
(1987) 09 SC CK 0013

In the Supreme Court Of India

Case No : Writ Petition(Criminal) 545 of 1975

V. Balasubramaniam and Others

APPELLANT

Vs

Tamil Nadu Housing Board and Others

RESPONDENT

Date of Decision : 21-09-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 226, 309
Madras Housing Board Service Regulations — Regulation 28
Road Transport Corporations Act, 1950 — Section 14, 45
Tamil Nadu General Clauses Act, 1891 &mda

Citation : AIR 1988 SC 6 : (1987) 3 JT 617 : (1988) LabIC 213 : (1988) 2 LLJ 435 : (1987) 2 SCALE 625 : (1987) 4 SCC 738 : (1988) 1 SCR 228 : (1988) 1 SLJ 90 : (1988) 1 UJ 48

Hon'ble Judges : M. M. Dutt, J;E. S. Venkataramiah, J

Bench : Division Bench

Final Decision : Allowed

Judgement

E.S. Venkataramiah, J.—The above appeals arise out of three petitions filed under Article 226 of the Constitution of India bearing Writ Petition Nos. 1367, 1389 and 1448 of 1973 on the file of the High Court of Madras. The appellant v. Balasubramaniam was the petitioner in Writ Petition No. 1389 of 1973 and S. Swaminathan and S. Suruli were the petitioners in the other two writ petitions. All of them were working as Supervisors in the Engineering Subordinate Service of the Tamil Nadu Housing Board (hereinafter referred to as 'the Board'). The Board was established under the Tamil Nadu State Housing Board Act, 1961 (hereinafter referred to as 'the Act'). The posts of Assistant Engineers (now called as Assistant Executive Engineers) in the Engineering Officers Service of the Board were to be filled up either by direct recruitment or by promotion from the cadre of Junior Engineers possessing the qualifications prescribed for a Junior Engineer or from the cadres of Supervisors, Head Draftsmen and Draftsmen Grade-I. According to the appellants the regulations framed by the Board which had received the approval of the State Government prescribed, that in order to

be eligible to be promoted to the cadre of Assistant Engineers 'a Junior Engineer should have put in service as Junior Engineer for not less than five years and that a Supervisor should have put in service as Supervisor for not less than ten years. This difference between the Junior Engineers and the Supervisors was due to the minimum qualification prescribed for entry into the cadre of Supervisors. The grievance of the appellants and other Supervisors was that Respondents 2 to 11 in these appeals, (who were Respondents 3 to 12 in the writ petitions) and one C.J. Jayachandran, who had been impleaded as Respondent No.2 in the writ petitions, who were working as Junior Engineers had been promoted to the cadre of Assistant Engineers even though they had not put in five years of service in the cadre of Junior Engineers contrary to the regulations of the Board and that the appellants and some other Supervisors who were eligible to be promoted as Assistant Engineers, had not been promoted to the cadre of Assistant Engineers. They, therefore, approached the High Court by filing the abovementioned petitions for the issue of writ in the nature of mandamus directing the Board to consider the claims of the appellants and other Supervisors who were eligible to be promoted to the 11 posts of Assistant Engineers in the place of Respondents 2 to 11 and C.J. Jayachandran who had been impleaded as Respondent No. 2 in the writ petitions. The writ petitions were opposed by the Board and the Junior Engineers who had been impleaded as respondents in the said writ petitions. The State Government was impleaded as a respondent to the writ petitions by the learned Single Judge who heard the writ petitions. After hearing all the parties, the learned Single Judge allowed the Writ Petitions by his common judgment delivered on 30.1.1974 declaring that the promotion of Respondents 2 to 11 and C.J. Jayachandran as Assistant Engineers was in violation of the requirements of the regulations and directed the Board to fill up the posts to which Respondents 2 to 11 and C.J. Jayachandran had been promoted according to the regulations. Aggrieved by the decision of the learned Single Judge the Board and the Junior Engineers whose promotions had been set aside by the learned Single Judge preferred in all seven appeals being Writ Appeal Nos. 175, 228, 238 and 263-2675 of 1974 before the Division Bench of the High Court. The Division Bench allowed the appeals by its judgment dated 25.11.1974 on a ground entirely different from the grounds which had been urged in the courses of the writ petitions to which we will advert to hereafter and dismissed the writ petitions. These seven appeals by special leave have been filed against the judgment delivered by the Division Bench of the High Court.

2. It is necessary at this stage to set out briefly the relevant provisions of law and the contentions urged by the parties. Chapter IV of the Act which is entitled 'Officers and Members of the Staff of the Board' contains provisions relating to the appointment of the employees of the Board and their conditions of service. Section 16 of the Act provides that the Board may appoint a Secretary, a Housing Board Engineer and such other officers and servants as it considers necessary for the efficient performance of its functions. Section 17 of the Act which deals with the conditions of service of officers and servants of the Board reads thus:

17. Conditions of service of officers and servants of the Board - The remuneration and other conditions of service of the Secretary, Housing Board Engineers and other officers and servants of the Board shall be such as may be prescribed by regulations.

3. Section 18 of the Act contains the provisions relating to promotions and punishment of the officers and servants of the Board. The material part of Section 18 reads thus:

18. Promotions and punishment of the officers and servants of the Board - (1) Subject to any regulations made u/s 19, the power of making promotion to posts in the service of the Board... shall be exercised by the following authorities, namely:-

(a) by the Chairman in the case of posts, the maximum monthly salary of which does not exceed three hundred rupees and the servants holding such posts;

(b) by the Board, in the case of posts, the maximum monthly salary of which exceeds three hundred rupees but does not exceed one thousand rupees and officers and servants holding such posts;

(c) by the Board, subject to the previous approval of the Government, in the case of posts, the maximum monthly salary of which exceeds one thousand rupees and officers and servants holding such posts:

...

4. Section 19 of the Act provides that subject to the provisions of the Act, the Board shall with the previous approval of the Government, make regulations with regard to the various matters set out therein such as leave, disciplinary proceedings etc. which are also referred to in Section 18 of the Act. But the promotions of officers and servants of the Board from a lower grade to a higher grade is not, however, one of the topics which is specifically mentioned in Section 19 of the Act. Section 160 of the Act deals with the power to make rules for the purpose of carrying into effect the provisions of the Act. Sub-section (3) of Section 160 of the Act provides that all rules made under the Act shall be published in the Fort St. George Gazette and unless they are expressed to come into force on a particular day, shall come into force on the day on which they are so published. The power to make regulations is conferred on the Board by Section 161 of the Act. Sub-section (1) of Section 161 of the Act provides that the Board may, by notification, make regulations not inconsistent with the Act; and the rules made thereunder, for the purpose of giving effect to the provisions of the Act. Sub-section (3) of Section 161 of the Act states that no regulation or its cancellation or modification shall have effect until the same shall have been approved and confirmed by the Government. In exercise of the powers conferred under Sections 17 and 19 of the Act the Board has made regulations which are called Madras State Housing Board Service Regulations. It is necessary to set out at this stage the manner in which the above regulations were made. The Board

by its Resolution No. 772 dated 20-3-1963 made and adopted the service regulations in regard to the conditions of the officers and service of the Board and sent them to the Government for its approval u/s 161(3) of the Act. In the said regulations as far as the promotion of the Junior Engineers and the Supervisors as Assistant Engineers was concerned, the Board had prescribed five years' qualifying service in the case of Junior Engineers and ten years' qualifying service in the case of Supervisors for being promoted to the cadre of Assistant Engineers. However, during the pendency of the above matter before the Government, the Board on its own revised the said regulations which had already been forwarded to the Government by its Resolution No. 368 dated 8.12.1964. By that revision, the Board altered the period of five years of service which had been prescribed as the qualifying service in the case of Junior Engineers to three years and forwarded the said resolution to the Government. When the matter was still pending with the Government, the Board by its Resolution No. 467 dated 8.11.1965 went back on its revision and again prescribed the qualifying service of five years in respect of Junior Engineers for promotion to the cadre of Assistant Engineers since according to the Board that would be in accordance with the rules governing the Madras Engineering Service in the Government. The Government considered the regulations submitted by the Board and gave its approval by G.C. Ms.No.156 (Housing) Department of Labour dated 14.5.1969. The regulations, as approved by the Government in the Government Order, however, showed only three years as the qualifying service in respect of Junior Engineers and not five years as the memorandum dated 26.2.1971 which was styled as an erratum and it said that the words 'Three Years' occurring under the sub-head "By promotion of (i) Junior Engineer" should be substituted by the words 'Five Years'. This memorandum was signed by an Assistant Secretary to the Government. It was the contention of the Junior Engineers who had been promoted as the Assistant Engineers that the qualification prescribed by the regulations in respect of Junior Engineers for promotion to the cadre of Assistant Engineers was three years' service as stated in the order of the Government dated 14.5.1969 and that the memorandum dated 26.2.1971 which had been issued as an erratum was liable to be ignored since it had not been issued by following the procedure prescribed for modifying a regulation. The Board, however, raised some inconsistent pleas with regard to the said erratum. It is at that stage the learned Single Judge directed the State Government to be impleaded as a party in order to ascertain whether the Memorandum dated 26.2.1971 was only an erratum which had been issued for the purpose of correcting a clerical mistake which had crept into the Government Order dated 14.5.1969 or whether it was in fact a modification of the earlier Government Order dated 14.5.1969. After the State Government was so impleaded an affidavit was filed on behalf of the State Government by Shri V.S. Subbiah, Secretary to Government Housing Department explaining reasons for issuing the erratum dated 26.2.1971. The relevant part of that affidavit reads thus:

2. The Tamilnadu Housing Board in its resolution No. 772 dated 20.3.1963

approved the draft service regulations in regard to the conditions of service of the Officers and Servants of the Board. The Chairman of the Tamilnadu Housing Board in his letter No. 188884/B/63-I dated 7.6.63 requested the approval of the Government for the regulations framed by the Board with reference to Sections 17 and 19 of the Tamilnadu State Housing Board Act 1961. In the above proposals the post of Assistant Engineer in the scale of pay of Rs. 350-25-650 was included in the Housing Board Engineering Officers Service. For the appointment as Assistant Engineer one of the qualifications proposed by the Housing Board included a service of five years in the State Housing Board, Public Works Department, or Highways in case of directly recruited Junior Engineers.

3. While the matter was under consideration of the Government the Tamilnadu Housing Board in its resolution No. 368 dated 8.12.1964 approved the revised draft service regulations. In regard to the appointment of Assistant Engineer the revised draft service regulations provided a period of three years of service as Junior Engineer instead of five years (vide page 409 to 410 of the G.O.). While these revised draft regulations were pending scrutiny by the Government the Tamilnadu Housing Board in its resolution No. 467 dated 8.11.1965 approved an amendment prescribing a period of five years as Junior Engineer for promotion as Assistant Engineer instead of three years. The above amendment was made in accordance with Rule 5 of the Special Rule of the Madras Engineering Service (vide page 555 to 556 of the G.O.). This resolution was forwarded by the Chairman, Tamilnadu Housing Board in his letter No. 972054/F2/64-9 dated 16.11.1965. This letter was however omitted at the time of issue of orders by Government in G.O. Ms. Nos. 156 Labour dated 14.5.69. When this omission was noticed by Government this was rectified by issuing an erratum in Memorandum No. 6403/ Housing/71-2 dated 26.2.71 (vide page 799 of the G.O.)

This respondent respectfully submits that the Thailand Housing Board in its resolution No. 467 dated 9.11.1965 has proposed a period of 5 years as the minimum qualification required for promotion as Assistant Engineers in the case of directly recruited Junior Engineers. At the time of approval by the Government in G.O. Ms. No. 156/Labour dated 14.5.1969 the minimum period for promotion has been wrongly mentioned as 3 years instead of 5 years. The above is purely a clerical mistake and in order to rectify the same, the Government has issued an errata in Government Memo No. 6403/Housing dated 26.2.71 wherein the period of 3 years was corrected into 5 years.

5. The learned Single Judge after going through the various affidavits and counter-affidavits in the case and the relevant Government files came to the conclusion that the period of 'three years' had been mentioned in the Government Order dated 14.5.1969 as a result of a clerical mistake. He observed that his definite conclusion on this part of the case is that what has been subsequently issued by way of an erratum by the Assistant Secretary to the Government was really an erratum and not a modification of the regulations as referred to already. The learned Single Judge, therefore, found that the

promotion of Respondents 2 to 11 and C.J. Jayachandran from the cadre of Junior Engineers to the regulations as they had not completed five years of service in the cadre of Junior Engineers when they were promoted as Assistant Engineers and that their promotions were liable to be set aside. It may be mentioned here that no other infirmity with regard to the regulations was put forward when the case was before the learned Single Judge.

6. In the appeals before the Division Bench of the High Court a new plea was urged on behalf of the appellants, namely, that the petitioners in the writ petitions were not entitled to the issue of a writ in the nature of mandamus on the basis of the regulations since the regulations had not the force of law as they had not been published in the official Gazette. The Division Bench permitted the appellants in the said appeals to raise the said plea. It held that because Section 17 of the Act had provided that the remuneration and other conditions of service of the officers and the servants of the Board had to be in accordance with the regulations made under the Act, Section 18 of the Act had provided that subject to any regulations made u/s 19 of the Act the power of making promotions to the posts of the Board could be exercised by the appropriate authority, Section 161 of the Act had empowered the Board to make such regulations by issuing a notification and u/s 3(19-A) of the Tamil Nadu General Clauses Act it was necessary that a notification issued under any statute should be notified or published in the Official Gazette unless the statute otherwise provided, the regulations were not valid as they had not been admittedly published in the Official Gazette. The Division Bench proceeded to hold that the effect of the not notifying the regulations as required by Sub-section (1) of Section 161 of the Act was that the regulations did not have the force of law and, therefore, no mandamus could be issued even if it was established that the regulations had been contravened in making the promotions. On that sole ground, the judgment of the learned Single Judge was set aside and the writ petitions were dismissed. Those appeals, as already stated, have been filed against the judgment of the Division Bench.

7. There is one other plea urged on behalf of the Board to which reference has to be made at this stage before dealing with the contentions urged before us and that plea is contained in paragraph 3 of the counter-affidavit filed by Shri K. Lakshminathan Bharathi, Chairman of the Board, which was sworn on 17.12.1973. The relevant part of that counter-affidavit reads thus:

3. ...Again in resolution No. 217 the Board has decided to relax the rule requiring 5 years of experience and also providing for promotion of Assistant Engineers in proportion of 3:1 between Junior Engineers/Supervisors. This was approved by the Board in resolution No. 45 dated 20.1.1972. In resolution No. 45 promotions were given to the Junior Engineers and Supervisors by relaxing their required period of service.

8. In the counter-affidavit of the Chairman, extracted above, it is pleaded that the Board had decided to relax the rule requiring five years of experience in the

cadre of Junior Engineers for purposes of promotion to the cadre of assistant Engineers by its resolution No. 217 which was later on approved by the Board by its resolution No. 45 passed in January 1972. The power to relax the regulations in appropriate cases is claimed under Regulation 28(d) of the Regulations which at the material time read as follows:

Notwithstanding anything contained in these regulations or in any of the rules mentioned in these regulations, the Board shall have powers to deal with the case of any persons or class of persons (inclusive of those on foreign service terms) serving under the Board or any candidates or class of candidates for appointment/promotion/ absorption to a service in such manner as may appear to it to be just and equitable subject to the approval of the Government....

9. The first point which requires to be considered in this case is whether the qualifying service prescribed in respect of Junior Engineers was five years or three years on the date on which the impugned promotions were made. The answer to this question depends upon the fact whether the memorandum dated 26.2.1971 issued by the State Government stating that the period of qualifying service in respect of Junior Engineers was five years and not three years was an erratum or was a modification of the earlier Government order dated 14.5.1969. The learned Single Judge has after going through the pleadings of the parties and the relevant Government record found that the error which had crept into the Government order dated 14.5.1969 was clerical in nature and it was open to the State Government to correct it by issuing an erratum. The Division Bench has not recorded any finding on this question in the course of its judgment. It is not disputed that the employees of the Board working in the cadre of Junior Engineers and in the cadre of Supervisors, the Board and everybody concerned with the question had understood that the qualifying service prescribed for Junior Engineers to be eligible to be promoted to the cadre of Assistant Engineers was five years during the relevant time. In fact, the Board had passed a resolution to the effect that the period of five years should be reduced to the period of three years. Having heard the arguments of learned Counsel of the parties and looking into the record, we are of the view that the memorandum issued by the State Government on 26.2.1971 was merely an erratum correcting a clerical error and was not a modification of an earlier regulation. We, therefore, uphold the finding of the learned single Judge on the above question.

10. We now proceed to consider whether the Division Bench was right in allowing the appeals and in dismissing the writ petitions on a very short ground namely that relief by way of mandamus could not be granted on the basis of the regulations which had not been published in the Official Gazette, without examining whether the petitioners in the writ petitions were entitled to relief otherwise or not.

11. The impugned promotions of 11 Junior Engineers were made on various dates between 25.6.1971 and 7.2.1972. It is true that the regulations which had received the approval of the State Government had not been published in the

Official Gazette by the relevant dates as required by Section 3(19-A) of the Tamil Nadu General Clauses Act, 1891 which defined the expression 'notification' as a notification published in the Official Gazette and by Section 21 of the Tamil Nadu General Clauses Act, 1891 which provided that where in any Act or in any rule passed under any Act, it was directed that any order, notification or other matter should be notified or published such notification or publication should unless the said Act otherwise provided be deemed to be duly made if it was published in the Official Gazette. In the present case the Act did not in fact provide for any other mode of publication or notification. The said regulations were actually published in the Official Gazette only on May 14, 1975. The Division Bench of the High Court as stated earlier proceeded to dismiss the writ petitions on the sole ground that no writ in the nature of mandamus could be issued because the regulations had not been published in the form of a notification in the Official Gazette on the dates on which the Writ Petitions were filed and, therefore, they were not enforceable. It is, however, not disputed that by the time the impugned promotions took place the regulations had been made by the Board and had also received the approval of the State Government although they had not been published in the Official Gazette. There were no other regulations which had been duly made and published in the Official Gazette. In the above situation could it be said there was a legal vacuum as regards the conditions of service of the officers and servants of the Board? Section 16 of the Act confers the power on the Board to appoint a Secretary, a Housing Board Engineer and such other officers and servants as it considers necessary for the efficient performance of its functions. Section 17 of the Act no doubt provides that the remuneration and other conditions of service of the Secretary, Housing Board Engineer and other officers and servants of the Board shall be such as may be prescribed by regulations. The making of the regulations in the ordinary course of events occupies considerable time since they have to receive the approval and confirmation of the Government in order to be effective. The Board came into existence on 22.4.61 and it passed the resolution adopting the regulations on 20.3.1963. The regulations were submitted by the Board to the Government for the approval after the said resolution was adopted by the Board. Until the regulations were approved and confirmed by the State Government the Board had necessarily to take decisions in accordance with certain norms laid down by it as regards the modes of appointment of officers and staff of the Board. Those decisions cannot be invalidated merely on the ground that the regulations had not yet been promulgated in accordance with law. In *DUNDEE HARBOUR TRUSTEES V.D. AND J. NICOL* (1951) A.C. 550 Viscount Haldane L.C. said that 'the answer to the question whether a corporation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used. The question is simply one of construction of language, and not of presumption. The above statement of law has been quoted with approval by a Constitution Bench of this Court in *Mysore State Road Transport Corporation Vs. Gopinath Gundachar Char*, . In that case the respondent therein had questioned the

validity of a notification issued by the General Manager of the Mysore State Road Transport Corporation inviting applications for appointments to certain posts on the ground that such a notification could not have been issued by the General Manager of the Mysore State Road Transport Corporation as no regulations had been made by that Corporation u/s 45(1) of the Road Transport Corporations Act, 1950 with the previous sanction of the State Government with regard to the conditions of appointment of servants and the scales of pay of officers and servants of the Corporation other than the Chief Executive Officer and the General Manager and the Chief Accounts Officers. In the Road Transport Corporations Act, 1950 the provisions relating to the power of the Corporation to appoint its officers and staff and the manner in which the conditions of appointment and service of such officers and staff was to be regulated were almost similar to the provisions in Sections 16 and 17 of the Act. For purposes of easy comparison the relevant parts of Sections 14 and 45 of the Road Transport Corporations Act 1950 are given below:

14(1). Every Corporation shall have a Chief Executive Officer or General Manager and a Chief Accounts Officer appointed by the Staff Government.

(2) A Corporation may appoint such other officers and servants as it considers necessary for the efficient performance of its functions.

(3) The conditions of appointment and service and the scales of pay of the officers and servants of a Corporation shall-

(a) as respects the Chief executive Officer or General Manager and the Chief Accounts Officer be such as may be prescribed, and

(b) as respects the other officers and servants be such as may, subject to the provisions of Section 34, be determined by regulations made under this Act.

45(1). A Corporation may, with the previous sanction of the State Government, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

..... (c) the conditions of appointment and service and the scales of pay of officers and servants of the Corporation other than the Chief Executive Officer or General Manager and the Chief Accounts Officer.

12. It is seen from the provisions set out above that Sub-sections (1) and (2) of Section 14 of the Road Transport Corporations Act, 1950 correspond to Section 16 of the Act, Section 14(3)(b) of the Road Transport Corporations Act, 1950 corresponds to Section 17 of the Act and Section 45 of the Road Transport Corporations Act, 1950 corresponds to Section 161 of the Act. Admittedly in that case no regulations had been framed by the Corporation u/s 45(2)(c) of the Road Transport Corporations Act, 1950 prescribing the conditions of appointment and

service and scales of pay of its officers and servants but still this Court upheld the power of the Corporation to make appointments in the absence of the regulations made u/s 45 of the Road Transport Corporations Act, 1950. The relevant part of the decision of this Court is given below:

In *Dundee Harbour Trustees v. D And J Nicol*, Viscount Haldane L.C. said: "The answer to the question whether a corporation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used. The question is simply one of construction of language, and not of presumption." Bearing in mind this statement of law, let us consider whether the appellant had the power to appoint officers and servants and to lay down their conditions of service in the absence of regulations framed u/s 45(2)(c) Act, 1950. The appellant is an autonomous Corporation incorporated under the Act for the purpose of operating road transport services in the State and extended areas. For the proper discharge of its functions, it is necessary for the Corporation to appoint officers and servants. Section 14(2) expressly confers upon the Corporation the incidental power to appoint such officers and servants as it considers necessary for the efficient performance of its functions. Section 19(1) (c) empowers it to provide for its employees suitable conditions of service. Section 14(3) provides that the conditions of appointment and service and the scales of pay of its officers and servants shall be such as may subject to the provisions of Section 34 be determined by regulations made under the Act. Section 45(2)(c) empowers the Corporation to frame regulations with the previous sanction of the State Government prescribing the conditions of appointment, service and scales of pay of the officers and servants. If the State Government issues any directions u/s 34 relating to the recruitment and conditions of service of the employees, the Corporation must obey those directions. The conjoint effect of Sections 14(3)(b), 34 and 45(2)(c) is that the appointment of officers and servants and their conditions of service must conform to the directions, if any, given by the State Government u/s 34 and the regulations, if any, framed u/s 45(2)(c). But until such regulations are framed or directions are given, the Corporation may appoint such officers or servants as may be necessary for the efficient performance of its duties on such terms and conditions as it thinks fit. There is necessarily a time-lag between the formation of the Corporation and the framing of regulations u/s 45(2)(c). During the intervening period, the Corporation must carry on the administration of its affairs with the help of officers and servants. In the absence of clear words, it is difficult to impute to the legislature the intention that the Corporation, would have no power to appoint officers and servants and fix the conditions of service unless the regulations u/s 45(2)(c) are framed."

13. Assuming for purposes of argument that the non-publication of the regulations in the Official Gazette rendered them ineffective as regulations as held by the Division Bench of the High Court but without expressing any final opinion on the said question it has to be held that it was open to the Board to lay

down appropriate norms in accordance with which it proposed to make appointments of its officers and staff. The regulations which were made by the Board on 20.3.1963 which had been modified by its two resolutions dated 8.12.1964 and 8.11.1965 and which had been approved and confirmed by the State Government could still form the basis of the appointments of the officers and staff of the Board until they were replaced by formal regulations published in the form of a notification in the Official Gazette. Even in the case of persons holding the civil posts in the Government this Court has held that notwithstanding the provisions of Article 309 of the Constitution the State Government had the executive power in relation to all matters with respect to which the legislature of the State had power to make laws and the absence of any such law made under Article 309 of the Constitution or the rules made under the proviso thereto the State Government could make valid appointments in exercise of its executive powers (Vide B.N. Nagarajan and Others Vs. State of Mysore and Others, . The power of the Board u/s 16 of the Act is similar to the power exercisable by a State Government under Article 162 of the Constitution as regards appointment to State Public Services is concerned and that power could be exercised by the Board in accordance with its own resolution which in this case had received the approval of the State Government until appropriate regulations were published by it in accordance with Section 161 of the Act. Having taken a decision as per its resolution dated 8.11.1965 laying down that the qualifying service which a Junior Engineer should possess for purposes of promotion to the cadre of Assistant Engineers should be 5 years which had received the approval of the Government the Board was bound to follow faithfully the said decision while making promotions of Junior Engineers. It could not have, therefore, departed from the norm prescribed by itself earlier without modifying it by another resolution of the Board and obtaining the approval of the State Government to it.

14. It is, however, urged on behalf of the Board that even though under the regulations framed by it, which had received the approval of the State Government it was necessary that a Junior Engineer should have experience of five years in that cadre for being promoted to the cadre of Assistant Engineers on the dates on which the impugned promotions were made, the impugned promotions cannot be questioned since under Regulation 28(d) as approved by the State Government the qualification prescribed in respect of Junior Engineers had been relaxed by the resolution passed by the Board on 20th of January, 1972. The learned Counsel for the Board has produced before us copies of relevant records relating to the said resolution. By resolution dated 20th January, 1972 the Board has no doubt approved the note prepared by the office. The relevant part of the note states that in view of the availability of the large number of supervisors in service in excess of the proportion and in view of the non-availability of Junior Engineers with five years of service for promotion, it is considered desirable that the rule requiring five years of experience should be relaxed in favour of Junior Engineers and that persons who have put in three

years of service should be considered for promotion as Assistant Engineers. The resolution approving the above note was passed by the Board in the light of Regulation 28(d) of the Regulations which has been set out above. Regulation 28(d) of the Regulations provided that it was open to the Board in appropriate cases to relax the qualifications subject to the approval of the State Government. The appellants and the two other petitioners in the writ petitions clearly stated in the course of the writ petitions that the relaxation made in favour of the Junior Engineers who had been promoted was not in accordance with Regulation 28(d) since even though more than nine months had elapsed after the resolution relaxing the qualifications was passed, the approval of the Government had not been accorded to the resolution relaxing the qualification. The impugned promotions have been made between 25.6.1971 and 7.2.1972. The resolution relaxing the qualification was passed by the Board on 20th of January, 1972. ON 5th July, 1972 a letter was addressed by the Board to the State Government which reads thus:

"Lr.No.60880/FT2/69 dt.5.7.72 To

The Secretary to Government, Labour Department, Madras - 9. Sir,

Sub: Establishment-Technical -Tamil Nadu Housing Board Engineers Officer Service - Promotion to the Assistant Engineer reduction of service from five years to three years. Amendment to service regulation.

Ref.: Board Resolution No. 45 dated 28.1.1972.

I am to enclose a copy of the Note for the Board together with the Board's resolution No. 45 dated 20.1.72 on the subject.

2. In the circumstances explained therein, the period of qualifying service for promotion as Assistant Engineer from the category of Junior Engineer has been reduced to three years by the Board in the resolution cited.

3. Relevant rules in the service regulation are to be amended suitably in accordance with the Board's resolution cited. Hence the following amendment is suggested to the rule in the service regulation for approval.

Rule 6

Existing:

Must possess the qualification in items (i) or (ii) above and service as Junior Engineer for a period of not less than five years.

Amendment

Must possess the qualification in items (i) and (ii) above and service as Junior Engineer for a period of not less than three years.

15. In the above letter the Board had not actually sought the approval of the State Government for relaxing the qualification under Regulation 28(d) but on

the other hand it had actually sought the modification of the regulations themselves. In reply thereto the State Government wrote to the Board on August 17, 1972 as follows:

Housing Department Letter No. 58479/Housing D (ii)/72 dated 17.8.1972

From:

U.P. Govindasami B.A. Deputy Secretary to Government To

The Chairman, Tamil Nadu Housing Board, Madras - 35. Sir,

Sub: Establishment - Technical - Tamil Nadu Housing board Promotion to the Assistant Engineer reduction of service from five years to three years Amendment to service regulation.

Ref. Your letter N. 60880/ET2/69 dated 5.7.72.

I am directed to invite a reference to your letter cited wherein it is stated that the period of qualifying service for promotion as Assistant Engineer from the category of Junior Engineer has been reduced to three years by the Board in resolution No. 45 dated 20.1.72. It is seen from the resolution that the Board has only relaxed the rules in favour of certain Junior Engineers who have not put in five years of service but has not approved any proposal to amend the Service Regulation to provide for three years service in the case of Junior Engineers for promotion as Assistant Engineers.

2. Further the Board has approved a proposal to amend the service regulations to provide for promotion of Assistant Engineers in the proportion of 3:1 whereas in the letter cited it is requested that the service regulations may be amended to reduce the qualifying service of Junior Engineers for promotion to three years.

3. I am to request you to clarify the above points.

sd/- (T.K. Krishnan) for Deputy Secretary to Government.

16. Under the above letter the State Government sought certain clarifications on points raised in it. No further steps in this regard appear to have been taken after the said letter was written by the State Government perhaps because the writ petitions out of which these appeals arise had been pending before the High Court. The writ petitions were disposed of by the learned Single Judge on January 13, 1974. Thereafter the Board wrote a letter to the State Government on the question of relaxation of the rules on March 7, 1974. The said letter reads as follows:

NO.60880/ET/69 dated 7-3-74. To

The Special Secretary to Government, Housing Department, Fort St. George, Madras - 600009. Sir,

Sub: Establishment - Technical - Tamil Nadu Housing Board Engineering Officers

Service - Promotion to the post of Assistant Engineer.

Ref: 1. Government Ir. No. 58479/Hg.D. (ii)/72-1 dated 17.8.72.

I invite your attention to the reference cited above. A reply could not be sent to para 3 of that letter till now, as the connected file of this office was handed to Board's Legal Adviser in connection with the W.P. Nos. 1367,1389 and 1448/73 filed in the High Court by the Section Officers against the promotion of Junior Engineers as Assistant Engineers. The connected file has now been received from the Legal Adviser. The Board in its Resolution No. 45 dated 20-1-72, has approved inter alia the proposal to relax the qualifying service in respect of certain Junior Engineers who do not possess five years of service for promotion as Assistant Engineers. According to Regulation 28(d) of the Tamil Nadu Housing Board Service Regulations, the power conferred on the Board to relax the rule, in case of any person or a class of persons is subject to the approval of the Government.

The Writ Petitions referred to above have since been disposed of by the High Court and a copy of the judgment has been sent to the Government, Housing Department in this office letter No. 1112/ET-2/74-3 dated 21-2-74. Action is also being taken to file an appeal by the Housing Board against the judgment referred to above. It is also understood from the Legal Adviser to the Housing Board that the Assistant Engineers affected by judgment have already filed a Writ Appeal when has been admitted and stay granted. In the circumstances, I am to suggest that the question of the Government approving the relaxation of rule in respect of the 11 Assistant Engineers who were promoted on the basis of the Board's Resolution No. 45 dated 20.1.72 may be held over till the Writ Appeal is disposed of.

sd/- Chairman

17. By this letter the Board requested the State Government not to take any decision on the subject-matter of the above correspondence till the appeals were disposed of. Till today the Government has not approved the resolution passed by the Board on 20th January, 1972 relaxing the qualifications prescribed for promoting Junior Engineers to the cadre of Assistant Engineers. In the context in which the words 'subject to approval of the Government' appear in Regulation 28(d) of the Regulations they have to be interpreted as meaning 'conditional upon ,the approval of the Government' that is, that unless that approval is given by the Government the relaxation would not be valid because the regulations themselves had been put into effect after obtaining the approval of the State Government: earlier. The words 'subject to' have been understood by this Court as meaning 'conditional upon' in K.R.C.S. Balakrishna Chetty and Sons and Co. Vs. The State of Madras, . Even if those words are understood as meaning that it was possible to obtain ex post facto sanction of a decision already taken by the Board, even then such an approval should have been given by the State Government within a reasonable time from the date on which the decision is

taken by the Board. Since the approval has not been given at all till now it cannot be said that the power had been validly exercised under Regulation 28(d). Since the claim made by the Board that the relaxation of the qualification has been done in accordance with Regulation 28(d) is untenable in the aforesaid circumstances it would be wholly unjust to uphold the impugned promotions on the ground that there was a valid relaxation. It should not be forgotten that having once obtained the concurrence of the State Government to the Regulations made by it, the Board could not act contrary to the said Regulations ignoring the State Government altogether merely because the Regulations had not been published. Any such action would be arbitrary in character. The impugned promotions are, therefore, liable to be set aside and it is necessary that the Board should be directed to pass fresh orders of promotion after considering the cases of all the Junior Engineers and the Supervisors as on the date on which the impugned promotions were made and to make promotions in accordance with the Regulations which had been acted upon by the Board with the approval of the State Government. In the circumstances mere non-publication of the Regulations in the Official Gazette was not fatal to the writ petitions. The judgment of the Division Bench is, therefore, set aside and the judgment of the learned Single Judge is restored.

18. We, however, make it clear that if in the process of reviewing the promotions already made in accordance with the directions issued by the learned Single Judge it becomes necessary to revert any Junior Engineer from the post which he is now holding we direct that he shall not be so reverted but he shall be continued in the post which he is now holding by creating a supernumerary post, if necessary, until such time he becomes again eligible to be promoted to the said post. The continuance of such Junior Engineer in the post which he is now holding as per this direction shall not, however, come in the way of the petitioners in the writ petitions or any other employee of the Board getting the promotion due to him and the seniority to which he is entitled in accordance with law. These appeals are accordingly allowed. There shall, however, be no order as to costs.