
(2004) 07 AHC CK 0149
In the Allahabad High Court
Case No : Special Appeal No. 1143 of 2001

Vijay Singh and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 28-07-2004

Acts Referred:

Constitution of India, 1950 — Article 13(3), 14, 16, 162, 226
Police Act, 1861 — Section 2, 46(2)

Citation : (2005) 2 AWC 1191 : (2004) 3 UPLBEC 2778

Hon'ble Judges : S. Rafat Alam, J; R.K. Agrawal, J; B.S. Chauhan, J

Bench : Full Bench

Advocate : Om Prakash Misra, A.K. Singh and V.K.S. Choudhury, for the Appellant; Sudhir Agarwal, A.A.G. and S.C., for the Respondent

Final Decision : Disposed Of

Judgement

B.S. Chauhan, J.—The Division Bench of this Court while hearing the Special Appeal No. 1143 of 2001, Vijay Singh and Ors. v. State of U.P. and Ors., against the judgment and order of the learned Single Judge in Civil Misc. Writ Petition No. 37667 of 2001, Vijay Singh and Ors. v. State of U.P. and Ors., dated 23.11.2001, wherein it had been held that provisions of the U.P. Recruitment of Service (Age Limit) Rules, 1972, hereinafter called the "Rules, 1972" are not applicable in case of appointment of Sub-Inspectors of Police in U.P. as the field stood occupied by the provisions of the Police Act, 1861, hereinafter called "Act, 1861", which empowers the State Government to issue Government Orders from time to time fixing eligibility including the Minimum and Maximum age etc., disagreed with the earlier judgment dated 23.10.2002 of another Division Bench of this Court in Subhash Chandra Sharma Vs. State of U.P. and others, , and referred the following questions to the Larger Bench for its opinion:-

"1. Whether a Rule made under Article 309 of the Constitution of India can be set at naught by an executive fiat?

2. Whether the Fundamental Right of a citizen to equal opportunity in the matter

of employment guaranteed under Article 16(1) of the Constitution has been denied to the appellants by lowering the upper age limit?

3. Whether change in criterion and age made by executive order without any authority of law and/or reason can be upheld on the anvil of Articles 14 and 16(1) of the Constitution of India or are mala fide?

4. Does the Division Bench decision in Subhash Chandra's case (supra) decides correct position of law?"

2. At the time of hearing, there has been an agreement among the members of the Bar that the question No. 1 does not require any answer as it is settled law that executive fiat cannot override the statutory provisions. It requires to be re-framed and it was re-framed as under:-

"As to whether any order issued by the State Government in exercise of its power u/s 2 of the Police Act, 1861, has statutory force and occupies the field, and, therefore, there is no scope of application of Rules, 1972."

3. Before we enter into the legal aspects of the reference, it is necessary to mention the facts briefly which are as under.

4. To fill up 530 posts of Sub-Inspector, advertisement was issued on 4.10.1991 wherein the upper age limit for candidates was mentioned as 30 years. Fixing maximum age as 30 years was challenged by filing Writ Petition No. 32156 of 1991, Indra Bahadur Singh v. State of U.P. and Ors., and the same was dismissed vide order dated 31.3.1992. The selection process could not be completed and it stood cancelled vide order dated 9.6.1994. A fresh advertisement was issued on 24.6.1994 for filling up 674 posts including the posts advertised earlier on 4.10.1991 of Sub-Inspectors of Police fixing the upper age limit as 30 years. However, the order dated 9.6.1994 by which selection process initiated in pursuance of advertisement dated 4.10.1991 stood cancelled, was challenged before this Court in Ram Darash Rai Vs. State of U.P., , which was allowed vide judgment and order dated 23.5.1995 and the order dated 9.6.1994 was quashed with a direction to complete the selection process which commenced by virtue of advertisement dated 4.10.1991. The said judgment was upheld by the Division Bench in Special Appeal with some modification in Jagdamba Prasad Singh and Others Vs. State of U.P. and Others, . The selection process was completed and result was declared on 2.12.1996 for filling up all the advertised vacancies. The advertisement dated 24.6.1994 could not be carried out further. Neither examination nor interview took place, thus, stood abandoned. In order to facilitate the applicants therein, news items were published in the newspapers that they could take back the fee etc. deposited by them. To fill up further vacancies, a fresh advertisement was issued on 4.5.1999 wherein the maximum age limit was fixed as 25 years as on 1.1.1999. The said advertisement was challenged by filing a Writ Petition No. 20771 of 1999, Jai Prakash Rai and Ors. v. State of U.P. and Ors.. However, the petition stood dismissed vide judgment and order dated 3.3.2000 and that order was

challenged by filing Special Appeal No. 232 of 2000, Subhash Chandra Sharma (supra), which also stood dismissed, Being aggrieved, a SLP (Civil) No. 12045 of 2000 was filed before the Hon'ble Supreme Court which stood dismissed vide order dated 16.8.2000. Selection process was completed. Appointments had been made and the advertisement dated 4.5.1999 stood exhausted. Petitioner-appellants had also challenged the advertisement dated 4.5.1999, and the petition filed up by them was also dismissed along with other cases vide judgment and order dated 3.3.2000. They did not challenge the said judgment further as had been done by others. Respondents further advertised the vacancies vide advertisement dated 1.9.2001 fixing the maximum age limit of 25 years which was enhanced vide Government Order dated 20.9.2001 to 28 years and last date for submission of applications was also shifted from 15.1.2001 to 31.10.2001. The Writ Petition No. 37667 of 2001 was filed by 19 petitioners challenging the eligibility criteria, i.e. fixing the maximum age as 28 years by Government Order on the ground that it was violative of the mandatory provisions contained in Rules, 1972, which prescribed maximum age as 32 years and further relaxation upto five years in case of reserve category candidates. The said writ petition was dismissed vide judgment and order dated 23.11.2001. When the issue was assailed before the Division Bench, the aforesaid four questions have been referred to for opinion. In the meantime, result of the main-examinations was declared on 28.7.2003. Writ Petition, i.e. No. 34757 of 2003, Durgesh Pratap Singh and Ors. v. State of U.P. and Ors., challenging the said result also has been dismissed on 26.2.2004.

5. The provisions of Rules, 1972 provide for maximum age limit of 32 years for all post to be filled up under the Rules for which Rule making power is with the Government. The said Rules have been made under the proviso to Article 309 of the Constitution of India. The provisions of Section 2 of the Act, 1861 provide that the entire police establishment of the State shall consist of such number of officers and "shall be constituted in such manner as shall be ordered by the provincial Government". Thus, for recruitment of Sub-Inspectors and Police Constables, i.e. officials of subordinate ranks, the said provision empowers the State Government to issue Orders from time to time prescribing eligibility including age limit etc. The case requires to be considered in view of these statutory provisions.

QUESTION NO. 1 :

6. It is settled legal proposition that executive instructions cannot override the statutory provisions [Vide B.N. Nagarajan and Others Vs. State of Mysore and Others, ; Sant Ram Sharma Vs. State of Rajasthan and Another, ; Union of India (UOI) and Others Vs. Majji Jangamayya and Others, ; B.N. Nagarajan and Others Vs. State of Karnataka and Others, ; P.D. Aggarwal and Others Vs. State of U.P. and Others, ; Beopar Sahayak (P) Ltd. and Others Vs. Vishwa Nath and Others, ; State of Maharashtra v. Jagannath Achyut Karandikar AIR 1989 SC 1133; Paluru Ramkrishnaiah and Others Vs. Union of India (UOI) and Another, ; Comptroller

and Auditor General of India and others Vs. Mohan Lal Mehrotra and others, ; State of Madhya Pradesh and another Vs. G.S. Dall and Flour Mills and Others, ; Naga People's Movement of Human Rights v. Union of India and Ors. AIR 1998 SC 431; C. Rangaswamaiah and Ors. v. Karnataka Lokayukta and Ors. AIR 1998 SC 96.]

7. Executive instructions cannot amend or supersede the statutory rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory Rule nor does it have any force of law; while statutory rules have full force of law provided the same are not in conflict with the provisions of the Act. (Vide The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, ; and State of Tamil Nadu Vs. Hind Stone and Others,).

8. In Union of India v. Sri Somasundaram Vishwanath AIR 1988 SC 2255, the Hon"ble Apex Court observed that if there is a conflict between the executive instruction and the Rules framed under the proviso to Article 309 of the Constitution, the Rules will prevail. Similarly, if there is a conflict in the Rules made under the proviso to Article 309 of the Constitution and the law, the law will prevail.

9. Similar view has been reiterated in Union of India and Others Vs. Rakesh Kumar etc., ; Swapan Kumar Pal and Others etc. Vs. Samitabhar Chakraborty and Others, ; Khet Singh Vs. Union of India (UOI), ; Laxminarayan R. Bhattad and Others Vs. State of Maharashtra and Another, ; and D.D.A. and Others Vs. Joginder S. Monga and Others, , observing that statutory rules create enforceable rights which cannot be taken away by issuing executive instructions.

10. In Ram Ganesh Tripathi and others Vs. State of U.P. and others, , the Hon"ble Supreme Court considered a similar controversy and held that any executive instruction/order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed as having no force of law. The Hon"ble Supreme Court observed as under :-

"They (respondents) relied upon the order passed by the State. This order also deserves to be quashed as it is not consistent with the statutory rules. It appears to have been passed by the Government to oblige the respondents and similarly situated ad hoc appointees."

11. Thus, in view of the above, it is evident that executive instructions cannot be issued in contravention of the Rules framed under the proviso to Article 309 of the Constitution and statutory rules cannot be set at naught by the executive fiat.

12. However, this reflects the general proposition of law. So far as the instant case is concerned, the basic controversy is as to whether the provisions of Rules, 1872 could be applicable for the appointment of Sub-Inspectors and Police Constables or the field already stood occupied by the Act, 1861. The question has been re-framed, as referred to above.

13. Shri V.K.S. Chaudhary, learned Senior Counsel appearing for the appellants submitted that Section 2 of the Act, 1861 provides for establishment and Constitution of police force but being the Pre-Constitution law, has lost the significance and, therefore, any order issued under the said provision, if in contravention of the statutory rules framed under the proviso to Article 309 of the Constitution, is bad and cannot be enforced. Once Rules, 1972 have been enforced providing for the maximum age in Government service, the police service cannot be made an exception as it would be unreasonable classification and, therefore, the first question is to be answered that the field cannot be held to be occupied by the Government Orders issued from time to time u/s 2 of the Act, 1861 and the Rules, 1972 are applicable. Pre-Constitutional law stands abrogated when Rules under Article 309 are framed. More so, as no order issued u/s 2 of the Act, 1861, ever stood notified in the Official Gazette, it cannot be enforced/acted upon.

14. On the contrary, Shri Sudhir Agrawal, learned Additional Advocate General has vehemently opposed the submissions made by Shri Chaudhary submitting that the provisions of Section 2 of the Act, 1861 remain operative by virtue of Articles 13, 313 and 372 of the Constitution of India, therefore, in spite of the fact that it is a Pre-Constitution Act, the provisions thereof remain operative and the order passed u/s 2 of the Act, 1861 has statutory force and once the field remains occupied, Rules, 1972 have no application, whatsoever. As petitioner-appellants had raised the same issue challenging the advertisement dated 4.5.1999 on the same ground and their case stood dismissed, it is not permissible for them to agitate the issue again, even if all the grounds had not been taken by them earlier. If the Act does not provide for publication in the Official Gazette of the State, its publication in Police Gazette is enough to meet the requirement of law. The first and fourth questions require to be answered in the affirmative and remaining two in the negative.

15. We have examined the rival submissions made by the learned Counsel for the parties.

16. Police Act, 1861 is one of the earliest enactment immediately subsequent to the Indian Mutiny of 1857. Preamble thereof provides that it was expedient to reorganise the police and to make it a more efficient instrument for the prevention and detection of crime. After the commencement of the Constitution into force in 1950, police became the State subject as it appears at Item No. 2 of List-II of 7th Schedule, which reads as police (including railway and village police) subject to the provisions of Entry 2-A of List-I. Entry 2-A of List-I provides for deployment of any armed force of the Union of India or any other force subject to the control of Union. Thus, it becomes clear that the police is a subject of State List and State Government is competent even to amend the Act and it has been amended by the States from time to time. The Pre-Constitution law continues to remain operative by virtue of provisions of Articles 313 and 372 of the Constitution. A Constitution Bench of Hon|ble Supreme Court in The South

India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another, , examined the issue of continuation and validity of the Pre-Constitution laws and held that such provisions are valid and enforceable, observing that "Pre- Constitution Law made by a competent authority, though it has lost its legislative competency under the Constitution, shall continue in force provided the law does not contravene other provisions of the Constitution". While deciding the said case, reliance had been placed upon large number of the judgments of different High Courts and also the judgment of Hon''ble Apex Court in The Amalgamated Coalfields Ltd. and Others Vs. The Janapada Sabha, Chhindwara, , wherein the Constitution Bench had held that the coal tax originally imposed u/s 51 of the Central Provinces Local-self Government Act, 1920, on 2nd March, 1935 was valid and continued to be valid after Government of India Act, 1935 and the Constitution, by virtue of Article 372 of the Constitution.

17. Police Service may, under certain circumstances, be considered as separate and distinguishable from any other State Public Service for the reason that police is subject matter of Entry 2 of List II and State Public Service falls under Entry 51 of List II, therefore, it cannot be held that whatever laws are framed for State Public Service, will automatically become binding for police personnel unless so adopted by the State Government or Rules are framed to that extent. There can be no doubt to the settled legal proposition that any order issued under the provisions of an Act has statutory force. Section 2 of the Act, 1861 empowers the State Government to frame Rule or issue Government Order. It reads as under:

"The entire police establishment under a (Provincial Government)..... shall be formally enrolled.....and shall be constituted in such a manner as shall from time to time be ordered by the Provincial Government.

Subject to the provisions of this Act the pay and all other conditions of service of members of the subordinate ranks of any police force shall be such as may be determined by the State Government."

18. Section 46(2) of the Act, 1861 provides that the State Government may, from time to time, by notification in the Official Gazette, make Rules consistent with the Act. Enrollment/recruitment of police personnel or anything related to that is not provided u/s 46(2) therefore, Section 2 is the exclusive provision empowering the State to issue Government Orders from time to time for enrollment of police personnel and Constitution of police force.

19. In The State of Rajasthan Vs. Ram Saran, , the Hon''ble Apex Court, while interpreting the provisions of Section 2 of the Act, 1861, held that State Government alone is empowered to frame Rules regulating the condition of service of members of the police force.

20. The question does arise as to whether an order issued by the Government in exercise of its power u/s 2 of the Act, 1861 has statutory force.

21. In Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and

Others, , the Apex Court held that circulars issued by the Central Board of Direct Taxes under the provisions of Section 119 of the Income Tax Act, 1961 have statutory force and any other instruction/circular not issued under the said provision, will not be of any assistance to anybody as the same would not have statutory force.

22. In *Punit Rai Vs. Dinesh Chaudhary*, ; *Union of India (UOI) Vs. Naveen Jindal and Another*, ; and *State of Kerala and Another Vs. Chandramohan*, , the Apex Court held that executive instructions cannot be termed as law within the meaning of Article 13(3)(a) of the Constitution.

23. In *Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others*, , the Hon"ble Supreme Court explained the difference in a statutory order and an executive order observing that executive instruction issued under Article 162 of the Constitution does not amount to law. However, if an order can be referred to a statutory provision and held to have been passed under the said statutory provision, it would not be merely an executive fiat but an order under the Statute having statutory force for the reason that it would be a positive State made law. So, in order to examine as to whether an order has a statutory force, the Court has to find out and determine as to whether it can be referred to the provision of the Statute.

24. In *Ajay Kumar Bhuyan and Ors. v. State of Orissa and Ors.* : (2003)1SCC707 , while considering a similar issue, the Apex Court held that any order issued by the Government or Rule framed in exercise of the powers of Section 2 of the Act has a legal/statutory basis and, therefore, binding. In this context, the Hon"ble Apex Court also considered the scope and application of Article 313 of the Constitution of India placing reliance upon its earlier judgments in *Union of India (UOI) and Others Vs. Majji Jangamayya and Others*, ; and *B.N. Nagarajan (supra)*, and held that Pre-Constitution law, unless is in contravention of the law framed after the Constitution, shall remain in force. More so, it has also categorically been held that Article 313 of the Constitution does not change the legal character of the document, meaning thereby if a Pre-Constitution Act still has not been repealed and is in consonance with the provisions of the Constitution, it will remain the Act. Its sanctity, rigour and Statute is not changed and the submission that any Rule framed under the proviso to Article 309 can even supersede the Pre-Constitution Act, cannot be accepted.

25. In *Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others*, , the Hon"ble Supreme Court hold that police forces are to be guided by the provisions of the Police Act and no exception can be taken thereto. The Court while dealing with the provisions of U.P. Government Servants (Criterion for Recruitment by Promotion) Rules, 1994 framed under the proviso to Article 309 of the Constitution, held as not applicable as the field stood occupied by a Government Order dated 5.11.1965 issued u/s 2 of the Act, 1861. Service conditions referable to the Act, 1861 could not be replaced by general service conditions framed for other civilian-employees.

26. The Court further held as under :

"The aforesaid, thus, depicts the understanding of the Home Department under the Ministry of Home Affairs (a wing of the Government) and on the wake of the understanding as above and acting thereon would mean and imply that while the State Legislature passed the Act of 1994 but by reason of the provisions of a special Statute, namely, the Police Act, read with the authorisation contained therein, to frame Rules by way of executive orders, the Government of Uttar Pradesh obviously did not in fact intend the apply general law to all and sundry."

27. In Babu Ram Upadhyay (supra), the Constitution Bench of Hon"ble Supreme Court held that by virtue of the provisions of Article 313 of the Constitution, the provisions of the Act, 1861 even today are in force and any Government Order issued under it is mandatory in nature.

28. Another Constitution Bench in Jagannath Prasad Sharma Vs. State of Uttar Pradesh and Others, , considered the same issue and explained the scope of provisions of Article 313 of the Constitution and held that Pre- Constitution Act remains enforceable unless repealed or is in fact in contravention of the law framed after the commencement of the Constitution into force. The Court held that by virtue of Article 313, the Police Regulations as well as the Tribunal Rules insofar as they were not inconsistent with the provisions of the Constitution, remain in operation even in post-Constitution era. There are certain observations in both the above referred cases in favour of the petitioner-appellants but in both the cases the issue involved herein was not directly there, as both the cases had been in relation to disciplinary proceedings and the Apex Court held that provisions therein were subject to the provisions of Article 311 of the Constitution.

29. In Gian Singh Vs. The State of Punjab, , the question arose as to whether the Tehsildar could be dismissed by the Financial Commissioner after commencement of the Constitution, in exercise of the powers under Punjab Tehsildari Rules, 1932, framed under the Punjab Land Revenue Act, 1887. Majority of the nine Hon"ble Judges held that it was a valid order for the reason that the said 1932 Rules remained operative even after commencement of the Constitution.

30. In John Vallamattom and Another Vs. Union of India (UOI), , the Supreme Court held that Article 372 per force does not make a Pre-Constitutional statutory provision Constitutional. It merely makes a provision for the applicability and enforceability of Pre-Constitutional laws subject to the provisions of the provisions of the Constitution.

31. In Dental Council of India and Another Vs. Hari Parkash and Others, , the Apex Court held that Pre-Constitutional enactment has application in post-Constitutional era also. Similarly, in Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, , and Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, , while considering the issue as to whether the sovereign has priority for recovery

of outstanding dues over others, the Apex Court held that the arrears of tax dues to the State can claim priority over private debts and this Rule of common law amounts to "Law in Force" in the territory of British India at the relevant time within the meaning of Article 372(1) of the Constitution of India and, therefore, continues to be in force thereafter. In *Superintendent and Remembrancer of Legal Affairs, Superintendent and Legal Remembrancer, State of West Bengal Vs. Corporation of Calcutta*, , the Court held that the common law doctrine that "Crown is not bound by Statute save by express provision or necessary implication being inconsistent with the principle of equality, enshrined in the Constitution and being incongruous in present set up is not saved by the provisions of Article 372 of the Constitution". While considering the issue of status of a Society registered under the Societies Registration Act, 1860 in *Illachi Devi (D) by Lrs. and Others Vs. Jain Society, Protection of Orphans India and Others*, , the Apex Court held that it cannot enjoy the status of a company, as the Rules had been framed by the Governor General in Council, which, after commencement of the Constitution, would be the "law in force" within the meaning of Article 372 of the Constitution of India. Article 372 has much wider circumference and it take in its ambit "all law" while Article 313 deals with the law related to "public services" only.

32. In *Subhash Chandra Sharma (supra)*, the Division Bench of this Court has considered the issue at length and held that as the Rules, 1972 had not been adopted by the State so far as the appointments of subordinate police officials are concerned, the same cannot be applicable in those cases for the reason that the field stood occupied by the provisions of Act, 1861; and the Rules, 1972 had no application to such category of services where no Rules had been framed at all prescribing upper age limit for recruitment. The Rules, 1972 had been brought to amend various Rules providing different upper age limit for initial recruitment in Government services and as the Rules did not exist for filling up the vacancies of subordinate police officials, the Rules, 1972 were not applicable, as the same only provide for amendment in the various existing Rules. In absence of any adoption by the Government of those Rules for filling up the vacancies of subordinate police officials, the said Rules are not attracted at all, provisions of Section 2 of the Act, 1861 empowers the State Government to issue Government Orders from time to time prescribing the eligibility including the upper and minimum age limit. In *Subhash Chandra Sharma (supra)*, the Division Bench held as under :

"The provisions of Act, 1861 remain in force and are enforceable by virtue of provisions of Article 313 of the Constitution of India and as the field stood occupied by the said statutory provisions and the Government of U.P. had never adopted the Rules, 1972 for filling the vacancies of subordinate police posts, the provisions of the Act, 1861 will prevail. The proviso to Article 309 of the Constitution empowers the President of India or the Governor of a State to frame Rules etc. for providing the service conditions as transitory in nature if the Parliament or the State Legislature has not enacted the Rules but the

subordinate legislation is not permissible in respect of field already occupied by the Statute."

33. Provisions of Section 2 of the Act, 1861 enables the State Government to prescribe the service conditions time to time including the maximum and minimum age limits. In police service, physical efficiency is of great significance and after considering large number of relevant documents including the reports of police commission etc., the Division Bench came to the conclusion that it is in the interest of the State to prescribe the age around 25 years, as the physical strength decreases with the advancement in the age, it is not desirable to prescribe higher aged limit. The Court also took note that if the selection process to fill up the vacancies in subordinate police posts starts keeping the maximum age of 32 years and selection process takes some time and they will have to spend some time in training, some candidates may join the police force at the age of 36-37 and they may not be suitable for the job they have been appointed lacking the physical strength.

34. In *Shri A.B. Krishna and Others Vs. The State of Karnataka and Others*, . The Supreme Court reiterated the same view holding that under the scheme of Article 309 of the Constitution of India, once the legislature intervenes to enact a law relating to the condition of service, the power of the executive, including the President or the Governor, is totally displaced under the doctrine of "Occupied field". If, however, any matter is not touched by that enactment, it is competent for the executive to either issue executive instructions or to make Rules under Article 309 of the Constitution of India in respect of that matter.

35. A Division Bench of Punjab High Court in *Dr. Partap Singh Vs. The State of Punjab*, , rejected the contention that the provisions of Article 309 of the Constitution of India, being prospective and not retrospective, Rules framed under the said provisions or proviso thereto, would not apply to the Government servants who had been appointed prior to commencement of the Constitution, though they may be continuing in service after commencement of the Constitution into force on the ground that Article 313 of the Constitution provides that until other provision is made or laws in force immediately before the Constitution and applicable in public service or any post continue but only with regard to any public service or any post, which continues to exist after the commencement of the Constitution. More so, the argument could not be accepted for the reason that the provisions of Article 309 of the Constitution would require to be read as the "appointed" after the commencement of Constitution. The Court further referred to the provisions of Article 372(1) of the Constitution which provides that all laws in force immediately before the Constitution shall continue to be in force until altered or repealed or amended by a competent legislature or other competent authority, The Court further relied upon the provisions of Section 276 of the Government of India Act, 1935 which provided for continuity of the old laws under the Government of India Act, 1950 by a deeming fiction.

36. In Chandra Prakash Tiwari (supra), the issue involved herein has been considered at length by the Apex Court. The Court held as under :

"Incidentally, the Police Act, 1861 being an Act for regulation of police has the following as its preamble : "Whereas it expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime". The Police Act of 1861, however, remained and maintained its effectiveness though a Pre-Constitutional Act by virtue of the provisions contained in Article 372(1) of the Constitution notwithstanding the repeal of the Indian Independence Act, 1947 and the Government of India Act, 1935. It is in this context Article 372 may be of some significance.....At this stage, it would be convenient also to note transitional provisions as engrafted in Article 313 of the Constitution.....The issue at this stage thus arises as to the true effect of the Government Order of 1965 - is it a mere circular without any effect and succumb to rules under Article 309 : a further question may also arise in this context, namely whether a post- independence Government Order having statutory back-up under Police Act which stands amended or modified up to the year 1998 stands to lose its efficacy by reason of Rule under Article 309 of 1994? Whereas the Government Order though under a Statute and especially empowered to frame Rules and administrative orders, was issued under the executive power of the State, the rules have been framed by the self same Government by reason of the power conferred under Article 309 -agency is the same : author is the same - why was it necessary if the same is to give way to the rules of 1994 to have a clarification issued" in 1998. It is on this score that Dr. Dhawan have been very bold and criticised the judgment as an "inexplicable contradiction". Truly a strong criticism, but we, however, find some justification therein."

37. The Supreme Court rejected the contention that as the U.P. Government Service Criteria for Recruitment by Promotion Rules, 1994 had been framed under the proviso to Article 309, it will override the orders passed under the Police Act in spite of the fact that the Rule 3 thereof provided for overriding effect on all other laws. The further held as under:

"That Police Act, 1861 is a complete Code insofar as police personnel are concerned service conditions which are referable to the Act are not replaced by general service conditions for other civilian employees under Article 309 of the Constitution of India.....police force has a special significance in the administration of State and the intent of the framers of the Constitution to empower the State Government to make Rules therefore has its due significance rather than being governed under a general omnibus Rule framed under Article 309 of the Constitution. When there is a special provision, unless there is a specific repeal of the existing law, question of an implied repeal would not arise.....The police force are to be governed by the provisions of the Police Act and no exception can be taken thereto."

38. The Apex Court further held that the order referable to the Act, 1861 has to

prevail being a subject matter of special law over General Rules unless the General Rules specifically repeal, the effectiveness of latter Rules and their becoming ineffective or inoperative does not arise. In order to be effective, an express intention is required rather an imaginary repeal. The Court held as under :

"On a conspectus of the whole issue, it is thus difficult to comprehend that the General Rule framed under Article 309 should or would also govern the existing special rules concerning the Police Rules, Admittedly, the guidelines as contained in the Government Order dated 5.11.1995 have been under and in terms of the provisions of the Police Act. There is special conferment of power for framing of Rules dealt with more fully hereinbefore, which would prevail over any other Rules. Since no other Rule stands formulated and the Government Order of 1965 being taken as the existing Rule pertaining to the subject matter presently under consideration with recent guidelines as noted above, its applicability cannot be doubted. Unless the General Rule specifically repeal the effectiveness of the special rules, question of the latter Rule becoming ineffective or inoperative would not arise. In order to be effective, an express mention is required rather an imaginary repeal. It is now a well settled principle of law for which no dilation is further required that law Courts rather loath repeal by implication."

39. While deciding the said case, the Hon^{ble} Apex Court also placed reliance upon its earlier judgment in *Maharaja Pratap Singh Bahadur Vs. Thakur Manmohan Deo and Others*, , wherein has categorically been held that an earlier special law cannot be held to be abrogated by mere implication.

40. In *D.R. Yadav and Another Vs. R.K. Singh and Another*, , the Apex Court placed reliance upon the judgment in *Chandra Prakash Tiwari (supra)* holding that special law will prevail over the general law and if a Statute or Rule made thereunder is already operating in the field, the General Rules under the proviso to Article 309 of the Constitution would apply to the services created thereunder. The Hon^{ble} Supreme Court examined the issue of promotion in the *Development Authorities Centralised Services under the U.P. Development Authorities Centralised Services Rules, 1985*.

41. In *Justiniano August Justiniano Augusto De Piedade Barreto Vs. Antonio Vicente Da Fonseca and Others*, , the Hon^{ble} Supreme Court while dealing with a similar issue observed as under :

"A law which is essentially general in nature may contain special provisions on certain matters and in respect of these matters, it would be classified as a special law. Therefore, unless the special law is abrogated by express repeal or by making provisions which are wholly inconsistent with it, the special law cannot be held to have been abrogated by mere implication."

42. Similar view has been reiterated by Hon^{ble} Supreme Court in *R.S. Raghunath Vs. State of Karnataka and another*, , wherein the Hon^{ble} Apex Court placed reliance upon the judgment of the Appeal Court in *Eileen Louise Nicolle v.*

John Winter Nicolle (1922) 1 AC 284, and held as under:

"It is a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases, of which the particular law is but one. This is a matter of jurisprudence, as understood in England, has been laid down in a great number of cases, whether the prior law be an express Statute, or be the underlying common or customary law of the country. Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

43. in *Municipal Corporation of Delhi Vs. Shiv Shanker*, , the Apex Court considered the issue and scope of implied repeal and held that Court should not lean towards implied repealing in absence of express or implied legislative intent, observing as under:

"As the legislature must be presumed in deference to the Rule of law to intend to enact consistent and harmonious body of laws, a subsequent legislation may not be too readily presumed to effectuate a repeal of existing statutory laws in the absence of express or at least clear and unambiguous indication to that effect. This is essential in the interest of certainty and consistency in the laws which the citizens are enjoined and expected to obey. The legislature which may generally be presumed to know the existing law, is not expected to intend to create confusion by its omission to express its intent to repeal in clear terms. The Courts, therefore, as a Rule, lean against implying a repeal unless the two provisions are so plainly repugnant to each other that they cannot stand together and it is not possible on any reasonable hypothesis to give effect to both at the same time. The repeal must, if not express, flow from necessary implication as the only intendment.....The meaning, scope and effect of the two statutes, as discovered on scrutiny, determines the legislative intent as to whether the earlier law shall cease or shall only be supplemented. If the objects of the two statutory provisions are different and the language of each Statute is restricted to its own objects or subject, then they are generally intended to run in parallel lines without meeting and there would be no real conflict though apparently it may appear to be so on the surface."

44. While deciding the said case, the Apex Court placed very heavy reliance upon the judgment in *Paine v. Stater* (1883) 11 QBD 120.

45. On the similar principles, the Hon^{ble} Supreme Court in *Om Prakash Gupta v. State of U.P.* AIR 1957 SC 148; and *T.S. Baliah Vs. T.S. Rengachari*, , had reiterated the same view. In the former case, Section 5(I)(c) of the Prevention of Corruption Act was held not to repeal Section 409, IPC.

46. In *Syndicate Bank Vs. Mr. Prabha D. Naik and Another etc.*, , the Hon^{ble}

Supreme Court held that doctrine of "implied repeal" should not be resorted to without adequate justification. Where it is obvious that a provision should not have been intended to survive would result in absurdity, the Court must declare it to have been repealed by implication. However, for that reason, determination of legislative intent is of paramount importance and the Court must bear in mind that the legislature is supposed to be conscious of the needs of the society at large and the prevailing laws.

47. In *Union of India (UOI) and Another Vs. Venkateshan S. and Another*, , the Supreme Court held that while interpreting the principle of statutory provisions, the Court should lean against the implied repeal unless the provisions are plainly repugnant to each other. There is also a presumption against the repeal by implication and the reason for that Rule is based on the theory that legislature while enacting a law had complete knowledge of the existing laws on the same subject matter and, therefore, when it does not provide a repealing provision, it becomes gives out an intention not to repeal the existing legislation. The Court had placed reliance upon its earlier judgment in *Municipal Council Palai Vs. T.J. Joseph and Others*, , wherein a similar view has been reiterated.

48. In *Kanwar Lal and Others Vs. IInd Additional Distt. Judg, Nainital and others*, , the Hon"ble Supreme Court while dealing with a case under the provisions of Government Grants Act, 1895 held that the State Legislature is competent to amend the Pre-Constitutional central Statute which is in force by virtue of the provisions of Article 372(1) of the Constitution of India.

49. Thus, it is evident that doctrine of implied repeal cannot be resorted to unless the latter enactment expressly repeals or it is crystal clear that legislature intended to repeal the earlier statutory provisions.

50. Thus in view of the above, as the State Government has never adopted the Rules, 1972 for filling up the vacancies of the Subordinate Police Services, the question of implied repeal does not arise.

51. As the State Government has not adopted the Rules, 1972 for filling up the vacancies of subordinate police officials, it cannot be assumed that statutory provisions of Act, 1861 stood repealed. Thus, provisions of Act, 1861 (Special Act) will prevail over Rules, 1972 general law. [Vide AIR 1931 149 (Privy Council); *The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others*, ; and *State of Orissa and Others Vs. Commissioner of Land Records and Statement, Cuttack and Others*, .

52. It is admitted fact that till today, no appointment had ever been made in the subordinate police services under Rules, 1972, though a period of 32 years has elapsed and appointments have always been made as per the Government Orders issued under the Act, 1861 from time to time.

53. It is well established Rule of interpretation of a Statute by reference to the exposition it has received from contemporary authority. However, the Apex Court

added the words of caution that such a Rule must give way where the language of the Statute is plain and unambiguous. Similarly, in *Collector of Central Excise, Bombay and Anr. v. M/s. Parley Export (P) Ltd.* AIR 1980 SC 644, the Hon'ble Supreme Court observed that the words used in the provision should be understood in the same way in which they have been understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. In *Indian Metals and Ferro Alloys Ltd., Cuttack Vs. The Collector of Central Excise, Bhubaneswar*, , the Hon'ble Supreme Court has applied the same Rule of interpretation by holding that "contemporaneo expositio by the administrative authority is a very useful and relevant guide to the interpretation of the expression used in a statutory instrument." Same view has been taken by the Hon'ble Supreme Court in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, ; *Collector of Central Excise, Guntur v. Andhra Sugar Ltd.* AIR 1989 SC 625; *State of Madhya Pradesh v. G.S. Daal and Flour Mills (supra)*, and *Y.P. Chawla and others Vs. M.P. Tiwari and another*, . in *N. Suresh Nathan and another Vs. Union of India and others*, ; and *M.B. Joshi and Others Vs. Satish Kumar Pandey and Others*, , the Apex Court observed that construction in consonance with long-standing practice prevailing in the concerned department is to be preferred.

54. In *J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors*, , it has been held that the maxim is applicable in construing ancient Statute but not to interpret Acts which are comparatively modern and an interpretation should be given to the words used in context of the new facts and situation, if the words are capable of comprehending them. Similar view had been taken by the Apex Court in *The Senior Electric Inspector and Others Vs. Laxmi Narayan Chopra and Others*, .

55. In *Desh Bandhu Gupta and Co. and Others Vs. Delhi Stock Exchange Association Ltd.*, , the Apex Court observed that the principle of contemporaneo expositio, i.e. interpreting a document by reference to the exposition it has received from Competent Authority can be invoked though the same will not always be decisive of the question of construction. The administrative construction i.e. the contemporaneous construction placed by administrative or executive officers responsible for execution of the Act/Rules etc, generally should be clearly wrong before it is over-turned. Such a construction commonly referred to as practical construction although not controlling, is never- the less entitled to considerable weight and is highly persuasive. However, it may be disregarded for cogent reasons. In a clear case of error the Court should, without hesitation refuse to follow such construction for the reason that "wrong practices does not make the law." [Vide *Municipal Corporation for City of Pune and another Vs. Bharat Forge Co. Ltd. and others*,]. In *D. Stephen Joseph Vs. Union of India and others*, , the Hon'ble Supreme Court has held that "past practice should not be upset provided such practice confirms to the rules" but must be ignored if it is found to be de hors the rules.

56. In the instant case, the administrative interpretation is totally in consonance with the Statute, i.e. Act, 1861, it has to be given due weightage.

57. The learned Single Judge of this Court while deciding the case in Indra Bahadur Singh (supra), dealt with the issue of fixing the maximum age limit by issuing Government Order u/s 2 of the Act, 1861 and also the applicability of Rules, 1972 and also referred to the order dated 7th July, 1996 issued by the Governor, which provided for exemption of the police services from the application of the Rules, 1972, and held that the Rules, 1972 were not applicable at all in case of recruitment of Sub-Inspectors of Police. Appeal No. 245 of 1992 preferred against the said judgment and order was dismissed in default vide order dated 23rd March, 1999. However, we are of the view that as we have answered the question No. 1 in affirmative that the field was occupied by the Government Orders issued u/s 2 of the Act, 1861, the order issued by the Governor on 7th July, 1996 seems to have been passed taking abundant caution, though there was no occasion for the Governor to pass such an order.

58. It has been submitted by Shri Sudhir Agarwal, learned Additional Advocate General, appearing for the State that petitioner-appellants in Paragraph 9 of their writ petition clearly admitted that they had challenged the similar advertisement for the recruitment year 1999 on similar grounds, i.e. on the issue of applicability of the Rules, 1972, and their petition was dismissed by the learned Single Judge though they did not prefer the appeal but other persons whose writ petitions had also been dismissed along with theirs, agitated the issue before the Division Bench in Subhash Chandra (supra) and lost, against that petition for special leave to appeal was also rejected by the Hon"ble Supreme Court. The issue of applicability of Rules, 1972 had been in issue and determined by this Court, thus it is not permissible for them to re-agitate the issue even if some of the points raised herein had not been agitated at that stage. However, Shri Chaudhary submitted that principle of res judicata has no application in case of impairment of fundamental rights and, therefore, the petitioner-appellants cannot be prevented from raising the same plea again.

59. Be that as it may, as the issue has not been referred to the Larger Bench for determination, we are not inclined to entertain the issue and it will be open to the parties concerned to agitate the same before the Division Bench.

60. The Court in Chandra Prakash Tiwari (supra) held that any Government Order issued u/s 2 does not require any Gazette publication for the reason that it is required only in respect of the Rules framed u/s 46(2) of the Act, 1861.

61. It may be pertinent thereto that observation made by the Hon"ble Supreme Court in Ajay Kumar Bhuyan (supra) that unless the orders issued by the Government are published in the Official Gazette cannot be given effect to, are not applicable here as Section 2 of the Act, 1861 does not provide for it and Rules framed u/s 46(2) of the Act, 1861 have to be published in the Official Gazette. More so, the Kerala Act provided for publication of orders in the State's

Official Gazette.

62. Purpose of publication is to make the people aware of the law. The issue as to whether in every case, the law requires to be published in the Official Gazette, came for consideration before the Hon"ble Supreme Court in B.K. Srinivasan and Others Vs. State of Karnataka and Others, . The Court held as under :

"Where the parent Statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent Statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication.

There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient. [Narayana Reddy v. State of A.P. (1969) 1 AnWR 77].

63. So far as the police service is concerned, admittedly, it does not concern the masses. It may be relevant for those only, who have attained eligibility and went to join police service. Government Orders issued u/s 2 of the Act, 1861 have never been published in the Official Gazette rather have always been published in the Police Gazette. Thus, we do not find any force in the submissions made by Mr. Chaudhary that Government Orders so issued can not be given effect to for want of publication in the Official Gazette.

64. In the view of the above, we reach the inescapable conclusion that statutory rules cannot be set at naught by issuing executive instructions. But the facts of the instant case do not make the said proposition of law applicable at all. As herein the field is already occupied by the provisions of Act, 1861 which is in operation by virtue of the provisions of Article 313 of the Constitution, thus. Rules, 1972 could not be attracted at all. The Government Orders issued for fixing the maximum age for recruitment on subordinate police posts operate in an entirely different field and are not in conflict with the Rules, 1972. The case stands squarely covered by the Apex Court judgment in Chandra Prakash Tiwari (supra) and, thus, it is not possible for us to take any other view. The main submissions made by Mr. Chaudhary that Pre-Constitutional law stands abrogated altogether by commencement of the Rules, 1972, is devoid of any merit. Therefore; our answer to question No. 1 is that the field stood occupied on account of the provisions of Section 2 of the Act, 1961. The Legislature while enacting the provisions of Section 2 of Act, 1961 itself delegated the power to the statutory authorities to fix the eligibility including the age etc, The statutory authorities had performed their duties in exercise of the delegated powers from time to time without any deviation therefrom.

65. In such facts and circumstances, there was no occasion for His Excellency, the Governor to frame the Rules under the proviso to Article 309 of the Constitution, also applicable in the case of recruitment of subordinate police officers.

QUESTION NOS. 2 AND 3 :

66. Both the issues are interrelated and, thus, are dealt with simultaneously. No person has a right of appointment but has a right only to be considered against the vacancies if he fulfils the eligibility prescribed under the Statute. Fixing eligibility falls within the exclusive domain of the legislature and cannot be a subject matter of judicial review unless found to be arbitrary, unreasonable or has been fixed/prescribed without keeping in mind the nature of services for which the appointments are to be made or it has no rational relation to the object sought to be achieved by the Statute. It is always permissible for the Government to prescribe appropriate qualifications/eligibility in the matter of appointments/ promotions to different posts. Even if a person joins the service he merely acquires a status and the rights and obligations thereto are not to be determined by the consent of the parties but by the Statute or Statutory Rules which may be framed and altered unilaterally by the Government. (Vide *State of Jammu & Kashmir Vs. Shiv Ram Sharma and Others*,).

67. In *Praveen Singh Vs. State of Punjab and Others*, , the Apex Court held that in the matter of employment, i.e. selection and appointment, the authority concerned has unfettered power in procedural aspect. The Courts should not interfere unless the appointments so made are found to have been made "at the cost of fair play, good conscience and equity".

68. The eligibility criteria should not be arbitrary or unreasonable and if it is found so, it becomes liable to be quashed as it falls within the mischief of Article 14 of the Constitution of India which provides for equality before law and equal protection of law.

69. The scope of Articles 14 and 16 of the Constitution has been widened by judicial interpretation to mean not only the right to be not discriminated but also protection of any arbitrary or irrational act of the State. Arbitrariness is an anathema of Rule of equality. [Vide *Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others*,].

70. The questions do arise as to whether the age fixed as 28 years is arbitrary or unreasonable or has been fixed without considering the object the Statute has to achieve.

71. In *Bombay Labour Union Representing The Workmen of International Franchises Pvt. Ltd. Vs. International Franchises Pvt. Ltd.*, , nearly a Constitution Bench of the Supreme Court struck down the Rule requiring unmarried women to give up service immediately she gets married observing that there had been no good and convincing reasons for continuance of such a Rule in a department or

an industry. The Court rejected the contention that it should not be struck off as such a Rule was existing in other such concern holding that it could not be a justification if the Rule cannot be justified on its own merits. Such a drastic Rule had been abrogated in the interest of social justice.

72. Articles 14 and 16 of the Constitution secure equal protection to Government servants. The doctrine of equality before law is a necessary corollary to the concept of Rule of law adopted in the Constitution. However, there is always a presumption in favour of the Constitutionality of the enactment and the person who challenges it has to show that there has been a clear transgression of the Constitutional principles. Such a presumption stands from the wide power of classification which the legislature must have possessed in making laws operating differently as regards different groups of persons in order to give effect to policies. Legislature is supposed to understand better the needs of the society and its laws are directed to problems made manifest by experience.

73. In *Madhu Kishwar and Ors. v. State of Bihar and Ors.* AIR 1990 SC 1864, the Hon'ble Supreme Court held that every discrimination does not necessarily fall within the ambit of Article 14 of the Constitution of India and becomes liable to strike off as every case has to be examined in peculiar facts and circumstances involved therein, otherwise it would create a chaotic situation.

74. In *Ashutosh Gupta Vs. State of Rajasthan and Others*, , the Hon'ble Supreme Court examined the issue at length and held as under :

"The concept of equality before law does not involve the idea, of absolute equality amongst all, which may be a physical impossibility. All that Article 14 guarantees is the similarity of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform. Equality before the law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike. Equality before the law does not mean that things which are different shall be treated as though they were the same. It is true that Article 14 enjoins that the people similarly situated should be treated similarly but what amount of dissimilarity would make the people disentitled to be treated equally, is rather a vexed question. A legislature, which has to deal with diverse problems arising out of an infinite variety of human relations must of necessity, have the power of making special laws, to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not "per se" amount to discrimination within the inhibition of the equal protection clause. The State has always the power to make classification on a basis of rational distinctions relevant to the particular subject to be dealt with. In order to pass the test of permissible classification, two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and (ii) that, that differentia must have a rational relation to the object

sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. When a law is challenged as violative of Article 14, it is necessary in the first place to ascertain the policy underlying the Statute and the object intended to be achieved by it. Having ascertained the policy and the object of the Act, the Court has to apply a dual test in examining the validity, the test being, whether the classification is rational and based upon an intelligible differentia which distinguished persons or things that are grouped together from others that are left out of the group, and whether the basis of differentiation has any rational nexus or relation with its avowed policy and objects. In order that a law may be struck down under this article, the inequality must arise under the same piece of legislation or under the same set of laws which have to be treated together as one enactment. Inequality resulting from two different enactments made by two different authorities in relation to the same subject will not be liable to attack under Article 14. It is well settled that Article 14 does not require that the legislative classification should be scientifically or logically perfect."

75. In *Javed and Others Vs. State of Haryana and Others*, , the Apex Court held that enactment does not become violative of Article 14 merely because the State police had not been introduced simultaneously in other fields also. The only criteria is Court must examine as to whether the enactment is likely to achieve the object sought to be achieved.

76. It is well settled law that hardship or inconvenience of group of persons cannot be the ground of deciding the law as bad. [Vide *Commissioner of Agricultural Income Tax v, Keshav Chand* AIR 1950; *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, ; and *Col. D.D. Joshi and Others Vs. Union of India (UOI) and Others*,]."

77. As is said, "Dura lex sed lex" which means "the law is hard but it is the law." Even if the statutory provision causes hardship to some people, Court has to implement the same.

78. In *The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others*, , a Constitution Bench of the Hon"ble Apex Court held that "inconvenience is not" a decisive factor in such matters.

79. In *Martin Burn Ltd. Vs. The Corporation of Calcutta*, , the Hon"ble Supreme Court while dealing with the same issue observed as under :

"A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A Statute must of course be given effect to whether a Court likes the result or not."

80. Similar view has been reiterated by the Hon"ble Supreme Court in *The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., and Prafulla Kumar Das and Others Vs. State of Orissa and Others*, .

81. Therefore, it is evident that hardship to an individual cannot be ground of not giving the effective to the statutory provisions.

82. More so, it is settled principle of law that the Court would lean in favour of upholding Constitutionality of a Statute unless it is manifestly discriminatory.

83. In *Municipal Corporation of the City of Ahmedabad and Others Vs. Jan Mohammed Usmanbhai and Another*, , the Constitution Bench of the Supreme Court has observed as under :-

"There is always a presumption in favour of Constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear violation of the Constitutional principles. The Courts must presume that the Legislature understands and correctly appreciate the claim of its own people that its laws are directed against the problems made manifestly be experience and that its discrimination are based on adequate ground. It must be borne in mind that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be a clearest and finally that in order to sustain the presumption of Constitutionality, the Court may take into consideration the matters of common knowledge, matters of rapport, history of the times and may assume every set of facts which can be conceived to be existing at the time of legislation."

84. In *K. Anjaiah and Others Vs. K. Chandraiah and Others*, , the Court has observed that¹ it is the cardinal principle of construction that the Statute and the rules or the regulations must be held to be Constitutionally valid unless and until it is established that they violate any specific provision of the Constitution, and the Court is under solemn duty to scrutinise the provisions of the Act, Rules or the Regulations within the set parameters if the validity of the statutory provisions is challenged. Same view has taken in *Smt. Parayankandiyal Eravath Kanapravan Kalliani Amma and others Vs. K. Devi and others*, ; *Dr. K. R. Lakshmanan Vs. State of Tamil Nadu and another*, ; *New Delhi Municipal Committee Vs. State of Punjab*, etc. etc., ; *Public Services Tribunal Bar Association Vs. State of U.P. and Another*, ; and *State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others*, .

85. Government Orders issued under the Act, 1861 are to fill up the vacancies in subordinate police services, i.e. for the post of Sub-Inspector and Constables etc.

86. The primary duty of police personnel is to ensure enforcement of law and keep the criminals under control. It has to prevent commission of crimes and catch the criminals and produce them before the Courts for prosecution. The only purpose of their appointment is to maintain the law and order. They have to face the criminals who may be well-equipped with all kinds of modern weapons, means of fast transport. Thus, the duty of the policemen is very strenuous and may be round the clock, therefore, the primary concern of the legislature is to be that every policemen is well-built, strong and must be possessing a sound health. As the police personnel generally do not perform office duty sitting on the

table but require to operate in the fields not only in climatic conditions but geographical conditions dealing with all sorts of awkward conditions, they have to be young and energetic, As the Division Bench in Subhash Chandra Sharma (supra) considered the Police Commission report wherein the recommendations have been made of maximum age from 20 years to 25 years for the post of Sub-Inspectors of Police, we do not think that fixing the age of 25 years is unreasonable, irrational which may be liable to be struck-off. In the instant case, all the petitioners/appellants had been born between 2.7.1965 to 13.7.1992. Thus, they are in the range of 32 to 39 years now and when the advertisements were made, they were in the range of 30 to 37 years. It is evident that selection had become a long procedure and as every action of the State is challenged in the Court of Law, it may also take some time, the vacancies advertised on 31st August, 2001 could not be filled up till today. By the time, the appointments are made and the selected candidates are sent for training and they are posted if candidates having maximum age of 32 years, or further relaxation of five years as the age required in the advertisement dated 31.8.2001, they may not be suitable for the job for which they are being appointed.

87. In this respect, it is pertinent to make reference to the provisions of Sections 22 and 23 of the Act, 1861, which read as under;

"22. Police officers always on duty and may be employed in any part of district.- Every police officer shall, for all purposes in this Act contained, be considered to be always on duty, and may at anytime be employed as a police officer in any part of the general police district.

23. Duties of police officers.-It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient ground exists; and it shall be lawful for every police officer, for any of the purposes mentioned in this section, without a warrant, to enter and inspect any drinking-shop, gaming-house or other place of resort of loose and disorderly characters."

88. Considering the nature and duties assigned under the Act, one has to determine as what should be the age fixed for their enrolment and as to whether the age fixed as 25 or 28 years is unreasonable.

89. Rules of interpretation require that Statute should be construed in a manner that it carries the objectives of the Statute, considering the text and context thereof. No construction is permissible which may render the provision meaningless and otiose. Statute is to be construed giving interpretation in the context and within the scheme underlying the text of the Statute with reference to the purpose and object of the Statute. Construction given by the Court must promote the object of the Statute and sub-serve the purpose, for which it as

been enacted and should not efface the said very purpose. Statute requires to be construed making the textual interpretation matching the contextual and it should clearly disclose the purpose for which the Statute stood enacted. [Vide Hindustan Lever Ltd. Vs. Ashok Vishnu Kate and others, ; Tata Engineering and Locomotive Co. Ltd. Vs. The State of Bihar and Another, and Gayatri Devi Pansari v. State of Orissa and Ors. AIR 2000 SC 1531].

90. In Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, , the Hon"ble Supreme Court placed reliance upon the judgment in Whitney v. I.R.C. 1926 AC 37, wherein it had been observed as under:-

"A Statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object....."

91. The Apex Court held as under:

"The Courts strongly lean against any construction which tends to reduce a Statute's utility. The provision of the Statute must be so construed as to make it effective and operative....."

92. In firm Firm Amar Nath Basheshar Dass Vs. Tek Chand, , the Hon"ble Supreme Court held as under :

".....The Courts are not concerned with the policy of the Legislature or with the result, whether injurious or otherwise, by giving effect to the language used nor is it the function of the Court where the meaning is clear not to give effect to it merely because it would lead to hardship.....In doing so, we must always presume that the impugned provision was designed to effectuate a particular object or to meet a particular requirement and not that it was intended to negate that which it sought to achieve."

93. Similarly, in Easland Combines, Coimbatore Vs. The Collector of Central Excise, Coimbatore, , while reiterating the similar view, the Court held as under :-

"It is well settled law that merely because of law causes hardship, it cannot be interpreted in a manner so as to defeat its object.....It is the duty imposed on the Courts in interpreting a particular provision of law to ascertain the meaning of intent of the Legislature and in doing so, they should presume that the provision was designed to effectuate a particular object or to meet a particular requirement."

94. Thus, keeping in mind the interest of the society and the nature of services for which the appointments are to be made, we do not think that by reducing the maximum age to 28 years as eligibility for applying for the post has by any means infringed the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India. More so, if earlier, a higher age has been fixed that does not become a ground for holding that it could be fixed for ever, as it may be a mistake and by that the Government might have learnt a lesson.

95. Article 14 is not meant to perpetuate an illegality nor it provides for negative

equality. Therefore, no one can be forced to repeat the wrong action done by him earlier. This view stands fortified by the judgments of the Hon''ble Apex Court e.g., Smt. Sneh Prabha etc. Vs. State of U.P. and Another, ; Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and Others, ; State of Haryana and Others Vs. Ram Kumar Mann, ; M/s. Faridabad Ct. Scan center Vs. D.G. Health Services and others, and Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others, .

96. In Finance Commissioner (Revenue) v. Gulab Chandra and Anr. AIR 2001 SCW 4774, the Hon''ble Apex Court rejected the contention that as other similarly situated persons had been retained in service, the petitioner could not have been discharged during the period of probation observing that if no action had been taken in a similar situation against similarly situated persons, it did not confer any legal right upon the petitioner therein.

97. In Jalandhar Improvement Trust Vs. Sampuran Singh, and Union of India and Ors. v. Rakesh Kumar AIR 2001 SCW 1458, the Hon''ble Supreme Court held that Court cannot issue direction to perpetuate a mistake on the ground of discrimination of hardship.

98. Any action/order contrary to law docs not confer any right upon any person for similar treatment. [Vide State of Punjab and Ors. v. Dr. Rajeev Sarwal (1990) 9 SCC 240; Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others, and Union of India (UOI) and Another Vs. International Trading Co. and Another,].

99. Thus, in view of the above, it becomes crystal clear that a wrong action taken or order passed cannot be peipetuated on the ground of equal treatment or hardship.

100. Thus, in view of the above, we answer the question Nos. 2 and 3 in negative and none of the rights much less of fundamental rights of the petitioner- appellants got prejudiced or transgressed.

QUESTION NO. 4 :

101. The view taken by this Court in Subhas Chandra Sharma (supra) is in consonance with the view taken by us and with law laid down by the Hon''ble Supreme Court in Chandra Prakash Tiwari (supra). Thus, it is to be held that Division Bench in Subhash Chandra Sharma (supra) has laid down the correct proposition of law.

102. We are not in a position to accept the submissions made on behalf of the petitioner-appellants that the judgment of Hon''ble Supreme Court in Chandra Prakash Tiwari (supra) is per incurium as the matter has been considered in great length and the mandate of Article 141 of the Constitution of India does not permit us to probe the issue further. Even the issue of publication of the Government Order in the Gazette has been considered by the Hon''ble Supreme Court in Chandra Prakash Tiwari- (supra) observing that it is not mandatory as

required u/s 46(2) of the Act, 1861.

CONCLUSION :

103. In view of the above, we are of the considered opinion that the Rules, 1972 are not applicable for appointment of Sub-Inspectors and other subordinate services in police, as the field is occupied by Section 2 of the Act, 1861. Thus, we answer first question, as refrained, in affirmative.

104. Fixing the age of 25 or 28 years or any other age by a Government Order issued u/s 2 of the Act, 1861, taking into consideration the nature of service involved herein, does not violate the fundamental rights of the petitioner-appellants guaranteed under Articles 14 and 16 of the Constitution nor it offends any other provision contained in Part III of the Constitution. Thus, the questions No. 2 and 3 are answered negative.

105. The law laid down in Subhash Chandra Sharma (supra) is in consonance with the law laid down by the Apex Court at a latter stage. Thus, we hold that it lays down the correct proposition of law.

106. Matter may be placed before the Division Bench to decide the special appeal in accordance with law.