

(2000) 07 KAR CK 0079

In the Karnataka High Court

Case No : Writ Petition No's. 29965 and 29966 of 1999 and 326 of 2000

The Karnataka State Accounts Department Employees"
Association, Bangalore and Another

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 07-07-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 226, 246

Citation : (2000) ILR (Kar) 3035 : (2000) 4 KarLJ 452

Hon'ble Judges : P. Vishwanatha Shetty, J

Bench : Single Bench

Advocate : Sri S. Ranganatha Jois, for the Appellant; Sri V. Prakash,
Government Advocate, for the Respondent

Judgement

1. Since the questions raised in these petitions are same and identical, all these petitions are taken up for hearing and disposed of by this common order.

2. Before proceeding to consider the questions which would arise for consideration in these petitions, it may be useful to briefly refer to the case of the parties.

(a) In Writ Petition Nos. 29965 and 29966 of 1999, the first petitioner is the Association of the Karnataka State Accounts Department Employees. The second petitioner claims that he is the senior most eligible First Division Assistant in the Department of State Accounts who is eligible to be posted as Accounts Superintendent in terms of the Cadre and Recruitment Rules.

(b) The petitioner in Writ Petition No. 326 of 2000 claims to be a member of the Association of the Karnataka State Accounts Department Employees and he is in the cadre of Accounts Superintendent; and he has been working as such in Buildings Sub-Division at Bangalore.

3. (i) In Writ Petition Nos. 29965 and 29966 of 1999, the petitioners have prayed for quashing the order dated 18th of June, 1999 passed by the State

Government, a copy of which has been produced as Annexure-B to the said petitions. They have also prayed for a direction restraining the respondents in the said writ petitions from making appointments to the post of Accounts Superintendents contrary to the rules and to follow the Cadre and Recruitment Rules strictly and consider the case of eligible First Division Assistants of State Accounts Department for posting as Accounts Superintendents in the Departments of Public Works and Irrigation.

(ii) In Writ Petition No. 326 of 2000, the petitioner has prayed for quashing the order dated 28th of December, 1999 passed by the second respondent-Chief Engineer, a copy of which has been produced as Annexure-C to the writ petition.

4. In order Annexure-B to Writ Petition Nos. 29965 and 29966 of 1999, the State Government has downgraded 5 per cent of the posts i.e., 13 posts, out of the total number of 253 sanctioned posts in the Departments of Public Works and Irrigation, and fixed the pay scale of the said posts at Rs. 1,720-3,300 (i.e., revised pay scale of Rs. 5,200-9,580) as against the pay scale fixed to the said post at Rs. 1,900-3,700 (i.e., revised pay scale of Rs. 5,575-10,620). In the said order, it is further ordered that the said 5 per cent of the posts i.e., 13 posts, of Accounts Superintendents, should be filled up only amongst the persons from the Departments of Public Works and Irrigation, who possess the qualification prescribed. It is useful to extract the relevant portion of the order, which reads as hereunder:

5. It is the case of the petitioners that the appointment to the cadre of Accounts Superintendents in the Department of Public Works is made in accordance with the Public Works (Irrigation Services) (Recruitment) Rules, 1988; and the said rules provides that the post of Accounts Superintendents have to be filled up by deputation of officials from an equivalent cadre in the Department of State Accounts and by no other source. It is their further case that when a similar attempt was made to fill up the posts of Accounts Superintendents in the Department of Public Works and Irrigation from amongst the staff of the Public Works Department contrary to the Cadre and Recruitment Rules, the Karnataka State Accounts Department Employees Association i.e., the petitioner in Writ Petition No. 29965 of 1999, challenged the said action of the State before the Karnataka Administrative Tribunal (hereinafter referred to as "the Tribunal") and the Tribunal, by means of its order dated 22nd of February, 1999 made in Application No. 6153 of 1998, a copy of which has been produced as Annexure-A to Writ Petition Nos. 29965 and 29966 of 1999, took the view that it was not permissible for the State to post the officials of the Public Works and Irrigation Department as Accounts Superintendents as it would run contrary to the Cadre and Recruitment Rules. It is also the case of the petitioners that the impugned orders are arbitrary and discriminatory in nature and, therefore, liable to be declared as unconstitutional as being violative of the rights guaranteed to the petitioners under Articles 14 and 16 of the Constitution of India.

6. However, the claim made by the petitioners is strongly resisted by the State

and the contesting respondents in all these petitions. It is the case of the respondents that since there was stagnation of the officials in the Department of Public Works and Irrigation, with a view to provide promotional opportunities to the persons who are holding the prescribed qualification, the impugned order came to be passed. It is their case that out of 253 posts of Accounts Superintendents in the pay scale of Rs. 5,575-10,620 (old scale of Rs. 1,900-3,700), 13 posts have been downgraded and the said downgraded posts are directed to be filled up by promotion among the First Division Assistants in the Public Works Department, who have put in minimum five years of service and who have passed certain departmental examinations prescribed; and that has been done in exercise of the executive power conferred on the State. According to the respondents, in exercise of the executive power, the State Government had created the said 253 posts of Accounts Superintendents; and by means of notification Annexure-B, dated 18th of June, 1999 issued by the State Government in exercise of the executive power, amended the earlier order dated 5th of July, 1989 and created a new cadre of Accounts Superintendents consisting of 13 downgraded posts. It is also pointed out by the respondents that the State Government issued notification dated 26th of July, 1999, a copy of which has been produced as Annexure-R3 by the State along with the Statement of Objections filed, providing for the method of recruitment and classification for promotion to the new cadre of Superintendents in the revised pay scale of Rs. 5,200-9,580 (old pay scale of Rs. 1,720- 3,300). It is their case that the Government has power to create more than one cadre of posts in different pay scales to perform the same job and in the absence of statutory rules of recruitment providing for method and procedure for filling up of the posts, it is permissible for the State to provide for the method and procedure by means of an executive order.

7. Sri S. Ranganatha Jois, learned Counsel appearing for the petitioners, challenging the correctness of the order Annexure-B, dated 18th of June, 1999, made two submissions:

(a) Firstly, he submitted that since the Cadre and Recruitment Rules provide that the post of Accounts Superintendents in the Departments of Public Works and Irrigation should be filled up by way of deputation, it is not permissible for the State to pass the impugned order providing for posting of the staff from the Department of Public Works and Irrigation. According to him, since the Cadre and Recruitment Rules provide for the procedure as to how the post of Accounts Superintendents should be filled up, by means of executive order, it is not permissible for the State to fill up the said post of Accounts Superintendents by way of promotion from the staff of the Departments of Public Works and Irrigation. It is his further submission that since the very question was considered by the Tribunal and the Tribunal, by its order Annexure-A, having taken the view that it is not permissible to do so, the impugned order is liable to be quashed on the very ground as- signed by the Tribunal. In support of his submission, he relied upon the decisions of the Supreme Court in the case of

State of Haryana, Vs. Shamsher Jang Bahadur, etc. etc., and B.N. Nagarajan and Others Vs. State of Mysore and Others, .

(b) Secondly, he submitted that the impugned order is also liable to be quashed on the ground that it is highly arbitrary, unreasonable, discriminatory in nature and violative of the rights guaranteed to the petitioners under Articles 14 and 16 of the Constitution of India. According to the learned Counsel, the purpose of posting the officials from the State Accounts Department is with a view to have a check over the expenditure incurred and the functioning of the officials of the Public Works and Irrigation Departments. He pointed out that in respect of almost all the departments in the State, the Accounts Superintendents are being posted from the Department of State Accounts; and keeping the larger public interest in view, the Recruitment Rules, provide for the posting of the officials of the State Accounts Department as Accounts Superintendents in Public Works and Irrigation Departments. It is his submission that if the officials of the Public Works and Irrigation Departments are allowed to function as Accounts Superintendents, they will not have the necessary independence and objectivity that is required of an Accounts Superintendent to scrutinise and point out the irregularities in the accounts of the Public Works and Irrigation Departments as they will have to scrutinise the accounts kept by their higher officers. Therefore, he submits that the object of scrutinising the accounts being to enforce discipline in the matter of incurring of expenditure and with regard to the works executed in respect of money spent by the State, the officers of the State Accounts Department, who are not subordinate to the Chief Engineer and other high functionaries of the Public Works Department, will be able to discharge the duties of Accounts Superintendents more effectively and objectively than the officials of the Departments of the Public Works and Irrigation. He further submitted that there is absolutely no rationale or basis for downgrading 5 per cent of posts in the cadre of Accounts Superintendents and reserving the said posts to the staff of the Irrigation and Public Works Departments. He further pointed out that the entire exercise of downgrading the said 5 per cent of the posts, has been made arbitrarily.

8. However, Sri V. Prakash, learned Additional Government Advocate, Sri H.K. Vasudeva Reddy and Sri B.B. Bhajentri, learned Counsel appearing for the respondents, while countering each one of the submissions advanced by Sri Jois, strongly supported the impugned orders. According to them, order Annexure-A passed by the Tribunal has no application to the facts of the present case. They pointed out that the Tribunal has taken the view in order Annexure-A, that it was not permissible for the State to post an employee of the Public Works Department as Accounts Superintendent, in the light of the provisions provided in the Recruitment Rules, on the ground that there was no executive order. They also submitted that the assumption made that impugned order Annexure-B runs counter to the Cadre and Recruitment Rules, is without any basis whatsoever. It is their submission that the Governor, in exercise of the power conferred on him under Article 309 of the Constitution, can make rules providing for two things --

one for the purpose of prescribing the procedure and conditions for recruitment and the other, for the purpose of conditions of service. According to them, in the absence of any rule or law made, it is permissible for the State to create any post and downgrade the post already created. Therefore, they submitted that in the instant case, though the State had created 253 posts of Accounts Superintendents by means of notification dated 5th of July, 1989, out of the said 253 posts, only 5 per cent of the posts, i.e., 13 posts, have been downgraded by prescribing separate and lower pay scale. This they submit is a creation of 13 new posts out of 253 posts. Therefore, they submitted that the Government, which had issued the notification by creating the posts, was entitled to alter the number of posts created by issuing one more notification. It is their further submission that since there is no Cadre and Recruitment Rules framed providing for the method of recruitment to the said 5 per cent of the posts, the State Government was entitled by means of executive order, to provide for filling up of the said posts by means of promotion. Therefore, they strongly countered the first submission of Sri Jois that the impugned order runs counter to the Cadre and Recruitment Rules. In support of their submission, they relied upon the decision of the Supreme Court in the case of J. -and J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., and that of this Court in the case of V.R. Shambulinga v State of Karnataka.

(a) Meeting the second submission of the learned Counsel for the petitioners, the learned Counsel for the respondents submitted that the impugned order is not liable to be declared as illegal on the ground that it is arbitrary, unreasonable or violative of the rights guaranteed to the petitioners under Articles 14 and 16 of the Constitution of India. They pointed out that out of 253 posts, only 5 per cent of the posts have been downgraded by prescribing lower pay scale and are made available for filling up by way of promotion amongst the personnel of the Public Works and Irrigation Departments who possess the requisite qualification as prescribed. It is their submission that the State has reserved 5 per cent of posts keeping in mind that the staff of the Departments of Public Works and Irrigation, who possess the qualification prescribed, have no promotional opportunities and with a view to avoid stagnation among the officials of the departments. In this connection, they drew my attention to the preamble given to the impugned order. Therefore, they submitted that if the State, keeping in mind the larger public interest and with a view to provide promotional avenues to its employees, has, out of 253 posts, made available only 13 posts to the staff of the Departments of Public Works and Irrigation, that too, at a lower pay scale, the petitioners cannot have any grievance on that account. They submitted that there is absolutely no basis for the assertion made that it would be only the officials of the State Accounts Department who will make a thorough job and not the officials of the Departments of Public Works and Irrigation. In support of their submission, they relied upon the decision of the Hon"ble Supreme Court in the case of P. Sadagopan and Others Vs. Food Corporation of India, Zonal Officer (South Zone) Represented by its Zonal Manager and Another, .

9. In the light of the rival contentions, the questions that would arise for consideration in these petitions, are:

(1) Whether the creation of 5 per cent of the posts of Accounts Superintendents in the downgraded pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200-9,580) out of 253 posts in the pay scale of Rs. 1,900-3,700 (revised pay scale of Rs. 5,575-10,620) and providing for filling up the said 5 per cent of posts among the First Division Assistants of the Public Works and Irrigation Departments who possess the requisite qualification, is liable to be declared as illegal on the ground that if it is permitted, it would run contrary to the Karnataka State Accounts Services (Recruitment) Rules, 1959, as amended by the Karnataka State Accounts Services (Recruitment) (Amendment) Rules, 1993?

(2) Whether order Annexure-B is liable to be quashed on the ground that it is arbitrary and discriminatory in nature and violative of the rights guaranteed to the petitioners under Articles 14 and 16 of the Constitution of India?

10. Let me now examine the first question that would arise for consideration, in the backdrop of the submissions very effectively made by the learned Counsel appearing for both the sides. The Governor of Karnataka, by means of notification dated 5th of July, 1989, sanctioned the establishment of State Civil Services in respect of Karnataka Irrigation Department Service. It is useful to refer to the relevant portion of the said order, which reads as hereunder:

"The Governor of Karnataka hereby sanctions the establishment of the State Civil Services in respect of the Karnataka Irrigation Department Service. The strength of each of the said cadres and the number and character of the posts borne thereon shall be as follows:

Sl. No.

Category of posts

Permanent

Temporary

Scale of Pay

XXX

XXX

XXX

XXX

21.

Accounts Superintendents

5

121

1,600-2,990"

As it can be seen from the said notification, which has been produced as Annexure-R1 along with the Statement of Objections filed by respondents 4 and 5 in Writ Petition Nos. 29965 and 29966 of 1999, 5 posts of permanent and 121 posts of temporary Accounts Superintendents were created along with various other posts. By means of another notification of the same date, the Governor of Karnataka, in supersession of the earlier notification dated 3rd of December, 1960, sanctioned the establishment of the State Civil Services Cadre in respect of the Karnataka Public Works Engineering Department Services. It is useful to refer to the operative portion of the said notification, which reads as hereunder: "In supersession of the Notification No. GADS GRR 57, dated 3rd December, 1960, the Governor of Karnataka hereby sanctions the establishment of the State Civil Services Cadre in respect of the Karnataka Public Works Engineering Department Service. The strength of each of the said cadres and the number and character of the posts borne thereon shall be as follows:

Sl. No.

Category of posts

Permanent

Temporary

Deputation

Scale of Pay

XX

XX

XX

15.

Accounts Superintendents

21

14

15

1,600-2,990"

As it can be seen from the said notification, 21 posts of permanent Accounts Superintendents and 14 posts of temporary Accounts Superintendents were created. The Governor of Karnataka, in exercise of the power conferred on him by the proviso given to Article 309 of the Constitution of India, by means of

notification dated 5th of July, 1989, framed rules known as "The Karnataka Public Works (Irrigation Services) (Recruitment) Rules, 1988". The said rules provided for the method of recruitment and minimum qualification to the various posts set out therein. As it could be seen from the said rules, the post of Accounts Superintendents in the Department of Irrigation was required to be filled up by way of deputation of an officer in an equivalent cadre from the State Accounts Department. Further, by means of another notification of the same date, the Governor of Karnataka, in exercise of the power conferred on him by the proviso given to Article 309 of the Constitution of India, framed rules known as "Karnataka Public Works Engineering Department Services (Recruitment) Rules, 1988", providing for the method of recruitment and minimum qualification to the various posts specified in column (2) of the said rules. As it can be seen from the said rules, the post of Accounts Superintendents was required to be filled up by deputation of an officer in the cadre of Accounts Superintendent from the Department of State Accounts. Therefore, from the reading of the notifications, referred to above, it is clear that by means of two notifications dated 5th of July, 1989, posts in the cadre of Accounts Superintendents were created both in the Irrigation Department and in the Public Works Engineering Department of the State. Further, in exercise of the power conferred on the Governor under the proviso given to Article 309 of the Constitution, the Cadre and Recruitment Rules were framed to fill up the post of the Accounts Superintendents in both the Departments i.e., Departments of Irrigation and Public Works. As noticed by me earlier, the Cadre and Recruitment Rules provided that the post of Accounts Superintendents should be filled up by way of deputation of an officer in the cadre of Accounts Superintendents from the departments of State Accounts. 11. Now, the question is whether the impugned order/notification Annexure-B has the effect of providing for recruitment to the post of Accounts Superintendents created in the Public Works and Irrigation Departments in disregard of the Recruitment Rules? In my view, if the impugned order/notification Annexure-B is to be understood as an order made by the State Government providing for recruitment to the post of Accounts Superintendents in the Public Works and Irrigation Departments from the cadre of First Division Assistants borne on the establishment of the Public Works and Irrigation Departments, there cannot be any doubt that the said order/notification is liable to be quashed and the action of the State requires to be held as illegal. It is well-settled principle of law that it is not permissible for the Government, by means of administrative instructions or orders made in exercise of its executive power, to alter the conditions of service prescribed under the Recruitment Rules. In this connection, it is useful to refer to the observations made by the Hon'ble Supreme Court in the case of B.N. Nagarajan, *supra*, at paragraph 5 of the judgment, which reads as hereunder:

". . . .It is hardly necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or Act".

The same is the view expressed by the Hon"ble Supreme Court in the case of State of Haryana, *supra*. At paragraph 7 of the judgment, the Supreme Court has observed thus:

". . . .Hence, we have to see whether the instructions with which we are concerned, so far as relate to the clerks in the Secretariat amend or alter the conditions of service prescribed by the rules framed under Article 309. Undoubtedly, the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service. The instructions issued by the Government undoubtedly affect the promotion of concerned officials and therefore they relate to their conditions of service. The Government is not competent to alter the rules framed under Article 309 by means of administrative instructions. We are unable to agree with the contention of the State that by issuing the instructions in question, the Government had merely filled up a gap in the rules. The rules can be implemented without any difficulty. We see no gap in the rules".

Further, in the case of P. Sadagopan, *supra*, the Hon"ble Supreme Court reiterating its earlier view, at paragraph 3 of the judgment, has observed thus:

"The regulation provides that such of the candidates who have put in three years experience as Assistant Category I are eligible to be considered for promotion as Assistant Managers in Category II post. It is now settled legal position that executive instructions cannot be issued in derogation of the statutory regulations".

Therefore, as noticed by me earlier, if the impugned order Annexure-B is in derogation of the Recruitment Rules, the impugned order is liable to be struck down on that short ground. However, having carefully gone through the impugned order and in the light of the submission made by learned Counsel appearing for the parties, I am unable to accept the submission of Sri Jois that the impugned order is contrary to the Cadre and Recruitment Rules. As it can be seen from the impugned order, the said order consists of two portions. The first portion provides that out of 253 posts of Accounts Superintendents in the Departments of Public Works and Irrigation in the pay scale of Rs. 1,900-3,700 (present scale of Rs. 5,575-10,620), 5 per cent of the posts i.e., 13 posts, have been created in the lower grade of Accounts Superintendents in the pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200-9,580). The second portion of the order provides for the procedure as to how the newly created posts in the pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200-9,580) should be filled up. Further, the State Government, by means of notification Annexure-R2, dated 26th of July, 1999, notified the procedure for filling up of the said 5 per cent of the newly created posts. As noticed by me earlier, while the Counsel for the petitioners would submit that order Annexure-B intends to fill up the posts of Accounts Superintendents in question in derogation of the Recruitment Rules, the Counsel for the respondents would submit that the impugned order only creates

5 per cent of posts of Accounts Superintendents in a lower cadre in the pay scale referred to above, out of 253 posts of Accounts Superintendents, retaining the same nomenclature given to the posts of Accounts Superintendents. In my view, as observed by me earlier, while I am unable to accept the submission of the learned Counsel for the petitioners that the impugned order runs counter to the Recruitment Rules in the matter of filling up of the posts of Accounts Superintendents, I find considerable force in the submission of the learned Counsel for the respondents that order Annexure-B creates 13 posts of Accounts Superintendents in the lower pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200-9,580), while retaining the nomenclature of Accounts Superintendents even to the newly created posts in the lower pay scale. The power conferred on the Governor under the proviso given to Article 309 of the Constitution is limited to the extent of framing rules for recruitment and conditions of service of the employees. There is no power conferred on the Governor under the proviso given to Article 309 of the Constitution of India, to create posts. The creation of posts is conferred on the State Government in Entry 41 of the State List. Therefore, under the said Entry 41, the State Legislature has the power to make laws regulating creation and abolition of the posts and all other matters relating to public service. Therefore, till the State Legislature exercises the power conferred on it under Entry 41 of List II and makes a law, it is open to the State to exercise its executive power under Article 162 of the Constitution, which is co-extensive with the power of the State Legislature, and create or abolish posts. By means of two notifications dated 5th of July, 1989, referred to above, certain number of posts in the Departments of Public Works and Engineering, and also Irrigation in the cadre of Accounts Superintendents, were created. The Recruitment Rules framed by the Governor in exercise of the power conferred on him under the proviso given to Article 309 of the Constitution, provided that the said posts should be filled up by means of deputation from the officer of State Accounts Department. Therefore, while the posts in the cadre of Accounts Superintendents were created by the State in exercise of its executive power, the Rules of Recruitment were made by the Governor in exercise of the power conferred on him under the proviso given to Article 309 of the Constitution. In the impugned order/notification Annexure-B, as observed by me earlier, 5 per cent of the posts (i.e., 13 posts) out of 253 posts in the cadre of Accounts Superintendents, were created in the pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200-9,580). As noticed by me earlier, the State, in exercise of its executive power in the absence of any law made by the State Legislature, has the power to create or abolish the posts. If that is so, it was within the competence of the State to create few posts of Accounts Superintendents in the pay scale of Rs. 1,720-3,300 (present scale is Rs. 5,200-9,580). In that event, the said action of the State cannot be questioned. The power to create and abolish the posts lies with the State Government. It is for the State, having regard to the administrative conveniences and exigencies, to decide how many posts should be created and continued in a given cadre; and once created how many, out of that, should be abolished. Therefore, it cannot be disputed that the State Government

has the power to create few posts in the cadre of Accounts Superintendents in a lower pay scale of Rs. 1,720-3,300. Merely because the said posts carry the same nomenclature of Accounts Superintendents cannot make the said posts as illegal or as has been done contrary to law. The petitioners, who belong to the State Accounts Department, cannot make any grievance. Under these circumstances, if the State Government had, out of 253 posts in the cadre of Accounts Superintendents in the pay scale of Rs. 1,900-3,700 (revised pay scale of Rs. 5,575-10,620), downgraded 13 posts i.e., 5 per cent, of the total number of posts and in the pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200-9,580), the said 13 posts, for all practical purposes, must be understood as new posts created in the lower pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200-9,580). The effect of creation of such 13 posts out of 253 posts of Accounts Superintendents is to abolish 13 posts of Accounts Superintendents in the pay scale of Rs. 1,900-3,700 (revised pay scale of Rs. 5,575-10,620). As noticed by me earlier, it is for the state in exercise of its executive power in the absence of the law made in that behalf, to decide, as a matter of policy, as to at what point of time how many posts in a particular cadre should be created and when created, should be continued and when continued, they should be abolished. When the State, having regard to the administrative convenience and in the larger public interest, has taken decision on these matters, it is not for this Court to go into the correctness of such a policy decision. Therefore, if the State Government while retaining the same nomenclature of Accounts Superintendents, carved out 13 posts out of 253 posts of Accounts Superintendents in the pay scale of Rs. 5,200-9,580, in my view, the said decision of the State only amounts to creation of the posts in exercise of the power conferred on it under Article 162 of the Constitution. It is also well-settled that the existence of the statutory rules is not a condition precedent to appoint a fit person to the post. The views I have taken above are also supported by the decision of this Court in the case of V.R. Shambulinga, *supra*. Justice Rama Jois (as he then was), at paragraph 5 of the judgment, has observed as follows:

"I do not see any force in the contention urged for the petitioners. The power to legislate on all matters relating to State Public Services is included in Entry 41 of List II of the VIII Schedule (State List) read with Article 246 of the Constitution. Special provision has however been made in recruitment and conditions of service under Article 309 of the Constitution. Under the proviso to that Article the power to frame rules regulating recruitment, and conditions of service of persons appointed to public service and posts under the Union or of any State is conferred on the President or the Governor, as the case may be, until provision is made in that behalf by Acts of appropriate legislatures. The power under Article 309 to regulate recruitment and conditions of service could be exercised in respect of the cadres or posts created until they are abolished. But the power to create or abolish the posts is not a power which falls under Article 309 of the Constitution. The said power is included in Entry 41 of the State List. Therefore, under Entry 41, the State Legislature has the power to make law regulating the

creating and abolition of posts and all other matters relating to recruitment and conditions of service. The executive power of the State is co-extensive with that of the Legislature in view of Article 162 of the Constitution. Therefore, in the absence of any law made by the legislature, the executive has the power to create or abolish any post or posts. In fact, notification sanctioning the cadre strength of each category of posts in any service of the State is always issued by the State in exercise of its executive power. Provisions for regulating recruitment are only incorporated in the rules made under the proviso to Article 309 of the Constitution. In the present case also, cadre strength was fixed by such separate notification issued on the same date when the Recruitment Rules were promulgated. The impugned order of the Government is only an amendment to the cadre notification issued in exercise of executive power and not to the Rules of Recruitment framed under proviso to Article 309 of the Constitution. The effect of upgradation of 54 posts of Motor Vehicle Inspectors is the abolition of 54 posts of Motor Vehicle Inspectors and creation of equal number of posts of Senior Inspectors. It was perfectly within the competence of the State to create a new cadre of posts in exercise of its executive power. After the creation of those posts by executive action, it was also competent for the executive to prescribe conditions of service as applicable to such posts as also the method of recruitment until the same is covered by rules framed under the proviso to Article 309 of the Constitution or law made by the legislature".

The Hon'ble Supreme Court, in the case of J. and K. Public Service Commission, *supra*, at paragraph 7 of the judgment, has observed thus;

"Existence of statutory rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil posts and fill them up according to executive instructions consistent with settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law.....".

Therefore, the decision of the Hon'ble Supreme Court in the case of J. and K. Public Service Commission, *supra*, and also the decision of this Court in the case of V.R. Shambulinga, *supra*, fully fortify the views I have taken above.

12. In the light of the above discussion, I have no hesitation to take the view that the impugned order Annexure-B is only in the nature of creation of 13 new posts of Accounts Superintendents in the lower pay scale of Rs. 1,720-3,300 (revised pay scale of Rs. 5,200- 9,580), and it does not run contrary to the Karnataka State Accounts Services (Recruitment) Rules, 1959, as amended by the Karnataka State Accounts Services (Recruitment) (Amendment) Rules, 1993. Therefore, I am of the view that the observation made by the Tribunal in its order made in Application No. 6153 of 1998 (Annexure-A) is of no assistance to the petitioners. Further, the said decision of the Tribunal is also under challenge

before the Division Bench of this Court.

13. In the light of the above conclusion reached by me, I am unable to accede to the first submission of the learned Counsel for the petitioners; and accordingly, the first question is held against the petitioners.

14. Even with regard to the second submission of the learned Counsel for the petitioners that impugned order Annexure-B is liable to be quashed on the ground that it is arbitrary and discriminatory in nature and violative of the rights guaranteed to the petitioners under Articles 14 and 16 of the Constitution of India, I find it difficult to accept the same. As observed by me earlier, while considering the first question, out of 253 posts 5 per cent of posts i.e., 13 posts, have been taken out and posts of Accounts Superintendents in the tower cadre in the pay scale of Rs. 5,200-9,580 have been created. As it could be seen from the preamble to the impugned order and also from the statement of objections filed by the State, the same has been done keeping in view that the First Division Assistants borne on the establishment of the Public Works and Irrigation Departments though they have passed S.A.S. Examination, have no promotional opportunities in the said Department and they will have to stagnate. If the State Government keeping in mind that a section of its employees though are eligible to be promoted to the higher cadre, having regard to the existing service conditions, they have no promotional opportunities and in that background, creates the posts to provide promotional opportunities to them either by creating additional posts in a particular cadre or takes out few existing posts out of the large number of posts and creates a new cadre, in my view, such an action cannot be considered as unreasonable, arbitrary or discriminatory in nature. While considering the first question I have come to the conclusion that the State has the power to create posts and abolish posts. That being the legal position, if the State, as observed by me earlier, had created 5 per cent of the existing posts in a lower cadre retaining the same nomenclature of the posts, the said action is not liable to be interfered with by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India. It is for the State, as a matter of policy, to decide as to how many new posts should be created and how many existing posts should be abolished or the number of existing posts should be reduced. In the facts and circumstances of the present case, I am unable to agree with the learned Counsel appearing for the petitioners that the action of the State in carving out 5 per cent of the existing posts for the purpose of creating new posts in the lower cadre of Accounts Superintendents, is liable to be struck down as being violative of Articles 14 and 16 of the Constitution of India. No doubt, the argument of the learned Counsel that the officials from the State Accounts Department are in a position to do a better job than the officials who get promotion from the post of First Division Assistant borne on the establishment of the Public Works Department, in the first flush appears to be very attractive, but if it is examined in the parameter laid down for examination of the contention on the ground that it is violative of Articles 14 and 16 of the Constitution, I find it difficult to accede to the said submission. The efficiency in

administration depends upon several factors. No doubt, the qualification and experience among other things, are important considerations. But, at the same time, the experience of the personnel in the Department to scrutinise the accounts and their commitment also are important. A view that the officials, who have gained experience in the Departments of Public Works and Irrigation and who possess requisite qualification in scrutinising accounts, cannot be said to be an unreasonable view or a consideration totally irrelevant to decide the question as to who is more competent or suitable to scrutinise the accounts in the Departments of Public Works and Irrigation. These are the matters on which there could be views more than one. In this background, if the State is of the view that a small portion of the posts in the cadre of Accounts Superintendents should be downgraded and a new cadre by retaining the same nomenclature, should be created in a lower pay scale, it is not permissible for this Court to go into the advisability or otherwise of such a decision. Prima facie, it does not appear to me that the said decision is totally irrational or does not stand to reason. As noticed by me earlier, while it cannot be disputed that the officials of the State Accounts Department are well-equipped to discharge their duties as Accounts Superintendents, the First Division Assistants who have worked for a period of minimum five years and who possess requisite qualification in State Accounts Service, cannot be said to be unsuitable to the posts, or not well-equipped to discharge the duties of Accounts Superintendents. Merely because the officials in the Departments of Public Works and Irrigation will have to scrutinise the accounts and point out irregularities of their superiors in the Department, in my view, cannot be the sole ground to come to the conclusion that the First Division Assistants who possess the requisite qualification, if they are promoted as Accounts Superintendents, will not be able to discharge their duties properly. Therefore, I do not find any merit in the second submission of the learned Counsel for the petitioners, and accordingly, the second question is also held against the petitioners.

15. In the light of the discussion made above, these petitions are liable to be rejected. Accordingly, they are rejected.

16. However, no order is made as to costs.

17. Sri V. Prakash, learned Additional Government Advocate, is permitted to file his memo of appearance within four weeks from today.