

Indian Administrative Service (S. C. S.) Association, U. P. and Others

Vs

Union of India and Others

Nirothi Lal Gupta and Others

Vs

Union India and Others

Writ Petition (C) Nos. 499 of 1991 With Civil Appeal Nos. 4788 And 4794 of 1992

(A.M. Ahmadi, V.Ramaswami - II, M.M. Punchhi JJ)

11.11.1992

JUDGMENT

K. RAMASWAMY, J. –

1. Special leave granted.
2. As the trio raised common questions of law, they are disposed of by a common judgment.
3. The first petitioner in the writ petition is an Association representing the officers of the State Civil Service of U.P. and petitioners 2 to 17 are its members. Some of them and Bihar State Officers are the appellants in the two appeals respectively. On January 19, 1984, the association represented to the Government of India requesting to remove wide disparity prevailing in different States of promotional avenues from the State Civil Services to All India Administrative Service. The officers from Andhra Pradesh and Kerala, on completion of 8 to 9 years of service are becoming qualified for promotion to All India Administrative Service, while the officers from States like Uttar Pradesh and Bihar would get chance only after putting 24 to 27 years of service. The Estimates Committee of Seventh Lok Sabha too in its 77th Report highlighted the injustice. A committee of senior Secretaries constituted by the Union Government recommended, after due consideration, to evolve equitable principles of comparable seniority from different States for promotion to Indian Administrative Service. Pursuant thereto the Central Government proposed to amend the Indian Administrative Service (Regulation of Seniority) Rules, 1954, for short 'the Seniority Rules'. In the meantime the Rules were repealed and replaced by I.A.S. (Regulation of Seniority) Rules, 1987 which came into effect from November 6, 1987 for short 'New Seniority Rules'. The first respondent issued Circular letter dated September 9, 1986 to the State Governments indicating amendments for fixation of seniority of officers promoted from State Civil Services' to I.A.S. to give weightage over and above 4 years in the assignment of year of allotment as per the existing relevant rules, namely, four years for the first 12 years' State service with additional weightage of one year for every two to three years' completed service subject to a maximum of five years. After receiving suggestions or comments from State Governments, the Central Government exercising the power under sub-section (1) of Section 3 of All India Services Act, 1951 for short, 'the Act' amended the New Seniority Rules, 1987 which amendment was published in the Gazette of India on February 3, 1989 for short

the 'First Amendment Rules'. The proviso thereto was made limiting its operation prospectively from February 3, 1989. Putting the proviso and its prospective operation in issue, the appellants from U.P. in Civil Appeal No. 4788 of 1992 [SLP (C) No. 13823 of 1991] filed Original Application No. 18 of 1989 in the Central Administrative Tribunal, Allahabad at Lucknow Circuit Bench, contending that they were promoted in 1980 onwards but by limiting its application to November 6, 1987, they were discriminated. Bihar Officers questioned the Rule in O.A. No. 136 of 1989 before the CAT at Patna. Therein the appellants though found to be entitled to the total weightage of 9 years since their juniors were given 1983 as the year of allotment, by operation of proviso to Rule 3(3)(ii) of the First Amendment Rules were given 1983 as the year of allotment. Thereby they were denied 3 years' weightage.

4. The Tribunal at Lucknow held that the prospective operation discriminated the Senior State Civil Service Officers but it refused to direct the Union Government to amend the Rules with retrospective effect. However, the Government of India was requested to reconsider the matter to give retrospective operation to the First Amendment Rules. The Tribunal at Patna upheld the rules and dismissed the application. The Officers from Uttar Pradesh through their Association filed the writ petition under Article 32 of the Constitution seeking writ of certiorari to quash the order dated December 12, 1990 made by the Ministry of Personnel, Public Grievance and Pension Department and for a mandamus to extend the benefits flowing from the First Amendment Rules to its members promoted prior to January 1988 and to the petitioners 2 to 17 in particular. It is needless to state that the first Amendment Rules would operate with the full effect from 1992, while the promotee officers promoted between 1988 to 1991 would reap partial benefit.

5. Rule 3 of the Seniority Rules, 1954 postulated assignment of the year of allotment as per the Rules to every officer appointed to the Indian Administrative Service, be it a direct recruit or a promotee officer. The promotee officer appointed in accordance with Rule 9 of the IAS Recruitment Rules read with Regulation 9 of IAS Promotion Regulations shall be allotted a year of allotment next below the juniormost direct recruit officer recruited in accordance with Rule 7 of the Recruitment Rules (Direct Recruitment Rules) and who officiated continuously in a senior post from a date earlier than the date of the commencement of such officiation by the promotee officer. Under the New Seniority Rules 1987, Rule 3(1) postulates that every officer shall be assigned year of allotment in accordance with the provisions hereinafter contained in the rules. The year of allotment of an officer in service at the commencement of the amended Seniority Rules shall be the same as per the Rule 3(2) as has been assigned to him by the Central Government in accordance with the orders and instructions in force immediately before the commencement of the New Seniority Rules. Sub-rule (3) of Rule 3 provides thus :

"3. (3) The year of allotment of an officer appointed to the Service after the commencement of these rules shall be as follows :

(i) The year of allotment of a direct recruit officer shall be the year following the year in which the competitive examination was held :

Provided that if a direct recruit officer is permitted to join probationary training under Rule 5(1) of the IAS (Probation) Rules, 1954, with direct recruit officers of a sub-subsequent year of allotment, then he shall be assigned that subsequent year as the year of allotment.

(ii) The year of allotment of a promotee officer shall be determined in the following

manner :

(a) For the service rendered by him in the State Civil Service up to twelve years, in the rank now below that of a Deputy Collector or equivalent, he shall be given a weightage of four years towards fixation of the year of allotment;

(b) He shall also be given a weightage of one year for every completed three years of service beyond the period of twelve years, referred to in sub-clause (a), subject to a maximum weightage of five years. In the calculation, fractions are to be ignored.

(c) The weightage mentioned in sub-clause (b) shall be calculated with effect from the year in which the officer is appointed to the service :

Provided that he shall be assigned a year of allotment earlier than the year of allotment assigned to an officer senior to him in that select list or appointed to the service on the basis of an earlier Select List.

(iii) The year of allotment of an officer appointed by selection shall be determined in the following manner :

(a) for the first 12 years of gazetted service, he shall be given a weightage of 4 years towards fixation of the year of allotment;

(b) he shall also be given a weightage of one year for every completed 3 years of service beyond the period of 12 years, referred to in sub-clause (a), subject to a maximum weightage of 5 years. In this calculation, fractions are to be ignored;

(c) the weightage mentioned in sub-clause (b) shall be calculated with effect from the year in which the officer is appointed to the service :

Provided that he shall not become senior to another non-State Civil Service Officer already appointed in the service :

Provided further that he shall not be allotted a year earlier than the year of allotment assigned to an officer already appointed to the service in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, whose length of Class I continuous service in the State Civil Service is equal to or more than the length of Class I continuous service of the former in connection with the affairs of the State."

A plain and fair reading of the sub-rules manifests the Central Government's intention that the year of allotment of a direct recruit officer shall be the year following the year in which the competitive examination was held. If any such officer was permitted to join probationary training with direct recruit officers of a subsequent year of allotment then he shall be assigned that subsequent year as the year of allotment. In determining the seniority of a promotee officer in assigning year of allotment, the service rendered in the State Civil Service up to 12 years as Dy. Collector, or equivalent post, weightage of 4 years shall be given. In addition he/she shall also be given further benefit of one year weightage of every completed 3 years of service, beyond the period of 12 years, subject to a maximum weightage of 5 years. In its calculations fractions are to be ignored. The weightage shall be computed from the year of appointment of the officer to the service. The offending proviso limits the operation of Rule 3(3)(ii)(a) and (b) that such an officer shall not be

assigned a year of allotment earlier than the year of allotment assigned to the officers senior to him in that select list or appointed on the basis of an earlier select list. Under Rule 3(3)(iii) also, though not relevant for the purpose of the case but serves as an analogy, the year of allotment of an officer appointed by selection shall also be given in the same manner as adumbrated in Rule 3(3)(ii) and its effect also was circumscribed under the proviso that he shall not become senior to another non-state Civil Service Officer already appointed to the service. It is, therefore, clear that the New Seniority Rules were to be operative from November 6, 1987 and the First Amendment Rules from February 3, 1989 with the result that in assigning the year of allotment, full weightage of 9 years' eligible service was given to the promotee State Civil Service Officers. However, the senior officer to him/her appointed from the State Civil Service earlier in the same select list or one above him in the previous select list shall remain senior to him. Thereby the proviso averted the effect of pushing an officer, who gained entry into IAS service by application of rule of weightage in 3(3)(ii) of the rules, down in seniority. It is settled law that ability, merit and suitability are the criteria to select an officer of the State Civil Service for inclusion in the select list for promotion under Regulation 9 of the IAS Promotion Regulations, 1955 read with Rule 9 of the IAS Recruitment Rules, 1954. In that behalf no change was brought about. A junior officer who thus superseded a senior State Civil Officer became entitled to carry his year of allotment and became senior to him in the cadre of IAS. But for the proviso, by the operation of Rule 3(3)(ii), the senior officer would have been saddled with the disability of being pushed down in seniority which would have nullified and frustrated the hard-earned earlier promotion and consequential effect on seniority earned by dint of merit and ability. Moreover, the entry into the service is from different streams and predominantly by direct recruitment and promotion. The direct recruit gets his year of allotment from the succeeding year of his recruitment. The direct recruit officers appointed earlier to 1988 also would be adversely affected in the seniority.

6. Under Section 3(2) of the Act, every rule made by the Central Government under Section 3(1) and every regulation made thereunder or in pursuance of any such rules, shall be laid, as soon as may be, after such rule or regulation is made, before each House of Parliament while in session. Before the expiry of the session, if both Houses agree to make any modification to such rules or regulations or both Houses agree that such rules or regulations should not be made, the rule or regulation shall thereafter have effect, only in such modified form or be of no effect as the case may be, so, however, that any such modification or annulment shall be, without prejudice to the validity of anything previously done under that rule or the regulation. Thereby the rules or regulations made in exercise of the power under Section 3(1) of the Act regulating recruitment and the conditions of service for persons appointed to an All India Service are statutory in character.

7. No statute shall be construed so as to have retrospective operation unless its language is such as plainly to require such a construction. The Legislature, as its policy, gives effect to the statute or statutory rule from a specified time or from the date of its publication in the State Gazette. It is equally settled law that Court would issue no mandamus to the Legislature to make law much less retrospectively. It is the settled canons of construction that every word, phrase or sentence in the statute and all the provisions read together shall be given full force and effect and no provision shall be rendered surplusage or nugatory. It is equally settled law that the mere fact that the result of a statute may be unjust, does not entitle the court to refuse to give effect to it. However, if two reasonable interpretations are possible, the court would adopt that construction which is just, reasonable or sensible. Courts cannot substitute the words or phrases or supply *casus omissus*. The court could in an appropriate case iron out the creases to remove ambiguity to give full force and effect to the legislative intention. But the intention must be gathered by putting up fair construction of all the provisions reading together. This endeavour would be to avoid absurdity or unintended

unjust results by applying the doctrine of purposive construction.

8. In *Hira Devi (Smt) v. District Board, Shahjahanpur* [1952 SCR 1122 : AIR 1952 SC 362] the Constitution Bench of this Court interpreting Sections 70 and 90 of the U.P. District Board Act, in particular, the expression "orders of any authority whose sanction is necessary", held that :

"No doubt it is the duty of the court to try to harmonise various provisions of an Act passed by the Legislature. But it is certainly not the duty of the court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act."

In *Nalinakhya Bysack v. Shyam Sunder Halder* [1953 SCR 533 at 545 : AIR 1953 SC 148] this Court held that it is not competent to any court to proceed upon the assumption that the Legislature has made a mistake. The court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature the court cannot aid the Legislature's defective phrasing of an Act or add or amend or by construction made up deficiencies which are left in the Act. The approach adopted contra by the High Court was held illegal. In *CST v. Auriya Chamber of Commerce, Allahabad* [(1986) 3 SCC 50 : 1986 SCC (Tax) 449 : (1986) 2 SCR 430 at 438] this Court held that in a developing country like ours any legal system may permit judges to play a creative role and innovate to ensure justice without doing violence to the norms set by legislation. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.

9. Thus it is settled law that where the intention of statutory amendment is clear and expressive, words cannot be interpolated. In the first place they are not, in the case, needed. If they should be added, the statute would more than likely fail to carry out the legislative intent. The words are the skin of the language which the Legislature intended to convey. Where the meaning of the statute is clear and sensible, either with or without omitting the words or adding one, interpolation is improper, since the primary purpose of the legislative intent is what the statute says to be so. If the language is plain, clear and explicit, it must be given effect and the question of interpretation does not arise. If found ambiguous or unintended, the court can at best iron out the creases. Any wrong order or defective legislation cannot be righted merely because it is wrong. At best the court can quash it, if it violates the fundamental rights or is ultra vires the power or manifestly illegal vitiated by fundamental laws or gross miscarriage of justice. It could thus be held that the legislature intended that the First Amendment Rules would operate prospectively from February 3, 1989, the date of their publication in the Gazette of India. Its policy is explicit and unambiguous. Rule 3(3)(ii) intended to remedy the imbalances while at the same time the proviso intended to operative prospectively to avert injustice to the officers recruited/promoted earlier than the officer promoted later to that date. The proviso carved out an exception to ward off injustice to the officers that became members of IAS earlier to those dates.

10. Whether the proviso is violative of Article 14 and Article 16(1) of the Constitution of India ? Undoubtedly all the promotees from the State Civil Service constitute a class preceding or succeeding the First Amendment Rules. The purpose of temporary truce carved out by the proviso is self-evident. By dint of merit, ability and suitability a junior officer could steal a march over the senior officers in the State Civil Service and get entry into the Indian Administrative Service earlier to the senior officers and thus become a member of the Indian Administrative Service. Thereby he becomes senior in service. The Senior State Civil Service Officer, who was superseded and subsequently became qualified for inclusion in the select list, after the New Seniority Rules or the

First Amendment Rules came into force, indisputably would be junior in IAS cadre to his erstwhile junior officers in State Civil Service. If he gets the benefit of the free play of the First Amendment Rules, it would have the inevitable effect of depriving the promoted erstwhile junior officers of the benefit of early promotion and he would be pushed down and would again become junior to him in the Indian Administrative Service. The proviso aims that the State Service senior officer, though had varied length of services, but because of late promotion to Indian Administrative Service, would receive and forego proportionate weightage of past service for a short period till the rules fully become operational. The First Amendment Rules doubtless provided the remedy to remove existing discriminatory results by giving graded weightage to a maximum of 9 years and would track back the year of allotment anterior to the date of inclusion in the select list under the Recruitment Rules read with Promotion Regulations. The proviso intended to protect the seniority of the officers promoted/appointed earlier than the appellants and its effect would be that till Rule 3(3)(ii) fully becomes operational graded weightage was given to the promotees. In other words it prevented getting seniority earlier to the date of his/her appointment to the Indian Administrative Service. Equally it intended not to let endless chain reaction occur to unsettle the settled interests in seniority. These compulsive circumstances denied the benefits of full 9 years weightage to officers promoted during 1987 to 1992. The discrimination, though is discernable, but inevitable to ensure just results. In other words the proviso prevented unequals to become equals. The contention of Shri P. P. Rao, therefore, that invidious discrimination was meted out to senior officers and that they are similarly circumstanced is devoid of force.

11. This Court by a Constitution Bench in *State of J&K v. T. N. Khosa* [(1974) 1 SCC 19, 28 (para 16) : 1974 SCC (L&S) 49, 58 : (1974) 1 SCR 771, 779] and *J. Kumar v. Union of India* [(1982) 2 SCC 116, 126 (para 17) : 1982 SCC (L&S) 177, 187 : (1982) 3 SCR 453, 463] held that the amended rules varying the conditions of service would operate in future and govern the future rights of the existing personnel. The ratio therein does not apply to the peculiar facts on hand. The promoted State Civil Service Officers who had already the year of allotment in IAS cadre are not discriminated. But the benefit of full weightage of 9 years was cut down and applied in varied degree to officers promoted during the transitional period to prevent unjust results and to mete out justice to the junior officers or officers promoted earlier and up to 1992.

12. It is equally settled law that in an affirmative action the court can strike down a rule which offends the right to equality enshrined in Articles 14 and 16(1) of the Constitution or is ultra vires the Constitution. But at the same time in a given situation like the one that arose in *D. S. Nakara v. Union of India* [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] and *B. Prabhakar Rao v. State of A.P.* [1985 Supp SCC 432 : 1986 SCC (L&S) 49 : 1985 Supp (2) SCR 573] this Court extended parity in an affirmative action by reading the rule down without doing violence to the language or injustice to others. The application of the First Amendment Rule has the inevitable and insidious effect of doing injustice to the direct recruit/promotee officers or officers promoted earlier to February 3, 1989 and the proviso avoided such unjust results. Giving retrospective effect or directing to apply the rule to all the seniors irrespective of the date of promotion of IAS cadre would land in or lead to inequitable or unjust results which itself is unfair, arbitrary and unjust, offending Article 14 of the Constitution. To avoid such unconstitutional consequences the proviso to Rule 3(3)(ii) of the First Amendment Rule was made. The doctrine of kicking down or picking up, put forth in *Union of India v. P. K. Roy* [(1968) 2 SCR 186, 201-02 : AIR 1968 SC 850] equally cannot be extended to the facts of the case. But for the proviso the operation of Rule 3(3)(ii) would be inconsistent with Section 3(1-A) of the Act. Equally though the doctrine of reading down is a settled principle of law, its application to the facts of the case would lead to injustice to the officers promoted earlier to the appellants. A writ of mandamus commanding the respondents to give full

benefit of weightage of Rule 3(3)(ii)(a) and (b) of the First Amendment Rules would amount to direct the Executive to disobey the proviso which is now held to be intra vires the Constitution. In the light of the above discussion no directions could be given to the Central Government to amend the Rules. Therefore, we have no hesitation to hold that though Government of India has power to amend the New Seniority Rules by First Amendment Rules prospectively giving weightage of total 9 years' service to promotee officers of State Civil Service in assigning a year of allotment, no direction or mandamus could be issued commanding the Central Government to disobey the proviso or to apply the rules retrospectively to all the officers even to work out monetary benefits as contended by Shri Vaidyanathan. His further contention that the First Amendment Rules would be applied with effect from the date of the New Seniority Rules or date of intimation of the proposed First Amendment Rules to the State Governments for limited retrospectivity also cannot be acceded to for the same reasons.

13. In this context it is necessary to note that Section 3(1-A) of the Act which provides thus :

"3. (1-A) The power to make rules conferred by this Section shall include the power to give retrospective effect from a date not earlier than the date of commencement of this Act, to the rules or any of them but no retrospective effect shall be given to any rule so as to prejudicially affect the interests of any person to whom such rule may be applicable."

14. Its bare reading clearly indicates that the rules made under the Act shall not be given retrospective effect so as to prejudicially affect the "interest of any person to whom such rules may be applicable". The attempt of Shri Vaidyanathan that this rule may be so read as applicable only to the promotee officers vis-a-vis the senior promotee officers cannot be accepted. The Lucknow Bench of the CAT glossed over it by adopting a strange construction that since the offending provision to Rule 3(3)(ii) of the First Amendment Rules would apply to promotee officers inter se, sub-section (1-A) of Section 3 of the Act would not apply to the direct recruits, to say the least, is a disparate construction. There is a distinction between right and interest. No one has a vested right to promotion or seniority, but an officer has an interest to seniority acquired by working out the rule. Of course, it could be taken away only by operation of valid law. Sub-section (1-A) of Section 3 of the Act enjoins the authorities not to give retrospective effect to such a rule or regulation so as to avoid "prejudicial affect to the interest" of any person to whom such rule may be applicable. The operation of law may have the effect of postponing the future consideration of the claims or legitimate expectation of interest for promotion. Take a case as an illustration. Articles 14, 16(1), 16(4), 335 and 46 read with proviso to Article 309 of the Constitution empowers the President or the Governor to make statutory rules of reservation, where there is no adequate representation to persons belonging to Scheduled Castes and Scheduled Tribes in a service or posts in connection with the affairs of the Central Government or the State Government. By operation of rule of reservation appointments or promotions given to a Scheduled Caste or Scheduled Tribe officer, though prejudicially affect the interest of officers of general category on parity of merit, in the larger public interest by operation of the rule of reservation discrimination in favour of Scheduled Castes and Scheduled Tribes is constitutionally permissible as a class. Therefore, the proviso to Rule 3(3)(ii) of the First Amendment Rules is consistent with Section 3(1-A) of the Act, and that therefore, it is not ultra vires the power of the Central Government, nor it offends Articles 14 and 16(1) of the Constitution.

15. Counsel for the appellants/petitioners are right in their contention that there is no vested right to seniority and it is variable and defeasible by operation of law. In *A. K. Bhatnagar v. Union of India*

[(1991) 1 SCC 544 : 1991 SCC (L&S) 601 : (1991) 16 ATC 501] this Court held that seniority is an incidence of service and when rules prescribe the method of computation, it is squarely governed by such rules. This would be amplified by following hypothetical illustrations. In a direct recruitment the seniority would be arranged in the order of merit and it starts from the date of joining the duty. Suppose A to D were appointed on the same day and A was seniormost among them. But A did not pass the prescribed tests and for varied reasons A's probation was confirmed after a long period. In the meanwhile B to D were confirmed. B to D thereby became senior to A though appointed on the same day and A was No. 1 among them. Suppose probation was not declared mala fide resulting in delayed confirmation and A challenged it in a court of law and succeeded in proving mala fide action and consequential direction was issued by the court to confirm A from the date of his appointment. Though B to D became seniors to A by early confirmation, their seniority was varied by A's later confirmation and the consequential defeasance of acquired seniority. An employee has an interest in the accrued seniority which by operation of law also is liable to be varied. Suppose A to D were appointed on the same day by direct recruitment. A and D are general candidates and B and C are scheduled caste and scheduled tribe respectively. In the order of merit D stands second but by operation of roster B and C though far below in merit were yet assigned second and third places as per roster and D lost seniority though secured at the competitive examination due to operation of roster system D became junior to B and C. By operation of law D's legitimate interest was thereby defeated. Suppose in promotion posts also similar situations may emerge. A though seniormost in the feeder cadre, due to pendency of charges, he was superseded by B to D and thereby they gained early entry into promotion posts and thereby they became seniors. A later on was exonerated of the charges and thereby was promoted. Though B to D became initially senior to A he was restored to his seniority in promotion posts as well and B to D's interest was defeated. Suppose the promotion was on the basis of merit and ability. D was found to be more meritorious and was promoted earlier than A to C. D thereby would become senior to A to C though he was juniormost in the feeder service. The right to seniority and interest thereby were varied by operation of law. Suppose B and C also have the benefit of reservation in promotion as well and by its application they were promoted earlier to A though the latter was more meritorious. A was later on promoted. He cannot claim his seniority over B and C who stole a march over A and became senior to A in promoted cadre or service. The seniority of A thereby was varied. However, law itself may protect the legitimate interest in seniority while granting relief to persons similarly circumstanced like the one under Section 3(1-A) of the Act read with proviso to Rule 3(3)(ii) and (iii) of the First Amendment Rule. It was neither void nor ultra vires offending Articles 14 and 16(1) of the Constitution.

16. Admittedly, the draft of the First Amendment Rules, as circulated to the State Governments, did not contain the offending proviso. It is stated in the counter-affidavit filed on behalf of the Central Government that some of the State Governments had suggested to incorporate the proviso and after necessary consultation the proviso was added to the First Amendment Rules. Section 3(1) of the Act provides thus :

"3. (1) Regulation of recruitment and conditions of services. - (1) The Central Government may, after consultation with the Governments of the States concerned (including the State of Jammu and Kashmir), (and by notification in the Official Gazette) make rules for the regulation of recruitment, and the conditions of service of persons appointed to an All India Service."

It is thereby clear that Section 3(1) empowers the Central Government to make any rule regulating the recruitment and the conditions of service of an All India Service, which include amendment from time to time, but the rider it engrafted is that the power should be exercised "after consultation

with the Governments of the States concerned". It is already held that by operation of sub-section (2) of Section 3 of the Act, the rules or regulations are statutory in character. The meaning of the word 'consultation' was considered in a catena of cases. This Court in *Union of India v. Sankalchand Himatlal Sheth* [(1977) 4 SCC 193 : 1977 SCC (L&S) 435] held that the word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution. In order that the two minds may be able to confer and produce a mutual impact it is essential that each must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision. In that case the question related to the transfer of a High Court Judge from one High Court to another. In that context this Court considered whether sounding of the Chief Justice of India without meaningful consultation would be proper discharge of the constitutional obligation by the President. In that context the principle of law laid was that the respective viewpoints of the Government and the Chief Justice must be known to each other and both were to discuss and examine the merits of the proposed transfer. The meaning of the word "consultation" was evaluated in that backdrop. This Court approved the dictum laid by K. Subba Rao, J., as he then was, in *R. Pushpam v. State of Madras* [AIR 1953 Mad 392].

17. In *State of U.P. v. Manbodhan Lal Srivastava* [1958 SCR 533, 542 : AIR 1957 SC 912 : (1958) 2 LLJ 273] the word "consultation" in Article 320 of the Constitution of India was considered by a Constitution Bench. It was held that the word "consultation" did not envisage mandatory character of consultation, but the Constitution-makers allowed the discretion to the appointing authority to consult the Public Service Commission. But the executive Government cannot completely ignore the existence of the Public Service Commission or pick up and choose cases in which it may or may not be consulted. However, prior consultation was held to be not mandatory for removal of a Government servant as the Central Government has not been tied down by the advice of the UPSC. This Court did not extend the rule of consultation to making the advice of the Commission on those matters binding on the Government. In the absence of a binding character, this Court held that non-compliance of Article 320(3)(c) would not have the effect of nullifying the final order passed by the Government of removal of the Government servant from service. In *U. R. Bhatt v. Union of India* [AIR 1962 SC 1344 : (1962) 1 LLJ 656] this Court held that the absence of consultation of the Public Service Commission or any irregularity in consultation under Article 320 does not affect the ultimate decision taken by the authority under Article 311 of the Constitution. In *Ram Gopal Chaturvedi v. State of M.P.* [(1969) 2 SCC 240 : (1970) 1 SCR 472] the same view was reiterated. In *N. Raghavendra Rao v. Dy. Commissioner* [(1964) 7 SCR 549 : AIR 1965 SC 136] construing the words "prior approval" of the Central Government in the proviso to Section 115(7) of S.R. Act of varying the conditions of service the Constitution Bench held that "prior approval" would include a general approval to the variation in the conditions of service within certain limits, indicated by the Central Government. Same view was reiterated by another Constitution Bench in *Mohd. Shujat Ali v. Union of India* [(1975) 3 SCC 76 : 1974 SC (L&S) 454 : (1975) 1 SCR 449, 469-471].

18. In *Chandramouleshwar Prasad v. Patna High Court* [(1969) 3 SCC 56 : (1970) 2 SCR 666, 674-675] construing the word "consultation" in Article 233 of the Constitution, another Constitution Bench in the context of removal of a District Judge by the Governor on the recommendation of the High Court, held that "consultation" or "deliberation" is not complete or effective unless the parties thereto, i.e. the State Government and High Court make their respective points of view known to each other and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter-proposal in his mind which is not communicated to the proposer the direction to give effect to the counter-proposal without anything more, cannot be said to have been issued after consultation. In that case it was held that the absence of any consultation with the High

Court rendered the order of removal dated October 17, 1968 passed by the State Government illegal.

19. In *Narayanan Sankaran Mooss v. State of Kerala* [(1974) 1 SCC 68 : (1974) 2 SCR 60] the facts were that the State Government, exercising the power under Section 4(1) of the Electricity Supply Act, cancelled the licence of the appellant without consulting the Electricity Board. The question was whether cancellation would be ultra vires the power. While examining that question, this Court considered whether consultation was mandatory or directory, and held that the revocation of the licence trenches into the right to carry on business guaranteed under Article 19(1)(g) of the Constitution. Therefore, when the Act prescribes prior consultation of the Electricity Board such condition was incorporated to prevent abuse of power and to ensure just exercise of the power. Section 4 of the Electricity Supply Act enjoins, in public interest, to consult the Board before revocation of the licence. Consultation provided an additional safeguard to the licensee and when revoking the licence the Government acts in two stages. Before and after the explanation was received and when the Government considered the explanation, it is mandatory that it should consult the Electricity Board and non-consultation rendered the order void. Consultation of the Board, was, therefore, held to be a condition precedent for making order of revocation.

20. In *Naraindas Indurkha v. State of M.P.* [(1974) 4 SCC 788 : (1974) 3 SCR 624] M.P. Madhyamik Siksha Adhiniyam Act, 1973 provided that before prescribing the textbooks the Chairman of the Board was to be consulted. Its infraction was considered and held that any attempted exercise of the power by the State Government without complying with this condition would be null and void. On the facts of the case, it was held that the notification issued by the State Government without consultation of Chairman was invalid being in breach of statutory requirement of the proviso to Section 4(1) of the Act.

21. In *Hindustan Zinc Ltd. v. A.P. State Electricity Board* [(1991) 3 SCC 299] the revision of tariff was effected without consulting the Consultative Council. This Court held that the revision of tariff was a question of policy under Section 78-A of the Indian Electricity Supply Act. The failure of the Board to consult the Consultative Council whether rendered the revision of tariff invalid? It was held that the consequence of non-compliance of Section 16 was not provided and the nature of the function of the Consultative Council and force for its advice being at best only persuasive, it cannot be said that the revision of tariff, without seeking the advice of the Consultative Council, rendered the revision of tariff itself invalid. On the other hand the Board after revision of the tariff has to place the revised tariff on the table of the House or Houses of the State Legislature and such statement is open to discussion therein, the Board is bound to take into consideration such modification, if made, or any comments made on such statement by the State Legislature. Under those circumstances it was held that the non-compliance of Section 16(5) did not render the revision of tariff invalid.

22. In *Rollo v. Minister of Town and Country Planning* [(1948) 1 All ER 13 (CA)] Section 1(1) of the New Towns Act, 1946 envisages that the Minister of Town & Country Planning after consultation with the local authorities, if satisfied that it is expedient in the national interest that any area of land should be developed as a new town by the Corporation established under Act, he may make an order designating that area as a site of the proposed new town. On October 7, 1946 press notice was issued giving the date of meeting of the representatives of the local authorities and the Minister explained in the meeting what he had in his mind in arriving at the boundaries of the area. Objections were raised and public enquiry was held. But actual explanation was not sought from any local authorities. In those circumstances contention was raised that there was no consultation as

adumbrated under Section 1(1). Repelling the contention, the House of Lords held that in the meeting the local authorities clearly were informed of the general nature of the proposal, the areas suggested, its size and what the Minister wished and intended to do. Discussion was followed. Minutes were prepared and press notice was issued stating what had happened. In those circumstances it was held that there was consultation and the requirement was complied with. The ratio of *Morris, J. in Fletcher v. Minister of Town and Country Planning* [(1947) 2 All ER 496 (KBD)] was approved. The same view was reiterated in *Sinfield v. London Transport Executive* [1970 Ch D 550 : (1970) 2 All ER 264 (CA)].

23. In *Derham v. Church Commissioner of England* [(1954) AC 245 : (1954) 2 All ER 22] the Judicial Committee was to consider the question of consultation with Church Commissioners for effecting the union of benefices under Section 3(1) of the Pastoral Reorganisation Measure, 1949 which postulates of "consultation so far as is practicable". Construing the language it was held that a meeting was held explaining the proposed scheme, the members of the Church though opposed the scheme, it was approved. As such it was held that the action was valid and there was proper consultation.

24. In *Port Louis Corporation v. Attorney General of Mauritius* [(1965) AC 1111 : (1965) 3 WLR 67] the local Government of Mauritius was empowered under the Local Government Ordinance, 1962 by Section 73(1) to alter the boundaries of any town, district or village, after consultation with the local authorities concerned. The Governor and Council of Ministers in May 1963 had in their minds to alter the boundaries of Port Louis, so that the villages surrounding Port Louis Township would be embraced within and would enlarge the area of the town of Port Louis. The Minister by a letter asked the views of the local authorities, enclosing the details of the proposed alteration and the map. Majority Councillors had resigned on the ground that they had no mandate to express any views. On subsequent nomination, those Councillors raised certain points and asked for information, which was duly complied with. Further information was called for, but the Minister refused to extend time nor supplied information. The Governor in Council had issued a proclamation extending the boundaries of Port Louis. Action was initiated by the local authorities for declaration that the proclamation was ultra vires, null and void insofar as it related to the extended boundaries of the town of Port Louis, contending that there had been no consultation as required by Section 73(1) of the Ordinance. The Judicial Committee construing the word "after consultation" in that setting held that the local authorities had received a clear proposal. The failure to supply information by detailed answers to their questions would not render the proclamation invalid. Accordingly it upheld the action as affirmed by the Supreme Court of Mauritius.

25. The ratio in *Union of India v. Dr S. Krishna Murthy* [(1989) 4 SCC 689 : 1990 SCC (L&S) 23 : (1989) 11 ATC 892] renders little assistance to the appellants. In that case the question was the year of allotment under the Forest Service (Regulation of Seniority) Rules, 1968. By fixation of the year of allotment it had retrospective effect from the date when the promotee was brought into select list or the date of appointment whichever was later. Under those circumstances it was held that retrospective operation of the rules did not prejudicially affect any vested right much less any fundamental rights of the officers recruited from the State service.

26. The result of the above discussion leads to the following conclusions :

- (1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds

between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

(2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.

(3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

(4) When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.

(5) When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action "after consultation".

(6) No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions now would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is "after consultation"; "was in fact consulted" or was it a "sufficient consultation".

(7) Where any action is legislative in character, the consultation envisages like one under Section 3(1) of the Act, that the Central Government is to intimate to the State Governments concerned of the proposed action in general outlines and on receiving the objections or suggestions, the Central Government or Legislature is free to evolve its policy decision, make appropriate legislation with necessary additions or modification or omit the proposed one in draft bill or rules. The revised draft bill or rules, amendments or additions in the altered or modified form need not again be communicated to all the concerned State Governments nor have prior fresh consultation. Rules or Regulations being legislative in character, would tacitly receive the approval of the State Governments through the people's representatives when laid on the floor of each House of Parliament. The Act or the Rule made at the final shape is not rendered void or ultra vires or invalid for non-consultation.

27. The proposal for amending the New Seniority Rules in the draft was only for inviting discussion and suggestions on the scope and ambit of the proposed law and effect of the operation of the First Amendment Rules. Keeping the operational effect in view, the proposed amendment could be modified or deleted or altered. The Central Government is not bound to accept all or every proposal or counter-proposal. Consultation with the Ministry of Law would be sufficient. Thereby the Central

Government is not precluded to revise the draft rules in the light of the consultation and advice. The Central Government had prior consultation with the State Governments concerned and the Law Department.

28. In the light of the above principles and applying them to the facts of this case we have no hesitation to hold that the general consultation had by the Central Government with the State Governments and Union Territories was sufficient and it was not necessary to have prior consultation again to bring the proviso on statutes as part of the First Amendment Rules. The contention of Shri Vaidyanathan that the proviso is rendered void for the absence of consultation of the State Governments is devoid of any force.

29. By operation of sub-section (2) of Section 3 the rules were laid on the floor of each House of the Parliament. There were no suggestions or alternations made by either House of Parliament. Thus the First Amendment Rules stood approved by the Parliament. Under the circumstances we have no hesitation to hold that the failure to consult all the State Governments or Union Territories on the proviso to Rule 3(3)(ii) or (iii) of the First Amendment Rules does not render the proviso ultra vires, invalid or void. Accordingly, we do not find any merit to issue the writ as prayed for in the writ petition. The writ petition and civil appeal arising out of SLP (C) No. 12469 of 1990 are dismissed. The appeal arising out of SLP (C) No. 13823 of 1991 is allowed and the order of the Central Administrative Tribunal, Allahabad, Bench at Lucknow is set aside. But in the circumstances parties are directed to bear their own costs throughout.

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