

(1984) 10 MAD CK 0018

In the Madras High Court

Case No : W.A. No's. 462 of 1981 and 575 to 578 of 1982 and W.P. No. 6401 of 1984 etc.

Syed Mohideen

APPELLANT

Vs

Govt. of Tamilnadu and Another

RESPONDENT

Date of Decision : 26-10-1984

Acts Referred:

Constitution of India, 1950 — Article 309

Tamil Nadu Ministerial Service Rules — Rule 11, 35

Citation : AIR 1986 Mad 188 : (1985) 2 LLJ 348

Hon'ble Judges : M.N. Chandurkar, C.J;T. Sathiadev, J;S.A. Kader, J

Bench : Full Bench

Judgement

M.N. Chandurkar, C.J.—The question which arises for decision before this Full Bench is whether the Government Order No. 783 issued

by the Rural Development Department on 30th April, 1981, giving effect to the guidelines with regard to the determination of seniority of persons

who were appointed in the Panchayat Development Units in the Tamil Nadu Ministerial Service is constitutionally valid. Since the impugned

Government Order was issued by the Government admittedly with a view to give effect to the decision of a learned single Judge of this Court in

W.P. Nos. 401, 402 and 403 of 1975 decided on 12th December, 1977, which was confirmed by a Division Bench of this Court while disposing

of Writ Appeals Nos. 394 to 396 of 1979, filed by the State Government, District Collector of Salem, and the Director of Rural Development,

Madras, and, since, the contentions raised on behalf of the appellant in W.A. No. 462 of 1984, which was taken up along with the writ petitions

which raise the same point, challenge the correctness of judgment of the learned single Judge as confirmed by the Division Bench, this Full Bench is

necessarily called upon to consider the correctness of the view of the learned single judge, as confirmed by the Division Bench of this Court.

2. At the very outset it may be stated that at the instance of three petitioners, G.O.Ms. No. 862 dated 27th April, 1968, which dealt with

Managers and Accountants, who were appointed subsequent to 16th October, 1964, was called in question, because, according to the petitioners

before the learned Judge, G.O.Ms. No. 862 was given effect to and the petitioners were reverted from the post of Manager to the Post of

Accountant, Panchayat Union. The learned Judge by his order, to the details of which we shall refer later, held that the reversions were bad and

that the petitioners before him were entitled to seniority on the basis of the dates on which they had acquired the requisite qualifications prior to

their being posted as Managers.

3. In order to appreciate the controversy which has given rise to the several writ petitions filed in this Court consequent upon the Government

issuing G.O.Ms. No. 783, dated 30th April, 1981, it is necessary to state certain earlier events and make a reference to the several steps taken by

the State of Tamil Nadu while absorbing the erstwhile employees of the District Boards and other Local Authorities by the constitution of three

different cadres known as (i) Panchayat Development Unit under the madras Ministerial Service; (ii) Madras Gram Sevak Service; and (iii)

Madras Panchayat Development Subordinate Service.

4. Initially by G.O.Ms. No. 2155, dated 16th October, 1964 these three cadres were constituted by the State Government by an administrative

order. By this Order the Government directed that the Departmental Unit-Item (xi) (Local Administration Department" in R II of the Madras

Ministerial Service Rules should be renamed as Panchayat Development Unit. This Unit would include the posts of Upper Division Clerks (later

called Assistants), Accountants and Managers of Panchayat Union Offices, Lower Division Clerks (later designated as Junior Assistants),

Assistants/Upper Division Clerks and Accountants in the Panchayat Development Branches in the Collectorates and in the Panchayat

Development Sections in the Revenue Divisional Offices. By the same order the Madras Gram Sevak Services was created in each Revenue

District consisting of the posts of Gram Sevaks and Executive Officers of Town

Panchayats. The constitution of the Panchayat Development unit in the Madras Ministerial Service was given in Clause 5 of this Government Order. So far as we are concerned, the first category of posts was Managers in Panchayat Union Offices and Accountants in Panchayat Development Sections in Revenue Divisional Offices and in Panchayat Development Branches in Collectorates. The second category was Upper Division Clerks and Accountants in Panchayat Union Offices and other offices specified above. The third category was Lower Division Clerks in Panchayat Development Section in the above-mentioned offices. The mode of appointment prescribed for category I was by promotion from Category II, to Category II by promotion from Category III; and to Category III by direct recruitment, Sub-Clause (e) of Clause 5 prescribed the tests. This clause reads as follows :

5. (3) Tests; No person shall be appointed to the posts of Accountants and Managers in Panchayat Union Offices and the posts of Accountants in Panchayat Development Sections in Revenue Divisional Offices and the Panchayat Development Branches in District Collectorates, unless he has passed both the "Departmental Test in Panchayat Development and the Panchayat Development Account Test.

It is to be noted that these tests were restricted to the posts of Accountants and Managers, and it was not till November, 1972, that retrospectively the tests were made a condition precedent for appointment to the post of Assistants. This Government Order was amended on 13th September, 1966 by introducing Sub-Clause (g) in Clause 5, and the amendment stated : Nothing contained in this order shall adversely affect any person holding any of the posts referred to in Sub-paragraph (1) of paragraph 4 as on the dated of issue of these orders.

The effect of this Government Order as on 16th October, 1964 was that, if an Assistant, i.e., Upper Division Clerk, wanted to be promoted to the post of Accountant and Manager, he had to pass the prescribed tests. The details of these tests, with which we are not concerned, were notified by G.O.Ms. No. 101, dated 16th January, 1965.

Later, when it was noticed that, even though the passing of the test was a condition precedent for appointment as Managers and Accountants, but that the prescribed examination was held for the first time only in November,

1965, with the result that the holders of the posts of Managers and Accountants were unable to qualify themselves, the Government decided by G.O.Ms. No. 1678, dated 7th July, 1966 to give four chances to the persons concerned to qualify. The Government directed that, if a person who was already Manager or Accountant, failed to pass the departmental test and account test within the first four chances, his increment would be postponed without cumulative effect until he passed the test.

5. The next of order made by the Government is of some importance. The Government issued G.O.Ms. No. 862 dated 27th April, 1968. By this

Order the Government took a decision that such of those Managers and Accountants who were appointed subsequent to 16th October, 1964

could pass the departmental tests on or before the examination to be held in November, 1969, and that, as a matter of concession the passing of

the departmental tests shall not be insisted upon as a qualification for appointment as Managers till December, 1969. The obvious effect of this

decision was that such of those Managers and Accountants, who were appointed as on the 16th October, 1964, could continue in their office,

notwithstanding the fact that they had not passed the prescribed tests and they were given a locus to hold office subject to the condition that they

should pass the examination before November, 1969. It has to be noticed that this was an administrative order issued by the State and this

decision ultimately took the form of a statutory rule under Art. 309 of the Constitution of India, on 28th August, 1973. By a notification issued by

the Government in exercise of its powers conferred by the proviso to Art. 309 of the Constitution of India, the Governor made certain

amendments to the Special Rules for the Tamil Nadu Ministerial Service Manual, (S. 22 in Volume III of the Madras Service Manual, 1970). One

of the amendments was that in Rule 11 for item"" (xxiv) Rural Development and Local Administration Department"", new entries specifying the

Panchayat Development Department and their units there under, the details of which are not necessary, were substituted. Two Sub-Rules, (q) and

(r), were added under R. 35. These rules run as follows :

(q) If any person holding the post of Manager or Accountant or Assistant in Panchayat Union Offices or the post of Accountant or Assistant in the

Panchayat Development Branch of the Collectorates and in Panchayat

Development section of Revenue Divisional Offices as on 16th October, 1964 fails to pass the Departmental test and Panchayat Development Account Test within the first four chances, their increments shall be postponed without cumulative effect until they pass the said tests.

(r). Such of those persons who were appointed subsequent to 16th October, 1964, as Manager/Accountant/Assistant in Panchayat Union Offices

or as Accountant/Assistant in the Panchayat Development Section in Revenue Divisional Offices and in Panchayat Development Branch in the

Collectorate, if they do not pass the tests before 31st December, 1969, shall be reverted.

6. Later by an amendment a proviso was added to Rule 35(r), which runs as follows :

Provided that persons selected from the Panchayat Union Service by the Screening Committee and appointed as Assistant fail to pass the tests

before the 31st December, 1969, shall not be reverted to the Panchayat Union Service but their increments shall be postponed without cumulative

effect until they pass the tests.

Though this proviso was made on 9th March, 1974, the amendment was expressly made retrospective with effect from 16th October, 1964, as

was also the case with the substantive amendment to Rule 35 by introducing sub-Rr. (q) and (r) by a notification dated 28th August, 1973. Prior to

this, that is, on 6th November, 1972, when it was noticed that, though the Government Order dated 16th October, 1964 directed that "necessary

amendments to Madras Ministerial Service Rules will be issued by the Public (Services) Department," but that no such notification under the

proviso to Art. 309 or the Constitution was issued, a notification came to be issued in G.O.Ms. No. 2336 RD & LA on 6th November, 1972,

notifying the rules made by the Governor of the State of Tamil Nadu in exercise of the powers conferred by the proviso to Art. 309 of the

Constitution. These rules were applicable to three categories of posts namely, Managers in Panchayat Union Offices, Assistants and Accountants

in Panchayat Union Offices, and Junior Assistants in Panchayat Development Sections, and other persons specified in those rules. These rules

prescribed the mode of appointment, which were the same as G.O.Ms. No. 2155, dated 16th October, 1964. These rules were specifically

intended to give statutory effect and force with effect from 16th October, 1964 to the decision of the Government contained in G.O.Ms. No.

2155, dated 16th October, 1964, with one additional fact namely, that it also dealt with the appointment to the post of Assistant, as already referred to.

7. On 28th April, 1974 another notification came to be issued in G.O.Ms. No. 833 RD & LA in the name of the Governor under the proviso to

Art. 309 of the Constitution of India, which again was made retrospectively operative from 16th October, 1964, and it was directed that the rules,

dated 6th November, 1972 G.O.Ms. No. 2336 should be treated as ad hoc, as they were not self-contained. In the absence of specific provision

requiring that the general and special rules applicable to holders of permanent posts in the Tamil Nadu Ministerial Service shall apply to the

Ministerial Posts in the Panchayat Development Unit, an amendment came to be made to the rules published on 28th April, 1973, by adding the

following preamble;

The General and Special Rules applicable to the holders of permanent posts in the Tamil Nadu Ministerial Service shall apply to the Ministerial

posts in the Panchayat Development Unit, subject to the following notification :

(ii) For rule I the following rule shall be substituted, namely :

Constitution : These rules shall apply to the following categories of posts and shall be treated as temporary additions to the corresponding posts in

the Tamil Nadu Ministerial Service;

Category (i) : Managers in Panchayat Union Office, Accountants in Panchayat Development Section in Revenue Divisional Offices and in

Panchayat Development Branches in Collectorates.

Category (ii) : Assistants and Accountants in Panchayat Union Offices, Assistants in Panchayat Development Sections in Revenue Divisional

Offices and in Panchayat Development Branches in Collectorates.

Category (iii) : Junior Assistants in Panchayat Development Sections in Revenue Divisional Offices and in Panchayat Development Branch in

Collectorates.

These are the rules which are now relevant.

8. Coming to the facts of W.P. Nos. 401, 402 and 413 of 1975, which were filed

by three petitioners, the judgment of the learned single Judge shows that the petitioner in the first writ petition had qualified himself to be promoted as Manager as early as November, 1965, in accordance with the requirements of G.O.Ms. No. 2115 dated 16th October, 1964, and the other two petitioners had qualified themselves by passing the requisite tests as early as in May, 1966, which according to them, enabled them to be posted as Managers; and they were in fact posted as Managers.

9. The grievance of the petitioners was that as a result of the implementation of G.O.Ms. No. 862 dated 27th April, 1968 all the qualified junior persons were reverted from the post of Manager and preference was given to seniors who were unqualified persons. This reversion was

challenged by one of the petitioners in W.P. No. 571 of 1969. In that writ petition, the petitioner Nagarajan expressly asked for the quashing of

G.O.Ms. No. 862 dated 27th April, 1968. The learned Judge held that G.O.Ms. No. 862 dated 27th April, 1968 purported to make a change in

the statutory rules by a mere administrative order and that the Government therefore, could not give effect to G.O.Ms. No. 862. It was contended

before the learned Judge in W.P. No. 571 of 1969 on behalf of the Government that in Salem District from where the petitioner came there was

no person who had become qualified earlier to persons occupying the posts of Managers and Accountants and who were reverted as a

consequence of G.O.Ms. No. 862 dated 27th April, 1968 and that it was therefore enough if a mere writ of mandamus was issued directing the

Government to restore the petitioner to the post of Manager. The learned Judge accepted the suggestion, and the judgment shows that G.O.Ms.

No. 862 was not expressly quashed, but the Government was directed to restore the petitioner to the post of Manager. The petitioner Nagarajan

was restored as Manager on 8th May, 1970. However, when the statutory rules were brought into force retrospectively by G.O.Ms. No. 2336

dated 6th November, 1972, two other petitions came up before Mohan, J., who heard W.P. No. 401 of 1975, and making a reference to some

of the G.Os., the learned Judge directed that the inter seniority should be refixed in accordance with the legal position contained in G.O.Ms. No.

2155 which was presumed to contain statutory rules. Consequent upon giving effect to the new statutory rules as promulgated by the notification

dated 6th November, 1972, petitioner Manoharan got reverted and it was this reversion which he made a grievance of before Mohan, J. After

referring to promotion and reversion made, and, when it was not disputed before the learned Judge that the petitioners had qualified themselves to

become Managers by passing the requisite tests and that the reversion was justified because the respondents in the case had passed the

examination within the due dates, that is, before 31st December, 1969, and that having regard to the fact that they were seniors to the petitioners in

the lower cadre the respondents were entitled to be promoted first in preference to the petitioners, the learned Judge observed as follows :

There is no rule which enables the authority to place the respondents 4 to 7 as seniors merely because they were so in the lower cadre.

Admittedly the petitioners had qualified themselves to the post of Managers long before respondents 4 to 7 by passing the required tests. It is not

necessary for me to deal with the nature of G.O.Ms. No. 2155 R.D. & L.A. dated 16th October, 1964 and G.O.Ms. No. 862 R.D. and L.A.

dated 27th April, 1968. Since it is clearly admitted that there is no rule which enables the authority to take on the seniority of respondents 4 to 7 in

the lower cadre to that of Manager. I may incidentally state that G.O.Ms. 2155 R.D. & L.A. dated 16th October, 1964 has already been held to

be statutory by this Court. Once, therefore, if the petitioners had qualified themselves earlier to be posted as Managers their seniority will have to

be reckoned from the date of attaining these qualifications. Therefore the impugned orders will have to be necessarily quashed and they are

quashed.

10. It has to be pointed out that, when the learned Judge referred to G.O.Ms. No. 2155 dated 16th October, 1964 as already having been held to

be statutory by this Court, the learned Judge was referring to the decision of Alagiriswami, J. in W.P. No. 571 of 1969.

11. The learned Judge assumed that the Government Order dated 16th October, 1964 was statutorily issued under the proviso to Art. 309 of the

Constitution of India, an assumption, which, it is not disputed, was wholly unwarranted and unjustified.

12. Now the Government filed appeals against the order of Mohan, J. in W.A. Nos. 394 to 396 of 1979. These appeals, however, came to be

summarily dismissed at the admission stage, on two grounds. The Division Bench assumed once again that G.O.Ms. No. 2155, dated 16th

October, 1964 had statutory force and observed that this view of Alagiriswami, J. was allowed to become final, because the Government did not

file any appeal. This is clear from the following observations of the Division Bench.

It is not in dispute that on an earlier occasion this Court had taken the view that G.O.Ms. No. 2155 Rural Development and Local Administration,

dated 16th October, 1964 was statutory and that view of this Court was allowed to become final by not preferring any appeal !.

13. In view of this the Division Bench found that the learned Judge could not be said to have committed any error in following that decision and on

that basis holding that the petitioners in the writ petitions had become qualified for appointment as Managers earlier than respondents 4 to 7

admittedly there being no rule to prefer respondents 4 to 7 on the ground that they were senior to the petitioners in the writ petitions in the lower

cadre of Accountant. The Division Bench thus dismissed the appeals.

14. The second ground on which the writ appeals came to be dismissed, and rather unfortunately, was that the State Government could not be said

to have been aggrieved by the Judgment of the learned Judge and therefore the appeal was not tenable. The relevant observations are as follows :

In any event, there being no change that the petitioner in the writ petitions were disqualified or inefficient or were not honest in the performance of

their duties, if at all any person who could be said to have been aggrieved by the order of the learned Judge, it is respondents 4 to 7 and the State

cannot be said to have been aggrieved. From this point of view also, we see no justification for admitting these appeals, and hence, these appeals

are dismissed.

15. There is no doubt that the Judgment of Mohan, J., confirmed by the Division Bench, laid down a principle for the determination of seniority.

The State Government implemented the decision of Mohan, J. by issuing G.O.Ms. No. 783 dated 30th April, 1981. The State Government's

reading of the Judgment of Mohan, J. is indicated by the following passage in the preamble to the Government Order in paragraph 2 :

The High Court allowed the writ petitions with a direction to the Government that

the writ petitioners who had qualified themselves earlier ought to be posted as Managers over the unqualified persons and that their seniority would have to be reckoned from the date of their acquiring the test qualification.

16. The impugned Government Order refers to the appeal of the State being dismissed by the Division Bench. Consequent upon this decision of the High Court the State Government decided that "the seniority of Accountants/ Assistants/Managers in the Panchayat Development Units be fixed with reference to the dates of their acquiring the test qualifications. The Director of Rural Development is requested to take action accordingly.

17. This impugned G.O.Ms. No. 783 admittedly affects adversely several of these persons who held the posts of Managers or Accountants for

whose benefit sub-Rr. (q) and (r) were added in R. 35 of Special Rules. Hence a large number of writ petitions had been filed in this Court making

a grievance of the impugned G.O.Ms. No. 783 as adversely affecting them. The appellant in W.A. No. 462 of 1981, whose case is symbolic of

the common grievance which is made on behalf of the several writ petitioners in this Court, was appointed as Assistant on 2nd October, 1961. He

had passed the required tests in November, 1968. When the original seniority list was made in accordance with G.O.Ms. No. 862, dated 27th

April, 1968, he stood at serial No. 25. However, when the new seniority list was sought to be prepared while implementing the impugned

G.O.Ms. No. 783 issued in order to implement the decision of this Court, his seniority went down to No. 54. The appellant has filed in his original

writ petition a list of Assistants appointed prior to 16th October, 1964, who were originally promoted from the cadre of Junior Assistants, and the

entries of that list would highlight the fact that by giving effect to the principle that seniority should be determined with reference to the date of

passing the qualifying tests, the very purpose of sub-Rr. (q) and (r) would be defeated, and these rules would be set at naught. In view of the

consequences which flowed from the G.O.Ms. No. 783, dated 30th April, 1981, the appellant Syed Mohideen filed the writ petition. The learned

Judge, who heard that petition, took the view that the State Government could not overlook the decision of the Division Bench of this Court in

W.A. Nos. 394 to 396 of 1979 and since the seniority was fixed in accordance

with the guidelines laid down in the judgment of this Court, the petition had to be dismissed. That is how the appeal has been filed against that judgment.

18. Since common questions were involved in these petitions and the writ appeal though the main argument was advanced in the writ appeal by

Mr. K. Doraiswami, we have heard Mr. Sukantha Raj, Mr. P. Chidambaram, Mr. Desappan, Mr. Muthuramalingam, Mr. Ramamurthi and Mr.

Radhakrishnan on behalf of the petitioners, and Mr. Selvaraj, Government Advocate, on behalf of the Government.

19. It is now conceded by all concerned, that the impugned Government Order had necessarily to be issued by the Government in order to give

effect to the judgment of Mohan, J. confirmed by the Division Bench. What is, however, argued before us is that the decision of the Division Bench

must be considered as a decision per incuriam, in as much as not only does it proceed on the assumption that G.O.Ms. No. 2155, dated 16th

October, 1964, is a statutory rule, but that the statutory rules framed on 6th November, 1972, 28th April, 1973, 28th August, 1973 as well as 9th

August, 1974, have not at all been considered. Learned counsel have, therefore, contended that the view taken by Mohan, J., that for the purpose

of seniority the date of acquiring the qualification or passing the qualifying test should alone be the relevant date, should not be considered as

binding, and, in any case, according to the learned counsel, the said decision needs to be overruled, as also the decision of the Division Bench

which confirmed the decision of Mohan, J.

20. Now there is no doubt that the assumption that G.O.Ms. No. 2155, dated 16th October, 1964 was a statutory rule is wholly unjustified.

Merely because in an earlier litigation between one of the Government employees and the Government, the Court had wrongly assumed that

G.O.Ms. No. 2155, dated 16th October, 1964 had statutory force, we fail to see how the State Government was precluded from contending to

the contrary and bringing to the notice of the Court in a subsequent litigation in the form of a Writ Petition filed by another employee that G.O.Ms.

No. 2155, dated 16th October, 1964, was in fact, not a statutory Rule and did not have any statutory force, not having been issued in the exercise

of the power conferred under the proviso to Art. 309 of the Constitution of India.

Merely because at one stage the Court has proceeded on the footing that a particular rule has a statutory status, when in fact that rule did not have the sanction of the proviso to Art. 309 of the Constitution of India, we fail to see how the failure of the Government to appeal against the earlier decision could prevent the Government from contending that G.O.Ms. No. 2155, dated 16th October, 1964 could not be treated on the same footing as a rule framed by the Governor under the proviso to Art. 309 of the Constitution. The failure to appeal against such a finding cannot have the effect of giving a rule, which does not have its source in a constitutional power, the status of a statutory rule, and, in our view, the Division Bench was clearly in error in holding that the Government could not contend to the contrary, more so when it has been established and, indeed, could have been established even before the learned Judges of the Division Bench, that G.O.Ms. No. 2155, dated 16th October, 1964 was in fact not made by the Governor at all in the exercise of the power conferred under the proviso to Art. 309 of the Constitution of India. This one circumstance, in our view, is enough to create a serious infirmity in the decision of the Division Bench, as well as the decision of Mohan, J. The principles of res judicata do not apply to such a case, because strictly, the petitioners were different. There could not have been any estoppel against the State, much in respect of rules which were promulgated later in the exercise of power under the proviso to Art. 309 of the Constitution. From this infirmity will also follow the second infirmity, namely, that, if there are service rules which are made under the proviso to Art. 309 of the Constitution, then whether one likes it or not, unless they are challenged as being ultra vires, the Court is bound to give effect to such rules. Neither the judgment of Mohan, J., nor that of the Division Bench shows that the very relevant and important rules, i.e., Rr. 35(q) and 35(r), which were framed by the State Government relating certain categories of Managers and Assistants, have been noticed. Managers and Assistants, or Accountants, for whose benefit these rules have been made, are entitled to the benefit of those rules, and they cannot be prevented from enforcing their rights under those rules, merely on the ground that those rules had not been brought to the notice of the Court on an earlier occasion when a similar question arose, or that the State Government had not

appealed against the earlier judgment, which was based on a wholly erroneous assumption. It also appears that, when a similar matter came up

before K. N. Mudaliar, J., in W.P. Nos. 2905 and 2550 of 1970, the learned Judge took notice of these rules, and he directed the State

Government to fix the inter se seniority between the writ petitioners and the fourth respondent before the learned Judge, in accordance with law.

The order of Mudaliar, J., recites this fact as follows :-

During the hearing of the present batch of writ petitions, G.O.Ms. No. 2336, dated 6th November, 1972 was passed by the Government

rendering G.O.Ms. No. 2155 RD & LA dated 16th October, 1964 retrospectively statutory and operative. In view of this change in the legal

position occasioned by the issue of the above G.O. and also the latest position prevailing in the Panchayat Development Unit of Salem District,

the Assistant Government Pleader stated that the concerned authority may be directed to fix the inter se seniority between the present writ

petitioners and 4th respondent in accordance with law and it is accordingly directed to do so.

21. We may incidentally point out that this decision was rendered almost four years prior to the decision of Mohan, J. - the decision of Mudaliar,

J., was dated 10th January, 1973, while the decision of Mohan, J. is dated 12th December, 1977.

22. A careful reading of the decision of Mohan, J., would indicate that this decision was cited before him, but it appears that the learned Judge was

more influenced by the fact that ""there was no rule which enabled the authority to place the respondents before him as seniors, merely because they

were so in the lower cadre"". This again, in our view, would be a very wrong assumption, because the very rules, dated 6th November, 1972 cover

the subject for which, according to the learned Judge there were no rules. This circumstance, in our view, is enough to show that the decision of

Mohan, J., as well as that of the Division Bench cannot be considered as a binding decision, and the matter has to be considered afresh.

23. While referring to the exception to the rule of stare decisis, it is observed in "Precedent in English Law" by Rupert Cross, 1961 Edition, at

page 130, as follows :

No doubt any court would decline to follow a case decided by itself or any other

court (even one of superior jurisdiction), if the judgment

erroneously assumed the existence or non-existence of a statute, and the assumption formed the basis of the decision. This exception to the rule of

stare decisis is probably best regarded as an aspect of a broader qualification of the rule, namely, that courts are not bound to follow decisions

reached per incuriam"".

The proposition that a decision per incuriam need not be followed as a binding precedent is well established. If authority is needed for this

proposition, we may refer to the decision of the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.*, 1944 2 All E.R. 293, where Lord

Greene, M. R. observed as follows :-

Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a

question of law. But where the court, is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of

a statute, the position is very different. It cannot in our opinion, be right to say that in such a case the court is entitled to disregard the statutory

provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples

of decisions given per incuriam.

24. The Supreme Court in *Jaisri Sahu Vs. Rajdewan Dubey and Others*, has also quoted with approval the observations in *Halsbury's Laws of*

England, Third Edition, Vol. 22, paragraph 1687, Pages 799-800, which are as follows :-

The Court is not bound to follow a decision of its own if given per incuriam. A decision is given per incuriam when the court has acted in

ignorance of a previous decision of its own or of a court of a coordinate jurisdiction which covered the case before it, or when it has acted in

ignorance of decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision

of the House of Lords.

To the type of cases referred to in the passage from the *Halsbury's Laws of England* cited above, must also be added decisions which are

rendered without noticing the crucial and relevant statutory provisions or the provisions of rules governing the relevant controversy.

25. After having given our anxious consideration to the question, we are of the view that we must consider the matter afresh. There are two

Government Orders in this case; one is the impugned Government Order. G.O.Ms. No. 783, dated 30th April, 1981, and the other is G.O.Ms.

No. 862, dated 27th April, 1968. We shall, for the moment, ignore these Government Orders, and consider the real and true effect of the relevant

rules. The relevant rules, which we have already quoted above, are Rr. 35(q) and 35(r). It will be advantageous at the outset to refer to the fact

that, though the State Government had prescribed the examinations and tests by an administrative order, being G.O.Ms. No. 2155 dated 16th

October, 1964, the examination was held for the first time only in November, 1965. Therefore by way of concession, the Government directed

that the passing of departmental tests should not be insisted upon as a qualification for appointment of Managers till December, 1969. Now, with

reference to the relevant date, namely, 16th October, 1964, so far as Managers are concerned there were two categories of employees - those

who were appointed as Managers prior to 16th October, 1964 and those who are appointed as Managers after 16th October, 1964. The

requirement of passing the departmental test came for the first time on 16th October, 1964. The Government took the decision administratively in

G.O.Ms. No. 1678 dated 7th July, 1966, that time should be given to those persons who were appointed as Managers or Accountants before

16th October, 1964 to pass the departmental tests within the first four chances. Passing the departmental tests has become condition for

appointment to the posts of Manager or Accountant with effect from 16th October, 1964. Hence, in the case of those who were appointed after

16th October, 1964, and were not able to comply with this condition by December, 1969, which was the date fixed by the State Government, the

natural consequence was they would be reverted. The Appointing Authorities seem to be in doubt as to the implementation of the Government's

decision dated 27th April, 1968. This doubt, on record, is in the form of a query which was made by the Collector of Salem, to which a

clarification was issued by the State Government in Memo dated 24th February, 1970. The query made by the Collector was as follows :

Whether juniors appointed after 16th October, 1964 will have to be reverted though they have since qualified now, the replace them by posting

seniors though they have not yet passed the test in view of G.O.Ms. No. 862 R.D. & L.A. dated 27th April, 1968.

The Government gave the clarification to the effect that "according to the orders issued in G.O.Ms. No. 862 R.D. & L.A. dated 27th April, 1968

the promotions made after 16th October, 1964 were purely temporary and the juniors appointed as Managers after 16th October, 1964 will have

to be reverted even though they (juniors) have qualified subsequently and they should be replaced by seniors though they have not yet passed the

tests till December 1969. The test qualification shall be a pre-requisite for future appointment to the posts of Managers/Accountants viz., after

December 1969.

26. Admittedly, the Government took an administrative decision with regard to the requirement of passing the department test. This administrative

decision would hold the field only till such time as statutory rules under the proviso to Art. 309 of the Constitution were made. Once statutory rules

came to be made by the notification dated 28th August, 1973 and it was expressly made retrospective with effect from 16th October, 1964, the

Government had deprived itself of its power to take any different administrative decision and hence, the rights of the concerned Government

employees would have to be determined only on the basis of the relevant statutory rules. Therefore, in so far as appointments and promotions to

the posts of Managers, Accountants and Assistants are concerned, if it is found that the matter is squarely dealt with by rules made under Art. 309

of the Constitution of India, the first rights will have to be determined in accordance with those rules only. It is in this context that Rr. 35(q) and

35(r) become very relevant. If any action had been taken pending promulgation of the rules, such actions are bound to be only of a temporary

character, except, of course, in such cases in which a person had been confirmed in his post prior to 16th October, 1964, when for the posts of

Manager and Accountant, there were no statutory rules issued prescribing tests.

27. We shall therefore proceed to consider the scope of these rules. The rules having been given effect to retrospectively from 16th October,

1964, the relevant date for the purpose of Rule 35(q) will be the 16th October, 1964, Rule 35(q) says that :

If any person holding the post of Manager or Accountant or Assistant in

Panchayat Union Office, or the post of Accountant or Assistant in the Panchayat Development Branch of Collectorates and in Panchayat Development Section of Revenue Divisional Offices as on 16th October, 1964, fails to pass the departmental test and Panchayat Development Account Test within the first four chances, their increments shall be postponed without cumulative effect until they pass the said tests.

The language is plain and simple. The rule deals, as already stated, with persons who are holding the posts described therein as on the 16th

October, 1964, which means that they have been appointed to the prior to 16th October, 1964, when there was no specification or requirement

with regard to passing departmental tests. The rule says that, if such persons failed to pass the departmental tests within the first four chances, then

their increments shall be postponed without cumulative effects until they passed the said tests. The rule therefore contemplated that the only action

which can permissibly be taken in respect of those officers would be that they would not earn their increments as and when they became due, if

they did not pass the necessary tests within the first four chances, and they would earn their increments only after they passed the tests. The rule

says nothing about their reversion in contradiction to the words of Rule 35(r), which specifically refer to reversion. We shall refer to sub-rule (q) a

little later. Regarding Sub-Rule (r), it deals specifically with

Such of those persons who were appointed subsequent to 16th October, 1964, as Manager/Accountant/Assistant in Panchayat Union Offices, or

as Accountant/Assistant in Panchayat Union Development Section in Revenue Divisional Offices and in Panchayat Development Branch in the

Collectors.

and says that, ""if they do not pass the tests before 31st December, 1969, they shall be reverted."" This sub-rule therefore clearly provides that such

of those persons who are appointed after 16th October, 1964 and have failed to pass the tests before 31st December, 1969, will have to be

reverted. In other words, it is obligatory on their part to pass the tests before 31st December, 1969, if they wanted to continue to hold the posts to

which they were appointed after 16th October, 1964.

28. A small category of such persons who are covered by sub-rule (r) is carved out by the proviso which was added to this rule. This proviso,

which we have reproduced earlier, refers to the employees selected from the Panchayat Union Service and appointed as Assistants, who have failed to pass the test before the 31st December, 1969, and the proviso expressly requires that such Assistants shall not be reverted to the Panchayat Union Service, if they were selected by the Screening Committee. It may be pointed out that Rule 35(r) requires all persons, who were appointed to the posts specified therein after 16th October, 1964 to pass the required tests before 31st December, 1969. A special treatment is given only to such Assistants and not to Managers or Accountants. The treatment is that, if the Screening Committee had selected the Assistants, then notwithstanding the fact that they have not passed the required tests before 31st December, 1969, they will not be reverted but they would only face the consequence of their increments being postponed without cumulative effect until they passed the tests. It has also to be remembered that the special Rule 35 deals with the aspect of seniority. When provision is made by adding sub-Rule (q) and (r) in a rule which substantively deals with seniority, the only logical conclusion which must follow is that the provision in sub-Rule (q) and (r) of Rule 35 were intended for the purpose of determination of seniority in a special way.

29. We may also at this stage refer to Rule 39 of General Rules which deals with temporary promotions. Rule 39(a)(i) enables the State

Government to promote a person from a lower category to a higher category otherwise than in accordance with rules, which would mean that an

unqualified person can be promoted, subject, of course, to the requirement that such a promotion is necessary in public interest owing to an

emergency which has arisen requiring the vacancy to be filled up immediately and that there was likely to be undue delay in making a promotion in

accordance with rules. What is relevant for our purpose is General Rule 39(a)(ii), which reads as follows :

No person who does not possess the qualifications, if any, prescribed for the said service, class or category, shall ordinarily be promoted under

Clause (i). Every person who does not possess such qualification and who has been or is promoted under Clause (i) shall be replaced as soon as

possible by promoting a person possessing such qualifications.

Rule 39(a)(ii) therefore contemplates that the promotion of any unqualified

person to a post in the higher cadre must necessarily be by way of a temporary measure. Any promotion made by way of a permanent arrangement of a person who is not qualified will be clearly a breach of the relevant recruitment rules. The express provision made in Rule 39(a)(ii) that "every person who has been temporarily promoted has to be replaced, as soon as possible, by promoting a person possessing such qualifications," is indicative of the fact and rightly so - that there should never be a regular promotion in any clear vacancy unless the person is qualified. Now if we read special Rule 35(q) and 35(r) of Ministerial Service Rules in the light of General Rule 39 it is obvious that the provisions of R. 35(q) and 35(r) were intended to prevent the consequences which would otherwise have followed, as a result of Rule 39(a)(ii). Though for the first time test qualification for the posts of Managers and Accountants were introduced in 1964 with effect from 16th October, 1964, so far as Assistants were concerned, only in G.O.Ms. No. 2336, dated 6th November, 1972, it was prescribed as a statutory rule. The position therefore clearly is that, unqualified persons promoted to the posts of Managers, Accountants or Assistants after 16th October, 1964 had to be reverted back, because their promotions were temporary by virtue of General Rule 39(a)(ii). When as a result of special Rule 35(q) all persons who were appointed as Managers or Accountants or Assistants prior to 16th October, 1964 were relieved of the consequences of the effect of Rule 39(a)(ii), the obvious intention was that their appointments were not treated to be of a temporary nature, but those appointments were given a finality. The fact that they have not been reverted and were entitled to continue in the respective posts would itself indicate that the appointments were treated as substantial appointments by the framing of Rule 35(q). Hence those persons who were appointed prior to 16th October, 1964 would necessarily become seniors to all those who were appointed after 16th October, 1964.

30. When we come to the appointments to those posts made after 16th October, 1964 their respective placements would have to be determined in accordance with Rule 35(r). No difficulty would be faced in the case of promotees after 16th October, 1964. If they have failed to pass the necessary tests before 31st December, 1969, and if they are not persons who fall

under the proviso of Rule 35(r) then they would all be reverted.

The categories of persons dealt with under Rule 35(r) would consist of two types : (i) those who had passed their examinations at different points

of time, but prior to 31st December, 1969, and (ii) those who were selected by the Screening Committee and would be entitled to the benefit of

the proviso to Rule 35(r). Strictly speaking, the case before Mohan, J. was concerned with the first category of those employees, that is, those

who had passed their examinations at different points of time, but before 31st December, 1969, all of them having been appointed after 16th

October, 1964. Some of the persons who were junior to those appointed earlier, but all of them appointed after 16th October, 1964, had passed

their examinations earlier. Now it is in that class of cases that it was directed that the passing of the qualifying tests would be determinative of

seniority. Now one thing which has to be appreciated is that, when Rule 35(r) was framed, in so far as Assistants were concerned, the passing of

examination before 31st December, 1969, was only relevant for the purpose of further promotion. If juniors had passed their examinations earlier

than the seniors, in the category of employees appointed between 16th October, 1964 and 31st December, 1969, the question is whether merely

by virtue of having passed the examination they would become senior to persons who had not passed the test, but who were appointed after 16th

October, 1964. All of these are persons who were not liable to be reverted at all, because they had passed the examinations prior to 31st

December, 1964. All of these are themselves, they were allowed to continue to be Assistants up to 31st December, 1969, without having passed

any examination.

Once this position is accepted, that is, that in the absence of any express intention in Rule 35(r) the those who had passed the examination earlier

would become senior to those who passed the examination later, it would be difficult to hold that Rule 35(r) contemplated the passing of the

examination as a criterion for determining seniority inter se between those who fall within Rule 35(r) Mohan J., seems to have taken the view that

there is no rule to the contrary which enables those who have passed the examination later to be treated as seniors than those who have passed the

examination earlier. With respect to the learned Judge, he seems to have lost

sight of the fact that Rule 35(r) treats alike different categories of persons, who were all permitted to continue in the posts and they have been given the facility of passing the examination up to 31st December. 1969. Once they satisfied that conditions of passing the examination before 31st December, 1969, unless there is an express provision in the rule which, as between themselves, requires them to be treated differently for the purpose of promotion all those persons covered by Rule 35(r) will have to be treated in the same manner. The same reasoning would apply to those who were entitled to the benefit of the proviso, because the effect of the proviso is that such persons cannot also be reverted. Their seniority will not become material, because for the purpose of further promotion, they will still have to pass the qualifying examinations, and their cases will have to be considered on the same footing as of those who have qualified after 31st December, 1969. Therefore, notwithstanding the fact that they will retain their placement in that post with reference to the date of their appointment, when it comes to their promotion and consideration of their chances of further promotion, they will have to be considered on the footing that they have passed the examinations after 31st December, 1969, and while doing so, their case will have to be considered only by reference to the dates on which they have qualified themselves and their seniority fixed on such dates.

31. We may therefore proceed on the basis that Rule 35(r) positively permits the continuance of persons specified therein in their respective post upon to 31st December, 1969 and they were not liable to be disturbed in their placement of seniority merely on account of the fact that some of the juniors have passed their examination earlier and some of the seniors have passed later.

32. In so far as Junior Assistants are concerned, sub-Rr (q) and (r) do not apply to them at all, and their promotions will be dependent upon their qualifying for the post of Assistants. Rr. 35(q) and 35(r) are special rules and they must prevail over the general rules, in so far as preference to qualified persons in the matter of appointment is concerned. Once we appreciate the correct scope of sub-R. (q) and (r) then the principle which is applicable for determining seniority will be that seniority in cases covered by sub-R. (q) and (r) will be dependent upon their continuous length of

service, and that will be the seniority which will have to be considered when the question of promotion arises.

33. There are further sub-R. (s), (t), (u), (v) and (w) in Rule 35, but those rules do not relate to seniority directly, but they provide for certain

exemptions. Sub-R. (s) and (t) are not relevant for our purpose. They deal with certain tests which need not be passed by certain categories of persons.

34. Sub-Rule (u) provides that "nothing contained in the Special Rules will apply to persons who held the posts of

Managers/Accountants/Assistants in Block Development Offices or in the posts of Assistant/Accountant in the Offices of the Collectorate in

Panchayat Development Branch or in Panchayat Development Section in Revenue Divisional Offices, on 16th October, 1964, or in the post of

Superintendents/Assistants in the Administrative Branch of the Office of the Director of Rural Development on 12th January, 1970, so far as the

posts which they held on those dates. This is a rule again by way of exception with which we are not concerned. Sub-Rule (v) applies to the

appointment to the posts of Assistants or Superintendent after 12th January, 1970, in the Office of the Director of Rural Development; and this rule

provides that, if a person fails to pass the departmental tests and Panchayat Development Account Test within the first four chances commencing

from the examination held in May, 1970, he shall be reverted. These rules are not relevant for our purpose. They will have to be taken into account

in such of those instances wherein such concessions are applicable.

35. The working of these rules can best be illustrated by taking a few instances from the petitions which have been argued before us. In the writ

appeal itself as we have already pointed out, the appellant Syed Mohideen was placed at serial No. 25, because, though he had been appointed as

Assistant on 2nd October, 1961, he passed the examination only in November, 1968. Now that placement is sought to be disturbed, because

other persons who were appointed later to him as Assistants had passed the examinations much earlier and they were sought to be promoted.

Irrespective of whether he passed the examination or not, he could not have been reverted, having regard to Rule 35(q). Consequently any fresh

appointees to the cadre of Assistants after 2nd October, 1961 must necessarily

be placed lower in the list of seniority to the appellant Syed Mohideen.

36. Two Assistants. P. Krishnaraj and H. M. Ali Baig, are represented before us, having been ordered to be impleaded at their instance in the writ appeal. It will be advantageous to tabulate the dates of appointments with the number in the seniority list of 1974, and as now contemplated, as follows :

No in the Date of Date of
1974 Appointment passing the
Seniority list Name Examination

1 2 3 4

25 Syed 2-10-1961 November,
Mohideen 1968
94 H. M. Ali 19-10-1966 May, 1968
Baig
122 P. Krishnaraj 26-8-1967 November,
1966.

37. Now the proposed seniority list as a result of implementing G.O.Ms. No. 783 dated 30th April, 1981 has resulted in Syed Mohideen going down from serial No. 25 to 54 in the new list, H. M. Ali Baig going up from 94 to 48; and p. Krishnaraj going up from 122 to 17. If G.O.Ms. No. 783 is implemented there is no doubt that this will be the result, because Krishnaraj has passed the examination as early as in November 1966; H. M. Ali Baig has passed the examination in May, 1968, and Syed Mohideen has passed the examination in November, 1968. However, having regard to the specific and special provision in Rule 35(1), Syed Mohideen being already an Assistant on 16th October, 1964 and not liable to be reverted at all, his placement could not have been disturbed, notwithstanding the

fact that he passed the examination only in November 1968, Syed

Mohideen's passing the examination in November, 1968, would become material of the limited purpose of considering as to when he should be

treated as qualified for promotion to the higher post, if his name has to be considered under the normal rule, Undoubtedly P. Krishnaraj and H.

M. Ali Baig were appointed after 16th October, 1964, and prior to 31st December, 1969. Between themselves, Baig is senior with reference to

the date of appointment and Krishnaraj is junior. Both of them have passed the qualifying examination prior to 31st December, 1969. There is

therefore no question of any disturbance of their inter se seniority; Baig would always be senior to Krishnaraj in the category of Assistants, he

having passed the examination prior to 31st December, 1969.

38. In W.P. No. 6403 of 1982, in which Mr. Chidambaram appears, the first eight of the petitioners were appointed as Managers in the

Panchayat Union Offices on several dates between 8th September, 1965 and 26th December, 1969. As between themselves they would fall under

Rule 35(r), and, if they have passed the examination before 31st December, 1969, then they would be entitled to placement with reference to their

date of appointment as contemplated by Rule 35(r).

39. When we come to W.P. Nos. 20, 21, 22, 23, and 24 of 1982 and 10995 and 10996 of 1982, which were argued by Mr. Sukantharaj, it

appears that the petitioners have come up merely to quash G.O.Ms. No. 783, which, according to them, was going to affect them adversely.

However, as rightly argued, by the learned Government Pleader, on the basis of the dates of their appointment, it appears to us that they would

neither be covered by Rule 35(q) nor by Rule 35(r). These petitioners were undoubtedly appointed as Assistants on 16th November,

1966, 22nd August, 1966, 7th June, 1966, 20th August, 1966 and 13th October, 1968 respectively. If this fact alone is to be considered,

undoubtedly they belong to the category contemplated by Rule 35(r). But the second requirement of passing the examination before 31st

December, 1969 has not been satisfied in the case of these petitioners, because it is not disputed that they have passed the tests only after the date,

namely, 9th November, 1972, 16th November, 1973, 8th November, 1973, 6th May, 1970, 14th May, 1971 and 11th November, 1971

respectively. Having regard to these dates, and it not having been shown that these persons fall within the proviso to Rule 35(r), they were all liable

to be reverted, and their seniority, if at all, in the cadre of Assistant, would have to depend upon when they are promoted subsequently by way of

regular promotion after passing the necessary tests.

40. When we indicated to the learned Government Pleader that this was how R. 35(q) and 35(r) should work, the learned Government Pleader

contended that those who fell under the two categories specified in R. 35(q) and 35(r) were not entitled to have their seniority over those who

were promoted on the basis of their qualifications. The learned Government Pleader contended that the limited effect of R. 35(q) and 35(r) was

that reversion was being prevented and that this was in the nature of a protection to employees who were already promoted. Apart from this,

according to the learned Government Pleader, there was no other purpose in making R. 35(q) and 35(r). We have already indicated earlier that

Rule 35(q) was intended, not merely for the purpose of avoiding the effect of Rule 39(a)(ii), but the further consequence of that sub-rule was that

the employees who fell within that sub-rule have acquired a right to continue in their respective posts, without earning increments up to their date of

superannuation, and they could be treated as validly holding the posts with reference to their respective dates of appointments. This would

necessarily ensure for their benefit in so far as the determination of their placement in the seniority list was concerned.

41. An argument was advanced before us, while attacking G.O.Ms. No. 783, by Mr. Sukantharaj that the said Government Order violated the

statutory provisions in regard to conditions of service in the General Rules, Rules 19, 27 and 36, and that the Government Order was being

implemented without giving any opportunity to the petitioners to show why they should not be reverted. The first contention, in our view, has no

substance. We have taken the view that Rules 35(q) and 35(r) are Special Rules and Special Rules must prevail over General Rules. With regard

to the contention that the Government Order was being implemented without giving an opportunity to the petitioners to show cause why they

should not be reverted, it is obvious that the step which the State proposed to take after G.O.Ms. No 783 was issued Was to make a provisional

list in accordance with G.O.Ms. No 783 and invite objections. The provision for inviting objections would afford sufficient opportunity, though we

have already indicated that, on fact placed before us, it does not appear that G.O.Ms. No. 783 was of any consequence to the petitioners.

42. Mr. Desappan has referred us to the decision in *Vijayadevaraj v. G. V. Rao* 1983 1 S.L.R. 292. This is a decision of the Karnataka High

Court in which it has been held that the term "seniority" in public service is length of service in the very same grade or cadre. On principle there can

be no dispute over this proposition.

43. Seniority is one of the important matters relating to the conditions of service, because it has a direct bearing on the question of promotion to the

next higher grade. Where promotion to the next higher grade is based on the principles of seniority and merit, the seniority of an official becomes

important, because where a senior official is suitable for promotion, he is entitled to get promotion on the basis of his seniority in preference to

juniors. Even in cases where promotion is based on selection, seniority is also important, because where persons are selected to the next higher

post on the basis of merit and suitability from among persons of equal merit, a senior is entitled to be preferred for appointment. See *Sant Ram*

Sharma Vs. State of Rajasthan and Another, .

44. The general principles, in our view, for fixing seniority are now well established. Seniority is always counted from amongst persons holding

similar posts with similar status. Persons holding permanent or substantive posts are always treated as seniors to persons holding appointments on

temporary or officiating posts. On this basis, those who were already covered by Rule 35(q) would be seniors to those appointed to their

respective posts after 16th October, 1964.

45. Mr Desappan has also referred us to the decision of this Court in *Venkataraman v. Director of Postal Services* 1970 II M.L.J. 49. In that case

the Division Bench was concerned with a Circular issued by the post and Telegraph Department, which provided that in the matter of confirmation

for the purpose of seniority of persons, who had passed the examination, whether officiating or not, it would be refixed in accordance with the date

of their passing the examination. The Division Bench, which laying down the law, held that though it would be open to the authorities to fix the

seniority before persons were promoted to the accountants grade on the date of their qualifying by the examination, once a number of people had been promoted and had begun to officiate in the higher grades all of them being qualified at the time of their promotion to officiate by having passed the examination, it would be discriminatory to ignore the seniority by the length of service and revert to the date of passing the qualifying examination for that purpose. The Bench took the view that to introduce a distinction in the matter of confirmation and seniority on the basis of the date of passing the examination would be introducing a totally irrelevant consideration for the purpose of confirmation. We respectfully agree with the view taken by the Division Bench.

46. We need not consider separately only one contention which was advanced by Mr. Ramamurthy, who appears in W.P. No. 10617 of 1982.

His contention that the judgment of Mohan J., was not correct and was per incuriam has already been accepted by us. His second contention is

that the Government was competent to file an appeal, which was held to be incompetent by the Division Bench. This contention must be accepted.

With great respect to the learned Judges of the Division Bench, it appears to us difficult to appreciate how, when a particular power of the State

Government for making a seniority list has been struck down by the High Court, the State Government cannot be said to be an aggrieved party

entitled to challenge the correctness of that decision before the appellate court on the ground that the Government's policy decision was a right

decision. The only forum where the State Government, whose policy decision has been struck down by a single Judge can challenge that decision

is the Division Bench where the State Government must come by way of appeal. The State Government was expressly made a party to the writ

petition, and apart from two other officers of the State Government who were respondents 1 and 2, the State Government was respondent No. 3.

The case of the State Government was that the list was prepared in accordance with G.O.Ms. No. 862, the principles of which later on were

incorporated in statutory rules, reflected the correct principle on which the seniority list would have to be framed. If this contention was rejected,

the State Government was competent to canvass before the appeal Bench that under Rr. 35(q) and 35(r) the State Government had laid down the

correct principle for the purpose of preparing the seniority list. We must therefore, respectfully differ from the view taken by the Division Bench

that the State Government was not an aggrieved party. Undoubtedly, if the decision went against the respondents who were parties to the

proceedings, they would be entitled to appeals, because, whether it was the right of the petitioners or the right of the respondents, how those

rights, have to be determined by State Government is a matter of policy decision and the State Government is entitled to canvass that the view

taken by it while laying down the policy decision was correct.

47. Having regard to what we have stated earlier, the propositions which follow may now be laid down :

(1) As a result of making Rule 35(q), any person who was already promoted to the post of Manager, Accountant, or Assistant in the Panchayat

Union Offices or the Post of accountant or Assistant in the Panchayat Development Branch of Collectorates and the Panchayat Development

Section of Revenue Divisional Offices as on 16th October, 1964 could not be reverted, notwithstanding the fact that he had failed to pass the

qualifying tests.

(2) The consequence of such failure to pass the qualifying test was simply that his increments are postponed without cumulative effect until he

passed the said tests. His further promotions and seniority would be dependent upon passing the tests.

(3) All those persons who were appointed subsequent to 16th October, 1964 to the posts mentioned above, were given the facility of passing the

examination before 31st December, 1969 failing which they would all be reverted.

(4) Only such persons who were selected from the Panchayat Union Service by the Screening Committee and appointed as Assistants would not

be reverted to the Panchayat Union Service, but their increments would be postponed without cumulative effect, until they passed the tests. Their

further promotions and seniority therein would be dependent upon the passing of the tests.

(5) In the category of employees who fell within Rule 35(q), their seniority would be determined with reference to their date of appointment.

(6) In the category of persons referred to in Rule 35(r), and who were appointed before 31st December, 1969, including persons who had the

benefit of the proviso to that rule, their seniority would be determined inter se with reference to the respective dates of their appointment.

(7) Persons who were promoted to the posts mentioned in Rule 35(r) after 31st December, 1969 would be junior to the persons who were

already covered by Rule 35(r), and their seniority inter se would be determined with reference to the respective dates of their promotions.

48. When we heard these cases, it was expressly made clear that it would not be possible to deal with the individual cases of the petitioners, but,

since in all these cases the main challenge was to the validity of G.O.Ms. No. 783 dated 30th April, 1981, the individual rights of the petitioners,

consequent upon the quashing of the said Government Order, would have to be determined afresh. Accordingly, having regard to the view which

we have taken, we must overrule the decision of Mohan, J., in W.P. Nos. 401, 402 and 418 of 1975, and the confirming judgment of the Division

Bench in W.A. Nos. 394 and 396 of 1979. We must also quash G.O.Ms. Nos. 783, 30th April, 1981, which is violative of Rr. 35(q) and 35(r).

49. It has also been brought to our notice that in G.O.Ms. No. 1581 dated 20th October, 1982 guidelines have been given as to how G.O.Ms.

No. 783 dated 30th April, 1981 is to be implemented. Since they are merely guidelines, it is not necessary to quash them, but it obvious that since

we have quashed G.O.Ms. No. 783 dated 30th April, 1981, these guidelines will now be no longer effective and operative.

50. In the result, the writ appeal and the writ petitions which have been filed for quashing G.O.Ms. No. 783 dated 30th April, 1981 are allowed.

51. W.P. Nos. 6401 of 1981, 10427, 10497 and 10548 of 1982, 1653, 3892 and 5320 of 1983 which have been filed by the respective

petitioners for the issue of a writ of mandamus directing the Government to implement G.O.Ms. No. 783 dated 30th April, 1981 must stand

rejected in the view we have taken.

52. Since G.O.Ms. No. 783 dated 30th April, 1981 has been quashed by us, the consequence is that any list made on the basis of that

Government Order will also automatically become ineffective. The appointing authorities are now directed to make fresh lists of seniority in the

respective cadres in the light of the above decision.

53. There will be no order as to costs.