on 19th October, 1984. Rule 3 of the aforesaid Rules provided for amendment to the Karnataka Public Works (Irrigation Services) (Recruitment) Rules, 1988, providing for insertion of Rule 6 which dealt with Transitional Provisions. It reads as under:

Notwithstanding anything contained in the Karnataka Public Works (Irrigation Services) Recruitment Rules, 1988, till the completion of formalities of the constitution of Irrigation Services in accordance with Rule 3, the posts in the Karnataka Irrigation Dept Services shall also be filled in accordance with the provisions of the Karnataka Public Works Engineering Dept Services (Recruitment) Rules, 1988.

71. Karnataka State Civil Services (Absorption of Persons appointed as Contract Engineers on contract basis in the Upper Krishna Project, Bheemarayanagudi in the Karnataka Public Works and Irrigation Department Engineering Services) (Special) Rules, 1990, came into force on 27th Feb. 1991. Rule 3 provided for absorption of persons appointed on contract basis as Assistant Engineer in the UKP. The aforesaid provision stipulates that, notwithstanding anything contained in the Karnataka Civil Services (General Recruitment) Rules, 1977 and in the Rules of recruitment applicable to the post of Assistant Engineer in the Karnataka Public Works and Irrigation Department Engineering services or in any other Rules made under the proviso to Article 309 of the Constitution of India, every contract engineer mentioned in Col.(2) of the schedule below, shall be absorbed in the corresponding category of posts and pay scales in the Karnataka Public Works and Irrigation Department Engineering Services mentioned in Col. (4) and (5) thereof.

72. The Karnataka Civil Services Rules, defines what a cadre is Rule 8(7) reads as under:

Cadre means the strength of a service or part of a service, sanctioned as a separate unit.

73. The Apex Court in the case of Chakradhar Paswan Vs. State of Bihar and Ors, dealing with the word cadre" has held as under:

In service jurisprudence, the term "cadre" has a definite legal connotation. In the legal sense, the word "cadre" is not synonymous with "service". Fundamental Rule 9(4) defines the word "cadre" to mean the strength of a service or part of a service sanctioned as a separate unit It is open to the Government to constitute as many cadres in any particular service as it may

choose according to the administrative convenience and expediency.

74. The Apex Court in the case of Union of India v. Pushpa Rani and Ors. (2008) 9 SCC 242 has held as under:

23. In the service jurisprudence which has developed in our country, no fixed meaning has been ascribed to the term "cadre". In different service rules framed under proviso to Article 309 of the Constitution as also rules framed in exercise of the powers of delegated legislation, the word "cadre" has been given different meaning.

27. ...the posts sanctioned in different grades would constitute independent cadres and we see no reason why a restricted meaning should be given to the term "cadre" for the purpose of implementing the roster.

75. Therefore in 1989, the Government took a decision for establishment of State Civil Service in respect of Karnataka Irrigation Department Service. Notification was issued prescribing the strength of the said service. Rules were also framed for providing for method of recruitment and minimum qualification. On the day the rules were framed, the Irrigation Department was a part of Karnataka Public Works Engineering Department. Persons who were recruited for the said department were working. If those persons were willing to be severed their connection from the original parent and become a member of the newly constituted irrigation department, he has to give his/her willingness. The Government has to issue a notification calling for such willingness and then willingness to be so appointed is to be given by an employee.

76. The material on record discloses that steps have been taken to bifurcate Public Works Department and Irrigation Department. Separate recruitment rules are already framed. However, the said process of bifurcation is yet to complete. It is not in dispute that the common seniority/gradation list of Assistant Engineers is being operated for the purpose of promotion as vertical bifurcation of both the departments has not yet taken place. The process of bifurcating Public Works Service and Irrigation Service is being taken up. In the process it is found that many officers who exercised their option at one point of time came to be promoted to the next higher cadre have retired from service and consequently, the said option exercised by them has become infructuous. Now steps are taken to invite fresh option from among the officers in various cadres. After the recruitment under separate Rules meant for Irrigation Department, while preparing seniority list, persons who are recruited under both the Departments are considered and a common seniority list is prepared. Therefore the practice prevalent in the Department makes it clear that both the Departments were treated as belonging to one cadre, common seniority is prepared and promotion is given based on the said seniority. Even to this day two cadres are not completely separated and they are treated as belonging to the same department.

77. It is clear from the letter dated 23.09.1994, a request was made by the

State to recruit 94 Assistant Executive Engineers (Division-1) by direct recruitment to be filled up in Public Works Department and Irrigation Department. That is the starting point for this recruitment process. However, consequently the request is confined to recruit Karnataka Public Works Engineering Department, Division-1, which is a patent mistake. A mistake would not confer any vested right in favour of any person, much less, an employee.

78. Therefore, because of the mistake crept in, in the subsequent letter, it is also carried into the notifications issued by KPSC, where there is no mention of the Irrigation Department. It was contended that it is not open to the Government or KPSC to act contrary to the terms of the notifications for recruitment to these posts.

79. In support of their contention that the recruiting authority has to conduct recruitment within the four corners of the terms of the notification issued and it has no power to alter the terms of the notification or make recruitment contrary to the terms of the notification, reliance is placed on the following judgments:

80. The Apex Court in the case of District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi, it is held as under: -

6. It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact.

In V.S. Richards Vs. The State of Karnataka and Another, it is held as under:

10. It is a well-settled principle of service jurisprudence that past or previous service will not be taken into account in reckoning seniority where the two services are distinct and different. Further seniority is a comparative concept between employees are equally circumstanced. Where the previous service is neither in the same class or grade, nor in an equivalent class or grade, the question of counting such previous service does not arise.

82. In Tripura Sundari Devi's case, in the notification issued, a particular qualification was prescribed. As persons who did not possess the said qualification had not applied, ignoring the said qualification when appointment was made, of persons who did not possess the said qualification by relaxing the same, the Court struck down the said "appointments on the ground that it is fraud on public. In Richard's cases it is a question of taking into consideration

the past service for the purpose of reckoning seniority, where two services are distinctly different. Therefore both the decisions have no application to the facts of this case. This is not a case where any person is denied an opportunity of applying to a post in pursuance of the notification. The grievance is of a person who filed his application in pursuance of the notification who is complaining of non-compliance of the terms of the notification after he was not selected to the post. Therefore, we do not see any merit in the said contention.

83. Though in the said notification there is no reference to the Irrigation Department, the material on record clearly demonstrates that at no point of time the State and the Departments had any doubt in their mind, that in the present recruitment, both the personnel from Irrigation Department as well as Public Works Department has to be considered. It is in this background only the aforesaid amendment to the Public Works Department Rules was effected. Therefore, as there is no bifurcation of these two Departments as understood in law and the common seniority is prepared, maintained and operated for the purpose of promotion and the letter dated 23.09.1994 makes it abundantly clear that recruitment is for filling up the vacancies in both Public Works Department and Irrigation Department, it is not possible to find fault with the authorities as well as with the KPSC in entertaining the applications from the persons working in both the Department and considering their case for appointment in pursuance of the notification, even though in the notification or in the application, there is no mention about the Irrigation Department.

84. The notification under which these applications were invited is 11.5.2007 issued by the Karnataka Public Service Commission. This is the first of the notification in the series, the last date was 6.5.2007. G. Kumar filed the application within time. After filing the application, on 6.6.2007 he made a representation to the authorities requesting them to prescribe 5 years experience as an eligibility criteria for applying to the said post in which event the Government Order regarding Creamy Layer was not applicable. The said representation was rejected. One more representation was given on 20.1.2007. In addition to that he also moved the Karnataka Administrative Tribunal by filing Application No. 4600/2007 challenging the earlier rejection. Thereafter, on 15.11.2007 he withdrew the application making it clear that he would be satisfied with the consideration of the representation made by him earlier. On 11.2.2008 that representation was again rejected. On 12.2.2008 the Commission announced the results of the written examination. On 12.3.2008 call letters were issued to all the successful candidates. The said G. Kumar was last in the list in the merit. After being satisfied that he has no chances of being selected, on 21.7.2008 the present application is filed challenging these selections.

85. In the light of the aforesaid facts it was contended that, once he participated in the recruitment process without any murmur, he has acquiesced with the proceedings. Therefore, he is estopped from challenging the procedure. In the earlier application when he did not raise these grounds, he is precluded from

raising it in the present proceedings on the principles of constructive res judicata. It was also contended that the Petitioner in the writ petition who is challenging the notification on that ground is estopped from doing so because of acquiescence. In support of his contention, the following judgments are relied upon:

(A) The first of the judgment was in the case of Dhananjay Malik and Others Vs. State of Uttaranchal and Others, where it is held as under:

7. It is not disputed that the Respondent-writ Petitioners therein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.

(B) Again the Apex Court in the case of K.H. Siraj Vs. High Court of Kerala and Others, held as under:

73. The Appellant-Petitioners having participated in the interview in this background, it is not open to the Appellant-Petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum mark for the interview was not proper. It was so held by this Court in para 9 of Madan Lal v. State of J & J as under:

9. Before dealing with this contention, we must keep in view the salient fact that the Petitioners as well as the contesting successful candidates being Respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The Petitioners also appeared at the oral interview conducted by the members concerned of the Commission who interviewed the Petitioners as well as the contesting Respondents concerned. Thus the Petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In Om Prakash Shukla v. Akhilesh Kumar Shukla 11986 Supp SCC 2851 it has been clearly laid down by a Bench of three learned Judges of this Court that when the Petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a Petitioner.

74. Therefore, the writ petition filed by the Appellant-Petitioners should be

dismissed on the ground of estoppel is correct in view of the above ruling of this Court. The decision of the High Court holding to the country is per incuriam without reference to the aforesaid decisions.

86. The aforesaid undisputed facts clearly demonstrate that Petitioner G. Kumar, participated in the selection process also made a representation pointing out his grievance. When the same was not considered, he approached the Tribunal and thereafter withdrew the said application and after not being successful in the selection process, he has again approached the authorities. Under those circumstances, the law laid down in the aforesaid judgments clearly applies to him and he is estopped from putting forth the said contention over again.

Re: Seniority

87. It is submitted that during the pendency of these proceedings, the KPSC has proceeded with the selection process and they have published the provisional select list on the basis of the stand taken by them. In view of their stand being found fault with by the Tribunal which is affirmed by us in these Writ Petitions, the said select list prepared by the KPSC is liable to be set aside. They are now directed to redo the whole thing keeping in mind the findings recorded by the Tribunal as well as by this Court in these proceedings from the stage of conducting the interview to whom they issued interview call letters and did not actually interview them.

88. It is submitted by the KPSC that they have prepared two separate lists, one, of candidates who are to be recruited to the 84 posts, i.e., 20% quota and another separate provisional list of 20 candidates who are to be directly recruited under the inservice quota of 5%. In view of the order passed by the Tribunal as well as by us, it is only the inservice candidates who are going to be affected. Therefore, the provisional list prepared by the KPSC in respect of these inservice quota of 20 candidates is hereby set aside and the KPSC is directed to redo the whole thing from the stage of oral interview and prepare a fresh provisional select list keeping in mind the findings and observations recorded by the Tribunal as well as by this Court.

89. It was submitted on behalf of these inservice candidates that 2007 Rules provide for one final list and, therefore, there is no provision for two separate lists. Therefore, even if the provisional list of candidates of 5% quota is set aside, in effect, both the lists are set aside and one final list is to be prepared.

90. Per contra, the learned Counsel for the persons who are selected in the 20% open category submitted that there is no flaw in the selection of these 84 candidates. They are without employment and if that provisional list is finalized and appointment orders are issued under Rule 5 of the Seniority Rules, it is the appointing authority which has to fix the inter se seniority between these two lists which can be done after the finalization of other list and, therefore, there is no case for selection of their list and selection process has to proceed.

91. In reply, the counsel appearing for the inservice quota candidates submitted that, it is settled law that the seniority is decided on the basis of the candidate joining the service. Therefore, once the select list of this open category is operated and they are given appointments and thereafter if the select list of inservice candidates is finalised and they are given appointment, they would become juniors to them and therefore, it is appropriate to have only one list and not to permit the other list to be operated.

92. It is settled law that, in the matter of seniority either between a direct recruitment and promotees or between two direct recruits, it is the date of appointment order, which is crucial. The person who enters the service first will be senior to the person who enters later. It is a general rule well established. However, it is not an invariable rule. In a case of this nature though the recruitment is conducted under the same notification, same examination is conducted, interviews are called for, two separate provisional lists are prepared. Because of the litigation those lists are not given effect to. In fact the list of 20% quota is not under challenge at all. Because the selection is one and the same, because of the interim orders passed by this Court, it is not given effect to.

93. The learned senior counsel Sri K. Subba Rao appearing for these direct recruits under 20% category submitted, if those candidates are given appointment order in earlier point of time, as the question of inter se seniority is to be decided by the appointing authority at the time of issuing appointment orders, they would concede that notwithstanding their earlier appointment orders and joining duty, Rule 5 is to be kept in mind and inter se seniority between these two lists is to be decided in accordance with Rule 5 ignoring the fact that the appointment orders are issued earlier and these persons have joined duty at an earlier point of time. This submission is placed on record and in our view that would solve the problem.

94. In fact, it would be appropriate for the Government while issuing the appointment orders to incorporate this aspect in the appointment orders, so that the same cannot be questioned subsequently. In view of the aforesaid submission, the list of all these 20% direct recruits in open category may be processed at the earliest point of time and taken through its logical conclusion. Similarly, without any further loss of time, the list of this inservice candidates also be finalized at the earliest.

95. In the light of the aforesaid findings recorded by us on the four points raised in these Writ Petitions, we do not see any merit in these Writ Petitions and accordingly they are liable to be rejected. Hence, we pass the following:

ORDER

In view of the finding recorded by us on the question of relaxation of age prescribed affirming the order of the Tribunal, the KPSC is directed to give the benefit of age relaxation to all the Applicants before them in terms of this order.

In view of the finding of the Tribunal as well as by this Court that the Creamy Layer Policy is attracted to inservice candidates as the said Government Order is made mutatis mutandi applicable to General Merit rural candidates, the benefit of the order of the Tribunal and this Court is to be extended to General Merit rural candidates under the in-service quota also.

The Petitioner in W.P. No. 13191/2009 G. Kumar though his application is rejected by the Tribunal, he would be entitled to the benefit of reservation under category IIA without applying the Creamy Layer Policy to him.

Writ petitions are dismissed.

Parties to bear their OWN COSTS.