**(1993) 04 KL CK 0002**

**In the High Court Of Kerala**

**Case No :** O.P. No''s. 7276 and 9752 of 1990, 4110 and 9423 of 1991 and 10200 of 1992

Valsala and Another — APPELLANT

Vs

Kerala Water Authority and Others — RESPONDENT

**Date of Decision :** 07-04-1993

**Acts Referred:**

Railway Establishment Code — Rule 157
Constitution of India, 1950 — Article 14, 16, 309
Kerala Public Services Act, 1968 — Section 2(1)
Kerala State and Subordinate Services Rules, 1958 — Rule 10, 2(6), 3, 4
Kerala Water and Waste Water Ordinance, 1984 — Section 65
Kerala Water Supply and Sewerages Act, 1986 — Section 64, 8(3)
Ministerial and Last Grade Service Rules, 1986 — Rule 2

**Citation :** (1993) 04 KL CK 0002

**Hon'ble Judges :** T.L. Viswamtha Iyer, J

**Bench :** Single Bench

**Advocate :** N. Sugathan and A.V. Ramakrishna Panicker, in O.P. 7276/90, K.A. Abdul Gafoor, in O.P. 9752/90 and O.P. 4110/91, P.V. Narayanan Nambiar, in O.P. 9423/91 and K. Ramkumar, in O.P. 10200/92, for the Appellant; N. Sugathan and A.V. Ramakrishna Panicker for Respondent 3 in O.P. 10200/92, K.A. Abdul Gafoor, for Respondent 6 in O.P. 10200/92, P.V. Narayanan Nambiar, for Respondent 5 in O.P. 10200/92, Emmanuel Thomas, for Respondent 1 in O.P. 7276/90 and O.P. 10200/92 and for Respondent 2 in O.P. 9752/90, D. Somasundaram, Govermment Pleader for Respondent 2 in O.P. 7276/90 and O.P. 10200/92 and for Respondent 1 in O.P. 9752/90 and 4110 and 9423/91, M.K. Damodaran, for Respondent 9 in O.P. 7276/90 and for Respondents 6 and 11 to 13 in O.P. 9752/90, John Joseph, for Respondents 15 to 27 in O.P. 7276/90 and B. Gopakumar, for Respondents 4 and 8 to 10 in O.P. 9752/90, for the Respondent

## Judgement

T.L. Viswamtha Iyer, J.—The challenge in these Original Petitions is to a Government Order dated October 1, 1990 marked Ext. P-11 in O.P. No. 7276 of 1990 and Ext. P-4 in O.P. No. 9752 of 1990 amending the method of appointment to the post of Divisional Accountants in the service of the Kerala Water Authority (the Authority for short). The service is governed by the rules issued as per G.O. (Ms.) No. 40/86/LAD., dated March 12, 1986 in exercise of the powers vested in Government u/s 65 of the Kerala Water and Waste Water Ordinance, 27 of 1986 read with Sub-section (3) to Section 8 thereof, corresponding to Sections 64 and 8(3) of the Kerala Water Supply and Sever age Act 14 of 1986 (hereinafter referred to as the Act) which replaced the Ordinance. The rules were called the Kerala Water and Waste Water Authority Administrative, Ministerial and Last Grade Service Rules, 1986. Rule 2 relates to constitution of the service which consists of thirty-six categories, of which category 17 is Divisional Accountant, category 18, Junior Superintendent; category 20, Head Clerk and category 25, Upper Division Clerk. Rule 10 made the provisions of the Kerala State and Subordinate Service Rules, (K.S.S.R.) applicable mutatis mutandis to the employees appointed there under. Rule 3 laid down the method of appointment to the various categories of posts. Appointment to the post of Divisional Accountant was by three methods in the ratio of 1:1:1, namely by promotion from category 18 (Junior Superintendents) considering the total service in that feeder category; (2) by recruitment by transfer from officers in the grade of Upper Division Clerks/Head Clerks/Junior Superintendents of the Authority; and (3) by direct recruitment. Rule 4 prescribed different qualifications for the three different modes of appointment. I shall extract the qualifications for purposes of easy reference:

Category Method of appointment Qualification

* * *

17. Divissonal Accountant Transfer B.Com. with Account Test Higher and minimum 5 years experience as Upper Division Clerk or Higher Grade

Promotion (i) Two years experience in the feeder category (ii) Account Test Higher

Direct recruitment M.Com. Degree of recognised University or Inter Examination of Institute of chartered Accountants of India/Cost and Words Accountants of India.

A direct consequence of the prescription of these differential qualifications for the three methods of appointment, was that a person could get promoted as Divisional Accountant either by virtue of his sheer seniority in the category of Junior Superintendents or be appointed by transfer from among Upper Division Clerks or Head Clerks or Junior Superintendents superseding his seniors in any of these categories, by reason of his possessing the B.Com. degree qualification, besides Account Test Higher, and a minimum of five years of experience as Upper Division Clerk or in the higher grade. This was the state of affairs till October 1, 1990 when the rules were amended by the impugned Government order. Thereby the method of appointment to the category of Divisional Accountants was limited to: (1) promotion from the category of Junior Superintendents considering the total service in that category; and (2) direct recruitment, the appointment by these two methods being in the ratio of 4:1. Appointment by transfer of Upper Division Clerks, Head Clerks and Junior Superintendents with B.Com. qualification, which existed till then, was done away with, apart from limiting the direct recruitment to 20 per cent of the cadre strength. Simultaneously, the qualifications were also altered as follows:

Promotion: Account Test (Higher) Direct Recruitment: M.Com. Degree.

There was a further crucial provision namely Note 4 which prescribed the mode of filling up of vacancies of Divisional Accountants which existed on the date of the notification, namely October 1, 1990. It read:

Vacancies of Divisional Accountants, if any, existing as on the date of this notification shall be filled up in accordance with the provisions of this notification.

All the vacancies as on October 1, 1990 were thus directed to be filled up, with reference to the amended rule even though the vacancies had arisen earlier.

2. It is the validity of this amendment that is challenged by B.Com/M.Com. degree holders whose avenue of appointment by transfer without reference to seniority has been taken away by the amendment.

3. When the rules were promulgated by G.O. (Ms.) 46/86, which for the first time provided an avenue of appointment by transfer for B.Com. degree holders, the senior hands in the service, who were not so qualified, challenged the preference given to the degree holders, by filing, writ petition O.P. No 3284 of 1986. Government opposed the writ petition with the plea that the Authority was availing institutional finance from the Life Insurance Corporation of India, the World Bank and Ors. , necessitating the commercial system of accounting to be followed. For that purpose, persons with sound knowledge of commerce had to be appointed as Divisional Accountants. The prescription of a method of appointment by transfer of B.Com. degree holders was intended to achieve this purpose. Sreedharan, J. dismissed the writ petition by judgment dated January 16, 1987 holding, inter alias, that when the purpose for which the educational qualification was prescribed is taken into consideration, it cannot be said that Government had acted arbitrarily in framing the rule in question.

4. There was another set of writ petitions, O.P. Nos. 4866 of 1987 and 7849 and 8627 of 1988 by some B.Com. degree holders alleging that promotions were being effected violating the quota prescribed. These petitions were disposed of on December 16, 1988 directing inter alia that the provisional promotions effected by certain proceedings dated June 9, 1987 and May 9, 1988 should be immediately reviewed, and any promotions made in excess of the quota for promotion, should be cancelled by the Authority. This Court also directed that the quota fixed in the rules for transfer should be filled up regularly from among persons eligible as per the rules. A review of the promotions was accordingly undertaken, and a few more B.Com. degree holders were appointed as Divisional Accountants by transfer. According to the Petitioners, there were 37 vacancies of Divisional Accountants to be filled up of which twelve fell to the quota of B.Com.

 

degree holders for being filled up by transfer. But, not all of these vacancies were so filled up, with the result the quota for transfer remained partially unfilled.

5. Petitioners state further that thirteen vacancies of Divisional Accountants arose between January 1 and September 30, 1990 some of which were not filled up. At the time the amendment came into force on October 1, 1990 there were still eleven vacancies of Divisional Accountants remaining unfilled. This factual background about the existence of vacancies as on October 1, 1990 (though not the exact number thereof) is necessary to understand the contentions and prayers of the Petitioners, which I shall presently state.

6. The relief claimed in these petitions is primarily to declare the amendment of October 1, 1990 as unconstitutional and void, and to direct promotions to the category of Divisional Accountants to be effected strictly in accord with the 1986 Rules. In any event, the vacancies which arose prior to October 1, 1990 should be filled up in accordance with the 1986 Rules, without taking note of the amendment. Note 4 to the 1990 amendment which directs the contrary is ultra virus and void.

7. The contentions raised by the Petitioners are that the 1990 amendment is arbitrary and unreasonable, and violative of Articles 14 and 16 of the Constitution, that it is tainted by mala fides in that Government succumbed to the pressure tactics of trade unions and made the amendment which was thus effected for extraneous reasons, contrary to what the Government had stated in their counter affidavit in the earlier writ petition O.P. No. 3284 of 1986. On the other hand, the contention of the Respondents is that Government has unfettered power to alter or amend the rules relating to conditions of service as and when occasion arises and that it is a matter of policy for them to decide what should be the method of appointment for a post and what should be the qualifications to be possessed for such appointment. Questions relating to policy are beyond the ken of judicial review unless they offend Articles 14 and 16 of the Constitution. According to the Respondents, the amendment does not violate either of Article 14 or 16 and that it was necessitated by the exigencies of service.

8. State of U.P. v. Ram Gopal Shukla (1981) 3 S.C.C. 1 was relied on by the Petitioners for the proposition that though rules regulating conditions of service are within the executive power of the State, or its legislative power under the proviso to Article 309, even so, they have to be reasonable, fair and not grossly unjust, if they are to survive the test of Articles 14 and 16 of the Constitution. In that case, an order issued by the Government of U.P. laying down that a list of three hundred persons already prepared for promotion had to be exhausted before any other person could be selected for promotion was struck down on the ground that it was obviously unjust, as it deprived other persons similarly situated of the opportunity of being considered for promotion (vide paragraph 15).

9. The next case relied on was the well known case of Ajay Hasia and Others Vs.

 

Khalid Mujib Sehravardi and Others, , where the Supreme Court reiterated, with reference to earlier decisions, that the concept of reasonableness and non-arbitrariness pervaded the entire constitutional scheme and was a golden thread which ran through the fabric of the Constitution. In Paradise Printers and Others Vs. Union Territory of Chandigarh and Others, , the Supreme Court reiterated what had been stated earlier in E.P. Royappa Vs. State of Tamil Nadu and Another, and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, that equality and arbitrariness were sworn enemies; while one belonged to the rule of law in a republic, the other belonged to the whim and caprice of an absolute monarch. When an act is arbitraly, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore, violative of Article 14. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. In The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others, , proposition (c) in paragraph 47 is that when appointment are made from more than one source, it is permissible to flx the ratio for recruitment from the different sources and if rules are framed in this regard, they must ordinarily be followed strictly. Vide also Noelima Mipra v. Harinder Kaur Paintal (1990) 2 S.C.C. 746. The case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, was also relied on to point out that State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rule of law. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test of not being arbitrary is the sine qua non to the validity of every State action. Inter alias, Counsel also made reference to the decision in Pankajakshy v. George Mathew 1987 (2) KLT 723, where the continued exemption granted from time to time from possession of qualifications for appointment to the post of Headmasters in aided schools, was held unreasonable and arbitrary.

10. The principles governing Articles 14 and 16 are too well established to need reiteration. The question is only one of applying these principles to the facts of a given case. Every State action has to be tested in the background of the rule of law and non-arbitrariness which pervade every aspect of governmental action under the Constitution and which strike at the whims and caprices of Government and its instrumentalities. The question for consideration is whether the impugned amendment of 1990 is unreasonable or arbitrary, liable to be struck down as violative of Articles 14 and 16 of the Constitution.

11. The amendment applies equally to all those in service. What it has done is only to alter the method of appointment to the post of Divisional Accountants, as also the qualifications for appointment under the different methods. As to what should be the method of appointment or as to what should be the qualifications that should be possessed by personnel in different categories of a service are matters exclusively within the domain of the executive. They are the best judges of the requirements of the service and therefore should be left with the liberty of fixing the method of appointment and qualifications for the posts in a service.

 

Unless they are patently unjust or unreasonable or unrelated to the requirements of the service, (in which event an inference of mala fides in law may arise), the question of such a rule violating Articles 14 or 16 of the Constitution does not arise. It is not for judicial bodies to sit in judgment over the wisdom of the executive in deciding the mode of recruitment, the source from which the recruitment should be made or the prescription of qualifications, as they are matters of policy falling exclusively within the domain of the executive. They are matters governed by the interests of administration and the exigencies of service see in this connection State of Andhra Pradesh and Another Vs. V. Sadanandam and Others, It is open to the Government to frame rules regulating conditions of service and also to alter them from time to time Roshan Lal Tandon Vs. Union of India (UOI), . Views may change. Situations unforeseen at the time the rules were framed may crop up. Necessities of administration may call for changes in the existing rules. Neither the legislature nor the rule making bodies can be tied down to a given set of law or rules for all time to come. So long as they act within the constitutional limits or within the limits set by the conferment of power (in the case of a rule making body) Courts will not castigate them for mere changes of the law or the rules. As stated by the Supreme Court in Tamil Nadu Education Department Ministerial and General Subordinate Services Association and Others Vs. State of Tamil Nadu and Others, , paragraphs 9 and 16, Court cannot strike down a Government Order or policy merely because there is a variation or contradiction from an earlier decision. Life itself is sometimes a contradiction, and consistency is not always a virtue. What is important to note in such circumstances is whether there is any mala fides or any irrational or extraneous factors fouling the Government action. This view has been reiterated forcefully in Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, where the Supreme Court observed in paragraphs 14 and 16 as follows:

It would be wholly wrong for the Court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations, acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the Court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provisions of the State can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation making power conferred on the delegate by the statute.

* * * * * * The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra virus and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution.

All that Government did by the 1990 rules was to alter the method of appointment to the post of Divisional Accountants as also the qualifications for the post. In fact there was very good reason for the amendment. I have already indicated that the operation of the 1986 Rules conferred an edge on junior B.Com. degree holders working either as Upper Division Clerks or Head Clerks or Junior Superintendents to get promotion as Divisional Accountants over the heads of the non-B.Com senior Junior Superintendents and Ors. by getting promoted in the transfer quota of 1/3rd, merely on the strength of their possessing the B.Com. degree. Necessarily this caused hardship and heartburn to the seniors in service leading to discontent. A conference was accordingly held before the Minister with representatives of the employees, at which a decision was taken to alter the rule and to do away with appointment by transfer, and with that, the advantage which the B.Com. degree holders had. A copy of the minutes of this meeting is Ext. R-1(a) produced along with the counter affidavit of the Authority, in O.P. No. 7276 of 1990. The change in the rule was thus dictated by reasons of expediency of having a contented service and to settle the unrest and discontent that was setting in because of the preference given to B.Com. degree holders and their getting promoted as Divisional Accountants over the heads of their seniors. This reason is not unrelated to toe object of achieving an efficient and devoted service, Contentment in service with the members sharing the avenues of promotion justly and equitably is the sine qua non for an efficient service leading to improved administration. The amendment is based on a factor which has to be reckoned in framing rules regarding conditions of service of Government employees. The amendment cannot therefore be branded as either arbitrary or unreasonable as contended by the Petitioners.

12. It is true that Government had pleaded in the earlier case O.P. No. 3284 of 1986 that the commercial system of accounting to be followed by the Authority necessitated better qualified hands. But that does not mean that Government should be pinned down to the same rules enternally and forever. I have already held that it is the right of the executive to vary the rules from time to time in the interests of the administration or exigencies of service, of course without affecting any of the guaranteed rights. The stand taken in the previous litigation does not preclude a revision, if the operation of the rule snowed signs of inequitable operation to the detriment of a section of the employees. As stated already, there is no law that a rule once framed should enure for ever nor does the fact that it was upheld on a particular. basis on an earlier occasion preclude its revision in future. No question of estoppel-promissory or otherwise-arises in this case. The Government was therefore justified on the facts of this case in amending the rule in the manner, done in 1990.

13. The 1990 amendment is also challenged as vitiated by mala fides, the mala fides alleged being that Government succumbed to the pressure tactics of the unions. When it is within the power of Government as a matter of policy to prescribe the conditions of service, a plea of mala fide of this nature cannot be easily entertained. Even if it be true, that Government had acted under pressure from, or at the behest of, a certain section of the employees, it could not be said that there is any mala fides involved in it. Contentment in service is an object to be achieved and any step taken by the Government to achieve that object cannot be faulted as mala fide. It is not as if the Government is using the rule making power vested in it u/s 64 for a purpose not intended thereby. The Petitioners do not have any vested right in a certain set of qualifications or methods of appointment or promotion to the category of Divisional Accountants. When no such right inheres in them, I am unable to countenance any plea of mala fide of the nature raised by the Petitioners. I have already indicated that Government had sufficient reasons for changing the rule as evident from Ext. R-1(a) in O.P. No. 7276 of 1990.

14. There is another vital point raised by the Petitioners which does invite serious consideration. That is that Note 4 to the 1990 amendment is unauthorised and invalid. It is pointed out that the rule in question is one made in exercise of the power conferred by Section 64 of the Act. This provision does not confer any power to frame rules with retrospective effect. What Note 4 does is to direct that all vacancies existing as on October 1, 1990 shall be filled up under the amended rules. The effect of this Note is that even vacancies which had arisen prior to that date have to be filled up under the amended rule. In effect therefore, the amendment has been given retrospective effect. There is much force in this submission. It is now well established having regard to the decisions of the Supreme Court in Income Tax Officer, Alleppey Vs. M.C. Ponnoose and Others, , Accountant General and Another Vs. S. Doraiswamy and Others, Bakul Cashew Co. v. Sales Tax Officer (1988) 62 S.T.C. 122, that a delegated authority cannot make any rule with retrospective effect unless the statute conferring the power

 

to make rules provides for the making of rules with retrospective operation. Section 64 of the Act does not authorise the Government to make any rules with retrospective effect. Therefore, and if the effect of Note 4 is to make the 1990 amendment retrospective, it has to be held that the Note is ultra vires the powers conferred on Government u/s 64.

15. Vacancies in service have ordinarily to be filled up with reference to the rules in force at the time the vacancies arise. It was so held by the Supreme Court in Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, . The Supreme Court emphatically declared that vacancies which occurred prior to an amendment to the rules would be governed by the old rules and not by the amended rules, and that they had not the slightest doubt on the point.

16. A decision of this Court in Padmanabhan v. State of Kerala 1982 KLT 589, is also in point (vide paragraph 7 of the judgment). A Full Bench of this Court had occasion to deal with an analogous question, with reference to qualifications, in Padmanabhan Nair v. Dy. Director 1991 (1) KLT 337, when it was held that eligibility for appointment should be reckoned with reference to the state of affairs as on the date on which the vacancy occurred. It is therefore clear that vacancies which arose prior to October 1, 1990 have to be filled up only with reference to the 1986 rules. A Government servant gets a right to be considered for appointment when the vacancy arises and if that is the crucial point of time, the fact that Government did not choose to fill up the vacancy then and there, but waited, cannot deprive the employee concerned of his chance of promotion. If this right is to be altered or affected, there must necessarily be some specific provision authorising Government to alter the rules with retrospective effect, Such a power is significantly absent in Section 64. I have no doubt that the effect of Note 4 is to make the 1990 amendment retrospective, applying it even in relation to vacancies which arose prior to October 1, 1990 by providing that all vacancies existing as on that date shall be filled up with reference to the amended rules. Thus the prior vacancies which in the normal course had to be filled up with reference to the 1986 rules stood surrendered to the amended rules.

17. It is pointed out in the counter affidavit that no vacancy of Divisional Accountant was filled up after May 22, 1990 in view of the conference held before the Minister and the proposal for amendment mooted therein. According to the Petitioners, there were at least eleven vacancies as on October 1, 1990, while according to the Government and the Water Authority, the number of vacancies was eight. Whatever be the exact number, it cannot be doubted that there were vacancies which were not filled tip, but which are now hit by the amendment, by virtue of Note 4. Note 4 being thus retrospective, is ultra virus the rule making power of Government u/s 64 and therefore invalid.

18. Counsel for the Respondents, particularly the Government Pleader, however sought to sustain the retrospectivity to Note 4, on the basis of the decision of the Supreme Court in B.S. Vadera Vs. Union of India (UOI) and Others, . That case

 

was one where the President, in exercise of the power vested in him under Rule 157 of the Indian Railway Establishment Code framed under the proviso to Article 309 of the Constitution of India, directed the Railway Board to make rules of general application for non-gazetted Railway servants. The question was whether the rules framed with retrospective detect fell within the ambit of this power. It was in that context the Supreme Court observed that having regard to the provisions of Article 309, the power to make rules with retrospective effect could not be denied to the Board in the absence of limitations prescribed by any parliamentary or other legislation. Article 309 is not a mere rule making power by a delegated authority. It is part of the legislative power of the State and therefore the power under the said Article could be invoked for making rules prospectively or retrospectively. It was in this context that B.S. Vadera Vs. Union of India (UOI) and Others, , was decided. Simon Luckose v. D.S.P., Kottayam 1990 (2) KLT 371, another decision relied on by the Respondents pertained to rules framed u/s 2(1) of the Kerala Public Services Act 1998. This provision itself enables Government to frame rules to regulate the conditions of service of employees with retrospective effect, but this Court observed that benefits accrued under the existing rules cannot be taken away by amendment with retrospective effect.

19. These decisions have no application to a case where the delegated rule making power does not confer any authority to make rules with retrospective effect. Section 64 does not empower the Government to make rules with retrospective operation, and therefore, Note 4 which has retrospective effect, is beyond the rule making power of the Government.

20. There are two subsidiary contentions raised by the parties, on both of which it is unnecessary for me to render any finding. I shall just sketch them and leave them for decision by the Government. I have already held that the vacancies which arose upto October 1, 1990 should be filled up with reference to the 1986 rules, without taking note of the amendment of 1990. Therefore, a decision on the question as to the number of vacancies which existed as on that date is called for. Government and the Water Authority have both contended in their counter affidavits that vacancies upto 22nd May 1990 have been filled up in accordance with the then existing ratio, but that subsequent vacancies which arose upto October 1, 1990 have not been filled up because of the decision Ext. R-1(a) to amend the rules. According to them, only eight vacancies arose during this period. The Petitioners have a different case. According to them there were eleven vacancies remaining unfilled as on October 1, 1990. There is thus controversy between the parties as to the exact number of vacancies which were in existence on October, 1, 1990 and also as to whether the full quota of 3 available for transfer under the 1986 rules had been filled up before October 1, 1990. In the absence of complete details on these aspects, it is not possible for this Court to render any decision thereon.

21. By an interim order dated July 21, 1992, this Court directed the Petitioners in

 

O.P. Nos. 7276 and 9752 of 1990 and 9423 of 1991 to be promoted as Divisional Accountants. The 14th Respondent in O.P. No. 9752 of 1990 was one of those who was reverted from the post of Divisional Accountant pursuant to the interim order aforesaid, to yield place to one of the Petitioners. He got himself impleaded and has filed a counter affidavit in which he has pleaded that the two Petitioners in O.P. No. 9752 of 1990 were not qualified for appointment on transfer before October 1, 1990 for the reason that they did not have five years of service as U.D. Clerk as on that date. It is pointed out by him that these two Petitioners were actually posted as Upper Division Clerks only on April 26, 1986, though with retrospective effect from September 16, 1985. He contends that the five years of service should be actual service as Upper Division Clerk, and not with reference to any notional promotion. Counsel for these Petitioners counters these arguments with the submission that Clerks, whether in the Lower Division or in the Upper Division, perform the same type of duties. They were promoted as Upper Division Clerks consequent on the increase in the ratio between Lower Division and Upper Division Clerks to 1:1 as per annexure 2 to the Fourth Pay Commission Report which was accepted by the Government by G.O. (P) No. 515/85/Fin., dated September 16, 1985. According to Counsel, their promotions were due on September 16, 1985 itself when the vacancies arose on acceptance of the Pay Commission''s Report. He also refers to Rule 2(6) of the Kerala State and Subordinate Service Rules, under which a person is stated to be on duty as member of a service, when he is given the benefit of notional promotion consequent on revision of rank, seniority, etc. Therefore the Petitioners must be treated as on duty as Upper Division Clerks from September 16, 1985 in which even they have completed five years of service as Upper Division Clerks on September 16, 1990.

22. I do not think it necessary to go into this question, particularly when Government has not so far addressed use if on this question. Apart from that, the question whether both or either of these Petitioners will be entitled to promotion before October 1, 1990 will depend on the number of vacancies which arose before that date, and the seniority of these two Petitioners vis-a-vis the Ors. . If the Petitioners do not fail within the range of B.Com. degree holders who Could be promoted in the quota available to them before October 1, 1990, the question of considering their eligibility for promotion before that date will not really arise. I am not therefore addressing myself to this question which may eventually prove to be an academic exercise. I leave this question open for decision by the Government, if occasion arises for them to consider the same after review of the vacancy position before October 1, 1990.

23. O.P. No. 4410 of 1991 is an Original Petition filed by a M.Com. graduate with the plea that the reduction in the quota for direct recruitment from 1/3rd to 1/5th reduces his chances of recruitment. This is not a ground for challenging the rule at all. At any rate, it is a matter of policy for Government as to what should be the mode of recruitment and from what sources. The writ petition is without merit.

 

The Original Petitions are disposed of as follows:

(a) The change in the mode of appointment of Divisional Accountants and the qualifications therefor brought about by the 1990 amendment are upheld. But Note 4 appearing in column 3 against category No. 17 in the Table under Rule 4, namely "4. vacancies of Divisional Accountants, if any, existing as on the date of this notification shall be filled up in accordance with the provisions of this notification" is declared invalid and inoperative.

(b) The Kerala Water Authority is directed to fix the number of vacancies of Divisional Accountants which were available for being filled up as on September 30, 1990, and to fill up those vacancies with reference to the 1986 rules without taking note of the amendment of 1990. The Kerala Water Authority shall also consider the question whether the Petitioners in O.P. No. 9752 of 1990 were qualified for promotion as on September 30, 1990. The appointments to vacancies arising after that date shall be made as per the 1986 rules as amended in 1990. The fixation of the number of vacancies, and review of the appointments, consequent thereon in the light of this judgment, shall be made and completed within a period of two months from the date of receipt of a copy of this judgment.

(c) The parties to these Original Petitions may, if so desired, make representations to the Water Authority, about the number of vacancies as on September 30, 1990 or about the eligibility of the Petitioners in O.P. No. 9752 of 1990 for appointment as Divisional Accountants within a period of one month from today.

 