
(1990) 06 BOM CK 0050

In the Bombay High Court

Case No : Writ Petition No's. 313 of 1985 and 3196 of 1988

R.S. Jadhav and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 08-06-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1), 16(4), 166

Citation : (1990) 2 BomCR 645

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : S.J. Deshmukh and Suresh Pakale, Shankaranarayan, for the Appellant; P.K. Thakur and B.E. Patil for respondents 1 to 3, for the Respondent

Judgement

S.M. Daud, J.

1 Government Resolution dated February 1, 1965 (GR 1965) has given birth to these petitions by rival groups aspiring for promotion in the Maharashtra Finance & Accounts Service, Class II (Service).

2. Accounting constitutes a vital function of all State departments and offices. Prior to 1960 this function was attended to by sections of employees in each office or department of the Government. These employees possessed a more or less common basic knowledge of accounts. Regard being had to the institutional divide, the accounts knowing personnel were placed at a disadvantage. Avenues for promotion were few and far between. Some offices had a surplus of them and some a severe shortage. The Secretary to the Government, Finance Department, was the Head of Department vis-a-vis as many as seven offices and much of his time was taken by the routine required of such head. To solve the problem, Government decided upon the establishment of a Directorate of Account & Treasuries (DAT). Details of the new-set-up were to be worked out by an Officer on Special Duty (OSD) in consultation with the Maharashtra Public Service Commission (MPSC). A Stenographer and Peon were provided to the OSD under the Govt. Resolution dated December 8, 1960 (1960 GR) and he was enjoined to

submit his proposals expeditiously. The DAT was established vide Govt. Resolution dated 27 December, 1961 (1961 GR). Next came the Govt. Resolution 1965 (GR 1965) constituting the Maharashtra Finance and Accounts Service (MFAS) comprising five grades viz. the supertime scale. Class I. Senior & Junior, Class II and Class III. The first four grades were to form part of the State Service, while the last was a subordinate service. The G.R. runs into 19 paragraphs, several Annexures and Appendices.

3. Annexure "G" lays down the rules for an examination. Annexed to G are Appendices A & B. Appendix C to G is the syllabus for the examination. The said examination is described as a "departmental" examination for Class I, Senior & Junior, and Class II grades. Of the G rules, the important ones are those numbered 3 to 7, both inclusive. Rule 3 says the examination will be compulsory for every incumbent of posts specified in Appendix A. Rule 4 enumerates the eligibles for the examination. Rules 5 and 6 make additions to the eligibles over and above those described in Rule 4. Rule 7 specifies the class exempted or entitled to exemption from passing the examination. The examination's role vis-a-vis the different streams in the service needs to be understood with reference to a time frame. Rule 7 as originally framed listed 5 classes entitled to exemption from the examination. One such class was of persons whose age exceeded 40 years on the date their liability to pass the examination commenced. Grant of exemption to them was to be considered by Government on merit, as and when necessary. Appointments to the service were to be made by the Director of Accounts & Treasures by promotion or nomination. The promotees were to be from a select list of persons fit for promotion to the service. This list had to consist of those who had passed the examination (passers) or were exempted from passing it (exemptees). As to the nominees, they had to pass the examination within the two years period of probation. For the nominees, failure to pass the examination within the period of exemption including the extended period, would subject them to the penalty of discharge without notice. In relation to the promotees, the vacancies were to be in the ratio of 2 : 1 as between the passers and exemptees respectively. This ratio was varied to 1 : 1 for a short duration of two years as from 1 September, 1967.

4. Preparation of a select list and matters ancillary thereto were regulated by Govt. Resolution dated 16 September, 1969 (Seniority Rules). A Committee of three officers was to prepare the list. It was to be in two parts part I was to be of passers and part II of exemptees. The latter dealt with one of the exempted classes vide Rule 7. Seniority inter-se the passers and exemptees was to be on the basis of date of issue of appointment orders, with the inter-se seniority in the respective seniority lists being maintained.

5. Government in the General Administration Department (GAD) had noticed the difficulties encountered by aging employees in the matter of passing departmental examinations. These employees were competent and all that they lacked was the ability to cram. This affected their chances of continuation and

confirmation or promotion to a higher post. Realising the havoc the rote factor had played in the lives and careers of deserving personnel, the GAD issued on 1 November, 1977, a resolution (1977 Resolution) of crucial importance. Government decided to exempt all those above the age of 45 years from passing a departmental exam where this was necessary for continuation, confirmation or promotion. The exemption was to be given by an amendment to the rules existing in this behalf. The amended rules, whenever framed, were to be given retrospective effect as from 1st November, 1977. Care was however to be taken to see that those exempted on account of age (over 45s or aged exemptees) would not get the double advantage of upsetting the seniority of those who had passed the examination and had preceded the former in the continuance, confirmation and promotion. A clarificatory resolution was issued by the GAD on 28th November, 1979. This resolution (1979 Resolution) made it clear that the 1977 Resolution did not apply to such departmental examinations in regard to continuance and confirmation, where the failure to pass the exam during the period of probation entailed the penalty of discharge. Next and, this is important it made clear the applicability of the exemption to all Government servants where the passing of the exam was a qualification for promotion to higher posts. GAD on 17th May, 1980 directed all departments who had not amended the rules to implement the 1977 Resolution by issue of executive orders of exemption coupled with orders releasing increments where such increments had been withheld.

6. The Finance Department (FD) which is the administering department for the DAT amended the Annexure G rules on 6th February, 1982 (1982 Amendments). A sub rule added to Rule 4, declared that the examination was to be treated as a departmental examination for all in the service whether they be passers or exemptees. Another addition was to Rule 7, which addition, stated that as from 1st November, 1977 persons in the service who were of 45 years as on 1st November, 1977 or the date of crossing 45 years would be exempted from passing the examination. These amendments were given retrospective effect as from 1st November, 1977.

7. The 1982 amendments were not implemented and that gave rise to the writ petition of 1985. The petitioners representing themselves and the exemptees pursuant to the 1982 Amendments claimed a direction to the State Government and the DAT to give effect to the rules as existing, work out their deemed of promotion and give them the resultant monetary benefits. R.K. Gavaskar, an Under-Secretar filed a preliminary return to the petition on 12 March, 1985. Additional and supplemental returns have come at a later stages the last of them being of 10 March and 4 July, 1988. The preliminary return took the stand and this has been adhered to at the later stages that the examination was a special competitive examination for the service albeit a departmental examination for the nominees. This being the position it did not come within the purview of the 1977 Resolution. The 1982 Amendments had been issued without due care. Converting a competitive examination into a departmental examination and that

with retrospective effect by means of an executive order, which is what the 1982 Amendment amounted to, was legally impermissible. The actual implementation of the exemption posed several difficulties. The aged exemptees had no right to claim a promotion but for the erroneous 1982 amendments. In any event an amendment to the Exam Rules did not have the effect of automatically amending the recruitment rules. None of the aged exemptees had been promoted. There was no reason for the petitioners to entertain the grievance of having been discriminated against. To remedy the situation Government on 9th November, 1987 carried out an exercise which was described as being in pursuance of the powers conferred by the proviso to Article 309 of the Constitution and in supersession of all existing rules, orders or instruments made in this behalf."

8. The result of the exercise, is, what for the sake of convenience will be referred to as the "1987 Rules". Entry to the service was to be by selection or nomination. The selection was restricted only to a Government servant who had passed in merits the examination. A new set of examination rules were framed. These referred to hereafter as the "1987 exam rules" in contradiction to the Ann. G rules, did away with the age exemption. It all about barred the over 40s from appearing for the examination.

9. The 1985 petition by extensive changes takes exception to the 1987 rules on several grounds. First, these are said to be violative of Articles 14 & 16. Next, they are invalid as they take away a vested right retrospectively. Lastly, they violate a promise contained in the 1977 resolution supplemented by the 1982 amendments. Formalities to secure permission to sue in a representative capacity was secured in 1989 and respondents 5 & 6 joined as representing themselves and the passers.

10. The States, DAT and the passers take the common stand of the 1982 amendments being an aberration and invalid. The 1987 Rules only set right the error. Support from the flanks comes to them from the petitioner of the 1988 writ petition. He passed the examination in October 1984 and is therefore eligible for appointment to the service. Government instead of permanently appointing a qualified person like him to the promotional post, is making locum appointments. The rules permit such appointments for a duration of 120 days, but only when qualified persons are not available. Taking recourse to the said device in the context of available qualified personnel, is illegal and a colourable exercise of power. Locum appointments be quashed and the qualified persons including him be appointed in the promotional posts permanently. The aged-exemptees agree as to the impropriety of making locum appointments. They disagree that passing the examination is the only qualification for promotion. The exemption from passing given by the 1977 resolution coupled with the 1982 amendments is an equally good qualification. The Government and DAT plead the pendency of the 1985 petition as a justification for the recourse to making of locum appointments. Consistent with their stand on the 1987 rules, they agree that passing the examination is a must for selection to the service and upward

mobility therein.

11. The first issue that requires a decision is as to the nature and effectiveness of the several GRS, resolutions and rules figuring in the list. All of them have the bottom line of being by order and in the name of the Governor of Maharashtra. The aged-exemptees contend that the entire material is legislation, being the product of an exercise of power vested in the Governor by virtue of the proviso to Article 309. Those wanting the 1987 rules to be upheld as paramount and, this includes the State and DAT take a somewhat ambivalent stand. The 1965 GR and the 1987 rules are products of the legislative power vested under Article 309. The resolutions of 1977, 1979 and 1980 as also the 1982 amendments are mere executive flats. A proper consideration of the question requires the setting out of the provisions and precedents applicable.

12. The Constitutional provisions relevant are parts of Articles 162, 166 and 309. Article 162 lays down that the width of a State's executive power shall be coextensive with matters on which its legislature has the power to make laws. Sub-clause (3) of Article 166 provides for the Governor of a State to make rules for "the more convenient transaction of the business of the Government of the State". The proviso to Article 309 empowers the Governor or a person designated by him to make "rules regulating the recruitment, and the conditions of service of persons appointed to, such posts and services". The "services and posts" spoken of above are those connected with the affairs of the State. Excluding the 1987 rules, none of the resolutions or GRS aforementioned were published in the official gazette.

13. The precedents cited on the issue are Harla Vs. The State of Rajasthan, , I.N. Saksena Vs. State of Madhya Pradesh, , and Chandrakant v. State of Maharashtra 78 BL.R. 468. The statement relied upon by M/s. Thakore and Shankarnarayan in Harla (supra) reads thus:--

"Before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is, or, at the very least, there must be some special rule or regulations or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence."

I.N. Saxena (supra) pressed with some persistence is no authority that circulars, letters and memorandums addressed by the Government to various heads of departments and offices cannot constitute a rule under Article 309. In fact what the decision amounts to, is, that in the circumstances surrounding the issue of the memorandum figuring in that case, the same could not be deemed to be the product of a legislative exercise under Article 309. Mr. Thakore contends that Chandrakant (supra) is erroneous to the extent it says that publication in the gazette is not an essential characteristic of legislation. The submission is based on certain recitals in the I.N. Saxena decision. The Full Bench which heard Chandrakant answered a suggestion advanced in terms similar to those

employed by Mr. Thakore, in these words:---

"Dealing next with the aspect of publication, Counsel for the petitioners invited our attention to a decision of the Supreme Court in *I.N. Saxena v. State of M.P.*, and a decision of Andhra Pradesh High Court, in *Radhakrishnan v. State*. In the former case the Court was concerned with a memorandum which had been issued by the Government of Madhya Pradesh addressed to all the Collectors and different departments which contained a decision of the Government raising the age of compulsory retirement to fifty eight years and on the question as to whether the memorandum itself amounted to a rule under the proviso to Article 309 of the Constitution, one of the grounds on which the Supreme Court took view that the said memorandum could not amount to a rule under Article 309 of the Constitution was that this memorandum had never been published in the gazette. It must however be mentioned that was not the principal reason why the memorandum was not regarded as amounting to a rule framed under the proviso to Article 309. From the phraseology employed in the memorandum and the contents thereof the Court came to the conclusion that the phraseology and the contents thereof clearly indicated that the memorandum contained a decision of the Government, intimation of which was given to all the Collectors and different departments and what is more, it was stated in the memorandum that necessary amendments to the State Civil Service Regulations will be issued in due course. It was relying upon these factors taken cumulatively that the Court took the view that the memorandum did not amount to a rule framed under the proviso to Article 309."

The argument that this is a misconstruction of what was decided in *I.N. Saxena* cannot be countenanced. This is for the simple reason that an exposition by a larger Bench of what the Supreme Court decided in a particular case, binds a smaller Bench and necessarily a Single Judge. The ratio in *Chandrakant* can be best stated in the answer given on the reference made to the Full Bench :

"Circulars, Orders or Resolutions or parts thereof laying down the rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra and intended to be applicable straightway can amount to rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution although the said Circulars, orders or Resolutions do not expressly state that the same are made or issued in exercise of exercise of the powers conferred under the proviso to Article 309 of the Constitution of India and are not published in the Government Gazette."

14. The word underlined in the above quotation is itself an indication that not all non-executive instruments bearing the imprimatur and name of the Governor, will be the product of an exercise of power under Article 309. In fact that Article was misused to set right an irredeemable invalidity as was the case in *The State*

of Mysore Vs. Padmanabhacharya etc., . The rule so framed in the form of a proviso to existing service regulations was struck down as not within the scope of Article 309, apart from being violative of Article 311.

15. Applying the principles flowing from the authorities mentioned above, the position emerging may be summarised thus;

(i) Gubernatorial power to legislate is to be found in Article 166 as also Article 309.

(ii) While the power under the two Articles is for different purposes, there can be a certain degree of over-lapping.

(iii) Neither Article prescribes any particular mode of publication of the product.

(iv) In the matter of recruitment and conditions of service of personnel for State posts, rules made under Article 309 will take precedence over those made under Article 166 if, there be a conflict between the two.

(v) Whether a set of rules flow from the power under Article 166 or Article 309, depends on the substance and not the mere form thereof.

Scrutinised in the light of the above, it follows that non-publication in the gazette of the different GRS and resolutions, does not by itself exclude them from Article 309. That there was no publication at all is not contendable seeing that copies of all the instruments were marked to almost all offices and departments of the State. The same interested only the employees of the State in fact, a minuscule section of them. The element of required publicity being established, we now proceed to an item-by-item examination.

16. The 1960 GR which is the starting point is an order made under Article 166(2), the object being to devise a scheme for the more convenient transaction of the business of the Government. The GRS of 1961, 1965 (together with amendments effected in 1967 & 1968) and the Seniority Rules of 1968 deal with recruitment and conditions of service of the personnel constituting the Directorate of Accounts and Treasuries. These would therefore fall under the proviso to Article 309. The 1977 resolution together with the supplements of 1979 and 1980 lay down and explain Government policy. The first and second are in the nature of executive instructions on part with the memorandum figuring in I.N. Saxena's case. The circular of 17 May, 1980 may be classified as para-legislative for it is to hold the filed until the rules are amended. Upto this stage parties are almost ad-idem.

17. The 1982 amendments are said to be an executive order. The very first factor negating this contention is the impermissibility of assuming that recourse would be had to a semi-executive power to amend rules framed under a purely legislative power. If the principal rules i.e. GR 1965 be under Article 309 and that is undeniable the 1982 amendments which seek to alter them, cannot but fall under the same classification. Next, unlike the Resolution of 1977, they come

into force immediately in fact, that are given retrospective effect as from 1 November, 1977. Whatever other infirmities the 1982 amendments suffer from, they cannot be dubbed as executive orders falling under Article 166. The same goes for the 1987 rules. It is described as being in exercise of the power under Article 309. This is not a misdescription or a colourable exercise of power for the rules in fact relate to recruitment and service conditions. There remains the argument that rules framed under the proviso to Article 309 cannot be retrospective. Mr. Deshmukh submits that the power of the Governor under the proviso is an inferior power as compared to that exercised by the legislature properly so called. While the latter has the power to legislate retrospectively, the Governor under Article 309 being a legislature by force of circumstances, cannot be deemed to have the same amplitude while legislating. This contention has been of raised and as often repelled. To quote from *K. Nagaraj and Others Vs. State of Andhra Pradesh and Another*, .

"It is well settled that the service rules can be as much amended, as they can be made, under the proviso to Article 309 and that the power to amend these rules carried with it the power to amend them retrospectively. The power conferred by the proviso to Article 309 is of a legislative character and is to be distinguished from an ordinary rule-making power. The power to legislate is of a plenary nature within the field demarcated by the Constitution and it includes the power to legislate retrospectively. Therefore, the amendment made to the Fundamental Rules in the exercise of power conferred by Article 309, by which the proviso to Rule 2 was deleted retrospectively, was a valid exercise of legislative power. The rules and amendments made under the proviso to Article 309 can be altered or repealed by the Legislature but until that is done, the exercise of the power cannot be challenged as lacking in authority. See *B.S. Vadera Vs. Union of India (UOI) and Others*, ; *Raj Kumar Vs. Union of India (UOI) and Others*,

Counsel next submitted that the right to promotion or to be considered for promotion embedded in the 1982 amendments could not be taken away. *M/s. Thakore and Shankaranarayan* counter this by arguing that the 1982 amendments stipulate a mere chance of promotion and this can be whittled away by exercise of a valid power. *T.R. Kapur and Others Vs. State of Haryana and Others*, has this to say at para 16 (page 422):

"It is well-settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the constitution carries with it the power to amend or alter the rules with a retrospective effect: *B.S. Vadera Vs. Union of India (UOI) and Others*, , *Raj Kumar Vs. Union of India (UOI) and Others*, , *K. Nagaraj and Others Vs. State of Andhra Pradesh and Another*, and *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, . It is equally well-settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the

qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which effects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules cannot be reverted and their promotions cannot be recalled."

Each sentence is important and pregnant with significance. Considered in the light thereof it cannot be said that the 1982 amendments deal with a mere chance of promotion. Subject to figuring in the select list which is the basic qualifications for promotion to the service, the aspirant gets a right to be considered for promotion. But even this right can be taken away, albeit the legislation dealing with that deprivation has to be clear and imperative. And the 1987 rules are specific on the intent to destroy the right to promotion conferred by the 1982 amendments.

18. Exception is taken to the 1982 amendments on the grounds of error and contravention of Articles 14 and 16. The argument is that the amendments through purporting to implement the 1977 resolution go far beyond the same. That resolution spoke of doing away with "departmental" and not "competitive" or "point of entry" examinations. This argument is based upon the examination being described as "departmental" for classes I & II but not so for the class 3 service in the unamended 1965 GR. There would have been some merit in the contention but for the fact that it seeks to gloss over two features of significance. In the 1965 GR the passing of the examination is prescribed as a qualification for promotion. Next, the 1977 resolution takes in it sweep all departmental examinations dealing with continuance and confirmation in service and also promotion to a higher post. The clarificatory resolution of 1979 makes it clear that exemption from passing is not to be given where the failure to pass will result in the penalty of discharge from service. Such a penalty was prescribed for nominees. For the promotees there was no such penalty unless ineligibility resulting from failure to pass be itself deemed a penalty. Such an inference is not possible seeing that the 1979 resolution in terms deals with rules providing for discharge from service as a consequence of the failure to pass an examination. Point of entry examinations to a promotional post by themselves, unless failure to pass them result in discharge from service, are thus not excluded from the sweep of the 1977 resolution. In fact the 1979 resolution reiterates that the rules to give effect to the 1977 resolution will see to it that aged persons will get exemption from passing a departmental examination prescribed as a qualification for promotion to higher posts. In substance, the examination prescribed by the 1965 GR for promotees was such an examination as would answer the prescription of the 1977 resolution. But even otherwise, regard being had to the width of the legislative power under Article 309's proviso, it cannot be said that

a "competitive" or point of entry examination could not be validly converted into a departmental examination. Recourse to legal fiction is a necessary tool in the hands of legislative draftsman. Articles 14 and 16 are said to be violated by the amendments as the passers are placed on par with non-passers, and, on the extraneous ground that they have or will be passing a particular age. This is said to be a case of placing unequals on par with equals.

19. The constitutional promise of equality has been explained in a number of decisions by the Supreme Court. In *All India Station Masters' and Assistant Station Masters' Association, Delhi and Others Vs. General Manager, Central Railway and Others*, it was said (Para 8 at page 386) :

"It is clear that as between the members of the same class the question whether conditions of service are the same or not may well arise. If they are not, the question of denial of equal opportunity will require serious consideration in such cases. Does the concept of equal opportunity in matters of employment apply, however, to variations in provisions as between members of different classes of employees under the State ? In our opinion, the answer must be in the negative. The concept of equality can have no existence except with reference to matters which are common as between individuals, between whom equality is predicated. Equality of opportunity in matters of employment can be predicated only as between persons, who are either seeking the same employment, or have obtained the same employment. It will for example, plainly make no sense to say that because for employment as professors of Colleges, a higher University degree is required than for employment as teachers of schools, equality of opportunity is being denied. Similarly it is meaningless to say that unless persons who have obtained employment as school teachers, have the same chance of promotion as persons who have obtained employment as teachers in colleges, equality of opportunity is denied. There is, in our opinion, no escape from the conclusion that equality of opportunity in matters of promotion, must mean equality as between members of the same class of employees and not equality between members of separate, independent classes".

Again, in *State of Kerala and Another Vs. N.M. Thomas and Others*,

"Article 16(1) and Article 16(2) do not prohibit the prescription of a reasonable qualification for appointment or for promotion. Any provision as to qualification for employment or appointment to an office reasonably fixed and applicable to all would be consistent with the doctrine of equality of opportunity under Article 16(1) see *The General Manager, Southern Railway Vs. Rangachari*,

20. Mr. Shankaranarayana says that the Directorate of Accounts & Treasuries was constituted as an elite service. The able and experienced were to form part of it. Class 3 was the base of the service. This base had to measure up to a certain level of competence. The nominees could only be from a group which had attained some academic distinction. Even so they were required to pass the examination within the period of probation. As for the promotees though held

eligible by virtue of being in Government service, they could gain admittance to the service only if they had passed the examination or were otherwise exempted. The latter i.e. exemption was because the exemptees had passed other equally tough examinations or had rendered a particular length of service in sensitive posts. This was a special force and could not be tainted by opening the floodgates to aged persons. Impressive as this sounds it has no real basis in the history of the Directorate of Accounts and Treasuries. The 1960 GR accepting the creation of a Directorate speaks of accounts people in different departments and office possessing a more or less common basic knowledge being in surplus somewhere and shortage elsewhere. The 1961 GR which was the nucleus of the service constituted by the 1965 GR did not prescribe any exams. It may be argued that the executive is at liberty as to manner of the constitution of services. Mr. Shankaranarayan has relied on *N.S. Mehta and Others Vs. Union of India (UOI) and Others*, to argue that prescribing an examination as a qualification for promotion is not violative of Article 14 or 16. The issue here is not as simple as that. The 1965 GR exempted several categories from passing the examination. One such class was that of Inspectors of Stores in the Stores Verification Branch of the Directorate appointed prior to 22nd May, 1969-see Rule 7(c) of Annexure G. Rule 7(d) of the same Annexure empowers Government to grant exemption to persons over 40 years-albeit on merit, and, as and when necessary. Experience and competence not annexed to the passing of the examination was recognised as a qualification for promotion even prior to the 1977 resolution. The refrain about the 1982 amendments seeking to make unequals equal is thus without substance.

21. This brings me to the plea that the 1982 amendments created a number of difficulties for which reason Government was constrained to go in for the 1987 rules. Now it must be accepted that service rules are not a specimen of the laws of Medes & Persians. If the grant of a concession work the unforeseen adverse consequences, the rules could be changed. But the pleaded difficulties must be real and substantial. The first alleged difficulty was as to who should get precedence in the matter of promotions viz. seniors in age or seniors in service. This difficulty could have been easily overcome had attention been paid to para 2 of the Seniority Rules of 1968 read together with the G.R. of 1950 mentioned therein. The 1968 G.R. is meant to regulate the drawing up of a select list of persons fit for appointment to the M.F. and A.S. as also fixation of seniority in between them. The 1950 G.R. which is referred to in para 2 of the Seniority Rules governs all cases of promotion from the lower to a higher grade, service or post by selection. Briefly, it says that promotion is conditioned upon (a) possession of the necessary positive qualifications e.g. personality, professional qualifications, initiative strength of character and readiness to assume responsibility and (b) seniority is to be given weightage unless the junior in service in addition to the above has "really exceptional ability or qualifications". Assessment of (a) and (b) is to be based upon a scrutiny or reports of at least three different superior officers. Seniority in this G.R. depends on length of

service and not age. Next, is said to be the difficulty posed by the great number of exemptees totalling about 200 and how to appoint all of them in one go. The ratio of 2 : 1 is fixed in the 1965 G.R. The Seniority Rules have the solution in the very first para. This para says that the select list should not be of excessive length and should ordinarily be limited to vacancies likely to occur in the coming two years. The D.A.T. has just to go back and work out the promotions on the basis of the estimates, keeping in mind the ratio and the other paragraphs of the Seniority Rules. The third difficulty pleaded is the inevitable repatriation of the passers to their parent establishments if the aged-exemptees are to be promoted. But this did not stop the Government from promulgating the 1977 resolution. Truly speaking the passers would not require to be repatriated. All that they would have to suffer would be a longer waiting period for promotion, and this, to the extent that every third vacancy in the promotional post would be taken away by an aged exemptee. Ups and downs for temporary periods are not rarity in Government service. Fourthly, the apprehension is that aged exemptees may not be acceptable to the departments and offices looking forward to hands trained in accounts. The argument assumes that the aged exemptees are something like reservists being fobbed off on a beleaguered town when a top-shape platoon is available. The aged exemptees, let it be reiterated for the umpteenth time, are not undeserving beneficiaries of a concession. The 1977 resolution itself speaks of the unmerited stagnation which meritorious people have to suffer because of advancing age crippling their cramming & facilities. Next, the exemption is of use only if one finds a place in the select list. The 1950 G.R. plus the Seniority Rules are not hurdles easy to cross. Being on the select list is not enough for there can be a displacement in the event of a deterioration. Paragraph 3 and 4 of the Seniority Rules show that deletions from a select list are a distinct possibility. Therefore it is not reasonable to apprehend that the aged exemptees will not be welcome to offices and sections seeking trained hands. The fifth pleaded difficulty is about reconciling the conflicting claims of aged exemptees from different wings. The Seniority Rules provide a ready answer to resolve the professedly intractable problem. The sixth apprehended difficulty is said to lie in the omission of the 1982 amendments to fix a ratio between the passers and the aged exemptees. The 1965 G.R. has fixed the ratio at 2 : 1 and there was no justification for wondering what the ratio should be. The seventh difficulty is said to lie in the 1982 amendments being ambiguous in that they did not specify whether the exemption was only to those who had passed other examinations or none at all. This difficulty also is more imaginary than real. If a person without passing any examination could continue in Government service till attaining the age of 45 years he must be assumed to be one with exceptional competence. Grant of exemption from passing an examination to such a person would not be unwarranted. The last apprehension is that conferment of exemption on the basis of age would lead to a breakdown of the very concept that lay behind the constitution of the M.F. & A.S. This is a lament without basis. An aged exemptee's entitlement to promotion will be on merit which is the gateway to a place in the select list. At one stage it was

contended that passers already officiating in the promotional posts would have to be reverted to make way for the aged exemptee promotions. The 1977 Resolution itself is clear that seniority lost by persons not passing the prescribed departmental promotion is not to be regained as a consequence of the exemption to be conferred on the over 45s. Assuming that there be any real difficulty, the executive could have got over the same by complementing and supplementing legislation, whether under Article 166 or 309.

22. This brings me to the vires of the 1987 rules. First, is the argument that it violates a promise and Government is estopped from going back on the same on the basis of the doctrine of promissory estoppel. There can be no estoppel against the law-making power and this immunity on is available to a body like the Parliament as also the Governor acting under the proviso to Article 309. But there is the test of Articles 14 and 16 which the 1987 rules have to surmount. It is to this aspect that I now turn.

23. Mr. Deshmukh contends that the 1987 Rules discriminate against the over 45s vis-a-vis prospects in the service. The service is a part of Government service. The 1977 resolution is to apply to all Government departments and offices. The 1982 amendments were meant to implement the 1977 resolution in the M.F.A.S. Similar amendments must have been effected in the departmental examination rules governing departments and offices other than the M.F.A.S. If the over 45s in other departments got the benefit of not having to pass an examination as from 1-11-1977, there was no reason to deny the same concession to their colleagues in the M.F.A.S. And the concession granted by the 1982 amendments could not be taken away by the expedient of the 1987 Rules describing the post as selectional instead of promotional. This is all the more so when the other eligibility clauses remain intact. The only aim of the 1987 Rules is to deprive the over 45 years of the chance to get into the service. The deprivation here is on par with that which was struck down by the Supreme Court in *State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others*, . At page 177 of the report appears the following passage which is appropriate to the present case also:-

"The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature made-law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written constitution, and have to conform to the dos and don'ts of the constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental rights. The law must satisfy the requirements of the constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the constitutional will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation

that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history."

Examine the 1987 Rules in their application to in-service personnel and the intent to keep out the over 40 years is clear. The post does not become a really selectional one, seeing that the Government servants under 40 days can still appear for the examination. The class discriminated against are the over 40/45 years, thus negating thus concession secured by such persons under the 1982 amendments. So long as the 1977 Resolution remains in force and so long as other departments and office personnel get the benefit thereof, the petitioners cannot be denied the same treatment. The power to legislate and do so retrospectively even in respect of vested or accrued rights, does not vest the legislature with the power to discriminate against one section of the employees. The veneer of converting the promotional post into a selectional one, cannot conceal the real intent. That object is to deny the benefit of the 1977 resolution to an otherwise eligible class. The 1987 Rules purport to be in exercise of the Governor's powers under Article 309 and in supersession of all existing orders etc. etc. But this cannot pass muster seeing that the arbitrariness and discrimination therein falls foul of Articles 14 and 16. The 1987 rules to the extent they deprive eligible Government servants of the right to get the benefit of the 1977 Resolution conferred upon them vide the 1982 amendments, are violative of petitioners' rights under Articles 14 and 16 of the Constitution. They cannot therefore be given effect to.

24. To now turn to the 1988 petition the aged exemptees as also the passers are agreed that locum appointments with breaks are impermissible. The Government's recourse to this device is understandable seeing that it had decided to do away with the 1982 amendments and could come out with no solution until 1987. Even thereafter it had to tread softly lest it be accused of pre-empting the adjudicatory process. Where the petitioner errs is in assuming that access to the service is restricted only to the passers. The eligibles are all those so found under the G.R. of 1965 as amended by the 1982 amendments r.w. the Seniority rules and all relevant instruments, but not including the 1987 rules.

25. The problems now is to work out the reliefs to be granted in the two petitions. The over 45s will be entitled to their rightful place in Class III, if otherwise eligible under the 1965 G.R. as amended upto date but not inclusive of the 1987 rules though including the 1982 amendments. Their entitlement will be in accordance with the Seniority Rules and all such other instruments as be applicable. Locum appointments without any discrimination against the over 45s will continue until the completion of the above exercise for which a period of 4 months is given. The over 45s in the exempted category, if found entitled to promotions from a back date, will not get arrears. But the said date will be taken into consideration for seniority, further promotions and death cum-retirement benefits. Having regard to the complexities of the problem, parties are left to

bear their own costs. Rules in the two petitions made partially absolute with costs left to be borne as incurred.