

(1977) 06 KL CK 0030

In the High Court Of Kerala

Case No : C.P. No's. 340, 398 and 446 of 1976

M. James Thomas and Others

APPELLANT

Vs

The Hon'ble the Chief Justice and Others

RESPONDENT

Date of Decision : 17-06-1977

Acts Referred:

Constitution of India, 1950 — Article 226, 229(2), 245, 309

Citation : AIR 1977 Ker 166 : (1977) 2 ILR (Ker) 287 : (1978) 2 LLJ 226

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; T. Chandrasekhara Menon, J.; George Vadakkal, J

Bench : Full Bench

Advocate : M.P. Menon, M. Ramachandran, S.A. Nagendran, N.N. Divakaran Pillai and K.B. Subhagamani, for the Appellant; S. Narayanan Poti, V. Bhaskaran Nambiyar, C.R. Natarajan, M.K. Ananthakrishnan and R. Radhakrishnan Party, for the Respondent

Judgement

Gopalan Nambiyar, C.J.—These three writ petitions challenge the action of the Chief Justice of this Court in cancelling a prior order dated 3-7-1971, on the basis of which promotions were effected in a certain category of the High Court staff from 1-7-1968. It was ordered that the cancellation was to be given effect to only from the Chief Justice's decision to cancel, viz. 7-9-1974 and not from 1-7-1968 from which date the cancelled order took effect. This is the grievance of the petitioners. The writ petitions will be dealt with seriatim. The facts will be noticed in detail in O. P. 340 of 1976, and supplemented, if necessary, with the additional facts, where present, in the other two writ petitions, O. P. No. 340 of 1976.

2. The petitioner in this writ petition, an Assistant Grade 1 in the High Court Services, was a lower division clerk (or an Assistant Grade II as it was redesignated) prior to 1-7-1968, a material date "for purposes of all the three writ petitions. Respondents 5 to 8 are also Assistants Gr. 1, By a G. O. dated 9-10-1969 the Government refixed the ratio between Upper Division Clerks and Lower Division Clerks. By another G O. they also accepted the recommendations

of the Pay-revision Committee regarding the revision of pay scales of posts in Government service. This was made applicable to the High Court Staff by the Chief Justice on 1-8-1969, which resulted in the proliferation of twenty additional posts of Upper Division Clerks redesignated as Assistants Grade I. Promotions to these posts were ordered by Ext. P-1 dated 17-7-1970. As the increased strength was sanctioned by the Government with effect from 1-7-1968, promotions were directed with effect from that date. The petitioner was No. 24 in Ext P-1. Respondents 5 to 8 were not included in Ext. P-1 or promoted at that time as they were not test qualified on 1-7-1968. The petitioner's probation was declared by Ext. P-2 dated 31-6-1978. Against the promotion directed by Ext. P-1 and the denial of promotion to him, the 6th respondent filed a representation dated 3-10-1970 (not exhibited) stating that he should be deemed to have passed the test in April, 1968, when he sat for the examination, although the results were declared only later. This was rejected by the Chief Justice. Ext. X-4 dated 19-8-1971 is a copy of the intimation of rejection from the Registrar. There was a departmental appeal filed on 16-3-1971, which was heard by a Bench of three Judges of this Court under Rule 26 of the High Court Service Rules 1970. Ext. X-7 dated 19-6-1971 is a copy of the Official Memorandum from the Registrar intimating the result of the appeal. While the appeal was pending, on 12-4-1971, the Government issued Ext. P-3 G. O. It referred to the G. O. dated 9-5-1959. Many seniors in service, lacking test-qualifications, were superseded by their juniors and lost their seniority. The Government ordered that the unqualified seniors who were thus passed over for want of test-qualification, would have their ranks and seniority restored, if they passed the test subsequent to 1-7-1969 and before 9-6-1969, On such restoration, the juniors who had meanwhile scored over their unqualified seniors were to be reverted, if necessary. By Ext. P-4 proceedings of the High Court dated 3-7-1971 the Chief Justice made Ext. P-3 G. O. applicable to the Members of the High Court Service, under the second proviso to Rule 35 of the High Court Service Rules 1970. It was in view of these G. Os. that the departmental appeal of the 6th respondent was disposed of on 1-7-1971 and the communication Ext. X-7 issued to him, stating that he was entitled to the benefit of Ext. P-4 proceedings by which Ext. P-3 G. O. was made applicable to the High Court Service. His contention that he should be deemed to have become test qualified on the date on which he wrote the last examination for the test and not on the date of publication of the results was rejected as seen from Ext. X-7.

3. By Ext. P-5 order dated 3-8-1971 implementing Ext. P-4, the promotions ordered by Ext. P-1, and by similar orders in respect of the petitioners and others in the other two writ petitions, were revised, and fresh nominations to the posts of Assistants Gr. I were ordered with effect from the dates shown against their names. Respondents 5, 6 and 7 were promoted with effect from 1-7-1968, the 8th respondent from 10-7-1968 and the petitioner also, from 10-7-1968. From Ext. P-5, it is clear that the petitioner lost his rank and seniority. It is also to be noted that Ext P-5 expressly recited that it was issued under Rule 36 of the

High Court Service Rules. Ext. X-5 dated 3-11-1970 is a copy of the order promoting respondents 6 to 8 with effect from 22-10-1970. Against Exts. P-4 and P-5, the petitioners in these three writ petitions (except the one in this O. P.) and some others who were affected, sought to file appeals but the Registrar returned the appeals as not maintainable. (This is seen from the file).

4. Matters rested quietly for a time. Then came two single Judge's judgments of this Court in O. P. Nos. 2280 of 1971 and 3911 of 1971 in each of which, Ex. P-3 order of the Government was quashed as violative of Rule 28 (bb) of the Kerala State and Subordinate Service Rules (K.S.S.S.Rule for short). Ext. P-6 and Ext. P-7 are copies of these judgments, the former dated 26th February 1974 by one of us (myself), and the latter, dated 28th February 1974 by Issac J. (since retired). In Ext. P-6 judgment it was stated:

"2. The petitioner has attacked Ext. P-7 order and Ext. P-5 order recited therein, as directly opposed to Rule 27 and Rule 28 (bb) of the Kerala State and Subordinate Service Rules. According to the earlier of these Rules, seniority is the criterion for promotion; and according to the latter one, the facts and circumstances existing on the date of the occurrence of the vacancy and not these existing on the date of a making promotion have to determine the issue as to who is entitled to be promoted. On both these grounds the petitioner's contention appears to be well-founded, and Ext. P-5 seems to be directly contrary to Rule 28 (bb) of the K.S.S.S.R."

(Ext. P-5 G.O. referred to in the judgment is the same as Ext. P-3 G. O. herein, and Ext. P-7 order is the consequential order based on the same). Ext. P-7 judgment also took the view, that Ext P-3 G.O. (which was Ext. P-4 therein) was in conflict with Rule 28 (bb) of the K.S.S.S.R. It was also ruled that the invocation of Rule 39 of the K.S.S.S.R. (corresponding to Rule 36 of the High Court Service Rules), cannot be regarded as proper or valid in view of the Full Bench decision of this Court in Sreedhara Pillai v. State of Kerala 1973 KLT 151 : 1973 Lab IC 722 .

5. After these judgments, the Government promptly accepted the position as correct, and by Ext. P-12 circular dated 10-9-1974, directed that the rank and seniority of clerks/Assistants who were adversely affected by Ext P-3 G.O. be restored to them, without back arrears. The Chief Justice followed with Ext. P-9 order cancelling Ext. P-4. The decision dated 7-9-1974 to cancel Ex. P-4 is recorded in the file. It was declared that Ext. P-4 would not be applicable to members of the High Court Service and that consequently promotion and ranks in the category of Assistant Gr. I, will have to be revised. The order recalled that the principle of G. O. Ma 472/59 dated 20-4-1959 that the date of writing the test and not the date of declaration of results would determine test qualification, had not been adopted by the High Court and that on this ground that 6th respondent's representation had been rejected by the High Court. It was noted that while the G. O. had taken a statutory form in Sub-rule (bbb) to Rule 28 of the K.S.S.S.R. the rule as such was not applicable to the High Court Service, and

that therefore test qualification on 1-7-1968 will have to be decided with reference to whether the results had been published before that date and whether the person concerned had passed the examination or test. The order of cancellation of Ext. P-4 followed by Ext. P-9 (is) dated 2-1-1975. But the learned Chief Justice did not think that all that had been done in pursuance of Ext P-3 G.O. (Ex. P-4?) should be annulled, particularly because, for over two years the position had remained unchallenged-It was observed that frequent disturbances in promotions, and ranks assigned will not be conducive to a sense of security in service. Hence it was ordered that Ext. P-3 G.O. will not be applied to the High Court Service after 7-9-74. The rank and seniority assigned to Assistants Gr. I, consequent on the implementation of the said G.O. was to remain unchanged. Against Ext. P-9 Departmental Appeals were filed by all the petitioners in these three, writ petitioners (except we were told the petitioner in O. P. 340/76) under the High Court Service Rules. They were dismissed by Ext. P-11. The Departmental Full Bench observed, referring to Exts. P-6 and P-7 judgments, as follows:

"A perusal of these judgments, however, shows that the ground on which the said G. O. Ms. 100/71/PD was held to be invalid was that it was inconsistent with the provisions contained in Rule 28 (bb) of the Kerala State and Subordinate Service Rules and that it was not legally open to the State Government to override the provisions of a statutory rule like Rule 28 (bb) by an executive order purportedly issued under Rule 39. There is no provision in the Kerala High Court Service Rules corresponding to Rule 28 (bb) of the Kerala State and Subordinate Services Rules. Hence so far as the personnel in the High Court Service are concerned the implementation of the principle incorporated in G. O. Ms. 100/71/PD in respect of the High Court staff did not involve the contravention of any statutory service rule. The ground of invalidation mentioned in the two judgments in O. P. Nos. 2280 of 1971 and 3911 of 1971 as necessitating the striking down of G. O. Ms. 100/71/PD in respect of the personnel in Government service governed by the Kerala State and Subordinate Services Rules does not therefore hold good in respect of the High Court Service. Such being the position the ratio of the decisions rendered in O. P. Nos. 2280 and 3911 of 1971 is not applicable to these cases and the legality and validity of either the High Court order dated 3-7-1971 making the provisions of G. O. Ms. 100/71/PD applicable to the members of the High Court staff of the consequential action taken for effecting revised nominations and promotions as per the proceedings dated 3-8-1971 are not in any manner affected by the said decisions. There was nothing inherently obnoxious about the principles laid down in G. O. Ms. 100/71/PD and hence no illegality was involved in its implementation with respect to the members of the High Court staff pursuant to the order dated 3-7-1971."

The Departmental Full Bench emphasised that there was no obligation at all on the Chief justice to cancel Ext. P-4 and that although a cancellation was in fact done, a further direction not to disturb the promotions already effected and the ranks already assigned on the basis of Ext. P-4 was correct and proper. The O. P.

geeks to quash Exts. P-5, P-9 and P-11 and to declare that Ext. P-4 was not valid, and other appropriate reliefs.

6. Counsel for the petitioner who argued his case with ability contended that the adoption of Ex. P-3 by Ext P-4 was itself improper and without jurisdiction and therefore Ext. P-4 had no legal force. Secondly, it was contended that Ex. P-4 having merely adopted Ext. P-3, must fall when Ext. P-3 was struck down by this Court in Exts. P-6 and P-7 judgments. Counsel took exception to the Departmental Full Bench going one step further than the Chief Justice himself, and stating that there was no obligation on the Chief Justice to cancel Ext. P-4, as there was no rule in the High Court. Service similar to, or in the same terms as, Rule 28 (bb) of the K.S.S.S.R. This conclusion of the Departmental Full Bench was also assailed on the merits as indefensible. Thirdly, it was contended that Exts. P-9 and P-11 are opposed to three different statutory rules, viz. (a) Rule 7 (2) of the High Court Service Rules, 1976; (b) Rule 15 of the said Rules; and (c) Rule 28 (bb) of the K.S.S.S.R. which is also incorporated into, or made applicable to, the High Court Service Rules. These arguments were, to some extent supplemented by counsel for the petitioners in the other two writ petitions. We shall proceed to deal with these arguments.

7. First as to the validity of Ext. P-4, Rule 35 of the High Court Service Rules 1970 is in these terms:

"35. Pay, Allowances, Leave Salary, Pension and other conditions of Service.

The Travancore Service Regulations, the Cochin Service Regulations, the Kerala Service Rules, the Government Servants Conduct Rules, the General Provident Fund (Kerala) Rules, the State Provident Fund Rules (Travancore), the Provident Fund Rules (Cochin), the Fundamental Rules, the Madras Leave Rules, Madras Pension Code, the General Provident Fund (Madras) Rules, the Madras Contributory Provident Fund Pension Insurance Rules 1950, and the rules regulating the pay of the services and other rules for the time being in force applicable to the officers under the rule-making control of the Governor or Government of Kerala, as the case may be shall, subject to these rules, govern the members of the service, in the matter of their pay, allowances, leave, leave salary, pension and other conditions of service:

Provided that except with regard to salaries, allowances, leave and pension the Chief Justice shall exercise the powers vested in the Governor or the Government under any of the aforesaid rules:

Provided further that the Chief Justice shall specifically issue orders sanctioning the grant of the scales of pay and allowances to the members of the service in accordance with those sanctioned by the Government.

Note:-- The Chief Justice is the Head of the Department as regards the members of the service."

Ext. P-4 is stated to be issued under the second proviso to the above rule. That

proviso authorises the issue of orders regarding the "scales of pay and allowances to members of the service in accordance with those sanctioned by the Government". Ext. P-3 G.O. was not one which had relation to scales of pay and allowances. It affected seniority and promotion. Therefore, its adoption under the second proviso to Rule 35 was beyond the scope of the rule.

8. We are also of the opinion that when Ext. P-3 G.O. was struck down by Exts. P-6 and P-7 judgments of this Court, the foundation of Ext. P-4 as knocked out; and with that, Ext. P-4 must also fall. After the judgments of this Court, the Government promptly accepted the position and cancelled Ext P-3 G.O. by Ext. P-12 order.

9. We cannot endorse the view of the Departmental Full Bench in Ext. P-11 order, which travelled beyond the learned Chief justice himself, and was prepared to hold that the cancellation of Ext. P-4 was unnecessary, as there was nothing in the High Court Service Rules corresponding to Rule 28 (bb) of the K. S. S. S. R. As we shall show presently this part of the reasoning of the Departmental Full Bench proceeds on a misconception.

10. We are in agreement again, with counsel for the petitioner that Exts. P-9 and P-11 orders are opposed to the statutory rules relied on by him. We shall refer to these Rules. Rule 7 (2) (a) of the High Court Service Rules, enacts:

"7 (2) (a) Special -- Subject to the provisions contained in Rule 16 no person shall be eligible for appointment to a category unless he possesses the general and educational qualifications and the special qualifications prescribed for the category in columns 3 and 4 of Annexure I or qualifications which the Chief Justice by order declares to be equivalent qualifications:

Provided that where the special qualification prescribed by column (4) of Annexure I is a pass in a Test, the qualification may be acquired by persons recruited direct within the period of probation or where the period is extended, within the extended period:

Provided further that the Chief Justice may by general or special order exempt any officer or a class of officers on the basis of his or their age and experience from the special qualifications prescribed by column (4) of Annexure I." We shall now turn to Annexure I, Division II, Category 8, which is as follows :

Division and Category

Post

General and Educational qualifications

Special qualifications.

1.

2.

3.

4.

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Category 8

Assistant Grade I

A decree of a University in the Indian Union in Arts or Science or Commerce or a degree of any other University which is recognised as an equivalent degree by the Kerala University.

1. Secretariat Manual Test. 2. Account Test (Lower). 3. Judicial Test or Civil Judl. Test & Crl. Judl. Test or a law degree.

Exemption: Those who have completed ten years of service as Assistants Gr. II (Category II in Division II) or in a corresponding post of the Madras or Travancore. Cochin High Courts and are over 40 years of age are exempted from the special tests, provided the Registrar recommends them as suitable.

Rule 16 (a) reads :

"16. Promotion

(a) Categories 1 to 7 In Division I, and Categories 1 to 13 in Division II shall be selection categories and promotion thereto shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal. In all other cases promotion shall be on the basis of seniority subject to fitness.

Rule 7 (2) prescribes the general and educational qualifications and the special qualifications for promotion, in Columns 3 and 4 of Annexure I. The provision for exemption is also noted in Column 4. Briefly, exemption is granted for these who have completed ten years of service as Assistant Grade II, and are above forty years of age, on the recommendations of the Registrar, in addition to the provisions in Annexure I, we have the second proviso to Rule 7 (2) enabling the Chief Justice to grant exemption on grounds of age and experience, -- a principle more specifically and pointedly crystallised in Category 8, Column 4 of Division II of Annexure I. In the face of these specific provisions the wholesale adoption of Ext. P-3 without advertence to the above Rules, and compliance with them flies in the face of these Rules.

11. Counsel complained that there was violation also of Rule 15 of the High Court Service Rules. That Rule in so far as it is material enacts:

15. Seniority

(1) (a) The seniority of a member in any category of the service shall, unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such category:

Provided that-

(i) where the first appointment is one made under Rule 17, seniority shall be determined by the date of the commencement of service which counts towards probation;

(ii) where a member has been transferred from one category to another under the first proviso to Rule 5, the seniority of the member in the latter category shall be determined with reference to the date of his first appointment to the former category;

(iii) where a member has been transferred to category 8 in Division II under the second proviso to Rule 5, the seniority of the member in the said category shall be determined with reference to the date on which he reached the minimum pay of that category;

(b) Where any difficulty or doubt arises in applying this rule, seniority shall be determined by the appointing authority."

The principle sanctioned by the Rule is that seniority is determined by the date of first appointment. The petitioner herein was appointed as Assistant Grade I, by order dated 17-7-1970 (Ext. P-1), with effect from 1-7-1968. The respondents were not promoted to that category at all at the time of Ex. P-1. Their representations against the same were rejected and they were eventually promoted by Ext. P-5 dated 3-8-1971, all of them except the 8th respondent from 1-7-1968; and the 8th respondent from 10-7-1968. (the 6th respondent was actually promoted earlier by Ext. X-5 dated 3-11-1970 with effect from 22-10-1970). Ext. P-5 order which implemented Ext. P-4, was contrary to the principle of determining seniority by reference to the date of first appointment, and by placing the petitioner below respondents 5 to 8, violated Rule 15 of the High Court Service Rules.

12. We shall next pass on to consider whether Rule 28 (bb) of the K. S. & S. S. R. is applicable to the High Court Service; and if so, whether there has been a contravention of the said Rule. Rule 28 (bb) of the K. S. & S. S. R. reads :

"28 (bb)-- Promotion which depends upon the passing of any examination -- Promotion in a service or class which depends upon the passing of any examination (General or Departmental) shall ordinarily be made with reference to the condition existing at the time of occurrence of the vacancies and not with reference to those at the time when the question of promotion is taken up." The rule was inserted in the K. S. & S. S. R. by a G. O. dated 16-6-1965. We have extracted earlier, Rule 35 of the High Court Service Rules. Mark, what we may

call, the residuary clause of the said rule, where, after specific enumeration of the various rules, the Rule proceeds to take in by a residuary clause, "other rules for the time being in force applicable to the officers under the rule-making control of the Governor or Government of Kerala".

This residuary clause is sufficient to attract the Kerala State and Subordinate Service Rules whenever and wherever the same have application. Therefore, in our opinion, Rule 28 (bb) is attracted. We cannot subscribe to the view taken by the Departmental Full Bench that the said rule has no application to the High Court Service Rules. The same ignores the portion of Rule 35 that we have emphasised. It was argued for the 6th respondent that it is surprising that such well known Service Rules as the K.S. & S.S.R. and the Classification, Control and Appeal Rules, did not receive specific enumeration but were left to be swept under the residuary clause. Where, as we think, the language of the residuary clause is clear, it would be an exercise in futility to search for reasons for the mode chosen by the legislative authority to express itself. Even indulging in the futile exercise, we feel that the reason may not perhaps be far to seek. Rule 35 of the High Court Service Rules 1970 is practically a verbatim reproduction of Rule 23 of its predecessor, the High Court Service Rules 1959. When the 1959 Rules were brought into force on 15-3-1960 the K.S. & S.S.R. and also the Classification, Control and Appeal Rules, 1960 had come into force (although Rule 28 (bb) of the K.S. & S.S.R. had not been inserted therein); Whether by inadvertence or otherwise, the 1959 Rules did not refer to the K.S.S.S.R. or Classification, Control and Appeal Rules. It may be, that when the High Court Service Rules, 1970 replaced the 1959 Rules, it bodily copied the predecessor Rule 23. Whether this be an adequate reason or not, we are clear that the residuary part of the rule is wide enough to cover the State and Subordinate Service Rules, and, in particular, Rule 28 (bb).

13. That turns the argument into other nice and interesting fields. Rule 28 (bb) was introduced in the K.S. & S.S.R. only on 16-6-1965. The appointments directed by Ext. P-5, though made on 3-8-1971 were to take effect from 1-7-1968 and 10-7-1968. It was therefore argued that the 1970 Rules which came into force on 19th January 1971 cannot stretch back to 1-7-1968; and the 1959 High Court Service Rules, although it came into force on 15-3-1958, had not specifically adopted the State and Subordinate Service Rules in general, and could not adopt Rule 28 (bb) in particular, as it was inserted in the K.S. & S.S.R. itself only on 16-6-1965. This raises the further controversy whether the law to be applied was what was applicable on the date of the occurrence of the vacancy or at the time of making the appointment. It was argued for the respondents that the general rule is what is now embodied in Rule 28 (bbb) inserted by G.O. dated 20-4-1974. The said rule reads as follows:

"28 (bbb) Where a pass in any examination or test confers on a person the title to any right, benefit or concession, such title to the right, benefit or concession shall be deemed to have accrued on the day following the last day of the whole

examination or test in which he has successfully completed the examination or test by passing one or more subjects. This principle shall be applicable for the drawal of increments and for promotions to posts not involving change of duties against vacancies remaining unfilled for want of test qualified hands.

Note:-- Where a person can choose between two examinations or tests or corresponding subjects/papers of two examinations or tests and where the two examinations or tests conducted during the same period and on two different dates, the benefit of passing the examination or test shall be deemed to have accrued on the day following the last date of the whole of the examination or test which ends on the later date."

Counsel for the 6th respondent contended that Rule 16 sanctions the principle that promotions shall be determined with respect to the circumstances existing on the date of the promotion and not on the date of occurrence of the vacancy. He even went to the extent of contending that, to regard Rule 28 (bb) as applicable or as being attracted under Rule 35 of the High Court Service Rules, would be contrary to the provisions of Rule 16; and "other rules" under Rule 35 can operate only "subject to these rules" i. e. the High Court Service Rules. Stress was laid that only "other rules for the time being in force" could be made applicable to the High Court Service, and that these expressions would restrict the applicability of the Rules to the position as it stood at the time of the promulgation of High Court Service Rules, and would therefore render inapplicable any subsequent amendments to the "other rules". Stroud's "Judicial Dictionary" was indented and other authorities were cited. The Fourth Edition of Stroud's work at page 2773, (Vol. V) has expounded the meaning of the expression "time being" as follows:

"Time Being, (1) The phrase "for the time being" may, according to its context, mean the time present, or denote a single period of time; but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time (Ellison v. Thomas (1862) 31 LJ Ch 867 : (1862) 32 LJ Ch 32 : Coles v. Pack (1865) LR 5 CP 65. See also Re Gunter's Settlement Trusts (1949) Ch 502." The meaning thus given to the expression seems wide enough to cover the amendments to the rule effected from time to time.

14. Quits consistent with the exposition in Stroud, is the decision of our learned brother Poti J. in Sivaraman Nair v. The State of Kerala ILR (1974) Ker 97. The relevant passage is as follows:

"12. That the expression "for the time being in force" may have these different meanings could well be deduced by reference to decided cases. This was noticed by the High Court of Calcutta in East India Film Studios Vs. P.K. Mukherjee and Others, . That concerned the expression "for the time being in force" of Section 19 (1) (g) of the Defence of India Act, 1939 and in the context of that enactment the Calcutta High Court held that the expression refers only to laws which were

actually in existence at the time the Defence of India Act came into force. The High Court of Patna has dissented from the view taken by the Calcutta High Court as to the construction of the words "for the time being in force", occurring in Section 19 (1) (g) of the Defence of India Act. The Patna Judges noticed that there may be no dispute that the expression "for the time being in force" may refer either to a particular point of time or two several periods of time, and the interpretation that has to be adopted in any particular case must depend upon the context in which the expression occurs. Reference was made to Burrow's Words and Phrases, Vol. 2, at page 326 and Stroud's Judicial Dictionary, Volume 4 at page 3030. The learned Judges in that case ultimately held that the words "for the time being in force" refer to enactments existing at the commencement of the Defence of India Act, 1939 as well as those made thereafter. This was in *Union of India (UOI) Vs. Ramdas Oil Mills, .* In *The Malankara Rubber and Produce Co. and Others, etc., etc. Vs. The State of Kerala and Others, etc., etc.,* referring to the expression "ceiling area for the time being in force" in Article 31-A or the Constitution, it was observed that this can refer only to the limit imposed by the law which fixes it, and not to any earlier law which is amended or repealed (see para. 39).

15. Our attention was called to the decision of our learned brother Eradi J. in O. P. No. 2827 of 1972 (Ker) that the general rule is that promotion must be made with reference to the circumstances existing at the time of promotion and not of the occurrence of the vacancy) and of one of us (Chandrasekhara Menon J.) in *Radhakrishna Kamath v. The Cochin T D. Corporate Educational Agency* ILR (1976) Ker 485. We do not understand either of these decisions as laying down the inelastic proposition in the way in which counsel for the 6th respondent would have us understand. The question was left open in the judgment in W. A. 413 of 1975 and 981 of 1976 by a Division Bench. Rule 28 (bb) itself seems to give some indication that the general rule is otherwise than what counsel for the 6th respondent would commend for acceptance. The negative part with which the rule concludes is significant; namely, "and not with reference to those at the time when the question of promotion is taken up". This affords some indication that the general rule is what is indicated by this concluding part of Section 28 (bb). Besides, examining the history of the G O. Ms. 472/ dated 20-4-1959 which was presented to us as the basis of the argument, we are unable to find any warrant for the submission. In Order No. S-2-3056/54/CS, dated 18th March 1954 of the Travancore-Cochin Government, (seen printed at pages 17 and 18 of the Handbook for Reference regarding the Departmental Tests and Graduate ratio), it is stated that the date of publication of results of an examination shall be the date on which the authority conducting the examination published the result, and not the date on which the results appeared in the Gazette, only for the limited purpose of drawing increments under the Travancore Service Rules. We were then referred to the Kerala Government's order R. Dis. 14356/57/PD dated 28th September, 1957. That refers to the proceedings dated 18-3-1954 and to the practice in Madras under which, where the passing of an examination

conferred on a Government servant the title to any right benefit or concession, the same was to be deemed to have accrued on the date following the last date of the examination or the test passed. The Kerala Government directed that the above practice be adopted in the Kerala State with effect from 1st November, 1956 so far as the drawal of increments was concerned. It was also made clear that the rule was not to be made applicable to promotions to a higher grade depending upon the passing of the obligatory departmental tests. In clear terms it was declared:

"As regards promotion, the Government consider that the sole criterion is whether on the date of occurrence of the vacancy, the person concerned has passed the test and it is not necessary to promote provisionally a person, who has appeared for the test and whose result is awaited. Government, therefore, order that promotions will be given only after the results are known and will take effect only from the date of publication of the results as clarified in the G. P. read above."

This contains a clear indication that the general rule is to decide promotions with respect to the time of the occurrence of the vacancy and not of the making of the appointment. This is further amplified by G. O. Ms. 472/dated 20th April, 1959 the last sentence of which we may quote:

"The Government have examined the case and are pleased to order that the above practice be adopted to promotions not involving change of duties against vacancies remaining unfilled for want of test qualified hands with effect from 28th September, 1957, subject to the condition that no arrears of pay will be granted on account of such promotion.""

This was passed after referring to the proceedings dated 28th September, 1957, In addition to these, we have the order of the Chief Justice dated 7-9-74 which dealt with the specific contention of the 6th respondent based on the applicability of the G. O. Ms. 472 dated 28-4-1959 and rejected the same. In rejecting the representation of the 6th respondent against Ex. P-1, the view taken by the Chief justice was that the 6th respondent was not qualified for promotion as on the date of the occurrence of the vacancy (vide Ex. X-4). Ext. X-7 which intimated to the 6th respondent the decision of the Departmental Full Bench on his appeal, informed the 6th respondent that his contention that the G. O. dated 20-4-1959 should be made applicable to posts created by the G. O. dated 9-6-1969 was not accepted. In the light of these, we are of the view that there is no warrant to hold that eligibility for promotion must be judged with reference to the date of the appointment, and not of the occurrence of the vacancy. We think the general rule to be that promotions should be made vis-a-vis the date of occurrence of the vacancy and not of the date of making the appointment. So viewed, on 1-7-1968 the petitioners (in these three O. Ps.) were qualified, and the respondents were not, whether according to the 1970 Rules or 1959 Rules. The rule of exemption, similar in terms to that in Category 8, Division II of Annexure I of 1970 Rules, is seen incorporated by a 1962 amendment into Category 3 of Division II of

Annexure I, viz., Upper Division Clerks, in the 1959 Rules.

16. Counsel for the 6th respondent contended that if Rule 35 (2) were to be understood as making applicable "other rules for the time being in force applicable to Officers under the rule-making control of the Governor or the Government", the same would amount to an abdication of the rule-making function and a surrender of the legislative power of the Chief Justice. He placed reliance on the decision of the Supreme Court in *B. Shama Rao Vs. The Union Territory of Pondicherry*, . In that well-known case. It was ruled that the provision in the Act passed by the Union Territory of Pondicherry making applicable not only the sales-tax law in force in the Madras State at that time, but also all amendments to the Madras Statute to be effected in future thereafter, was a total surrender of legislative power and cannot be upheld as valid piece of legislation. *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, and *Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another*, , are the subsequent decisions of the Supreme Court considering the limits of delegation of legislative power. The position received further treatment in *S. B. Dayal v. State of U. P.* AIR 1972 SC 1168. That case marks the rejection of the theory that the legislature, and not the executive, should apply its own mind to making the laws, or laying down policies, guidelines and safeguards for delegated legislation. This was pronounced to be unreal, because:

"In a Cabinet form of Government the executive is expected to reflect the view of the legislature. In fact in most matters it gives the lead to the legislature."

(See the discussion of this aspect in Seervai's Constitutional Law of India, Second Edition, Vol. II, page 1206 at seq). In the light of the decisions, we are not prepared to say that there was a wholesale surrender of legislative power or abdication of legislative function by the Chief Justice in directing by Rule 35 (2) the adoption of "any rules for the time being in force" relating to Government servants. The object of Rule 35 seems to have been to place the members of the High Court Service Staff as far as possible in the same position as the Government servants. The Government's power of promulgating Rules relating to conditions of service of the Government servants, and the Governor's powers under Article 309 of the Constitution, are well known; and when rules are made in exercise of these powers there seems to be nothing wrong on principle to direct that such Rules and their amendments effected from time to time shall apply to the High Court Service also. This seems only to be in conformity with the policy and the object of Rule 35.

17. It was argued that Ext. P-5 order in implementation of Ext. P-4 had expressly invoked Rule 36 (2) of the High Court Service Rules. Rule 36 is in these terms:

36. Savings.

Nothing in these rules shall (1) adversely affect any person who is a member of the service on the date of coming into force of these rules excepting the

operation of Sub-rule (2) (b) of Rule 7 and Sub-rule (3) of Rule 15 or,

(2) be construed to limit or abridge the power of the Chief Justice to deal with the case of any member of the service or any person to be appointed to the service in such manner as may appear to him to be just and equitable:

Provided that, when any such rule is applicable to such member or person, the case shall not be dealt with in any manner less favourable to him than that provided by that rule."

We do not think a residuary and comprehensive power conferred by this rule can be exercised against the specific and pointed power of exemption conferred by the second proviso to Rule 7 (2) (a), and the provision for exemption in Column 4, Category 8 in Division II of Annexure I noted earlier. Under the Rule, the power of exemption can be granted by the Chief Justice only on the basis of age and experience; and under the Annexure, the exemption is given for those over 40 years of age and having over ten years' service on the recommendation of the Registrar. We are not prepared to understand the wide powers conferred under Rule 36 (2) on the Chief Justice as one to be exercised to flout the specific provisions like the two that we have referred to earlier on the ground that it is "just and equitable" to do so. To that extent, certainly, we are prepared to place reliance on the decision of the Full Bench of this Court in *T. C. Sreedharan Pillai v. State of Kerala* 1973 KLT 151 : 1973 Lab IC 722. The Full Bench was considering the scope and effect of Rule 39 of the Kerala State and Subordinate Service Rules, conferring similar, if not identical, powers as Rule 36 of the Kerala High Court Service Rules. It was observed that the Rule had to be understood as conferring a power to mete out special treatment only in cases where the facts and circumstances are such that a reasonable classification was possible; and that ordinarily Rule 39 was not to be invoked to get round the provision contained in any of the general rules or special Rules. Paragraph 21 of the judgment summarised the conclusion of the Full Bench. The Rule, it was said, did not warrant the issuance of any general order with respect to any indefinite or undefined group of persons exempting them from the operation of any existing Rule, or granting relaxation of any Rule in their favour; the Rule authorises only specific case or cases of an individual officer or officers, after full application of the mind to all the relevant facts and circumstances. In paragraph 46, the Full Bench expressed itself against the power of granting exemption so as to have effect retrospectively from an anterior date.

18. Counsel for the 6th respondent strongly urged that the decision of the Full Bench in 1973 KLT 151 : (1973 Lab IC 722) would require reconsideration in view of the recent decision of the Supreme Court in *Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another*, . It was pointed out that in that case, the Supreme Court had decided that the Governor could grant an exemption under a power similar to what was conferred by Rule 39 considered by the Kerala Full Bench, in favour of a group of sixty-three persons, and also, that the Governor could exempt with retrospective effect.

Paragraph 7 of the Report shows that the real question which was considered by the Supreme Court was whether the rule there in question permitted relaxation of any rule with retrospective effect, It was held that the power of exemption could be exercised with retrospective effect. There was no pointed consideration or decision as to whether exemption could be granted with respect to a group of persons, although on the facts, the exemption sustained, was in fact to a group of sixty-three persons. Whether on the basis of this decision, the Full Bench ruling in 1973 KLT 151 : (1973 Lab IC 722) requires re-examination or not, we need not pause to consider, as we are satisfied that Rule 36 (2) cannot override the specific provisions in Rule 7 (2) (a) and in Category 8 of Division II of Annexure I. Nothing was stated or disclosed why the exemption from these provisions should be regarded as "just and equitable".

19. We do not think that the theory of disturbance of seniority and unsettling of promotions, or the doctrine of "sitting back" with security and composure can have any application to the facts. As soon as Ext. P-4 was passed and Ext. P-5 implementing the same was issued, the aggrieved persons (including some, at least of the petitioners in the three writ petitions dealt with in this common judgment) sought to file appeals/representations, but the Registrar stopped their petitions and returned t appeals as not maintainable. it was thereafter that some Govt. servants challenged Ext. P-3 G. O. which resulted in Exts. P-6 and P-7 judgments and precipitated the chain of developments already sketched. In the circumstances, the prospect of unsettling the promotions effected or disturbing the security and repose of those promoted, do not appeal to us as sufficient grounds to forbid interference.

20. In order to emphasise the quiescence and delay and laches on the part of the petitioner and the sense of security into which the respondents had been lulled, counsel for the 6th respondent emphasised that by Ext. P-5 dated 3-6-1971, the 6th respondent had become a 1st Grade Assistant; that by Ext. 8 dated 16-9-1972 he was promoted as Bench Clerk/Court-fee Examiner; that in July 1974 the post was upgraded as Court Officer and that thereafter, by Ext. X-9 dated 7-8-1974 the 6th respondent was posted as Court Officer; and that by Ext. X-10 dated 6-10-1975 he was declared to have completed his period of probation in the said post. It was stressed that none of these orders had been specifically challenged and that without doing so, the petitioner was not entitled to any relief. We find it difficult to appreciate this argument. Exts. X-8 and X-9 were before the Chief Justice's order, dated 7-9-1974 and Ext. P-5, following the same. They were issued after the attempt to file appeals/representations against Ext. P-4 had been discountenanced by the Registrar by returning the appeals/representations. There is also the fact that whatever be the position in respect of these orders, the Chief Justice himself by Ext. P-9 cancelled Ext. P-4. The only question then is whether, in giving effect to Ext. P-9 we should stop short at the date-line of 7-9-1974 or go the whole hog up to 1-7-1968. We see no reason why the benefit of Ex. P-9 should not be pushed back to its irresistible logic.

21. Counsel for the 7th respondent in this writ petition (and also in the other two writ petitions) urged similar objections. By Ext R-4 order dated 3-11-70 the 7th respondent was promoted as an Assistant Grade I with effect from 22-10-1970; by Ext. R-5 dated 1-11-1973 his probation was declared; by Ext. R-6 dated 7-6-1974 he was promoted temporarily as Court Officer; by Ext. R-7 dated 4-2-1975 he was posted temporarily as Court-fee Examiner with effect from 15-7-1974; by Ext. R-8 dated 8-5-1975 he was promoted as Court-fee examiner on regular basis; and by Ext. R-9 dated 1-12-1975 he was posted as Court Officer. It was pointed out that Exts. R-8 and R-9 are outside the pale of attack and had not been specifically challenged or attacked. Without doing so, it was submitted, that the petitioner would not be entitled to the reliefs sought. The decision of the Full Bench of this Court in M.P. Raghavan Nair Vs. State Insurance Officer and Others, was brought to our notice for the proposition that if an earlier pro-motion to a category had not been challenged, the subsequent promotion to a higher category cannot be successfully attacked. On examination of the facts and circumstances disclosed, we find little scope for applying the said principle to the instant case. Exts. R-4 to R-6 were all reviewed by Ext. P-5, and the promotion of the 7th respondent was directed with effect from 1-7-1968. The developments since then have been sketched, and need not be repeated. These culminated in Ext. P-11 which is under Challenge in these proceedings. In the circumstances we cannot sustain the objection of counsel for the 7th respondent that without attacking the orders Exts. R-4 to R-9, the petitioners are not entitled to relief.

22. The question whether the post of Court-fee Examiner can be regarded as a promotion post so as to regard Exts. R-8 and R-9 as promotions is also not free from difficulty. Rule 4 of the High Court Service Rules which provides for the constitution of the service enumerates the Divisions and Categories. Rule 6 provides that the method of appointment to the categories mentioned in Column 1, shall be as prescribed against each in column 2. The Court-fee Examiners were originally on a pay-scale of Rs. 410-715. In 1974, the category of Court Officers was put on a scale of Rs. 495-835, and an amendment was effected in 1975 to Rule 4, Division I, to introduce category 6-A viz. that of Court Officers. Promotion to the post is from categories 1 to 10 in Division I. It is by this tortuous process that the counsel for the 7th respondent tried to build his case that a Court Officer's post is a promotion post. But the relevant amendment was on 24-2-1976, and Ext. R-9 was on 1-12-1975. The basis for the contention is not therefore made out. For that reason again, we cannot countenance the objection voiced on behalf of the 7th respondent that Court Officer's post is a selection grade post, promotion to which is on the basis of merit and ability. If the post is "not a promotion post, this argument does not arise for consideration.

23. For the 7th respondent it was further urged that other rules" in Rule 35 (2) of the High Court Service Rules should be understood ejusdem generis as comprehending only rules relating to leave, salaries and allowances and pensions. We see no ground to invoke the applicability of the rule, of ejusdem

generis. Rule 35 enumerates a conglomeration of illassorted rules, which cannot be brought under any common genus.

24. When the case was posted for judgment on 15-4-1977, there was some doubt, especially in one of us, whether Exts. P-4 and P-9 orders, and the order recorded on the file on 7-9-1974, can be regarded as passed by the Chief Justice in exercise of his legislative power under Article 229, Clause (2) of the Constitution; and if so, what will be the result. The article reads as follows :

"229 (2)-- Subject to the provisions of any law made by the Legislature of the State the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or Officer of the Court authorised by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State."

To resolve the doubt, we requested counsel to assist us on the question and dictated a short order indicating the points on which we required elucidation. On the questions thus formulated, the matter was further heard on 30-5-1977. Sri M. P. Menon, counsel for the petitioner contended that these orders can in no sense be regarded as legislative, or as action taken under Article 229(2) of the Constitution. He took the stand that the action can only be regarded as executive or administrative and cited to us the recent decision of the Supreme Court in the Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, -- paras 18, 21 and 24). He further stressed that Ext. P-4 did not lay down any matters regarding pay and allowances; and reminded us once again of his argument advanced already and covered earlier in this judgment, that the action, statedly taken under the second proviso to Rule 35 of the High Court Service Rules, was beyond the scope of the said proviso. He further pointed out that it was impossible to regard Ext. P-9 as a rule or as a legislative action under Article 229(2). It was appealed against to a Full Bench of three Judges, and, dealt with by Ext. P-11 order, which would be inconceivable if it were to be regarded as legislative action under Article 229.

25. Sri V. Sivaraman Nair, counsel for petitioner in O. P. No. 446 of 1976 supported Sri M. P. Menon and drew the analogy between the executive power under Article 162 and the Governor's power under Article 309, stressing that the former cannot invade the field occupied by the latter. He cited the decision in Rule R.N. Nanjundappa Vs. T. Thimmiah and Another, and the Full Bench decision of this Court in Sreedhara Pillai v. State of Kerala 1973 KLT 151 : 1973 Lab IC 722.

26. Sri Shenoy, learned counsel appearing for some of the contesting

respondents very fairly and frankly stated that he cannot support the position that Exts. P-4 and P-9 orders can be regarded as issued under Article 229 of the Constitution. He reiterated his stand on the earlier occasion, that the impugned orders can only be traced to the statutory rules in the High Court Service Rules and must stand or fall on their being consistent with the Rules. Counsel very forcefully reminded us of the genesis of Ext. P-4, as an adoption of Ext. P-3, issued under Rule 39 of the K.S. & S.S.R., which has its counter-part in Rule 36 (2) of the High Court Service Rules, and stated that it should be a pointer as to the correct source of the power. We record our appreciation of the fair stand taken by counsel.

27. The learned Government Pleader maintained that Exts. P-4 and P-9 could be sustained on the basis of Article 229(2). He cited the decision of the Supreme Court in *M. Gurumoorthy Vs. Accountant-General, Assam and Nagaland and Others*, , where the appointment of a Secretary to the Chief Justice of the Assam High Court came in for challenge. Paragraph 8 of the decision was stressed He next cited the Full Bench decision in the *Judicial Officer's case* 1967 KLT 853 : AIR 1968 Ker 158. We are unable to derive any assistance from the principle of these two decisions. Our difficulty is that under Article 229, the Chief Justice had exercised his powers by framing an elaborate set of rules viz. the High Court Service Rules. To regard Exts. P-4 and P-9 as further attempts at legislation under the Article would amount to amendment or repeal pro tanto of the Rules. Neither the nature of Exts. P-4 and P-9 nor the manner of their issue would warrant such a conclusion. As pointed out by Sri Shenoy, the genesis of Ext. P-4, militates against tracing it to Article 229(2). On the materials placed, and arguments advanced, we cannot regard Exts. P-4 and P-9 orders as passed under Article 229(2) of the Constitution.

28. Nor are we persuaded by the argument that we should decline interference with the discretion exercised by the Chief Justice not to project back the effect of cancellation of Ex. P-9 to 1-7-1968, but to limit it only from the date when the decision for cancellation was taken on the file, viz., 7-9-1974. To so understand and give effect to Ext. P-9, would be to perpetuate and encourage a wholesale transgression of the High Court Service Rules, which we have noticed earlier. We cannot countenance such a position. That would, in our opinion also violate Article 16 of the Constitution.

29. We allow this writ petition and set aside Exts. P-5, P-9 and P-11 orders in so far as they affect the rank and seniority of the petitioner and recognise respondents 5 to 8 as senior to him in the cadre of Assistant Gr. I. A writ, of mandamus will issue to the 3rd respondent to fix the petitioner's seniority in the cadre of Assistants Grade I in accordance with law and to grant him his due promotion, if any, in service. We also declare that the adoption of Ext. P-3 by Ext P-4 proceedings of the High Court was void and of no effect as against the petitioner.

30. The O. P. is allowed as above. There will be no order as to costs. O. P. No.

398 of 1976.

31. There are two petitioners in this writ petition. Respondents 5 to 11 are seniors to the 1st petitioner in the category of Assistant Grade II. Respondents 5 to 15 are seniors to the two petitioners. Petitioners were test qualified before 1-7-1968. Respondents 1 to 15 became test qualified subsequent to that date. Ext. P-1 is a copy of the order dated 29-9-1970 by which the petitioners were promoted as Assistant Grade 1. Ext, P-2 is the copy of the order declaring the petitioners to have satisfactorily completed their probation. The representations on behalf of respondents 5 to 15 were rejected on 2-2-1971. While the 6th respondent's appeal before the Departmental Full Bench was pending, Ext. P-3 G. O. came into force (same as Ext, P-3 in O. P. No. 340 of 1976) Exts, P-4 to P-9 and P-11 and P-12 are the same as in the previous writ petition. Ext. P-10 is the appeal preferred by one of the petitioners.

32. The petitioners' counsel invited our attention to C. M. P. No. 3208 of 1977 to show that the results of the tests taken by the respondents were published on 28-9-1968 and notified in the Gazette on 15-10-1968, to show that on 1-7-1968 the respondents were not test qualified. These represent the difference in facts from O. P. No. 340 of 1976. Except for these, the petitioners' counsel completely associated himself with the arguments of the petitioner in O. P. No. 340 of 1976. For reasons noticed while dealing with O. P. No. 340 of 1976, the petitioners herein are also entitled to the same relief. We allow this writ petition on the same terms. We make no order as to costs. O. P. No. 446 of 1976.

33. Counsel for the petitioner in this writ petition raised one contention in addition to what was urged by the petitioner's counsel in O. P. No. 340 of 1976. It was urged that Exts. P-5, P-9 and P-11 also violated Rule 17 of the High Court Service Rules which is as follows:

"17. Temporary appointments.

(a) Where it is necessary to fill a vacancy in the service and there would be undue delay or administrative inconvenience in appointing a person who is qualified for or entitled to such appointment or a duly qualified person is not available, the appointing authority may appoint any other suitable person temporarily until an appointment is made in accordance with these rules. Such temporary appointment shall not be made for a period exceeding three months at a time and a regular appointment in accordance with these rules shall be made as soon as possible.

(b) A person appointed under Sub-rule (a) shall not be regarded as a probationer in the post and shall not by reason only of such appointment be entitled to any preferential claim to future appointment. If he is subsequently appointed to the post in accordance with these rules, he shall commence his probation in the post from the date of such subsequent appointment or from such earlier date as the appointing authority may determine."

The argument was that an unqualified person can be appointed only temporarily and for not more than three months, it was further pointed out that under the first proviso to Rule 15 an appointment which cannot count for probation, cannot count also for seniority. Rule 15 (1) proviso (1) reads:

"15 (1) Proviso (1)

"Where the first appointment is one made under Rule 17, seniority shall be determined by the date of the commencement of service which counts towards probation."

We have some doubt in completely accepting the argument of counsel. The power under Rule 17 is a limited and an extraordinary power. We feel some hesitation in pressing it into service to evolve the proposition submitted by counsel for the petitioner in this O. P. We do not express our final opinion on this aspect. The petitioner herein is entitled to the same relief as in O. P. No. 340 of 1976,

34. Counsel for the 13th respondent in O. P. 398 of 1976 and 446 of 1976 (who is not a party in O. P. 340/1976) argued that the impugned orders Exts. P-9 and P-11 must be sustained applying the principle of "Nunc pro tune". We are unable to understand how such a principle can arise, or be applied to the facts disclosed. A contention was also raised for the 13th respondent that the K. S. S. S. R. and Rule 28 (bb) thereof were not applicable to the staff of the High Court in view of Rule 2 (j) and (k) and Rule 8 of the High Court Service Rules, all of which specifically mention the K. S. S. S. R. It was argued that in view of these provisions it was inconceivable that the K. S. S. S. R. would have been left to be covered by the omnibus phrase "other Rules" in Rule 35 (2). Alternatively, it was said that Rule 28 (bb) must be read down to square with the terms of Article 229(2) of the Constitution. We see little force in these contentions. As stated earlier, the language of the latter part of Rule 35 (2) is clear. There is no attack against the Rules as outside the powers under Article 229(2) of the Constitution; and we see no scope to read down Rule 28 (bb) of the K. S. S.S.R.

35. The petitioner in this writ petition is also entitled to relief on the same terms in O. P. No. 340 of 1976. We allow this writ petition on the same terms. There will be no order as to costs.