

(1961) 09 KAR CK 0008

In the Karnataka High Court

Case No : Writ Petns. No's. 736 of 1961, connected with W.P. No's. 737, 803, 829, 832, 847, 848, 849 and 850 of 1951

K.N. Chandra Sekhara and Others

APPELLANT

Vs

State of Mysore and Others

RESPONDENT

Date of Decision : 04-09-1961

Acts Referred:

Mysore Munsifs (Recruitment) Rules, 1958 — Rule 12, 6, 6 (4)
Mysore Public Service Commission (Conduct of Business and Additional Functions) Act, 1959 — Section 9

Citation : AIR 1963 Kar 292

Hon'ble Judges : Mir Iqbal Husain, J;A.R. Somnath Iyer, J

Bench : Division Bench

Advocate : K.S. Srinivasa Iyer, in WP No. 736, P. Subba Rao, in WP No. 737, Malur Subba Rao, in WP No. 803, V.L. Narasimha Murthy, in WP Nos. 829, 848 and 849, T. Krishna Rao, in WP No. 832, V. Krishna Murthy, in WP No. 847 and N.S. Narayana Rao, in WP No. 850, for the Appellant; G.R. Ethirajulu Naidu, General, for the Respondent

Judgement

A.R. Somnath Iyer, J.—For the purpose of making appointments to the posts of Munsiffs in the judicial Service of the State of Mysore, the State Public Service Commission, which will be referred to as the Commission, conducted a competitive examination which commenced on December 20, 1960, and continued till March 10, 1951. There were 229 candidates but it was announced by the Commission by a notification which it made on May 22, 1961, that only fifty two had succeeded. Their names were published in the order of merit. The petitioners who took the examination but did not succeed challenge the notification as one made without lawful authority.

2. The examination was conducted under Rules made for that purpose by the Governor of the State under Article 234 and the proviso to Article 309 of the Constitution. Those rules which were intituled the Mysore Munsiffs Recruitment Rules, 1958, will be referred to as the Rules. Rule 3 of those Rules directed the

appointments to the cadre of Munsiffs to be made either by a competitive examination or by promotion. Rule 4 enumerated the disqualifications and Rule 5 the conditions of eligibility. Rule B required the competitive examination to consist of a written examination and a viva voce examination, conducted by the Commission, and directed that the aggregate marks obtained in these two examinations should form the basis for the preparation of the list of successful candidates. That applications for the competitive examination should be invited by open advertisement was the requirement of Rule 7. Rule 9 prescribed the procedure for making promotions.

Rule 10 made it the duty of the Commission to make arrangements for the conduct of the examination. Rule 12 enjoined the Commission to publish the list of successful candidates in the order of merit, so that appointments may be made in that order. Rule 13 directed the list so prepared to be in operation for a year. Rule 14 prescribed a period of probation and Rule 15 empowered the termination of the services of an unsuitable probationer. Rule 16 which is also a saving rule declared that those rules which permitted appointments by promotion shall stand repealed after the expiry of a period of three years. These Rules end with a schedule which contains what is called a "Syllabus" specifying the subjects for the examinations and the maximum marks therefore. The maximum fixed for the written examination was 300 and that for the viva voce examination was 200.

3. Under Rule 7, a notification was first published on July 11, 1959, calling for applications and was followed up by another on August 30, 1960. It was declared that it was unnecessary for those who had presented applications in response to the first notification to apply again.

4. The written examination was conducted on December 20 and 21, 1960, and after an inordinate delay, the viva voce examination began on March 1, 1961, and continued till March, 10, 1961.

5. It was on May 22, 1961, that the impugned notification was published by the Commission under Rule 12, proclaiming the names of successful candidates. It is stated on behalf of the Commission that that announcement was preceded by a decision taken by the Commission on May 19, 1961, fixing 45% for candidates belonging to the scheduled castes and scheduled Tribes and 55% for the others, as the qualifying marks for success.

6. One of the many arguments presented is that the specification of the qualifying marks was the special responsibility of the Governor on whom that duty was imposed by Article 234 of the Constitution, and that there was in this case a usurpation of that power by the Commission.

7. Mr. Advocate General who could not dispute the necessity for the specification of qualifying marks to be secured in the examination conducted in this case, contended that that matter being a mere detail had been validly delegated to the Commission which had, therefore, the competence to take a decision on that question.

8. That the qualifying marks were fixed at a meeting of the Commission on May 19, 1961, is completely established by the minutes of that meeting produced before us. But, the question is whether the specification of those qualifying marks, was within the Commission's competence.

9. A discussion of this question would necessitate reference to the relevant constitutional provisions. Article 233 of the Constitution provides for the manner in which District Judges may be appointed. Article 234 provides for appointments of persons other than District Judges to the Judicial Service of the State. That article reads:

"234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in Recruitment of per- accordance with rules made by sons other than distract him in that behalf after con- tract judges to the judicial consolation with the State Public cial service. Service Commission and with the High Court exercising juris- diction in relation to such Slate."

10. This constitutional provision appoints the Governor to make rules for the appointment of Judicial Officers other than District Judges, and ordains that those appointments shall be made only in accordance with the rules so made. The further requirement of the article is that those rules should be made only in consultation with the High Court and the State Public Service Commission.

11. The rules made by the Governor in this case purport to have been made not only under Article 234 but also under the proviso to Article 309 of the Constitution. Article 309 empowers legislation for recruitment to the State Public services and for the determination of the conditions of service applicable to those posts. The proviso to that article empowers the Governor to make transitional rules for that purpose. That article reads:--

"309. Subject to the provisions of this Constitution,

Acts of the appropriate Legis- Recruitment and con- legislature may regulate the recruit- ditions of service of per- ment, and conditions of service sons serving the Union of persons appointed, to public or a State. services and posts in connection with the affairs of the Union or of any State : Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

12. This article is subject to the other provisions of the Constitution, and therefore, subject to Article 234 which regulates appointments to posts other

than those of District Judges in the Judicial service of the State, The only the or rule which can be made under Article 309 or under the proviso to it, in respect of such appointments is a law or rule determining the conditions of service applicable to them.

13. The competitive examination in this case having been held under Rules made by the Governor under Article 234, the question is whether the impugned notification published by the Commission which had the power to publish the list of successful candidates under Rule 12 of those Rules, is one which can claim the status of a notification properly made under that rule.

14. The notification is impeached on the ground that since the Rules did not prescribe the criterion by which the success of a candidate should be determined, there was no criterion by which the Commission could have determined whether a candidate had succeeded or failed, and it was not open to the Commission to prescribe for itself a criterion not found in the Rules.

15. Now, the formula applied by the Commission for the purpose of ascertaining the names of the successful candidates was one which it admittedly evolved on May, 19, 1951. What it did was to fix 45% as the qualifying marks for the candidates belonging to the scheduled castes and scheduled Tribes and 55% for the others. Although the claim made by the Commission is that the power of the Governor to fix the qualifying marks was delegated to it, it is admitted that there is no explicit delegation of that power under a rule expressly making such delegation. But it is asserted that that delegation has been made implicitly and to that argument. I shall advert at the appropriate stage.

16. I shall first proceed to consider whether any such delegation is permissible or valid.

17. Now, Article 234 which directs the appointment of persons to certain cadres of the Judicial Service of the State only in accordance with the rules made under that article and which appoints the Governor of the State the authority to make those rules, makes for that purpose consultation with the High Court and the Public service Commission imperative.

18. The insistence on the consultation with the High Court is obviously attributable to the recognition of that source as one from which the most useful advice is obtainable on a matter concerning a service under its own control. The requirement that the Public Service Commission should also be consulted is equally intelligible for the reason that that Commission is enjoined by Article 320 to conduct examinations for appointments to the services of the State.

19. It is reasonably clear that the purpose of Article 234 is that the collective wisdom of the Governor, the High Court and the Public Service Commission should regulate appointments referred to in that article, and it is plain that no rule made without the required consultation can have any effect or potency. It is obvious that within the range of the many matters requiring such collective

deliberation would fall a multitude of subjects such as the determination of the question whether the appointments should be made on the basis of an examination, and if so, of what pattern, the selection of the subjects in which the candidates should be examined, the determination of the qualifying and maximum marks, the appointment of the authority to conduct the examination, the qualifications and disqualifications of the candidates and the like.

20. Indeed, the Rules made by the Governor made provision for everyone of these matters but one. They directed that those who were not already in the ministerial services, should take a competitive examination consisting of a written and a viva voce examination. The maximum number of marks for each of those examinations was determined, the State Public Service Commission was constituted the authority to conduct the examination and to announce the names of successful candidates. The period during which the appointments from among those candidates should be made was also prescribed. The Rules covered many other details such as the calling of applications by the Commission and the arrangements for the examination. The Commission was directed to determine the success of the candidates on the basis of the aggregate marks obtained in the written and viva voce examinations. That an Officer designated by the Government should be associated with the viva voce examination and the ascertainment of the result thereof was also one of the requirements of the Rules.

21. But, there was no rule prescribing the qualifying marks. Nor was the power to determine those qualifying marks expressly delegated to any designated authority.

22. It is this situation which presents the question whether the omission of the Governor to specify the qualifying marks in his Rules amounts to an abdication of his constitutional duty and whether in prescribing those marks, the Commission arrogated to itself authority not bestowed on it. The complaint that there was an abdication of his power by the Governor can succeed only if the power to determine the qualifying marks was not delegable but has been surrendered to the Commission.

23. Now, it is manifest from Article 234 of the Constitution that the Constitutional intent was that appointments to the judicial service in a State, unlike other State services, should be regulated only by rule made under that article and not by a law made by the Legislature of the State, which was conferred power by Article 309 to make laws for recruitment to other services. The Judicial service was selected for special treatment and appointments to it were excepted out of the operation of Article 309, and out of the orbit of ordinary Legislative control. Article 234 incorporates a command of the Constitution on the subject of appointments to the cadres of the judicial service referred to in it, and constitutes the Governor in a sense a select legislative organ for the enactment of rules for the accomplishment of that constitutional purpose. The status of the rules so enacted is as high as that of a law made by the Legislature under Article 309 and of the rules made under the proviso to it. The attributes of the power of

a Governor to enact rules under Article 234 therefore resemble those of a Legislature enacting legislation in its own legislative field. The similitude between the power of the Legislature and the power of the Governor being so obvious, it is clear that the bounds of permissible delegation in each case should also be similar.

24. There is an old and well known rule that a Legislature cannot delegate an essential legislative function, and that principle is equally applicable to the delegation of power by a Governor functioning under Article 234. The corollary to that proposition which permits delegation of an immaterial function not constituting the essence of legislative power similarly makes the delegation by a Governor of a non-essential rule making function permissible.

25. In *In re Article 143, Constitution of India and Delhi Laws Act (1912) etc.* AIR 1951 SC 332 Mukherjea, J., as he then was, observed:

"The decisions referred to above clearly lay down that the legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct. A surrender of this essential function would amount to abdication of legislative powers in the eye of law. The policy may be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the Legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse. These I consider to be the fundamental principles and in respect to the powers of the legislature the constitutional position in India approximates more to the American than to the English pattern. There is a Basic difference between the Indian and the British Parliament in this respect. There is no constitutional limitation to restrain the British Parliament from assigning its powers where it Will, but the Indian Parliament qua legislative body is fettered by a written constitution and it does not possess the sovereign powers of the British Parliament."

Mukherjea J., proceeded to allude with approval to the following passage of Schwartz., in his work on American Administrative Law:

"that these doctrines enable the American Courts to ensure that the growth of executive power necessitated by the rise of the administrative process will not be an uncontrollable one. Delegation of powers must be limited ones -- limited either by legislative prescription of ends and means, or even of details or by limitations upon the area of the power delegated. The enabling legislation must, in other words, contain a frame-work within which the executive action must operate."

26. It is by the application of these principles that we should pronounce on the deferability of the power exercised by the Commission in this case.

27. Article 234 which imposes on the Governor a constitutional duty to enact rules also confers power exercisable for its discharge and that power undoubtedly involves the exercise of the discretion by the Governor as to what the rules should be. It is by the exercise of such discretion that he determines, in consultation with the High Court and the Public Service Commission, the method to be adopted for making the appointments, the principles on which they should be made, and the standards by which the suitability of the person to be appointed should be judged.

28. If the method chosen for appointment is a competitive examination, the prescription of the examination should ordinarily also involve the signification by the Governor of the marks to be secured for succeeding in it, unless the pattern of the examination and its purpose make such signification unnecessary. But, if the determination of the qualifying marks, though necessary, does not constitute a matter sufficiently important for a rule but only a mere detail, the power to make such determination can be validly delegated on the principle that the Governor, like the Legislature, should not be denied the necessary resources of flexibility and practicability which, while enabling to formulate policies and establish standards make it also possible for him to authorise designated instrumentalities to perform all subsidiary functions necessary for the accomplishment of the purpose of his rules.

29. The denial of the capacity to make such authorisation would only stop the wheels of legislative or rule making power, the direct exercise of which is impracticable where the policy of the Legislature has to be adapted to infinitely variable conditions.

30. What, therefore, has to be considered is whether the importance of the qualifying marks was such as to demand their determination by the Governor. It would be impossible to draw the exact line which separates those essential legislative or rulemaking functions which must be entirely regulated only by the Legislature or the rulemaking authority, from the less important matters, which may be validly entrusted to those who are to act under the provisions enacted. It is plain that no precise or exhaustive definition of an essential legislative function is possible. In *Rajnarin Singh Vs. The Chairman, Patna Administration Committee, Patna and Another*, , Base J., who delivered the Judgment of the Court, said :

"Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy."

31. The doctrine of non-delegation being a judge made doctrine and the boundaries of permissible delegation being so obscure, the answer to the question whether a function is an essential rule making function cannot be in the abstract but must depend upon the circumstances.

32. That answer will depend upon a variety of factors, such as, the quality of the power delegated, the occasion for delegation and the manner in which it is to be exercised.

33. Normally, an authority appointed to make rules and who has to exercise the discretion as to what the rules shall be must exercise that discretion himself, although he may delegate the power to perform acts necessary to effectuate the rule so made. When that rule should operate, as to whom or on what occasion are all subsidiary acts involving mere details, the performance of which can be delegated to a designated authority.

34. The Governor who is the constitutional bearer of the power to make rules under Article 234 had the power to make a rule requiring the holding of a competitive examination. But was it enough for the Governor to merely direct the holding of a competitive examination and to name the subjects in which the examinations have to be held and specify the maximum marks for the papers to be set in such examination? Was it also necessary for him to formulate a principle for the determination of success or failure in the examination?

35. The basic purpose of every competitive examination for whatever purpose it is held, is the selection of the worthiest person, the machinery of the examination being adopted for the assessment of a candidate's competence, proficiency and attainment. A competitive examination is a well-known system designed to measure merit and for the appraisal and evaluation of proficiency. Only those persons who possess the required standard of excellence assessed on no other basis than their performance in the examination can be declared as having succeeded in the examination. One method for the appraisal of merit is the prescription of a minimum standard, such as minimum qualifying marks. That method would involve the inclusion of all those who secure that minimum and above, in the list of successful candidates. If the examination is held for making appointments, the utility of such list is obvious since appointments from that category could be made as and when vacancies arise, rendering unnecessary the holding of further competitive examinations again and again at short intervals.

36. The examination in this case was one which, as the rules make it very clear, was conducted for the purpose of the preparation of a list of that pattern, the rules did not envisage the preparation of an adhoc list just sufficient for the appointments to be immediately made. Rule 13 directed the list to be prepared by the Commission in this case to be in operation for a year. That rule makes it abundantly clear that the list was intended to be of use not only for immediate requirement but also for making appointments to future vacancies during that period.

37. Another and equally useful procedure sometimes adopted for the holding of a competitive examination for making appointments is to first determine the number of appointments to be made and to hold an examination for making a

selection for these posts, only on the basis of the performance in the examination. The specification of qualifying marks even for that purpose would be necessary,, although such specification can only be for exclusion and not for selection.

38. That the competitive examination held in this case was of the first pattern and not of the second is not disputed. Although the advertisement published on August 30, 1960 by the Commission declared that there were about fifty appointments to be made, it is clear that the examination directed to be held by the Governor was not one for making only those fifty appointments. However that may be, it cannot be gainsaid that the determination of the minimum qualifying marks is the determination of the minimum standard required of a candidate, and those qualifying marks, if secured, constitute the vital qualification for the appointment sought.

39. If, on its true construction, Article 234 does not require that standard to be specified or formulated by a rule, then alone, could it be said that the Governor could delegate that function to another. That article is a special constitutional provision removing from the provisions of Article 309 certain appointments to the judiciary and enjoining the Governor to make them in accordance with rules enacted in consultation with the High Court and the Public Service Commission. What are the matters about which the Governor is required to consult the High Court and the Public Service Commission. The Public Service Commission, it is obvious, was required to be consulted in regard to matters in which it had special competence to offer advice. The High Court was required to be consulted so that its advice may be obtained as to how and in what manner the appointments to a service under its control may be satisfactorily made.

40. Now, the purpose of the consultation with the Public Service Commission can be ascertained from the provisions of Article 320 of the Constitution, which makes it the duty of the State Public Service Commission to conduct examinations for appointments to the services of the State. Sub-clauses (a) and (b) of Clause (3) of that article direct that that Commission shall be consulted on all matters relating to the methods of recruitment to Civil services and Civil Posts, and the principles to be followed in making appointments to civil services and civil posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers. These sub-clauses read

"320. Functions of Public Service Commission.

(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;

41. Although these constitutional provisions govern appointments to the services of the State, other than its judicial service, it is clear that the consultation with the Public Service Commission required by Article 234 for rules to be made under it for the judicial service is not different from that required by Sub-clause (a) and (b) of Article 320(3) in respect of appointments to other services. If the required consultation in respect of those other services is, as specified in those two clauses of Article 320(3), on the method of recruitment, the principles to be followed in making appointments and the suitability of candidates, it is clear that the consultation ordained by Article 234 should also relate to the methods of recruitment, the principles to be followed in making appointments and the suitability of candidates.

42. The consultation enjoined by Article 320(3) of the Constitution must precede the enactment of the law under Article 309 or the rules under the proviso to it. The three matters on which consultation is necessary are the method of recruitment, the principles regulating the appointments, and the suitability of the aspirants for the posts. A competitive examination being clearly a method of recruitment, before that method is chosen, the Public Service Commission has to be consulted. The Public Service Commission should also be consulted about the principle on which appointments should be made and on the suitability of candidates for those appointments. The next question is whether consultation in the matter of the fixation of the qualifying marks is also necessary if the holding of an examination is the method to be employed for recruitment. Such consultation would be unnecessary only if the fixation of the qualifying marks is a matter not falling within Sub-clauses (a) and (b) of Clause (3) of Article 320, and if such fixation is not part of the method for recruitment or is unconnected with the principles to be formulated for making appointments or has no bearing on the suitability of the candidates.

43. The construction Mr. Advocate General asked us to place on Article 320(3) is that that clause does not require the Governor or the Legislature functioning under Article 309 of the Constitution to consult the Public Service Commission for the determination of the qualifying marks, and that it is open to the Legislature or the Governor, as the case may be, to determine and fix those qualifying marks without such consultation.

44. The provisions of Article 320(3) which are so comprehensive and full, do not admit, in my opinion, of that interpretation. In my view, the determination of the qualifying marks is an integral part of the scheme of an examination if the examination is the method employed for recruitment, and is one of the principles regulating appointments, if not one of the many processes by which the suitability of a candidate is tested. In any view of the matter, what the qualifying marks in an examination should be is a matter on which Article 320(3) compels consultation with the Public Service Commission.

45. The construction suggested by Mr. Advocate General, which makes it possible for the Legislature or the Governor to decline to consult the Public Service Commission on the determination of the qualifying marks, and to that extent diminishes the utility of the consultation and makes it futile and illusory, cannot merit acceptance.

46. If the consultation required by Article 234 must as it should in my opinion, extend to every one of the matters on which Article 320(3) enjoins consultation, it follows that the qualifying marks to be secured in a competitive examination prescribed by rules made under Article 234 should also form the subject-matter of consultation by the Governor with the High Court and the Public Service Commission. Can it be said that a matter on which the mandate of the Constitution is that a rule shall be made only after the collective deliberation of the three authorities specified in it, is not a matter of importance but only a subsidiary detail? If the prescription of an examination is an important matter, as it is admitted to be, the fixation of the qualifying marks which is a material slip in the process of prescription and without which the holding of an examination, like the one held in this case, would become unmeaning and purposeless, is a matter equally important. Among those to be taken, for prescribing an examination, the fixation of the qualifying marks is a cardinal step and I cannot imagine anything of greater import and consequence in the scheme of an examination than the specification of the qualifying marks which formulates a standard. To relegate a matter which is such an essential part of the apparatus of a competitive examination to the realm of unimportant details would be to dwarf the importance of the barrier separating success from failure and to belittle the greatness of attainment and merit whose discovery is the chief and primary purpose of a competitive examination.

47. If the determination of qualifying marks which I consider to be one of the important matters on which the Governor is under a duty to make a rule, is not a matter of mere detail, or a matter so subsidiary as to be entrusted to some other agency, Article 234 on its true construction makes it the special duty and responsibility of the Governor himself to make a rule about it. The power to be exercised for that purpose, committed to him by the Constitution, is plainly what cannot be delegated.

48. Mr. Advocate General produced before us certain rules made by the Central Government for the regulation of recruitment to certain All India Services. Those rules, it was pointed out to us, authorised the Union Public Service Commission to fix the qualifying marks in all cases in which an examination was to be conducted for recruitment, and it was suggested that such delegation would not have been made unless it was permissible.

49. But, it will be seen from Section 3 of the All India Services Act, 1951 (Central Act LXI of 1951) that Section 3 which authorised the Central Government to make those rules also directed that the rules made by it should be laid before Parliament for necessary modifications, whether by way of repeal or amendment.

50. However that may be, neither the fact that there has been a delegation of the power to determine the qualifying marks to the Union Public Service Commission nor the fact that while making rules for certain other services of this State, the Governor himself determined the qualifying marks by a rule, as he has sometimes done, can afford any guidance or assistance to the decision of the question whether that power is or is not in law capable of delegation. That question has to be decided on our own construction of the relevant constitutional provisions which must rest on well recognised principles which have throughout held the field. Those are the principles which have influenced my view that, in these cases, the Governor could not denude himself of the power to determine the qualifying marks and vest it in the Commission.

51. That being the position, the principle evolved by the Commission in May 19, 1961, can be no effective substitute for that which had to be determined by the Governor

52. I reach the same conclusion by another route. The occasion for the promulgation of rules in this case was that created by the necessity to make appointments to one of the cadres of judicial service. It was the duty of the Governor to fix the primary standards and name them and to guide the determination of the subsidiary details on the basis of specified standards or intelligible principles indicated directly or indirectly, explicitly or implicitly in his rules, without making an unbridled delegation conferring wide and undefined discretion without the mention of named standards for subsidiary executive action. The exercise of his power which is comparable to that of the Legislature had to conform to the principle that he may enact rules so far as is reasonable and practicable, leaving to another, the authority to accomplish their purpose. If the rules enacted directed the conduct of only one competitive examination and provided for many details about it, it would be difficult to suggest that there was any element of impracticability in the naming of the criterion by which the success in the examination should be determined.

53. Further, it is impossible to hold that there was in fact a delegation to the Commission of the power to fix qualifying marks.

54. In support of the argument that there was such delegation, reliance was placed on Rules 6 and 12 of the Rules,

55. Those two rules read:--

"6. Examinations. -- (1) The competitive examination shall be conducted by the Commission and shall consist of --

(a) written examination to test the candidates' knowledge of law and language; and

(b) a viva voce examination.

(2) The syllabus for the competitive examination shall

be as specified in the Schedule to these rules.

(3) The candidates eligible for appointment as Munsiffs shall be determined by the Commission on the basis of the aggregate marks obtained in the written and viva voce examinations.

(4) For purposes of conduct of the-viva voce examination and determination of persons eligible to be appointed as Munsiffs, the Secretary to Government, Law Department, or any other officer nominated by Government shall be associated with the Commission.

12. List of candidates successful in competitive examination.-- Names of candidates successful in the competitive examination shall be published in the Mysore Gazette by the Commission in order of merit. Appointments shall be made of candidates in the order in which their names appear in the list:

Provided that the selection of candidates for appointment shall be in accordance with any general or special rules made by Government on or before the date of inviting applications for examination in respect of reservation of vacancies in favour of Scheduled Castes and Scheduled tribes and other Backward Classes. When such reservation has been prescribed, the Commission shall indicate in the list of candidates successful in the examination whether a candidate belongs to a Scheduled Caste, a Scheduled Tribe or to the other Backward Classes."

56. Clause (3) of Rule 6, according to Mr. Advocate General implicitly delegated to the Commission the power to fix the qualifying marks. That clause of Rule 6 when read with Rule 12, it was submitted, made the conclusion irresistible that there was such delegation. The argument advanced was that the direction to the Commission by Rule 6 to determine who the successful candidates were making the aggregate marks in the written and viva voce examinations the basis for such determination, and the further direction under Rule 12 to publish the list of the successful candidates, considered with the impossibility of the preparation of that list without in the first instance fixing the qualifying marks, justified the view that there was an implied transmission to the Commission of the power to fix such marks. We are asked to read into Rules 6 and 12 the delegation of such power to give an effectual meaning to those two rules.

57. In *Korathi Heggadthi v. Radhamma Heggadthi* 38 Mys LJ 142 this Court observed:

"It is well settled that in the interpretation of a statute, we should avoid a construction which leads to insuperable difficulties or anomalies and that we should similarly avoid a construction which would leave without effect the statute or any part thereof. It is our duty to endeavour to give effect to every part of the statute and to prefer a construction which makes the statute effectual and to reject the one that renders it devoid of meaning. We are at liberty, as it has been pointed out on more than one occasion, to modify the meaning of the words found in a statute and even the structure of a sentence contained in it if its

ordinary meaning and grammatical construction lead to inconvenience and absurdity, hardship or injustice presumably not intended by those who made the law and that we should do so by even departing from rules of grammar and by giving a meaning to particular words other than what its plain language warrants or justifies, by altering their collocation by rejecting them altogether or by interpolating other words, which we should, however, so do only under the influence of an irresistible conviction that the legislature could not possibly have intended what its words signify and that modification thus required to be made is a mere correction of careless language and really gives the true meaning. This, in our opinion, we can always do when reasonably permissible."

58. But, this rule of construction which can be applied to cases where the meaning of the enactment is not clear for the purpose of making it sensible and effective, by supplying inadvertent legislative omissions, becomes unavailable to provide for contingencies which the enactment has failed to meet. This principle has been undeviatingly followed in numerous cases. In *Mersey Docks and Harbour Board v. Henderson Brothers* (1888) 13 AC 595, Lord Halsbury L. C., observed:--

"I believe that no case can be found to authorise the construction of the majority of the Court of Appeal altering a word so as to produce a *casus omissus*."

59. In *Robert Wigram Crawford v. Richard Spooner* (1846) 6 Moo PC 1, the Judicial Committee observed :

"The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Act; we cannot add, and mend, and, by construction, make up deficiencies which are left there."

60. The principle, therefore, is that while a difficulty in construction must be resolved by the Court, omissions and deficiencies must be supplied only by the Legislature, in *lord Howard De Walden v. Inland Revenue Commissioners* 1948-2 All ER 825, Lord Uthwatt, after referring to the above statement of the law by the Judicial Committee observed that the principle that what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication, means in its application that "a statute may not be extended so as to meet a *casus omissus*." Since the interpretation of Rules 6 and 12 does not present any difficulty it would not be permissible for us to strain their language, supply a meaning of which it is incapable and deduce a delegation of power not really made.

61. In seeking the assistance of Rule 6 (3) for his proposition that that clause made an implied delegation of the power to fix the qualifying marks, Mr. Advocate General found himself in great difficulty. According to him, for the determination to be made under that clause, the fixation of the qualifying marks by the Commission was inevitable and the delegation of the power to do that had

to be interred. But Mr. Advocate General had to admit that if clause (3) is so interpreted, clause (4) on which the same interpretation has to be placed would establish an implied delegation of the very same power to another body consisting of the Commission and the Officer specified in that clause, thus creating a conflict between the respective provisions of those two clauses. Under clause (3), the delegation would be exclusively to the Commission, but under clause (4), the Commission together with another officer would tie the delegates, and the determination made by the commission without the association of the Officer specified in clause (4) on May 19, 1981, although permissible under clause (3) would not be one properly made under clause (4).

62. In the view that I take, it becomes unnecessary to consider the validity of the submission that the delegation on which Mr. Advocate General depended was delegation of uncanalised power and therefore invalid or to consider the effect of the pronouncement of their Lordships of the Supreme Court in *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, on which the petitioners relied, or the enunciation made by them in *Vasantlal Maganbhai Sanjanwala Vs. The State of Bombay and Others*, cited by Mr. Advocate General.

63. It would likewise be unnecessary to consider the argument advanced that the fixation of the qualifying marks by the Commission on May 19, 1961, after the completion of the examination being an *ex post facto* determination is invalid and ineffective.

64. The validity of the proceedings of the commission fixing the qualifying marks, is challenged on another ground. The record by the Commission of its proceedings reads:--

""Proceedings of the Meeting of the Mysore Public Service Commission held on the 19th May 1951.

Minimum qualifying marks to be secured by candidates for being declared successful in the competitive examination, held for the recruitment of Munsiffs in the Mysore Judicial Service during December 1960 and March 1961.

With a view to keeping up the efficiency in the Judicial Service of the State, such of the candidates as have secured not less than 275 marks out of a total of 500 marks, fixed for the examination, i.e., 55 per cent of the total marks in the aggregate, may be declared successful at the examination. This will, however, be subject to Rule 7 (1) of the Mysore State Civil Services General Recruitment Rules, 1957, according to which the minimum marks in the case of candidates belonging to Scheduled Castes and Scheduled Tribes shall be 10 per cent less than the minimum."

What the Commission did was to fix 45 per cent as the qualifying marks for the candidates belonging to the Scheduled Castes and Scheduled Tribes, and 55 per

cent for the others. The fixation of two sets of qualifying marks, it was urged, was repugnant to the very concept of a competitive examination, and therefore, illegitimate.

65. But, Mr. Advocate General sought the support of Article 16(4) of the Constitution and Rule 7(1) of the Mysore State Civil Services General Recruitment Rules, 1957, for what the Commission did, which according to him, amounted to no more than a reservation of appointments or posts in favour of certain backward classes of citizens. It is true that Rule 7(1) of the Mysore State Civil Services General Recruitment Rules, 1951 which were made under the proviso to Article 309 of the Constitution, on which the Commission depended, in effect, fixed a smaller percentage of qualifying marks for candidates belonging to the scheduled Castes and Scheduled Tribes. It was suggested that this rule became applicable to the competitive examination conducted in these cases, by reason of the proviso to Rule 12 of the Rules made under Article 234. The relevant part of that proviso reads:--

"Provided that the selection of candidates for appointment shall be in accordance with any general or special rules made by Government on or before the date of inviting applications for examination in respect of reservation or vacancies in favour of Scheduled Castes and Scheduled Tribes and other Backward Classes. When such reservation has been prescribed, the Commission shall indicate in the list of candidates successful in the examination whether a candidate belongs to a Scheduled Caste, a Scheduled tribe or to the other Backward Classes."

This proviso does no more than to state that when making the appointments, the reservation made by the State under Article 16(4) of the Constitution shall be implemented, The proviso in terms, refers to general or special rules made by Government, and those rules can be no other than those made by the State Government for the reservation of appointments and posts under Article 16(4). It does not authorise any discrimination like the one made by the Commission between two classes of candidates in the matter of the fixation of qualifying marks. However, the reservation to be made under Article 16(4) is what may be made by the State and not by the Governor enacting rules either under the proviso to Article 309 or under Article 234, and the fixation of a smaller percentage of marks for success in a competitive examination, being no reservation in any sense of the term under Article 16(4), is not one which even the State can make. It is, however, unnecessary to pursue this discussion or to express any definite opinion on this question since the fixation of qualifying marks by the Commission was itself, in my opinion, not within its competence.

66. The next criticism was of the viva voce examination conducted by the Commission. The argument presented is that although the Rules directed a viva voce examination to be held only to test the candidate's general knowledge and his grasp of the principles of law, the Commission exceeded its authority and proceeded to assess the candidates' eligibility on additional and extraneous considerations.

67. The schedule to the Rules specifies the "syllabus" for the viva voce examination as hereunder:--

SCHEDULE

VIVA VOCE (Marks 200).

To test the candidate's general Knowledge and grasp of Principles of laws."

68. In the first notification calling for applications, the Commission referred to the purpose of the viva voce examination in the same way. But, when it published the second notification on August 30, 1960, what was stated in that notification, in the context of the viva voce examination, reads:--

"III. Syllabus and Rules.

6. The examination shall consist of :--

(3) Viva Voce Marks.

200

(To test the candidate's general knowledge, grasp of principles of Law, personality, and suitability, of the candidates for appointment to the cadre of Munsiffs)."

69. Although there is no plea in that form in the affidavits produced in these cases, it was argued before us that the Commission did not conduct the viva voce examination solely for the purpose of assessing the candidates' general knowledge and grasp of the principles of law, as it should have done, and that it quite improperly proceeded to determine the candidates' eligibility also on considerations such as, the candidates' "personality" and "suitability". This argument rested on the second notification in which It was stated that the viva voce examination would include an examination of the candidates' personality and suitability.

70. Mr. Advocate General asked us to ignore the references to "personality" and "suitability" in that notification, and submitted that since the author of the notification was the Secretary of the Commission, it was not possible for the petitioners to assail the viva voce examination on the ground that, in fact, the Commission allowed itself to be Influenced by the "personality" or "suitability" of a candidate.

71. Two counter-affidavits have been produced in these cases. The deponent of one of them is the secretary and of the other the Chairman of the Commission. Neither the Secretary nor the Chairman explained why the second notification was so worded. That omission may be attributed to the fact that the petitioners did not in their own affidavits raise the issue. But, the argument in these cases commenced on August 18, 1961, and on that very day, Mr. Narasimhamurthy who opened the case for some of the petitioners, submitted that one of his arguments was that the viva voce examination stood vitiated By reason of the

Commission allowing itself to be influenced by the personality and suitability of the candidates.

72. Although the answer of Mr. Advocate General to this contention was that the question whether the Commission did or did not in fact award marks for personality and suitability, being one of fact, should not be allowed to be raised without a plea, it was only on the fifth day on which these cases were heard and after he concluded his own argument, that he asked for an opportunity to produce an affidavit for the elucidation of the question whether any marks had been awarded to the candidates by examiners for personality and suitability. We did not consider it fit to accede to that request at the inordinately late stage at which it was made.

73. The notification by which the Commission called for applications on August 30, 1950, made it perfectly clear that at the viva voce examination, the factors which would be taken into consideration by the Commission would be the candidate's general knowledge, his grasp of the principles of law, his personality and suitability, we should, unless the contrary is established, proceed on the assumption that all those four matters were regarded by the Commission as relevant factors for the assessment of the candidate's eligibility. The notification which was published under the signature of the Secretary of the Commission, is obviously what was published under the authority of the Commission and cannot therefore be disowned by it.

It is plain that the Commission did intend when (SIC) called for applications .by that notification to hold a viva voce examination in respect of all the four matters enumerated by it. What it avowedly intended to do, we must presume it did, and it would be too much for Mr. Advocate General to suggest that it was necessary for the petitioners in their own affidavits to assert that what the Commission did was not different from what it intended to do. On the question whether the candidates' personality and suitability did or did not influence the Commission and the Law Secretary who was associated with it at the viva voce examination, the members of that examining body were the persons who has special means of knowledge. It was for them to tell us that the declared proposal to measure the somewhat intangible qualities of a candidate, such as, his personality and suitability, was, in fact, not implemented, but abandoned, and that marks were awarded only for the candidate's general knowledge and grasp of the principles of law, exhibited by him at the examination.

74. There is another equally weighty consideration which makes it difficult for Mr. Advocate General to overcome the difficulty presented by the second notification. In the Secretary's affidavit, he stated that the members of the Commission and the Law Secretary who constituted the body of examiners maintained a record of the marks allotted by them to each of the candidates. That statement was made while traversing the statement contained in the affidavit of the petitioners that no marks were awarded by the examiners at the time of the examination. That part of the Secretary's affidavit reads:--

"The examiners for the viva voce did maintain the record of marks. Marks were generally put after the conclusion of the interview of each candidate and before the interview of the next candidate commenced. It was not necessary for the examiners in the viva voce to write down the marks in the presence of the candidates. Generally marks are put after a candidate leaves the room and before the next candidate enters the room."

This record containing the marks awarded by the examiners would have constituted important evidence on the question whether any marks were awarded for personality and suitability. But, when we required its production, we were told by Mr. Advocate General that it was not available since it had not been preserved. It would not be necessary for us to go so far as to think that that record, though available, was not produced before us. The non-availability of that record is, however, a circumstance inducing the conviction that the personality and suitability of a candidate were allowed by the examiners to influence their determination of the candidate's eligibility.

75. This conclusion stands reinforced by the perfectly intelligible inability of the Chairman of the Commission to remember the precise nature of the questions put to the candidates at the viva voce examination. The possibility of questions relating to the personality and suitability being addressed to the candidates, cannot, in these circumstances, be eliminated.

76. Mr. Advocate General, however, pointed out to us that in paragraph 3 of his affidavit, the Chairman of the Commission has made the following statement:--

The statement that only formal questions or only a few general questions were put to the examinees is not correct. Questions were put by the members of the Commission and the Law Secretary to test the candidates' general knowledge and grasp of principles of law." From this statement, Mr. Advocate General asks us to deduce that the only questions which the candidates were required to answer were those relating to the two matters.

77. It is, I think, impossible to construct any such argument on so slender a foundation. The statement on which Mr. Advocate General depends was made by the Chairman for the purpose of traversing the allegation in the petitioners' affidavits that in many cases only formal questions were put to the candidates. The Chairman does not state in his affidavit that no questions other than those relating to general knowledge and the grasp of the principles of law were asked to be answered. It is obvious that the interrogation of a candidate is not the only process by which the intangible qualities which constitute a candidate's personality or suitability may be judged.

78. It is also difficult to understand what precisely was meant by the Commission when it referred to "suitability" in the notification. It is obvious that that suitability was something apart from the suitability to be established by the candidate by his performance in the examination, the expression "personality" occurring in the notification is again one which does not admit of any scientific

definition. Which of the numerous facts of the candidates' personality was subjected to scrutiny by the Commission is a matter which is left in a state of obscurity and therefore not one on which we can speculate.

79. However that may be, that the commission am consider that apart from his general knowledge and grasp of the principles of law, the candidates should possess certain other qualities, indefinitely described as personality and suitability, is to my mind a .certainty. That the examiners at the viva voce examination did award marks for those qualities is, I think equally certain. If that is what they did, the viva voce examination was not one conducted in obedience to the Rules and could not, therefore, form the foundation of the list of successful candidates. That viva voce examination, the marks secured in which should have formed the foundation of that list, was never held and what was held was a different kind of examination not allowed; by the rules.

80. It was staled that the Commission committed certain other irregularities in the conduct of the viva voce examination. The petitioner in writ Petition No. 735 of 1961 took the viva voce examination on March 1, 1961, and, according to him, one member of the Commission was not present and did not on that day participate in the examination. The point made out of this is that there was, when the petitioner was orally examined, an incomplete complement of the body of examiners.

81. On a question of fact, it should in my opinion, be held that there is no sufficient proof that any member of the Commission was absent when the petitioner was examined. The petitioner does not in his affidavit name the absentee member, which makes it obvious that the petitioner did not know who all were the members of the Commission. It is just possible that that member of the Commission who, according to the petitioner, was absent, was really present but the petitioner was unaware of his membership of the Commission. The Commission consists of three members and the number of examiners who had to conduct the viva voce examination was four. The impression in the mind of We petitioner that there were only three examiners is perhaps traceable to his inability to identify the fourth person who though present was not identified by the petitioner as one of the members of the Commission. In the affidavit of the Chairman of the Commission, it is asserted that all the members of the Commission were present on March 1 1961, and, in my opinion, we should accept that statement.

82. But, it is admitted that on March 6, 1961, when some of the other candidates took their viva voce examination, Mr. Appajappa, one of the members of the Commission, was on casual leave, and therefore absent. The names of some of those candidates appear in the list published by the Commission. The argument is that the viva voce examination conducted for them by only three of the examiners was not the prescribed viva voce examination at which, the requirement of Rule 6(4) was that all the four examiners should be present, and that the declaration that they were successful in the examination cannot be

sustained.

83. That that submission would be without an answer if the requirement of Rule 6(4) is that all the three members of the Commission and the Law Secretary should be present at every stage of the viva voce examination, is not controverted by Mr. Advocate General. But his answer is the argument was that u/s 9 of the Mysore Public Service Commission (Conduct of Business and Additional Functions), Act, 1959, (Mysore Act 20 of 1959), a constitutional act performed by only two members of the commission is an act performed by the Commission as a whole.

84. Now, Article 320(1) of the Constitution makes it the duty of a Public Service Commission to conduct examinations for appointments to the services of the State or the Union, as the case may be. The 41st entry in the State List, in Schedule VII to the Constitution, bestows competence on the Legislature of the State to make a law with respect to the Public Service Commission. It was in the field of this entry that the Legislature of the State or Mysore enacted the Mysore Public Service Commission (Conduct of Business and Additional Functions) Act, (Mysore Act 20 of 1959). Sections 3 to 15 of that Act are contained in Chapter II. Section 3 which is contained in that Chapter, reads:--

"3. Procedure for performance of functions of the Commission.-- The provisions of this Chapter shall be applicable for the performance of the functions of the Commission under the Constitution or under any law for the time being In force."

Sections 8 and 9 read:--

"8. Vacancy, etc., not to invalidate proceedings.--The proceedings of the Commission shall not be invalidated by any vacancy or by the absence of a Member.

9. Quorum.-- The quorum for a meeting of the Commission shall be two but the Presiding Officer may adjourn any business at a meeting if he is of opinion that St cannot conveniently be transacted owing to the non-attendance of any member."

Section 8 validates the decisions and proceedings of the Commission at meetings in which not all the required number of the members of the Commission is present. Section 9 fixes a quorum for the meetings of the Commission. These are the two sections on which Mr. Advocate

General depended and his submission was that since the conduct of the viva voce examination was a constitutional function enjoined by Article 320(1) of the Constitution, sections 8 and 9 contained in Chapter II became applicable to it, as provided by Section 3. On March 6, 1961, there having been two members of the Commission who formed the quorum for the meeting of the Commission, u/s 9, the entire body of the Commission, according to him, must be regarded to have conducted the examination along with the Law Secretary.

85. But, I do not find it possible to accede to the contention that when the members of the Commission, in association with the Law Secretary, together constituted the body of examiners specially created by Rule 6(4) to conduct the viva voce examination, the members of the Commission included in that body were performing a function under the Constitution, within the meaning of Section 3 of the Mysore Public Service Commission (Conduct of Business and Additional Functions) Act (Mysore Act 20 of 1959). Article 320(1) of the Constitution enjoins the Commission to conduct an examination for making appointments to a service If it is required to do so.

It may be that even when the members of the Commission themselves perform the functions of an examiner, they would be performing a constitutional function. But, if the examiners are not exclusively the members of the Commission but include a person not belonging to that foods, and those examiners of whom the members of the Commission are only a few, conduct an examination under a rule framed under Article 234 of the Constitution, that examination cannot be- one conducted under Article 320 of the Constitution. The function performed by that body or examiners is not and cannot be equip rated with the function of a Commission under Article 320, and therefore, not one performed under the Constitution. If Chapter II of the Mysore Public Service Commission (Conduct of Business and Additional Functions) Act cannot therefore regulate that act, Sections 8 and 9 contained in that chapter can supply no assistance to the endeavour made to defend the examination conducted on March 6, 1961.

86. Only a few more matters remain to be considered. The first of them is a complaint that too many marks were set apart for the viva voce examination. It was pointed out that although at one stage, the Rules made under Article 234 set apart as many as 850 marks for the written examination and only 200 marks for the viva voce examination, those Rules were amended reducing the maximum marks for the written examination to 300, without making any corresponding reduction in the maximum for the viva voce examination.

It was urged that the possibility of manipulation with little likelihood of detection being greater in the case of a viva voce examination, the setting apart of a large number of marks for such examination should be discountenanced. But, that is a matter about which we can do nothing. The determination of the marks to be allotted for each part of the competitive examination is a matter for the Governor, enacting Rules under Article 234 and there can be no judicial review of the wisdom or mere unreasonableness of such determination. It would be enough to say that the eminence of an authority like the public Service Commission affords more than anything else the greatest guarantee that whatever may be the maximum marks set apart for the viva voce examination, those who appear before it will receive fair and evenhanded treatment.

87. The other submission was founded on the form of the intimation sent to the candidates about the dates on which they should appear for the viva voce examination. That intimation was described as an "Interview Notice", by which

the candidates were "directed to appear before the Commission for an interview". Not unnaturally, the petitioners contend that the Commission did not conduct a viva voce examination but only arranged for an interview for the candidates.

88. That an interview is not the same thing as a viva voce examination is incontrovertible. An interview is a meeting of the interviewer and the interviewed face to face, especially for the purpose of formal conference on some point, whereas a viva voce examination which is something very different, is an oral examination in a specified subject. If when the candidates went to the Commission what took place was nothing more than an interview, it would be easy to hold that the required viva voce examination was not held. But, it will appear from the affidavits, of which the deponents are the Chairman and the Secretary of the Commission, that what the commission in fact did when the candidates appeared before it, in response to the intimation sent to them, was to conduct a viva voce examination, although, as already found, it extended to matters beyond those specified in the schedule to the Rules. We must, in my opinion, accept that statement made in those affidavits and if that is done, the petitioners will be left without any ground to support their case that they were subjected only to an interview without a viva voce examination being held. The inexact and inappropriate reference to an "interview" in the intimation sent to the candidates is nothing more than a misdescription of the purpose for which the candidates were required before the Commission, and therefore of no consequence.

89. The criticism next made that the impugned notification was based on communal and regional considerations resting as it does on the extremely exiguous foundation that it indicates the names of the candidates belonging to the Scheduled Castes and Scheduled Tribes and other Backward Classes, must, in my opinion, be dismissed as groundless.

90. The complaint that there was an unreasonably long interval between the written examination and the viva voce examination, and that there was an equally inordinate and equally inexplicable delay in the publication of the results cannot produce any result useful to the petitioners.

It is to my mind somewhat surprising that the viva Voce examination was not conducted immediately after the Written examination was completed. Where a competitive examination is selected as the method of recruitment and it consists of a written and a viva voce examination, the two examinations must be held in such quick succession that there may be no occasion for the reproach that one of them was deliberately deferred for collateral and oblique purposes. But, it seems to me that the long delay after which the viva voce examination was held and the equally long delay in announcing the names of successful candidates cannot form the foundation of an argument that the conduct of the examination which was entrusted to an authority as highly placed as the Public Service Commission was anything but irreproachable.

91. But the list of successful candidates prepared by the Commission which had no competence to determine the qualifying marks and which did not conduct the viva voce examination enjoined by the Rules, cannot claim the status of a list made under Rule 12 and is therefore one made without the authority of law, with the result that appointments made of persons declared by that list to be the successful candidates will not be appointments made in accordance with the Rules made under Article 234.

It would be difficult to predicate who would have been the successful candidates if the qualifying marks had been determined by the governor and that determination was different from that made by the Commission. It would be equally difficult to imagine who would have been the successful candidates, if the examiners who conducted the vive voce examination had not allowed the personality of the candidates and their suitability other than that prescribed by the Rules, to influence their determination, this difficulty is further enhanced by the fact that from the materials before us, it is not possible to ascertain whether separate marks were awarded by those examiners for each of the four matters forming the subject-matter of the viva voce examination, and if so, how many marks each candidate secured under each of those heads. The only document produced before us is that which mentions the aggregate marks obtained by each candidate in the viva voce examination.

It would, therefore, not be possible to ascertain the marks secured by each candidate for his general Knowledge and grasp of the principles of law, in respect of which alone the Commission could have conducted the viva voce examination.

92. The list of successful candidates prepared by the Commission which is now masquerading as the list prepared under Rule 12 must therefore be quashed and it is so ordered. Since we are told that no appointments on the basis of that list have so far been made, and since such appointments are now no longer possible, it will be unnecessary for us to give any further directions.

93. It is unfortunate that the list prepared by the Commission, over which so much of public time and money have been expended, should be struck down, but the greater danger is the harm generated by appointments to public offices in plain transgression of the Constitution. It should, however, be open to the Governor to now make a rule determining the qualifying marks and to the Commission to conduct another viva voce examination in accordance with the Rules. If those things are done, the aggregate of the marks secured by a candidate in the written examination already conducted, and in the viva voce examination to be conducted hereafter, can form the basis for the determination of his success with reference to the qualifying marks specified in the Rule. Although it was strenuously argued that the enactment of a new rule specifying the qualifying marks would render necessary the conduct of another written examination so that both the candidate and the examiner might respectively make the preparation and the correction, with the awareness of the qualifying marks, it seems to me that that argument is insubstantial. A candidate appearing

for a competitive examination, having as his target only the qualifying marks can scarcely hope to achieve any measurable degree of success and the duty of the examiner is only to award marks commensurate with the candidate's performance, the qualifying marks being no concern of his.

94. What I have said so far disposes of all the applications before us in so far as they relate to the competitive examination. But, among the petitioners before us, there are some who not only sat for the competitive examination but also sought promotion from the ministerial posts held by them. Rule 9 of the Rules empowered the Public Service Commission to interview candidates seeking such promotion and prepare a list of those suitable for appointment in the order of seniority in service, and forward it to the Government to enable promotions to be made accordingly. The petitioners who sought promotion in that way state that they have an apprehension that from the list so forwarded, their names were improperly excluded.

95. The question whether those petitioners though entitled to be promoted were excluded from the list prepared by the Commission is one which can arise only after the promotions are made in accordance with the list, on behalf of the petitioners who sought promotion it was very properly conceded that that part of their application relating to the promotion sought by them was premature and that all the questions arising out of it should be left open to be decided at the appropriate stage. There is thus nothing more to be done about it than to permit withdrawal from that part of the case without prejudice to the remedies obtainable at the appropriate stage.

96. There should be no order for costs.

Mir Iqbal Husain, J.

97. I agree.