SUPREME COURT OF INDIA

S. S. Bola

Vs.

B. D. Sardana

C.A.No.422 of 1993

(K. Ramaswamy, S. Saghir Ahmad and G. B. Pattanaik JJ.)

11.07.1997

JUDGEMENT

K. RAMASWAMY, J.:-

1. Application/s for impleadment allowed.

2. These appeals and transfer cases are wrapped up of complex facts interwoven with diverse principles in service jurisprudence, compounded by legislative intervention impinging upon judicial review by enacting Act 20 of 1995 to regulate the conditions of service of persons appointed to the Haryana Service of Engineers, Class-I, Public Works Department (Buildings and Roads Branch). (Public Health Branch) and (Irrigation Branch) respectively. The said Act 20 of 1995 (for short, the 'Act') came into force with effect from November 13, 1995. It amended and repealed the Haryana Service of Engineers, Class-I, PWD (Buildings and Roads Branch), (Public Health Branch) and (Irrigation Branch) Rules, Irrigation Branch by Ordinance 6 of 1995. The latter repealed the Punjab Service of Engineers, Class-I, PWD (Roads and Buildings Branch), (Public Health Branch) Rules 1960 and (Irrigation Branch) Rules, 1961 issued under proviso to Article 309 of the Constitution

(for short. the 'Rules'). This Act was given retrospective effect from 1st day of November, 1966, the date on which the State of Haryana was formed by bifurcation of the former State of Punjab.

3. The cases have their chequered history. On the date of formation of the State of Haryana, the respective services were manned by and constituted of ten promotee officers allotted from the former State of Punjab. All of them were from Haryana (erstwhile Punjab) Class-II subordinate officers. The respective repealed Rules constituted Haryana Services of Engineers, Class-I, PWD consisting of Buildings and Roads Branch, Public Health Branch and Irrigation Branch respectively which were governed by the statutory repealed Rules. The class-I service of Engineers consists of the Executive Engineers, Superintendent Engineers and Chief Engineer. Subsequently, the post of Engineer-in-Chief was added in the respective branches. The Assistant Executive Engineers are the feeder cadre to the said Class-I Service; they are drawn by way of direct recruitment. Haryana (erstwhile Punjab) Class II, Subordinate service was also feeder channel for appointment by promotion, as Executive Engineers and thereafter as Superintendent Engineer or Chief Engineers or Engineer in Chief, as the case may be. The respective repealed Rules and the Act contained a provision for appointment by transfer from any other State or Central Service; however, none was appointed from that feeder channel. Therefore, these cases do not concern that group and it has now become a dried up source. As stated, as on November 1, 1966, ten posts, each manned by promotee personnel, were allotted to the respective Branches of Haryana Services of Engineers, Class-I. The Rules provided the ratio of recruitment in Buildings and Roads and Public Health branches, viz., 50% to the direct recruits and 50% to the promotees. In the Irrigation Branch, for the first eight years, the ratio between promotees and direct recruits was 75% and 25% thereafter, it became 50 : 50 as in other two branches. Though the Rules provided for creation of the cadre posts every year under Article 3 read with Appendix-A of the respective repealed Rules, the State failed to demarcate the cadre posts; nor did it operate the services in strict conformity with the respective quotas as per the repealed Rules. As usual, it led to the acrimony between the promotees and the direct recruits; their inter se seniority, which is a perennial and unending source of litigation, has again given rise to these appeals and transfered writ petitions filed in the High Court of Punjab and Haryana.

4. The usual endless acrimony for seniority, between promotees and direct recruits, when the former are interjected into the service due to lapse of regular direct recruitment and their passage into Class-I service, is being met with turbulence for faculty transposition channels. The unsuccessful writ petitions filed in the High Court by promotees were dealt with in appeals by this Court concerning Buildings and Roads and Public Health Branches in, A. N. Sehgal v. Raje Ram Sheoram, (1992) Supp. (1) SCC 304 : (AIR 1991 SC 1406) and S.L. Chopra v. State of Haryana, (1992) Supp. (1) SCC 391 : (1991) AIR SCW 1028). Therein, Dr. B.D. Sardana of Public Health Branch was one of the contesting respondents. The third stage now intermingles with the chains from the promotees in Irrigation Branch which undoubtedly was not dealt with on the previous occasion. They came to be linked with the two Branches and together dealt with in the Ordinance and the Act as well as by the High Court. The respective repealed Rules stand now wiped out from the statute after the coming into force of the Act with retrospective effect, i.e., from November 1, 1966.

5. Instead of dealing again with the repealed Rules of the respective Branches, it would be appropriate, advantageous and of necessity to reiterate from, Sehgal (AIR 1991 SC 1406) and Chopra's cases, (1991) AIR SCW 1028) cases the findings and mandamus issued by this Court. The judgments now stand repealed by legislative judgment from ex-facie tenner under the Act. Though the facts are baffling, questions of law are diverse and the intricacies of judicial review, and require careful examination for resolution of the controversy. The galaxy of the senior counsel representing the promotees and the counsel for the State made their bee-line Herculean efforts to sustain the constitutionality of the Act and the consequential seniority determined on its basis. On ultimate analysis, after deep probe and independent investigation, we find that the valiant arguments of the respective counsel for the State and the promotees, if given ac-ceptance would lead to destruction of the vitality of judicial review, resultant husk would remain for the successful party; and the mandamus issued by this Court would bear no fruit. Thus, the revealation of emerging results given us deeper anxiety to have a pervasive fresh look into the legal setting and constitutional contours; and to set out our soujourn to tread on delicate track. Founding fathers of the Constitution foundly entrusted, expressly, to this Court "as worthy Judges," in the language of Dr. K.K. Munshi, the doyen of the Bar and prominent member of the Constitution, as per the solemn oath taken, to uphold the Constitution, to dispense justice according to constitution and the law without fear of favour, affection or ill-will. This case calls for decision on the delicate task of judicial review of legislative Act and we solemnly undertake hereunder to discharge that onerous constitutional duty.

6. As stated earlier, it is not necessary to reiterate the relevant provisions of the repealed statutory Rules governing Buildings and Roads Branch and Public Health Branch since they have been extensively dealt with by a Bench of two Judges (to which one of us, K.R.S., J., was a member) in, Sehgal (AIR 1991 SC 1406) and Chopra (1991 AIR SCW 1028), cases relieving us of the task to tread the path once over; it would be sufficient to record those findings and the mandamus issued with directions contained therein for compliance. At the outset, we may State that when the Bench dealt with the matter in Sehgal and Chopra's cases, a pointed question was put to the counsel then appearing, whether it would be advantageous to decide the question of law without determination of the cadre posts and fixation of the inter se seniority between promotees and direct recruits. The learned counsel for the parties, including the State, informed this Court of their difficulty in understanding the scope of the Rules and requested this Court to declare the law on the Rules and leave it to the State to determine inter se seniority on the basis of the law so declared. Acceding to that request, the Division Bench considered all the relevant Rules, declared the law and gave the directions to the State Government and the mandamus for compliance thereof. In, Sehgal's case, (1992 Supp (1) SCC 304 : AIR 1991 SC 1406), in para 6 at page 309, (of Supp SCC) : (at p. 1410 of AIR), this Court had observed that the service shall comprise Assistant Executive Engineers, Executive Engineers, Superintending Engineers and Chief Engineers. "Rule 3(2) read with Appendix 'A' enjoins the State of Haryana to determine the cadre strength of service each year, Appendix 'A' lays down the procedure for determination of the cadre strength of service. The senior posts includes Executive Engineers and above while the junior scale posts include Assistant Executive Engineers." be it cadre or ex-cadre posts. "Rules 6 and 7 prescribe qualifications and method of appointment by direct recruitment. Sub-rule (3) of Rule 7 states that appointment to the service shall be made according to the number of vacancies to be filled up by direct recruitment strictly in the order of merit." Rule 11(1) regulates and operates probationary period. On satisfactory completion of the probation by operation of Rule 11(3)(a), the direct recruits get confirmation into the service and those whose service is found unsatisfactory become liable to be discharged from service. As stated earlier, the post of Assistant Executive Engineers was a junior scale post which is

integral to the service and Rule 12(3) prescribes the year of allotment as the calendar year in which the order of appointment is issued by the Government.

7. In para 7, it is stated that Rule 2(1) defines appointment to service which includes an appointment made according to the terms and provisions of the rules to an officiating vacancy or to ex-cadre post provided that an officer so appointed shall not be deemed to have become a member of that service as defined in Rule 2(12). The Assistant Executive Engineer, though appointed to an ex-cadre post, since he is appointed by direct recruitment, becomes a member of the service from the date of his appointment as the Assistant Executive Engineer; though he performs the duty of an ex-cadre post awaiting appointment to a regular post, on satisfactory completion of the probation and its confirmation, the seniority dates back to the date of appointment. Therefore, the date of his appointment as Assistant Executive Engineer and his becoming a member of the service remain unalterable. It was held in paragraph 8 as under:

"A reading of the rules clearly indicates that an Assistant Executive Engineer appointed by open competition to a substantive vacancy in a cadre post and put on probation is a member of the service. Equally each Assistant Executive Engineer recruited by open competition and appointed to ex-cadre post and put on probation and to having successfully completed his probation and awaits appointment to a cadre, post would also become a members of the service."

8. In paragaph 9, it was held that "Para 11(b) of Appendix 'A' read with Rule 3(2) while determining the cadre strength of the services it adumbrates creation and appointment of Assistant Executive Engineers (direct recruit) to an ex-cadre junior scale post in each year. Therefore, in a given situation, a direct recruit appointed to an ex-cadre post, cannot be kept in lurch until he is appointed to a cadre post so as to become a member of the service. Obviously to avoid such a hiatus, Rule 2(12)(a) was introduced. The main part of Rule 2(12)(a) declares that an appointee substantively to a cadre post i.e., permanent post is a member of the service. The inclusive definition brings out that an officer appointed by direct recruitment and put on probation in an ex cadre post, who having successfully completed probation and awaits appointment to a cadre post, is also a member of the service." "The words 'and such an officer' 'directly appointed' would obviously be referable to an Assistant Executive Engineer directly appointed to an ex-cadre post who is entitled to be placed on probation and on successful completion awaits appointment to a cadre post. By operation of the definition clause, he also becomes the member of the service from the date of initial appointment. This view is further fortified by the definition of the appointment to the service in Rule 2(1) which says that appointment to the service includes an appointment made, according to the terms and provisions of these rules, to an officiating vacancy or to an ex-cadre post. Rule 2(7) says that direct appointment means appointment by open competition but excludes 'promotee' or 'transferee'. So a promotee promoted to an officiating vacancy or an ex-cadre post does not become a member of the service unless he is appointed substantively to a cadre post. We, therefore, hold that a direct recruit appointed to an ex-cadre post alone is a member of the service even while on probation and Rule 2(12)(a) applies to them and it does not apply to a promotee from Class II service."

9. In para 12, it was held that "It is settled law that prescription of quota for recruitment from different sources is constitutionally a valid rule." Para 13 dealt with quota of 50% to the promotees as Exectutive Engineer, Superintending Engineer and Chief Engineer and it was found in paragraph 12 that 50% of the post as Executive Engineer, Superintending Engineer and Chief Engineer shall be occupied only by direct recruit Assistant Executive Engineers. It may be made clear at this juncture that the entire Haryana Service of Engineers Class-I, PWD compositely consists of Executive Engineers, Superintending Engineers, Chief Engineers and Engineer-in-Chief in the respective Branches. It was, therefore, held that 50% quota between direct recruits and promotees would apply to all posts of Executive Engineers. Superintending Engineers and Engineer-in-Chief unlike in some other State/Central services. Executive Engineers, Superintending Engineers etc. are not each a separate cadre.

In para 19 at page 317, (of 1992 Supp. (1) SCC 304) : (at p. 1415 of AIR 1991 SC 1406), it was held as under:

"19. It is settled law that appointment to a post in accordance with the rules is a condition precedent and no one can claim appointment to a post or promotion, as of right, but has a right to be considered for promotion in accordance with the rules. Appointment by promotion or direct recruitment, therefore, must be in accordance with the rules so as to become a member of the service in a substantive capacity. Seniority is to be fixed in accordance with the principles laid down in the rules."

10. The rights of promotees were considered in para 20 thus:

"20. Rule 8 prescribes procedure for appointment by promotion from Class II service. Rule 9(2) states that promotion would be made by selection on the basis of merit and suitably in all respects and no member of the service shall have any claim, to such promotion as a matter of right by mere seniority. The committee as constituted under Rule 8 shall prepare the list of officers considered fit for promotion in the order of merit and on approval by the Public Service Commission, the State Government shall appoint the persons from the list in the order in which the names have been placed by the Commission. Appointment by promotion may be made under Rule 8(12) to an ex-cadre post or to any post in the cadre in an officiating capacity from the list prepared as aforesaid. On promotion, as per Rule 11(1), officer shall be on probation for a period of one year, but if the officer had been officiating as an Executive Engineer the period of officiation would be counted towards probation. Rule 11(4) provides that on satisfactory completion of the probationary period, the Government confirms the officiating promotee and "appoint him in a substantive capacity on a cadre post provided the post is available to him". If no cadre post is available, the officer has to wait for an appointment to the cadre post."

11. Accordingly, the promotee officers from the subordinate Class II service as Executive Engineer under Rule 9 read with Rule 8 constitute a source of recruitment by promotion to Haryana Engineers Service Class-I. By operation of Rule 11(4), the probationer promotee gets appointed in a substantive capacity on "a cadre post available to him." If no cadre post is available the promotee has to wait for an appointment to the cadre post. As regards the quota between direct recruits and promotees, in para 12, this Court considered the operation of Rule 5 and its effect and held that "recruitment to the service shall be so regulated that the number of posts so filled by promotion from Class II Service shall not exceed 50% of the number of posts in the service excluding the posts of Assistant Executive Engineer; provided that till such time the adequate number of Assistant Executive Engineers who are eligible and considered fit for promotion are available, the actual percentage of officers promoted from Class II service may be larger than 50 per cent." It was concluded thus:

"A reading thereof clearly manifests the legislative animation, namely, that the promotees from Class II service shall not exceed 50% of the posts in the service. The word 'shall' indicates that it is mandatory that the remaining 50% posts shall be kept open only to the Assistant Executive Engineers who were directly recruited but later were found eligible and fit for promotion as Executive Engineers. Therefore, unless the Government, resorts, exceptionally with prior permission of Public Service Commission, vide Rule 10 to recruitment by transfer of an officer from other service of the State Government or of the Union, the remaining 50% of the posts as Executive Engineers, Superintending Engineers and Chief Engineers shall be occupied only by the direct recruit Assistant Executive Engineers."

12. It is settled law that prescription of quota for recruitment from different sources is constitutionally a valid rule. It may be necessary to recapitulate that the service consists of Junior Scale posts; Class II Assistant Executive Engineers and Class-I posts are of Executive Engineers, Superintending Engineers and the Chief Engineers. Thus, the entire cadre posts are held by the promotees and direct recruits from the stage of Executive Engineers to the stage of Engineer-in-Chief in the ratio of 50 : 50 between direct recruits and the promotees.

13. The effect of Rule 5 and the result of 50% quoid to the promotees from Class II service was dealt with in para 13 and stated as under:

"The intendment appears to be that so long as the direct recruit Assistant Executive Engineer eligible and considered fit for promotion is not available, the promotee from Class II service in excess of the quota is eligible to occupy in officiating capacity in the senior posts, i.e., Executive Engineers and above. The moment direct recruits are available, they alone are entitled to occupy 50% of their quota posts (Class-I) and the promotees shall give place to the direct recruits."

14. The need to blend the direct recruits and promotees is to argument efficiency of the service. It

was dealt with in paragraph 17 and 18 which read as under:

"17. With a view to have efficient and dedicated services accountable for proper implementation of Government policies, it is open and is constitutionally permissible for the State, to infuse into the services, both talented fresh blood imbued with constitutional commitments, enthusiasm, drive and initiative by direct recruitment, blended with matured wealth of experience from the subordinate services. It is permissible to constitute an integrated service of persons recruited from two or more sources, namely, direct recruitment, promotion from subordinate service or transfer from other services. promotee from subordinate service generally would get few chances of promotion to higher echelons of service. Avenues and facilities for promotion to the higher services to the less privileged members of the subordinate service would inculcate in them dedication to excel their latent capabilities to man the cadre posts. Talent is not the privilege of few but equal avenues made available would explore common man's capabilities overcoming environmental adversity and open up full opportunities to develop one's capabilities to shoulder higher responsibilities without succumbing to despondency. Equally talented young men-women of great promise would enter into service by direct recruitment when chances of promotions are attractive. The aspiration to reach higher echelons of service would thus enthuse a member to dedicate honestly and diligently to exhibit competence, straight forwardness with missionary zeal exercising effective control and supervision in the implementation of the programmes. The chances of promotion would also enable a promotee to imbue involvement in the performance of the duties obviate frustration and eliminate proclivity to corrupt practices, lest one would tend to become corrupt, sloven and mediocre and a deadwood. In other words, equal opportunity would harness the human resources to augment the efficiency of the service and undue emphasis on either would upset the scales of equality germinating the seeds of degeneration."

"18. With a view to achieve this object, the rule-making authority envisaged to appoint direct recruits as well as by promotion from Class II Service, otherwise by transfer from other services. In interpreting the rules, effect must be given to allow everyone drawn from these sources to have their due share in the service and chances of involvement to effectively discharge the duties of the posts honestly and efficiently with dedication. Any wanton or deliberate deviation in the implementation of the rules should be curbed and snubbed and the rules must be strictly implemented to achieve the above purpose. If wanton deviations are allowed to be repeated, it would breed indiscipline among the services and amount to undue favour to some and denial of equality for many for reasons known or unknown subverting the purpose of the rules."

15. The interplay of seniority between direct recruit Assistant Executive Engineers and promotee Class II subordinate service Engineers for promotion as Executive Engineer was dealt with in para 21 which reads as under:

"21. A promotee within quota under Rule 5(2) gets his seniority from the initial date of his promotion and the year of allotment, as contemplated in Rule 12(6) shall be the next below the

junior-most officer in the service whether officiating or confirmed as Executive Engineer before the former's appointment counting the entire officiating period towards seniority, unless there is break in the service or from the date of later promotion. Such promotee, by necessary implication, would normally become senior to the direct recruit promoted later. Combined operation of sub-rules (3) to (5) of Rule 12 makes the direct recruit a member of the service of Executive Engineer from the date of year of allotment as an Assistant Executive Engineer. The result is that the promotee occupying the posts within 50 per cent quota of the direct recruits, acquired no right to the post and should yield to direct recruit, though promoted later to him, to the senior scale posts i.e., Executive Engineer, Superintending Engineer and Chief Engineer. The promotee has right to confirmation in the cadre post as per Rule 11(4) if a post is available to him within his quota or at a later date under Rule 5(2) read with Rule 11(4) and gets appointment under Section 8(11). His seniority would be reckoned only from the date of the availability of the post and the year of allotment he shall be next below to his immediate senior promotee of that year or the junior-most of the previous year of allotment whether officiating or permanent occupying the post within 50 per cent quota. The officiating period of the promotee between the dates of initial promotion and the date of the availability of the cadre post would thus by rendered fortuitous and stands excluded. A direct recruit on promotion within his quota, though later to the promotee is interposed in between the periods and interjects the promotee's seniority: snaps the links in the chain of continuity and steals a march over the approved promotee probationer. Harmonious construction of Rules 2(1). 2(3), 2(7), 2(10), 2(12) (a), 5(2) (a), 8, 9(2), 11, 12(3), 12(5) to 12(7) would yield to the above result, lest the legislative animation would be defeated and the rules would be rendered otiose and surplus. It would also adversely affect the morale and efficiency of the service. Mere officiating appointment by promotion to a cadre outside the quota; continuous officiation therein and declaration of probation would not clothe the promotee with any right to claim seniority over the direct recruits. The necessary conclusion would, therefore, be that the direct recruit shall get his seniority with effect from the date of the year of allotment as Assistant Executive Engineer which is not alterable. Whereas the promotee would get his seniority w.e.f. the date of the availability of the posts within 50 per cent quota of the promotees. The year of allotment is variable and the seniority shall be reckoned accordingly. Appointment to the cadre post substantively and confirmation thereof shall be made under Rule 8(11) read with Rule 11(4) of the Rules, A promotee Executive Engineer would only then become member of the service. Appointed substantively within the meaning of Rule 2(12) (a) shall be construed accordingly. We, further hold that the seniority of the promotee from Class II service as Executive Engineer shall be determined with effect from the date on which the cadre post was available to him and the seniority shall be determined accordingly."

16. Ultimately, the directions were given in para 28 as under:

"We accordingly, direct the Government of Haryana to determine the cadre posts, if not already done, regularly from time to time including the posts created due to exigencies of service in terms of Rule 3(2) read with Appendix 'A' and allot the posts in each year of allotment as contemplated under Rule 12 read with Rule 5(2) (a) and issue orders appointing substantively to the respective posts within the quota and determine the inter se seniority between the appellants-promotees and R.R. Sheoran, direct recruits in the respective quota cadre posts of Executive Engineers etc, within four months from the date of receipt of this judgment. The inter se seniority of promotees and direct recruits shall be determined accordingly. All the impugned promotions or those pending

proceedings in the High Court or in this Court shall be subject to the above determination and the status quo would continue till the appointments according to the rules are made and seniority is determined in the light of the law declared in this judgment. The appeal is disposed of accordingly. In the circumstances, parties are directed to bear their respective costs."

17. Similarly, in Chopra's cases, (1991) AIR SCW 1028), the same consideration was adopted and ultimately in paragraphs 11 and 12, this Court had given the directions as under:

"11. As far as the appellants are concerned, they shall be considered for appointment to a substantive vacancy against a cadre post within their 50 percent quota of the promotees and their seniority would be counted next below the immediate senior promotee of the same year or juniormost promotee of the preceding year of allotment either officiating or confirmed, in accordance with sub-rules (6) and (7) of Rule 12 and Rules 8(11) and 11(4). The year of allotment is accordingly, alterable. If a promotee Class II officer holds the cadre post within the quota of direct recruit, his period of service from the date of initial promotion till the date of availability of a cadre post is rendered fortuitous. A direct, recruit though promoted later steals a march over the promotee and gets right to consideration and if found fit gets promotion within his 50 per cent quota and thereby becomes senior to the officiating promotee."

"12. Therefore, the State Government is directed to determine the cadre strength in the Haryana Service of Engineers, Class I, PWD (Public Health Branch) under the rules, Executive Engineers, Superintending Engineers and Chief Engineers, consider the cases of the appellants and the contesting respondents B.D. Sardana, F.L. Kansal for promotion to the senior posts of Executive Engineers, Superintending Engineers and Chief Engineers respectively with the respective quota of 50 per cent and make appointment, if found eligible and fit for promotion. This exercise shall be done within four months from the date of the receipt of the order. The impugned promotions or any appointment made pending the writ petitions in the High Court or appeals in the Court are subject to the above directions. The status quo as of today will continue till the Government carries out the directions. The appeal and the writ petition are accordingly disposed of and Civil Appeal No. 2316 of 1986 is dismissed but in the circumstances parties are directed to bear their own costs."

18. Though time given under the above directions had expired, the State Government failed to comply with the directions and we are informed that in the meanwhile some of the promotees who were not eo-nominee parties to the appeals before this Court, filed the writ petition in the High Court. R.R. Sheoran, promotee from Buildings and Roads Branch had filed a contempt petition and this Court accepted the unconditional apology for the contrite and contumacious conduct committed by them in implementation of the directions and disregard fo the implementation of the mandamus, due to advice tended to them; this Court directed them by order dated March 31, 1995 to redetermine the seniority in that behalf afresh in the light of the directions contained in the judgment as well in the order dated March 31, 1995; we are informed that it has been done.

19. Dr. B.D. Sardana though filed a contempt petition, since a writ petition was already pending in the High Court, we felt it expedient to have the matter decided by the High Court in the light of the law laid down by this Court. Similarly, J.K. Dewan and other promotees in Irrigation Branch claimed seniority over H.L. Gupta, the direct recruit Assistant Executive Engineer appointed w.e.f. August 21, 1971. They claimed that they were promoted as Executive Engineers on different dates between March 19, 1970 to November 30, 1973 and M.L. Gupta completed this 5 years tenure as Assistant Executive Engineer with effect from September 17, 1976 by which date the promotees had already completed their probation period and were confirmed as Executive Engineer. Therefore, they claimed seniority over the direct recruit, M.L. Gupta and subsequent direct recruits. Their claim was not acceded to and the final seniority was published by the Government. The seniority list was prepared on September 29, 1986 which was the subject matter of the Writ Petition No. 5082 of 1986 in which the High Court had directed by an order of the aforesaid date to determine the seniority by passing a speaking order and quashed their seniority accordingly. Simillarly, Writ Petition No. 6182 of 1986 filed by the direct recruit, M.L. Gupta claiming seniority over promotees Executive Engineer was also disposed of. The Financial Commissioner by his proceedings dated July 26, 1987 ordered that the promotees should be placed as juniors to M.L. Gupta though they were promoted earlier to him. That gave rise to Writ Petition No. 5780/87 filed by the promotees against M.L. Gupta claiming seniority over him. The learned Single Judge dismissed the writ petition filed by M.L. Gupta and allowed the writ petition filed by the promotees by his order dated January 24, 1992 and held that the promotees were seniors to the direct recruits. The L.P.A. Nos. 367 and 411 of 1992 filed by M.L. Gupta were allowed by the Division Bench by judgment dated August 27, 1992 and it was held that M.L. Gupta is senior to the promotees and, therefore, the promotee should be ranked junior to him. That gave rise to number of appeals filed by the promotees as well as the State Government. In M.L. Gupta's case, the Division Bench had given directions as under:

"For the reasons recorded above, both the Letters Patent Appeals are allowed. The judgment of learned Single Judge in both the cases are set aside. Civil Writ Petition filed by Devki Nandan Pant and others stands dismissed whereas Civil Writ Petition filed by M.L. Gupta is allowed. The order fixing seniority of M.L. Gupta vis-a-vis respondent Nos. 2 to 42 is quashed. The promotion of respondent Nos. 2 to 42 to the post of Superintending Engineer and above considering them senior to M.L. Gupta also stands quashed. Direction is given to the respondents to re-fix the seniority of members of the service treating M.L. Gupta as senior to respondent Nos. 2 to 42 allocating necessary years of allotment or thereafter pass orders of confirmation and promotion respectively with retrospective affect from the date the posts became available for confirmation and promotion."

20. As stated earlier, Mr. Sardana challenged the seniority prepared by the Government contrary to the mandamus issued in, Chopra's case, (1991 AIR SCW 1028). Similarly, the promotees filed writ petition in the High Court. While determining the inter se seniority as per the directions of this Court, the Financial Commissioner had temerity to express himself in writing that the judgments of this Court were inequitous against the promotees; therefore, he followed his own sense of justice proclaimed in this regard, contrary to the mandamus, and determined the seniority which came to be challenged by B.D. Sardana in the High Court. Pending the writ petition in the High Court, the Government came forward with the Ordinance No. 6 of 1995 and the Act, amended the law with retrospective effect from 1st day of November, 1966 nullifying the mandamus issued by this Court

directing redetermination of the seniority between direct recruits and promotees in Buildings and Roads Branch and Public Health Branch respectively making the mandamus ineffective by a legislative device. Some of the direct recruit officers filed writ petition in the High Court challenging the constitutionality of the Ordinance and the Act and the sequential seniority list prepared by the Government. When the matters had come up for final hearing and the pendency of those writ petitions and the effect of the Act on the seniority of the direct recruits and the judgment in these appeals was brought to our notice, we passed an order transferring those writ petitions to this Court to be heard along with these appeals. Thus, these transfer cases. The Division Bench by judgment dated August 27, 1994 disposed of writ petitions in the following terms;

"after adjustment of B.D. Sardana, taking his year of allotment as 1977, as already discussed above, immediately after the aforesaid 10 persons allocated to State of Haryana, Since their seniority is not under challenge, declaration of cadre strength for subsequent years, may be retrospectively, will be valid as right of other direct recruits will not be involved as none has so far been appointed to the service. However, State is required to refix the seniority of B.D. Sardana, a direct recruit and other promotees to the extent of their quota fixed including 10 persons, allocated to Haryana as on November 1, 1966 in the cadre. State Government is also required to pass fresh promotion orders of B.D. Sardana and other promotees to the post of Superintending Engineers and above as and when such posts became available keeping in view the seniority of the member to be redetermined."

21. As stated earlier, the seniority list of the Irrigation branch vis-a-vis M.L. Gupta was also directed to be reconsidered. All the promotee officers and the State Government filed appeals against B.D. Sardana as well as M.L. Gupta. Sardana filed appeal as against the part of the judgment giving 100 per cent quota to initially allotted promotees.

22. We directed the counsel to argue in the first instance on the constitutionality of the Act. Dr. B.D. Sardana appeared in person and, therefore, we cannot except him to argue on the constitutionality; but, on facts, he made out a good point which may be dealt with at a later stage. Shri D.D. Thakur, Shri Rajeev Dhawan, Shri Rohtagi, learned senior counsel and Shri Tulsi, learned senior counsel for the State, while making candid statement that the statement of Objects and Reasons clearly manifests the blatant object, viz., to nullify the mandamus by a legislative judgment, requested this Court to eschew it from consideration and look at the operative parts of the provisions of the Act to find whether the legislature has made any attempt to overrule the judicial decision by legislative judgment. The attempt of the counsel is as under:

23. This Court in, Sehgal, (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases, pointed out that the normal continuous length of service did not find mention in the repealed Rules. The promotees became members of the service only from the date of their substantive appointment to the cadre posts. Consequentially, their length of service as Executive Engineer, though performed in regular posts which were available, was cut off as fortuitous. The direct recruits were not available. The base pointed out in the judgment was knocked of its bottom by suitable amendments made

under the Act repealing the statutory Rules. Though the repealing provision again is not happily worded, the Court is required to supply omission "except as already done" to give effect to the provisions of the Act so that the senior promotee officers, continuously officiating from the date of the availability of the post, though in excess of the quota, could be deemed to have been regularly appointed. Thereby, they became seniors to the direct recruits. Shri Rajeev Dhawan appearing for promotees in Irrigation Branch further contended that the repealed Rules relating to Irrigation Branch thus contained the proviso to Rule 5(2) of the repealed Rules which postulates that when the promotees were appointed and on completion of their probation, it was declared. They must be deemed to be the members of the service. Thereby, the absence of statutory rules in respect of Buildings and Roads Branch and Public Health Branch, we removed by the proviso to Section 5(2) of the Act with which we deal with later. Therefore, there is a consistent rule brought in the Act that from the inception of their appointment by promotion, Class II officers would become members of the Class-I service. Right to promotion though is not a vested right, a right to be considered for promotion is the rules. As and when vacancy arises, every officer, be it promotee or direct recruit, is entitled to consideration for promotion in accordance with the rules then existing. The effect of retrospective operation would mean that the Act by fiction of law was in operation with effect from November 1, 1966, when the promotees were appointed and started officiating, though in excess of their quota. They were discharging the duties of the posts in accordance with the Rules and they became members of the service from the respective dates of promotion and thereby their continuous length of service as Executive Engineer and upwards is required to be counted for the purpose of seniority. Thereby, they became seniors to the direct recruits. By fiction of law, the Act has taken away their right to be considered for promotion which arises only in accordance with the Rules then existing. Rules of quota, due to non-availability of the direct recruits, stood broken down and became inoperative. Therefore, the quota also cannot be implemented.

24. Sri Tulsi further contended that the State had not placed before this Court when, Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) decisions, were rendered, that the Government made its efforts to have the direct recruits appointed within their quota and notified from time to time to the Public Service Commission for recruitment but due to non-recruitment, the consequence would be that the promotees who performed the duties of the post must be given unbroken seniority from the respective dates of promotion. Normal continuous length of service is the rule. The Act gives effect to that rule by retrospective effect. The mandamus as directed to be implemented within the prescribed quota is no longer the good law. The Act is a piece of legislative device within the power and competence of the legislature. No direction could be given to disobey the law and to determine seniority contrary to the Act.

25. At this juncture, it is also relevant to point out that before appearance of Shri Tulsi, Shri Altaf Ahmad learned Additional Solicitor General had appeared on behalf of the State of Haryana. Shri Altaf Ahmad had taken a very candid stand and submitted that the direction issued by this Court in Sehgal and Chopra's cases are clear, unambiguous and transparent. Officers, though understood with clarity the directions, had misapplied the law in their own perception with the wrong notion of equality. The seniority was not correctly prepared as per the mandamus. He stated that he would suitably advise the officer to redetermine the seniority in the light of the directions given by this Court. He further stated that the Legislature was not well advised to make the Act to overrule the mandamus by legislative judgment, the Legislature, however, has the competence to amend the law

prospectively removing the defects pointed out by this Court. The Act will become operative prospectively giving 50 per cent quota each to the direct recruits and promotees. It remains to be operative under the Act. Any relaxation in defiance of the Act giving advantage to the promotees would be permissible only if the State Government should give satisfactory explanation and that too in writing, that they made all sincere efforts to have the required number of direct recruits, recruited within the quota of 500 posts but that became impracticable since required number of direct recruits were not selected by the Public Service Commission. On giving such satisfactory explanation only, the Government should determine the seniority inter se between direct recruits and promotees in respect of the future vacancies only. He would advise the Government to act accordingly.

26. We indeed appreciated the fair stand taken by Shri Altaf Ahmad on behalf of the State and gave direction to comply with the fixation of the inter se seniority between the direct recruits and the promotees accordingly. But, unfortunately, instead of doing that exercise, the Government have changed the counsel and Shri Tulsi has taken over the threads from Shri Ahmad on behalf of the State. According to Shri Tulsi, so long as the Act remains on the statute, no one can be permitted to disobey the law. According to the learned counsel, the State is empowered to enact the law suitably removing the defects in the law pointed out by the Court which was lacking in the repealed Rules by enacting the law with retrospective effect. This is an accepted and recognised constitutional principle approved by this Court in catena of decisions. Therefore, the mandamus issued by this Court is no longer in operation and the directions given in, Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028), cases are no longer enforceable. The seniority shall be determined only in accordance with the provisions of the Act.

27. Shri Rajeev Dhawan further contended that the motives cannot be attributed to the Legislature that it deliberately intended to overrule the decisions of the Court. The Act is neither a fraud on legislative power nor a colourable exercise of that power. Entry 41 of List II of the Seventh Schedule read with Article 309 of the Constitution empowers the Haryana State Legislature to make the Act. Therefore, the Legislature neither lacks competence to enact the law nor it be characterized as fraud on power or colourable exercise of power. The Act, therefore, is now uniformly applicable to all the three Branches of the P.W.D. Department of the Haryana Engineering Service Class-I. The seniority list prepared in 1992 in compliance of mandamus exhausted itself. The seniority should be determined as per the law as it exists under the Act. The direct recruits have no vested right to promotion but they have right to be considered for promotion as per the existing law, that is the Act. The learned counsel cited several decisions in support of the contentions. Shri Rajeev Dhawan also has given elaborate written arguments in that behalf. Only Shri Raju Ramachandran has given brief written arguments on behalf of some of the direct recruits on the effect of Statement of Objects. Though opportunity was given to the counsel appearing for direct recruits to give their written arguments, many of them have not availed the same.

28. Three main principal questions arise for decision are: whether the Act is ultra vires the Constitution? Whether the mandamus issued by this Court became ineffectual and unenforceable after coming into force of the Act and whether the inter se seniority between the promotees and direct recruits has correctly been drawn in accordance with the mandamus issued by this Court?

With a view to get at the bottom of these questions and to appreciate the respective contentions it is necessary to look into the relevant provisions in the Act. It would be redundant to reiterate once over the operative parts of the judgment in, Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases, and the directions issued thereunder. The ingenuity of the learned counsel for the promotees would be appreciated for their effort to salvage the promotee officers to get them seniority from the respective dates of promotion. But giving legitimacy to the actions in question on the equitable considerations would leave indelible inversion on the efficacy of judicial review. It would grant legitimacy to the legislature to overrule hereafter every inconvenient final judgment by legislative judgment with retrospective effect rendering judicial review a supine mute witness to legislative overruling judicial decisions emasculating the vitality of judicial review which would generate feeling of disbelief in the efficacy of rule of law. As soon as a judgment rendered by a constitutional Court becomes final, it would become an easy passage for the executive to tap the door of the legislature and have the rule nisi or mandamus or directions issued by a constitutional Court nullified by legislative judgment. In view of these startling effects, the true legal and constitutional perspectives require correct perspective in that behalf. The inevitable consequences that would emerge from giving acceptance to the contentions of the counsel for promotees and the State of Haryana, driven us to give very deep, anxious and thoughtful consideration to these questions.

29. Article 309 of the Constitution in Part XIV of the Constitution titled "Service under the State and the Union", postulates that recruitment and conditions of Service the Union or of a State; subject to the provisions of the Constitution, the Act of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to Public Services and post in connection with the affairs of the Union or of the State. Under the proviso the President for Union of India or the Governor of the State respectively have been empowered to make rules regulating the recruitment and conditions of service of persons appointed to the respective services and post of the Union of India or the State until the provisions in this behalf is made by or under an appropriate legislature under this Article. Any rules so made shall have effect subject to the provisions of such Act. Entry 41 of List II (State List) of the Seventh Schedule empowers the States legislature to make law concerning State Public Services; State Public Service Commission. Article 245(1) empowers the legislature of the State to make any law for the whole or any part of the States. Such law shall be subject to the provisions of the Constitution and the law made by the Parliament for the whole or any part of the Territory of India.

30. It would, thus, be clear that the legislature of the State of Haryana has, no doubt, been empowered to make law regulating recruitment and conditions of service of the persons serving the State of Haryana. The Rules made by the Governor under the proviso to Article 309 shall hold the field until provision in that behalf is made by an Act of the legislature of the State of Haryana under that Article or Article 245(1) read with Entry 41 of List II of the Seventh Schedule. The statutory Rules made under the proviso shall have effect subject to the provisions of such an Act. Thus, the Act replacing the Ordinance and the repealed Rules shall have effect of regulating the recruitment and conditions of service of persons appointed to the Haryana Services of Engineers Class I, PWD (Buildings and Roads), (Public Health) and (Irrigation Branch) respectively.

31. As stated earlier, the Act has come into force on and with effect from 1st day of November, 1966 by deeming provision under Section 1(2) of the Act. By operation of Section 3 it shall apply to the persons who are the members of the Service but shall not include persons who were appointed before the 1st day of November, 1966. In other words, the persons appointed prior to 1st day of November 1966 are not governed by the provisions of the Act and thereby they were not, in law, the members of the service. There was no saving provision with regard to their continued membership for retiral service conditions under the repealed Rules except as mentioned in Section 25 and the proviso thereto. The allotees thereby, stood excluded from service. The repeal shall not affect the benefit accrued to the persons who have retired from service during the period commencing from the 1st day of November, 1966 and ending with the date of the promulgation of the Ordinance. In other words, even the retired employees under the repealed Rules were never members of the service of the respective Branches except to the extent of the benefits they had already derived and enjoyed under the repealed Rules. This is the disastrous consequence that has been brought about in relation to the employees alloted on 1st November, 1966 and those retired either to the 1st day of November, 1966 or after passing of the Ordinance 6 of 1995 or from the date of prospective operation of the Act. They are men of non grata.

32. As regards the existing members and the service conditions of the respective Branches, Section 2 deals with the definitions. It defines in sub-section (1) of Section 2 appointment to the service" to mean an appointment made to the post in service and includes an appointment, made according to the terms and provisions of the Act to an officiating vacancy of a post in service. "Assistant Executive Engineer" as defined in Section 2(2) means a member of the service in the junior scale of pay. Thereby, his entitlement to be a member of the service under the repealed Rules has been continued under the Act. His continuance as a member of the service in the junior scale of pay from the date of his appointment remained undisturbed and uninterrupted.

33. Section 2(3) defines 'cadre post' to mean a permanent post in the service. Section 3(1) of the Act provides that the service shall comprise of such number of posts of Assistant Executive Engineers, Executive Engineers, Superintending Engineers. Chief Engineers and Engineer-in-Chief, as may be determined each year on the 1st day of January or as soon thereafter, as may be practicable according to the provisions of Appendix-A. The strength so determined shall remain in force till it is revised. It would, thus, be seen that the cadre posts are the permanent posts in the service determined each year on the 1st day of January or soon thereafter. The number of cadre posts in the service shall comprise of such number of the aforestated junior scale posts and senior scale posts. The first category consists of Assistant Executive Engineers and the second category consists of Executive Engineers, Superintending Engineers, Chief Engineer and Engineer in-Chief in the respective Branches.

34. Sub-section (4) of Section 2 defines 'Class-II Service' to mean the Haryana Service Engineers, Class II Public Work Department in the Buildings and Roads Branch. Public Health Branch or Irrigation Branch, as the case may be. In other words, the Class-II service, namely, the officers in that category, remain as such officers until they are duly brought in and made members of service after being duly promoted and appointed to the service of the respective Branches in accordance

with the provisions of the Act; until then they do not become members of the service of the respective Branches of Class-I service.

As seen earlier, under sub-section (1) of Section 2 appointment is made to the posts in the service of the cadre posts including an appointment made according to the terms and provisions of the Act to an officiating vacancy of a post in service. By mere officiation, he does not become a member of the service. Therefore, before making an appointment, every year on 1st day of January or soon thereafter, the required number of cadre posts shall be determined and thereafter any person appointed to the service, be it an Assistant Executive Engineer, in the junior scale of pay of the service under the Act or promoted officer from Class-II service defined under Section 2(4) shall be appointed to a cadre post in accordance with the provisions of the Act which is a condition precedent. Until that is done, they do not become members of the service.

35. Section 2(8) defines 'direct appointment' to mean an appointment by open competition but does not include: (a) "appointment made by promotion" and (b) an appointment made "by transfer" of an officer already in the service of a State Government or of the Union. Explanation postulates that a Class II officer who enters the Service by open competitive selection shall for the purpose of this Act, be deemed to have entered the Service by direct appointment. In other words, the promotee officer otherwise seeks an appointment by direct recruitment by a competitive selection through Public Service Commission from open market and appointed as such does become a member of the service. Since by operation of Clause (a) of sub-section (6) of Section 2 the promotee/transferee shall not be included as member of the service. An appointment made by promotion/transfer stood excluded from definition of direct appointment.

36. Sub-section (12) of Section 2 defines 'member of the service' to mean "an officer appointed substantively to a cadre post" and includes (a) in the case of a direct appointment an officer on probtation, or such an officer, who having successfully completed his probation, awaits appointment to a cadre post, he becomes a member of the service from the date of the appointment, since he was appointed directly on probation to a cadre post or to an ex-cadre post. A direct recruit on successful completion of probation but kept on officiating basis in an ex-cadre post, awaits appointment to a cadre post; nevertheless, remains to be a member of the service. As stated earlier, he continues to be a member of the service in the junior scale of pay as Assistant Executive Engineer from the date of his appointment which remains unalterable. Under Clause (b) of Section 2(12) an officer becomes a member of the service in case of an appointment by transfer who is on probation or who, having successfully completed his probation, awaits appointments to a cadre post, initially as he was appointed by transfer, becomes a member of the service from the date of his appointment by transfer provided such an officer does not have a lien on a substantive post in any Government Department. In other words, it is settled service jurisprudence under the fundamental Rules that an officer cannot be appointed substantively to more than one post and he cannot also hold two posts simultaneously in a substantive capacity. Therefore, an officer appointed to a cadre post substantively as per the provisions of the Act on a transfer but who lost his lien in his parent department, he becomes a member of the service under the Act from the date of his appointment on successful completion and declaration of his probation. Provided that he ceased to hold a lien on a substantive post in his parent Department.

37. Under Clause (c) of sub-section (12) of Section 2 in case of an officer appointed by promotion, he becomes a member of the service on his successful completion of probation and awaits appointment to a cadre post. Explanation qualifies as under:

"It is necessary that a member of the service shall at any given time be actually doing the work of a cadre post. He may be working in an ex-cadre post for reasons of administrative convenience. Conversely, an office, officiating post may in fact perform the duties of a cadre post."

In other words, the explanation qualifies that a person, i.e., a direct recruit Assistant Executive Engineer but was posted to an ex cadre post, when he was discharging the duties of the post, though in an ex cadre post for reasons of administrative convenience, nonetheless he becomes a member of the service by operation of Clause (a) of Section 2(12). An officer officiating against an ex-cadre post may, in fact, perform the duties of the cadre post. In other words, though on successful completion of the probation and awaits appointment to a cadre post, nevertheless, prior to his actual appointment to a cadre post, he is empowered to perform and officiate his duties of a cadre post, though he was appointed as a direct recruit and was posted to an ex-cadre post. Equally, the promotee Class II officer appointed on probation is also entitled to continue on an ex cadre post or cadre post in officiating capacity and the period of officiation counts towards probation. In other words, the promotee officer does not come within the ambit of the explanation as a substantive capacity but authorised the promotee officer to perform the duties of a cadre post either as a probationer or in an officiating capacity which falls far short of substantive capacity by operation of Clause (c) of Section 2 (12), a Class-II officer defined under Section 2(4) on his appointment by promotion as an Executive Engineer, i.e., to the Class I service as first appointment from feeder channel into Class I service, he is empowered to officiate as an officer on probation on cadre/ex-cadre post. On successful completion of his probation, does not automatically become a member of the service until he is duly appointed to a cadre post. In other words, he is empowered, by reason of the explanation to Section 2(12), to officiate on a cadre post, but it does not amount that he was appointed to a cadre post in a substantive capacity. This demarcation of the nature of the membership of the service between direct recruit Assistant Executive Engineer on one hand and the officer appointed by transfer of promotee Class II officer who does not have such status but gets limited right to officiate in a cadre/ex cadre post as Executive Engineer, brings out the nature of their membership of the service.

38. Sub-section (15) of Section 2 defines service to mean the Haryana Service of Engineers, Class I Public Works Department in the Buildings and Roads, Branch, Public Health Branch and Irrigation Branch, as the case may be. An officer in Class I service becomes an officer of that service only when he is appointed substantively to the cadre post, be it from junior scale of pay posts, namely. Assistant Executive Engineers, who is a member of the service in the Junior scale of pay or an officer appointed by transfer or a promotee officer from Class II service to a cadre post as Executive Engineer. As seen earlier, the Assistant Executive Engineer who is a member of the junior scale of pay service, appointed to an ex cadre post and has completed the probation and awaits appointment

to the cadre post, remains to be a member of the service and empowered to officiate in the cadre post as Executive Engineer though he has not become full member of the service while promotee officer does not get that right unless the procedure under Section 8 is gone through and on selection as a probationer as per the merit list. Therefore, as soon as the Assistant Executive Engineer successfully completes the probation, unless he is discharged from service for unsatisfactory performance of the duties, he remains to be a member of the service and his date of appointment remains the same, i.e., from the date of his initial date of appointment as Assistant Executive Engineer and remains to be a member of the service and entitles to discharge the service on a cadre post and his seniority dates back to his date of initial appointment to the cadre/ex-cadre post as Assistant Executive Engineer. Thereby, the direct recruit Executive Engineer or Assistant Executive Engineer direct recruit appointed directly to a substantive post and Assistant Executive Engineer direct recruit appointed to an ex cadre post treated on par and their service conditions remain unalterable throughout. But, in the case of the officers belonging to Class II service, as defined under Section 2(4), he does not become a member of the service as Class I officer until he is appointed to the cadre post substantively, nor he be empowered to officiate in the cadre post except as a probationer or in an officiating capacity and on successful completion, he awaits appointment substantively as Executive Engineer to the cadre post if available within the quota. Until then, he does not become in a substantive capacity a member of the Haryana Service of Engineers, Class-I. One stark effect which was not even anticipated or visulised in making the Act is that though he was made eligible to officiate as a probationer on a cadre post of Class-I service, namely, Executive Engineer, he does not automatically become a member of the services; nor does he cease to be a member of his Class-II service by reason of his promotion as Executive Engineer on probation/officiation. It is understandable for the reason that the promotee Executive Engineer from Class-II service holds his lien in his Class-II service in a substantive capacity as a permanent member of Class II service. Until he is duly appointed in accordance with the provisions of the Act to a cadre post, he remains to be a member of Class-II service and awaits appointment substantially to Class-I service to a cadre post as Executive Engineer. It is obvious that he cannot cease to hold a lien on his substantive post in Class II service for the reason that though he was promoted (technically called temporarily) on probation, if he would be found not to have satisfactorily completed the probation or the Government would find him to have deteriorated in his performance of duties he is liable to be reverted to his substantive post as Class II officer unless otherwise dealt with like disciplinary action. Thereby though they intended to make the promotee as a member of the service by the appropriate definitions many of which do not find place under the repealed Rules, the Act does not in reality advance their right to become a member of Haryana service of Engineers Class-I, PWD in the respective branches in a substantive capacity. If one looks at correct legal perspective, putting up any other interpretation is impossible.

39. Section 3(2) does not advance any benefit to the promotees. It postulates as under:

"Notwithstanding anything contained in sub-section (1) Government may appoint a member of the service to an ex-cadre post not included in the service in accordance with the provisions of this Act, provided such post has been sanctioned."

40. In other words, by virtue of the non obstante clause employed in sub-section (3) it benefits only the direct recruits Assistant Executive Engineers appointed to the service of the junior scale of pay and posted to discharge the duties of an ex-cadre who would otherwise be excluded from the service made a member of the service in accordance with the provisions of the Act. By virtue of the explanation to sub-section (12) of Section 2 and in the light of discussion hereinabove, by mere officiation even to a non-sanctioned cadre posts under sub-section (1) of Section 3 as an Executive Engineer by virtue of the non obstante clause in sub-section (2) of Section 3 he does not become a member of the service; since the explantion intended to explain that it does not create a right but clarifies the purported ambiguity of the operation of the substantive provision. It appears to benefit the direct recruits totally and the promotees partially to officiate on cadre post/discharging the duties of a cadre post as the probationer promotee/officiator in an ex-cadre post in order to earn his said period of service to count it towards probation and legitimatised his service as probationer/officiator in an ex-cadre/cadre post who would otherwise has no right to be posted. Thereby, by virtue of this enabling provision in the service in the respective branches in Buildings and Roads branch, Public Health branch an elbow entry was given who were otherwise totally excluded and the previous legal position held by the officers from Buildings and Roads, Public Health Branches and brought on par with officers from Irrigation Branch who retained the officiating character. The rights of the promotees have not any further been advanced.

41. Section 4 deals with nationality and domicile of the candidates seeking appointment to the service, the details whereof are not necessary. Section 5 reads as under:

"5. (1) Recruitment to the service shall be made by Government by any one or more of the following:-

(a) by direct appointment:

(b) by transfer of an officer already in the Service of a Government or of the Union; or

(c) by promotion from Class II Service.

(2) Recruitment to the Service shall be an regulated that the number of posts filled by promotion from Class II Service shall not exceed 50% of the strength of Service excluding the posts of Assistant Executive Engineers:

Provided that if adequate number of Assistant. Executive Engineers who are eligible and fit for promotion are not available, the posts in service even beyond 50% shall be filled up by promotion of members of Class II service or by transfer as may be decided by Government:

Provided further that in case of Irrigation Branch for the first eight years commencing from 1st day

of November, 1966, for the word 50% the word 75% be read.

(3) In the case of persons who were members of the Service on the commencement of this Act it shall be assumed that the member recruited by promotion from Class II service is in accordance with the provisions of sub-section (2) of Section 5 and future recruitment shall be based on this assumption.

(4) All direct appointments to the Service shall be made to the post of Assistant Executive Engineers:

Provided that a direct appointment may, in exceptional circumstances for reasons to be recorded in writing, be made to the post of Executive Engineer.

(5) An officer promoted from Class II Service shall be appointed to the post of Executive Engineer.

(6) Appointment by transfer of an officer will normally be made to the rank of Executive Engineer.

(7) That in execptional circumstances, for reasons to be recorded in writing, Government will have the power to alter the percentage specified in sub-section (2) of this section."

(Emphasis supplied)

42. Section 5 deals with recruitment to survice. Sub-section (1) of Section 5 postulates that recruitment to the service shall be made by Government by any one or more of the following methods, i.e., (a) by direct appointment; (b) by transfers or (c) by promotion from Class-II service, defined in Section 2(4). Sub-section 2 posits that recruitment to the service shall be so regulated that the number of posts filled by promotion from Class-II service shall not exreed 50% of the strength of service excluding the posts of Assistnat Executive Engineers. Thereby. racruitment, the ratio of 50% and regulation of the service between direct appointment of the Assistant Executive Engineers or direct recruitment as Executive Engineer put together and appointment by promotion from Class II service/transferee as Executive Engineers of the strength of the service consisting of Executive Engineers, Superintending Engineers, Chief Engineers and Engineer-in-Chief in respective branches shall not exceed 50% ratio. In other words, it is mandatory that while recruiting promotees from Class II service/transferee from other service, "the service shall be so regulated" that the number of posts filled by promotee officers from class II service/transferee "shall not exceed 50% of the strength of the service." The only exclusion from the 50% quota service in that behalf in

computation of the 50% is junior scale posts occupied by junior scale pay officers, namely, Assistant Executive Engineers.

43. The first proviso amplifies that if adequate number of Assistant Executive Engineers who are eligible and fit for promotion as Executive Engineers are not available, the posts in service as Executive Engineer even beyond 50% shall be filled up by promotion of members of Class II service or by transfer as may be decided by Government. Filling up by promotion of Class-II Officers or by transfer from other Departments in excess of the quota, does not per se make the promotee a member of the service. By operation of sub-section (7) of Section 5 the Government should record in writing the exceptional circumstances for such deviation. The reasons in support thereof do indicate the in grave exceptional circumstances only as an exception for one time measure, the deviation from 50% is permissible. The second proviso further says that in case of Irrigation Branch for the first 8 years commencing from 1st day of November, 1966 for the word "50%", the word "75%" be read. In other words, the promotees have 75% cadre posts to their quota. It is seen that under the repealed Rules in respect of Buildings and Roads Branch or Public Health Branch, the proviso was non-existent and the Irrigation Branch Rules did contain this proviso. In other words, prior to the judgment rendered by this Court in, Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases, the first proviso was not in vogue and so there was no occasion to consider its effect the need to do the same has arisen in these cases. The promotees do not become members of the service until appointed substantively to a cadre post. When the promotee Class II officer as Executive Engineer would become member of the Haryana Service of Engineers, Class I would be considered later while dealing with other Sections; suffice it to State that the proviso has been introduced under the Act for the first time and by its operation, the promotees were made eligible for being appointed in excess of 50% quota or by transfer into the quota reserved for direct recruits either as Executive Engineer when promotee Assistant Executive Engineers were not available. We would also deal separately with the effect of the existing roviso in Irrigation Branch under the repealed Rules and its effect on the first and second proviso in sub-section (2) of Section 5.

44. Any officer promoted from Class-II service shall be appointed to the post of Executive Engineer, i. e, cadre post substantively and not to an ex-cadre post. However, he becomes eligible for appointment from Class II service as probationer/on officiation/transferee from other service. It is dealt with in sub-section (1) of Section 5 and under sub-section (6) appointment by transfer of an officer who initially was made to the rank of Executive Engineer. Sub-section (7) of Section 5 deals with exceptional circumstances for reasons to be recorded in writing the Government will have the power to relax as special case in regulation of the percentage specified in sub-section (2) of this Section and we do not find any relaxable specified percentage prescribed in that behalf. It is not implicit that total 50% to the direct recruits is relaxable. Therefore, for the purpose of this case, it is not necessary for us to elaborate further. Suffice it to state that it is relevant for the purpose of this case that a Class II officer defined in Section 2(4) which is a feeder cadre for appointment by promotion to Haryana Service of Engineers Class I, on probation/officiation shall be appointed to the initial post of Executive Engineer under this sub-section (5) of Section 5 within the prescribed ratio to a cadre post, if any available.

45. Section 6 deals with the qualifications. Clauses (a) and (b) only are relevant for a limited purpose, namely, in case of appointment by direct recruitment, the candidate shall be a graduate from a recognised University. The qualifications have been specified in Appendix 'B' to the Act the details of which are not necessary; suffice it to state that Appendix '5' is an integral part of Clause (a) of Section 6. Similarly, in the case of appointment by promotion from Class II service, the appointee shall have, in addition to the qualifications provided in Clause (a), i.e., Appendix 'B' eight years' completed service and has passed the prescribed tests as mandatory, unless suitably relaxed for reasons to be recorded in writing, the passing of departmental examination of the Class II service. The proviso are not relevant for the purpose of this case. The mode of competition of eight years' service has been explained in the explanation appended thereto. The further proviso thereafter and Clauses (c) and (d) are not relevant for the purpose of this case, hence they are omitted.

46. Section 7 prescribed age qualifications with which we are not concerned in this case. Section 8 is most relevant provision for the purpose of these cases which deals with appointment by promotion of the officers belonging to Class II service. It reads as under :

"8.(1) A Committee comprising of such members as may be notified by Government from time to time shall be constituted for Buildings and Roads Branch, Public Health Branch and Irrigation Branch, as the case may be, to prepare a list of officers suitable for promotion to the senior scale of the service. The selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority.

(2) The Committee shall meet at intervals ordinarily, not exceeding one year, and consider the case of all eligible officers for promotion to the senior scale of the service, as on the 1st day of January of that year.

(3) The names of the officers included in this list shall be arranged in order of seniority in Class II service :

Provided that any junior officer, who in the opinion of the Committee, is of exceptional merit and suitability, may be assigned a place in the list higher than that of officers senior to him;

(4) The list so prepared shall be revised every year.

(5) If in the process of preparing the list or its revision, it is proposed to supersede any eligible candidate, the Committee shall draw up a list of such officers and may record its reasons for the proposed supersession.

(6) The list prepared or revised in accordance with sub-sections (1), (3) and (4) shall then be forwarded to the Commission by Government along with-

(i) the records of all officers included in the list;

(ii) the records of all officers proposed to be superseded as a result of the recom-mendations made by the Committee;

(iii) the reasons, if any, recorded by the Committee for the proposed supersession of any officer; and

(iv) the observations, if any, of the

Government on the recommendations of the Committee.

(7) The Commission shall consider the list prepared by the Committee along with other documents received from the Government and, unless it considers any change necessary, approve the list.

(8) If the Commission considers it necessary to make any change in the list receiving from the Government, the Commission shall inform the Government of the changes proposed and after taking into account the comments, if any, of the Government, may approve the list finally with such modification, if any, as may in its opinion, be just and proper.

(9) Appointments to the Service shall be made by Government from its list in the order in which names have been placed by the Commission.

(10) Appointments by promotion may be made to the post in Service, or to any post in the cadre in an officiating capacity from the list prepared under this section.

(11) It shall not ordinarily be necessary to consult the Commission before appointment under sub-

section (9) or (10) are made, unless during the period intervening between the inclusion of the name of the officer in the list and the date of the proposed appointment there occurs any deterioration in the work of the officer which in the opinion of the Government is such as to render him unsuitable for appointment to the service.

47. A reading thereof does postulate that a Committee, comprising of the members specified in sub-section (1) of Section 8 and the Rules made in that behalf shall be constituted for selection of Class II officers which shall prepare a list of suitable officers for promotion to the senior scale of service, in other words, Haryana Service Engineers, Class I, i. e., Executive Engineers is the only entry gate thrown open to Class II officer, as another feeder source which was otherwise would not have been eligible and instead be occupied by promotion of Assistant Executive Engineers already a member of the service but was initially appointed to junior pay scale. The selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority. The Committee shall meet at intervals ordinarily, not exceeding one year and consider the cases of all eligible Class II officers for promotion to the post on the 1st day of January of that year. The names of the officers included in that list shall be arranged in the order of seniority determined in Class II service. Any junior officer, who, in the opinion of the Committee, is of exceptional merit and suitability, may be assigned a higher place in the list than that of officers senior to him in Class II service and equally upwards. In other words, a junior officer who has shown exceptional merit and suitability may supersede a senior officer and scales a march over his seniors and he may be assigned higher place than the senior officer. The list shall be operative for one year and it shall be revised every year. Among Class II officers, this sub-section inculcates to develop spirit of competence, superior merit, ability or suitability, in other words, excellence and generates a separate and competent breed among promotees to augment efficiency and competence in service, apart from honesty and integrity which always remain pre-condition.

48. If in the process of preparing the list or its revision, if the Committee proposed to supersede any otherwise eligible officer, it shall draw the list of such officers and it shall record its reasons in support of the decision for such supersession. It is settled legal position that before reaching decision for such a supersession, the superseded officer shall be entitled to prior opportunity of notice supported by reasons and hearing and then only the recording of reasons would be meaningful, otherwise the officer will have no opportunity to meet any of the grounds on the basis of which the Committee may propose to supersede the officer in the preparation of the list or revised list, as the case may be. It is also settled legal position that this is in compliance of the principles of natural justice which is an inbuilt part of the right to justice, fairness in procedure and equality of opportunity which are part of Article 14 of the Constitution. Communication of the reasons to the supersede officer is also a facet of part of principles of natural justice. The list thus prepared shall be revised every year and new list prepared before 1st day of January each year. The record of reasons also shall be forwarded to the Government.

49. The list thus prepared or revised shall be forwarded to the Government by the Committee and the Government in turn shall forward the list to the Haryana Public Service Commission along with the record of all the officers included in the list or the revised list. Obviously, the records of all

officers proposed to be superseded, as a result of the recommendations by the Committee also shall be forwarded to the Public Service Commission. The reasons recorded by the Committee for the proposed supersession of the officer shall also form part of the record communicated to the Public Service Commission. If the Government makes any observations on the recommendations made by the Committee including supersession of any officer thereof, it is necessary that their observations also should form part of the record communicated to the Public Service Commission for its consideration. In other words, the Government also would examine independently the record of all officers. Obviously giving due weight to the reasons of the Selection Committee as inbuilt guarantee for independent and objective assessment of merit and suitability of the officer by the Committee and to express its frank opinion so as to improve efficacy of service by the incumbent officers.

50. The Public Service Commission shall independently consider the list prepared by the Committee along with other documents received from the Government and, unless it consider any change necessary, approve the list. If the Public Service Commission considers it necessary to make any change in the list received from the Government, it shall also inform the Government of the proposed changes and after taking into consideration the comments, if any, received in that behalf from the Government, the Public Service Commission should be entitled to consider the same and if necessary alter the order of merit and then communicate the approved list to the Government. At this stage, it would be necessary to clarify that in the process of inter-department exercise an opportunity to officers does not arise. Thereafter, the Government is empowered to finally approve the list with such modification as was suggested and altered by the Public Service Commission. If the alteration suggested by the Public Service Commission would not be acceptable to the Government, then it should again consult the Public Service Commission with supportive reasons and after due consideration to the advice of the Public Service Commission, the Government approves the list of eligible Class II officer for promotion as Class I officers, i.e., Executive Engineer.

51. Appointments to the service shall be made by the Government from the final list in the order in which names have been placed by the Public Service Commission and approved by the Government. Appointment by promotion will be made to the cadre post in the service or to any ex-cadre post on probation or in an officiating capacity from the said list. As seen, the appointment to the service of an officer from Class-II service as an Executive Engineer shall be made by the Government from the final list in the order in which their names have been placed by the Commission. Appointment by promotion may also be made to the cadre/ex-cadre post in service as probationer or to any post in the cadre in an officiating capacity from the final list approved and became final under the Section. In other words, after the receipt of the approved list from the Public Service Commission and its approval by the State Government, the list becomes final and operative for one year or if revised in the meanwhile after following the procedure. An appointment should be made of the Class II officers in the order of the names in the list under Section 8(9) and be put on probation. Equally an appointment in an officiating capacity to the ex-cadre post and in case of administrative necessity to a cadre post may be made by operation of sub-section (10) of Section 8.

52. By operation of sub-section (11) of Section 8, it shall not ordinarily be necessary to consult the

Public Service Commission again, if an appointment under sub-section (9) or (10), unless during the period intervening between the inclusion of the name of the officer in the list and the date of the proposed appointment there occurs any deterioration in the work of any of the officer found approved in the list which in the opinion of the Government is such as to render him unsuitable for appointment to service. Here also, the principles of natural justice be followed of prior opportunity of communication of reasons in support thereof and brief hearing, if necessary and brief reasons in support thereof. Thereafter, consultation with the Public Service Commission is mandatory. Appointment on probation and after satisfactory completion of probation and declaration thereof, the probationer shall be appointed under Section 8(9) substantively to any cadre post within the quota, if any post is available.

53. Section 9 deals with promotion within service as indicated in its marginal note. Sub-section (1) provides that subject to the provisions of sub-sections (2) and (3), members of the service shall be eligible for promotion to any post in the service, namely, Executive Engineer, Superintending Engineer, Chief Engineer and Engineer-in-Chief within their respective branches. As seen earlier, a direct recruit Assistant Executive Engineer, in the service of senior scale of pay is empowered to officiate in a cadre post, namely, on his appointment as an Executive Engineer or thereafter as a Superintending Engineer and so on since he has already been a member of the service. Equally, so a direct recruit Executive Engineer. But, unfortunately, the legal effect to the promotee Class-II officers is different. Unless he is appointed as Executive Engineer in a substantive capacity to the service, after the list is approved to a cadre post within the quota he becomes a member of the service in a substantive capacity. Even in exceptional circumstances, due to administrative exigency, he can be appointed under Section 8(10) to officiate as Executive Engineer only of the officers from the approved list, appointment even to a cadre post in Class I service, he could be appointed only as probationer/officiating capacity. That is the consequence of the operation of Section 8 and in particular sub-sections (9) and (10), as the case may be. Sub-section (11) only enables the Government to exclude an officer in the approved list provided it finds before the date of appointment that the Government forms an objective opinion on the basis of material on record that in the interregnum, the officer included and approved in the list was found unsuitable for appointment to the service due to deterioration of his work. As seen, as an inbuilt procedure of fairness, compliance of the principles of natural justice in that behalf and consultation with Public Service Commission is an integral facet, otherwise it becomes arbitrary, unjust and unfair to an officer whose name was found fit by the Committee and approved by the Public Service Commission and finds his place in the order of merit finally prepared by the Public Service Commission and approved by the State Government, gets denied of the legitimate expectation of appointment by probation. On satisfactory completion of probation, a substantive appointment to a cadre post under Section 8(9) within quota shall be made or else promotee- appointee remain as a probationer/officiating appointee under Section 8(10). This also is a caveat to the promotee officer/Assistant Executive Engineer to continue to dedicate himself assiduously in the performance of or in discharge of the duty efficiently with honesty and integrity. Thereby, puts a nail in the coffin of a corrupt proclivity. If he exhibits, it knocks him of the bottom. Legitimate expectation of promotion equally get ensured by all the above stated steps to direct as well as promotee officers as Executive Engineer and upwards.

54. The proviso to sub-section (1) of Section 9 clearly and unambiguously puts the officer on notice

that a member of the service who does not possess any of the University degree or other qualifications prescribed in Appendix B, he shall not be eligible for further promotion to the post of Superintending Engineer or above till he acquired the requisite qualifications. In other words, though an unqualified officer with a degree of University or other prescribed qualifications specified in Appendix B, but found eligible and meritorious and suitable, he may also be given only one opportunity to become an Executive Engineer and thereafter until he acquires all the requisite qualifications and passes all the prescribed tests unless already passed, he shall not be eligible for promotion to the post of Superintending Engineer and above. In this behalf, it is necessary to reiterate that it is the settled legal position that prescription of the degree qualifications (higher qualification to posts with higher responsibility) for promotion to the higher services is a valid qualification and classification as upheld by a Constitution Bench of this Court in State of Jammu and Kashmir v. T. N. Khosa, AIR 1974 SC 1, another Constitution Bench in Mohd. Sugat Ali v. State of Andhra Pradesh (1976 SCR 482) (sic) and hosts of decisions thereafter. This principle inculcates searching competitive spirit among employees for continuing education in the subject of the charge and a spirit of competition which helps improvement of efficiency of administration.

55. Sub-section (2) of Section 9 reiterates the settled legal principle that the promotion shall be made by selection on the basis of merit and suitability in all respect but such a member shall not have any claim to such promotion as a matter of right on mere seniority. In assessing merit and suitability seniority also may be considered but if a junior officer is found more meritorious and suitable, he steals a march over his seniors and scale higher ladders in service earlier to his seniors.

56. Sub-section (3) of Section 9 deals with required length of service as eligibility for promotion to the rank at each stage of Class-I posts. It says that a direct recruit shall not be eligible for promotion, though he is a member of the service, to the rank of Executive Engineer, unless he rendered five years' service as Assistant Executive Engineer and he has passed the departmental examination as prescribed in Section 15. Under the first proviso, any officer who has rendered six years or more service as an Assistant Executive Engineer shall, unless he is considered unsuitable for promotion, be given preference for such promotion over an eligible Class II officer who has already been defined under Section 2(4) of the Act, namely, officer from the feeder cadre eligible for promotion as Executive Engineer of Haryana Service, Class I posts and upwards. The second proviso deals with minimum qualified service for an officer who is a member of the service working on the civil side on Buildings and Roads Branch unless one has served a total minimum period of two years on a post relating to the design or planning or research or survey and investigation or teaching or training or purely office posting whether in Head Officer or Circle Officer or Research Laboratory under the Haryana Government or while on deputation under any other authority, he is ineligible for promotion as Executive Engineer. Explanation postulates that any service of the specified nature rendered while in Class II service by the member of the Service shall also be counted for computation of two years' service as Executive Engineer of such specified nature. In Buildings and Roads branch a previous experience is necessary for promotion as Executive Engineer so that the required specialised expert service would augment expert performance of the duties as Class I officer.

57. Clasue (b) of sub-section (2) deals with Superintending Engineers and it prescribes seven years' qualifying service as an Executive Engineer for promotion as Superintending Engineer. The proviso deals with that in the case of promotion of a member to the post of Superintending Engineer working on the civil side in Buildings and Roads Branch, he has served for a total minimum period of two years at a post of Executive Engineer relating to design or planning or research or survey and investigation or teaching or training or purely office posting whether in Head Officer Research Laboratory under the Haryana Government or while on deputation under any other authority. Even for promotion as Superintending Engineer again two years' experience as Executive Engineer in the above subjects is insisted upon as continuing expert education and as part of service since supervisory officer does not stop at saturation point.

58. Clause (c) of Section 9(5) deals with Chief Engineer and Engineer-in-Chief and prescribes three years' qualifying service as Superintending Engineer for promotion as Chief Engineer. The proviso adumbrates that if it appears to be necessary to promote an officer in public interest who does not possess such minimum service, the Government may for reasons to be recorded in writing, either generally for a specified period or in any individual case, reduce the period specified in Clause (a), (b) or (c) to such an extent as it may deem proper. In other words, the proviso to Clause (a), (b) or (c) of sub-section (3) of Section 9 gives elbow power to the Government in an appropriate case either generally or in a case of any individual case to relax the minimum period of service mentioned in the respective clauses as it indeed proper and appropriate. Situation and the condition precedent to exercise that power requires that the Government should record its reasons in writing before giving relaxation. It would be obvious that the pressing public interest is the predominant and paramount consideration for such relaxation. Reasons recorded for such exercise, must of necessity, ex facie form part of record which should disclose relevant and germane reasons. It would appear that the scheme of preparing merit list as envisaged in Section 8 is also necessary for promotion as Superintending Engineer and upwards perhaps as inbuilt fair procedure. But for the purpose of these cases, it is not necessary for us to express any final opinion. In an appointment case, it may be considered and decided.

59. Section 10 relates to appointment by transfer with which we are not concerned. Therefore, it is omitted. Section 11 deals with probation which is again material for the purpose of this case which has got interlink and close connection with the contentions raised by the counsel for the parties and, therefore, reads as under :

"11. (1) Officers appointed to the Service shall remain on probation for a period of two years, if recruited by direct appointment and one year if recruited otherwise :

Provided that-

(a) any period after appointment to the Service spent on deputation on a corresponding or a higher

post shall count towards the period of probation fixed under this Section;

(b) in the case of an appointment by transfer, any period worked in the rank of Executive Engineer or above, prior to appointment to the Service may, at the discretion of Government be allowed to count towards the period of probation fixed under this section; and

(c) an officiating appointment in the Service shall be reckoned as a period spent on probation but no member who has thus officiating shall, on the completion of the prescribed period of probation be entitled to be confirmed, unless he is appointed against a cadre post.

(2) If the work or conduct of an officer appointed to the Service during the period of probation is in the opinion of Government, not satisfactory it may-

(a) dispense with his services, if recruited by direct appointment; or

(b) if recruited otherwise-

(i) revert him to his former post; or

(ii) deal with him in such other manner as the terms and conditions of his previous appointment permit.

(3) On the completion of the period of probation of an officer, the Government may-

(a) confirm such officer in his appointment; or

(b) if no cadre post is vacant for him, declare that he has completed his probation satisfactorily; or

(c) if his work and conduct has, in its opinion, not been satisfactory, dispense with his service, if recruited by direct appointment; or

(d) if recruited otherwise-

(i) revert him to his former posts; or

(ii) deal with him within the terms and conditions of his previous appointment; or

(e) extend his period of probation and thereafter pass such orders as it could have passed on the expiry of the first period of probation :

Provided that the total period of probation, including extension, if any, shall not exceed three years.

(4) On the satisfactory completion of the period of probation, Government shall confirm such officer in a cadre post, if one is available for him.

60. By operation of sub-section (1) of Section 11 an officer appointed to the Service shall remain on probation, in case of a direct recruit for a period of two years and in other cases, namely, appointment by promotion or transfer, for a period of one year. The proviso postulates that any period, prior to appointment to the Service spent on deputation on a corresponding or a higher post shall count towards the period of probation fixed under Section 11. Clause (b) of the proviso is not relevant, hence omitted. Clause (c) of the proviso to sub-section (1) of Section 11 postulates that an officiating appointment in the Service shall be reckoned as a period spent on probation but no member who has thus officiated shall, on the completion of the prescribed period of probation, be entitled to be confirmed, "unless he is appointed against a cadre post". In other words, clause (c) of the proviso to Section 11(1) is the opening key to understand that in cases of a direct recruit, on satisfactory completion of the period of probation, if he is appointed to an ex-cadre post or promoted to a cadre post but is officiating, the period spent on such posts shall be counted towards probation. Similarly, in the case of a promotee from Class II service defined under Section 2(4) and found eligible, to put in the list, appointed in the service as per the order in the list either under Section 8(10) and put on probation under Section 11(1), he becomes eligible to perform the duties of the post in Class-I Service as Executive Engineer, though he is not member of the Service as he was not appointed substantively to the cadre post "within the quota" to a post "if available to him". On completion of the prescribed period of probation, he shall not be entitled to be confirmed unless he is appointed against a cadre post. Equally a promotee appointed to officiate in a cadre/ex-cadre post is entitled to count the period spent on officiating capacity need not again be put on probation. The period may be counted towards probation and if he satisfactorily discharges the duties of the post, the probation may be declared. But he is not entitled to be confirmed until the cadre post is available and appointed accordingly. In other words, his confirmation of the probation or completion of probation of officiating officer does not automatically give him absolute right to be appointed against a cadre post; nor does he automatically become a member of the Service, unless he is duly appointed in that behalf to a cadre post in a substantive capacity within the quota to any cadre post, if available to him.

61. Section 11 would equally apply to direct recruits as well as promotee/transferee officers. Sub-section (2) deals with the case relating to officers whose service during probation is found unsatisfactory; they may be discharged from service if appointed by direct recruitment or by promotion/transfer revert him to his former post as Class-II Officer/revert to parent Department or may be dealt with otherwise in terms and conditions of previous appointment. It is not relevant for the purpose of this case to elaborate further, sub-section (3) has a material bearing in this case. It says that the Government may, on completion of the period of probation of an officer, (a) confirm such officer on his appointment; or (b) if no cadre post is vacant and available within quota for him, declare that he has completed his probation satisfactorily and awaits appointment in a substantive capacity to a cadre post, if available within the quota; or (c) if his work and conduct has, in its

opinion, not been satisfactory, dispense with his service, if recruited by direct appointment; or (d) if recruited otherwise ; (i) revert him to his former post; or (ii) deal with him within the terms and conditions of his previous appointment; (e) extend his period of probation and thereafter pass such orders as it could have passed on the expiry of the first period of probation.

62. It would, thus, be clear that if no cadre post is available to either the direct recruits or the promotee within quota, it shall be declared that they have satisfactorily completed their probation and as soon as the cadre post become available, they would be appointed substantively to the cadre post in accordance with the Rules and within their quota. If the service during probation is found unsatisfactory, the direct recruit is required to be discharged from service; or a promotee or a transferee is required to be reverted to his former post or parent department or be dealt with in such other manner as per the conditions of the services of his previous appointment unless the period of probation is further extended. The proviso to Section 11(3) postulates that the total period of probation including extended period shall not exceed three years. Confirmation on probation is a condition precedent to acquire the status as confirmed probationer. This will apply equally to direct recruit or promotee officer. Sub-section (4) of Section 11 says that on the successful completion of the period of probation, Government shall confirm such officer in a cadre post "if one is available for him". It is necessary to recapitulate that the confirmation of an officer, be it direct recruit or promotee, should be only to a cadre post within quota only when the cadre post is available to their respective source. None can trench into the other; nor can they claim officiation as a right. The officiation is fortuitous, as performance of duty as probation is an enabling provision to complete the prescribed promotion and await appointment in a substantive capacity to a cadre post within the quota. Equally, of officiating appointment. The effect of the phrase "shall confirm such officer in a cadre post if one is available" and the word "shall" manifest the intent of the legislative in unequivocal terms that on mere probation/officiation, he does not ipso facto would become a member of the service in a substantive capacity. Appointment under Section 8(9) to a cadre post within the quota is a condition precedent. No more confusion. No more further right.

63. As seen, by operation of Section 8 read with Sections 9 and 11, the preparation of the seniority list, arrangement of the Class-II officers in the order of merit by the Committee, approval by the Public Service Commission and final approval by the Government are pre-conditions for putting the promotee officers on probation. By necessary implication, a temporary appointment on probation or officiation on a cadre post/ex-cadre post or on confirmation of the probation on successful completion thereof does not ipso facto gives right to be the member of the Service. Appointment to the Service where a cadre post is available under sub-section (9) of Section 8 in a substantive capacity, is a condition precedent. Therefore, a promotee Class-II officer shall be appointed substantively only within the quota. In other words, if there is necessity of promotion of Class-II officers to the Haryana Service of Engineers Class I, under the Act, due to exigencies of the administration, they can be promoted under Section 9 on complying with the pre-condition of selection under Section 8 appointing them temporarily in officiating capacity under Section 8(10). Declaration of successful completion of the probation does not ipso facto give them right to be members of the service in a substantive capacity. They get into the service only if cadre post is available within the 50% quota (for 8 years with 75% quota to the Irrigation Branch) and their appointment in a substantive capacity dates back to their date of appointment on probation. The inter se seniority of the direct recruits and promotees shall be determined in the manner laid down in

the Act only when they are appointed within their respective quota and their appointments are confirmed in a substantive capacity from the respective dates of appointment. The order of seniority of the direct recruits as Assistant Executive Engineers promoted as Executive Engineer is fixed with reference to the initial date of appointment. It remains unalterable. This was the law laid down in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases and no change has been brought about under the Act. Equally of the direct recruit Executive Engineers under the Act.

64. The only enabling provision for Class II Officer promoted as Executive Engineers in Buildings and Roads Branch and Public Health Branch has breathed life as probationers and get confirmation after successful completion, but have to await appointment in a substantive cadre post within the quota. The quota has remained unalterable. Thus, the promotee Class II officers are appointed to Class-I Service as Executive Engineers. This scheme does indicate that the first proviso to sub-section (2) of Section 5 does not automatically gives power to the State Government to fill up the posts in service by promotion of the members of Class II Service or by transfer in excess of the quota; nor does it amount to relaxation of rule of quota. In other words, it gives an elbow power to the State Government to promote the Class II officers in excess of 50% quota (75% in case of officers of Irrigation Branch cadre post for 8 years) to meet administrative exigencies and due to non-availability of the eligible and fit Assistant Executive Engineers who always remain to be members of service in junior scale. It gives only a right to the promotee officer to occupy the cadre post reserved for the direct recruit Executive Engineer and promotee Executive Engineers from the cadre of Assistant Executive Engineers in junior scale of pay until their availability and no more.

65. A reading of these sections does indicate that successful completion of the probation and declaration thereof enables the officer to continue to officiate in a cadre post of Haryana Service of Engineers, Class-I, PWD in the Irrigation Branch hitherto had, but the promotee officers from Buildings and Roads Branch and Public Health Branch had no such right as was declared by this Court in Chopra (1991 AIR SCW 1028) and Sehgal's (AIR 1991 SC 1406) cases. But, now, it has been provided with a limited breather to complete the period of probation or to officiate in an ex-cadre/cadre posts, i.e., due to probation or administrative exigencies. He shall not be confirmed to the cadre post unless the post is available to him. The phrase 'if one is available' rendered hereinbefore is positive and unambiguous to the effect that successful completion of the probation and declaration thereof does not automatically amount to confirmation of such officer in his substantive appointment referred to in clause (a) of sub-section (3) and sub-section (4) of Section 11 makes the matter amply clear in that behalf. Availability of a cadre post within quota shall always remain a pre-condition.

66. The crucial stage has now been set to consider the play of seniority under the Act. Section 12 deals with seniority. It reads as under :

"12. (1) In the case of Assistant Executive Engineers the order of the merit determined by the Commission shall not be disturbed in fixing the inter se seniority amongst them.

(2) inter se seniority of the members of the Service appointed as Executive Engineers in the Buildings and Roads Branch, Public Health Branch and Irrigation Branch shall be determined by the length of continuous service on the post of Executive Engineers :

Provided that seniority shall be determined separately for Buildings and Roads Branch, Public Health Branch and Irrigation Branch.

Provided further that in case of Executive Engineers directly appointed or promoted from Assistant Executive Engineer or promoted from Class II Service or appointed by transfer on the same day, their inter se seniority shall be in the following order :

(i) Executive Engineer direct appointed shall be senior to all;

(ii) Executive Engineer promoted from Assistant Executive Engineer shall be senior to the Executive Engineer promoted from Class II Service or appointed by transfer;

(iii) Executive Engineer promoted from Class II Service shall be senior to the Executive Engineer appointed by transfer.

(3) In the case of the Executive Engineers appointed by transfer from different cadres, their seniority shall be determined according to pay, preference being given to a member, who was drawing a higher rate of pay in his previous appointment, and if the rates of pay drawn are also the same, then by the length of their service in the appointment; and if the length of such service is also the same, the older member shall be senior to the younger member.

(4) Where a member of the Service, for a cause which Government considers to be sufficient, is unable to join the Service or continues with Government's approval on deputation outside the Service, it shall be open to Government to allow him credit for such service as if it was service rendered under this Act for purposes of the fixation of his seniority.

Explanation.- All employment on deputation after a member has joined the Service and has had his seniority fixed under this Act, shall count as if it was employment in the Service and shall not in any way affect the seniority already fixed, except to the extent that such seniority would in any case have been affected had the member of the Service continued to work in the department."

67. Sub-section (1) of Section 12 assures continuance of inter se the order of merit determined by the Haryana Public Service Commission. It postulates that the order of seniority "shall not be disturbed in fixing the inter se seniority amongst them". In other words, between direct recruits, the inter se seniority as determined by the Public Service Commission shall be the guiding star shedding light onto their inter se seniority. Here, it may perhaps be relevant to mention that in a direct recruitment, the open candidates and the reserved candidates are recruited in accordance with the vacancies reserved; or are selected to the respective posts and their fitment is in accordance with the roster maintained by the Government. Their seniority thus determined with the concurrence of the Public Service Commission remains final. Therefore, it is equally settled law that the reserved candidates are also entitled to be considered and appointed to the general vacancies, while the reserved candidates are to be fitted into the roster points earmarked for the reserved candidates. Thus, sub-section (1) of Section 12 ensures the compliance of the maintenance of the inter se seniority in that behalf.

68. Sub-section (2) of Section 12 deals with the inter se seniority between the members of the Service appointed as Executive Engineers in the respective branches. It provides that their inter se seniority shall be determined by the length of continuous service on the post of Executive Engineers. Provided that the seniority shall be determined separately for each of the Branches. The second proviso further says that in the case of Executive Engineers directly appointed or promoted from Assistant Executive Engineers or promoted from Class II Service or appointed by transfer on the same day, the inter se seniority shall be in the following order :

"(i) Executive Engineers directly appointed shall be senior to all.

(ii) Executive Engineers promoted from Assistant Executive Engineer shall be senior to the Executive Engineers promoted from Class-II Service or appointed by transfer.

(iii) Executive Engineer promoted from Class-II Service shall be senior to the Executive Engineer appointed by transfer."

69. In other words, it postulates appointment of Executive Engineers by direct recruitment in which event they shall be put on probation under the relevant provision and on the successful completion of the probation, the seniority between direct recruit Executive Engineer, direct recruit promotee from junior scale of pay, i.e., Assistant Executive Engineers and promotee Class-II officers or transferee officers, shall be directed to be arranged as per their respective ranking specified therein. Thus, seniority shall be given firstly to direct recruit Executive Engineers; then promotee Assistant Executive Engineer; and then to Class-II promotee officers and in the last to the transferee officers, if any. That is made manifest by clause (iii) postulating that Executive Engineer promoted from Class-II Service shall be senior to the Assistant Executive Engineers appointed by transfer. In other words, the direct recruits take seniority over the promotees. For instance in any year, there is direct recruitment of Executive Engineer; in the same year Assistant Executive Engineer is also promoted as Executive Engineer; equally, a Class-II officer officiating in cadre post after his placement in the

select list and approval and successful completion of the probation, is appointed to the Service to any cadre post available to him. In such a case, direct recruit Executive Engineer shall be confirmed first and automatically his seniority would date back to his date of appointment as Executive Engineer on probation. Similarly, the Assistant Executive Engineer would be promoted and kept on probation and his seniority would date back to the date of completion of probation as Executive Engineer but his entry to the service as Assistant Executive Engineer remains unalterable. In a given situation, where suitable relaxation of the minimum qualifying service is given uniformly to the Assistant Executive Engineers as well as the promotees also, the Assistant Executive Engineer promoted as Executive Engineer would become senior to the Executive Engineer promoted from Class-II Service and thereafter if there is any Executive Engineer appointed by transfer, he would become junior-most, irrespective of the date from which he was appointed and kept on probation and would await appointment to a cadre post and appointed accordingly, as the case may be. It is seen that this provision instead of helping the promotees, alters the law declared by this Court in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases to their detriment. The continuous length of service must, of necessity, be understood in that perspective; lest several distortions would creep in and would defeat the scheme of seniority and disturb the balance brought out by this section. The continuous length of service should, therefore, be from the respective dates of appointment within the quota to the available cadre posts allocated to the respective sources, i.e., direct recruits as one unit and promotees and transfers as another unit and inter se between themselves of each source. The effect would be considered after considering the constitutionality of the Act.

70. Sub-section (3) of Section 12 makes the matter further clear and states that in the case of Executive Engineer appointed by transfer from different cadres, their seniority shall be determined according to pay, preference being given to a member who was drawing a higher rates of pay in his previous appointment and if the rate of pay drawn are also the same, then by the length of their service in the appointments and if the length of such service is also the same, the older member shall be senior to the younger member. In other words, the transferee officer on successful completion of the probation would be junior-most among others after the direct recruits and promotees are fitted into the service. Among the equal transferee appointees on deputation, the officer drawing higher pay in previous appointment shall be senior, where pay drawn by them is same, then the officer with longer service would be senior; and if service length is equal, the officer older in age would be senior. It is further explained that all appointments on deputation, after a member has joined the Service as member and "has had his seniority fixed under this Act, shall count as if it was employment in the service and shall not in any way affect the seniority already fixed, except to the extent that such seniority would in any case have been affected had the member of the Service continued to work in the department".

71. That will be clear when we look at the conjoint operation of all the provisions and the operation of the seniority under Section 12 of the Act.

72. Sections 13 to 22 are not relevant for the purpose of this case; hence they are omitted. Section 23 provides that the Rule of reservation provided to Scheduled Castes and Backward Classes, Ex-

Servicemen and physically handicapped persons or any other class or a category of persons provided previously or other concessions shall not be affected by the provisions of the Act and same shall continue and Government has been given power to exercise in that behalf the said power from time to time. Section 24 gives power to make Rules and Section 25 is repealing and saving provision. It says that the Haryana Ordinance No. 6 of 1995 is repealed the statutory Rules of 1961 relating to the three Branches with their application to the State of Haryana are also repealed except to the extent that the Rules shall continue to apply to persons who were members of the Service under the respective Rules prior to the 1st day of November, 1966. The proviso saves any penalty or punishment imposed as a result of the disciplinary proceedings; disciplinary proceedings initiated or pending under the repealed Rules; any relaxation for qualification granted to any member of the Service under the repealed Rules and also the benefits accrued to the officers who retired during the period from 1st day of November, 1966 to the date of promulgation of the Ordinance. It further postulates that the Punjab Service of Engineers Class-I, PWD (Buildings and Roads) Rules, 1960, The Punjab Service of Engineers, Class-I, PWD, (Public Health Branch) Rules, 1961 and the Punjab Service of Engineers, Class-I, PWD (Irrigation Branch) Rules, 1961 shall continue to be in force as if the same had not been repealed.

73. What consequence would emerge from its repeal and savings, is the question. By operation of the abovequoted sections, the direct recruit Assistant Executive Engineers in junior scale of pay have already been integrated as members of the Service and their pre-existing rights have already been protected and continued. Be it under the law as declared by this Court or by operation of retrospective deeming fiction given to the Act. But as far as the promotee officers are concerned, though deeming fiction is equally available, until they are duly brought in the Service by express order of appointment, there is nothing to suggest that they must be deemed to have been appointed under the Act. On the other hand, the respective Rules remain unaffected and continue to remain in force. Therefore, until they are duly and carefully integrated into the Service, they do not become the members of the service in a substantive capacity under the Act. This is the startling consequence that has been brought about under the Act and given little benefit to the promotee than they had under the respective repealed Rules. On the other hand, the axe knocked of their heads and they have not been saved under clauses (a) to (d) under proviso to Section 25 of the Act. The direct recruits were already integrated into the membership of the Service and they became the members of the Service by fiction of the law by giving retrospective effect which otherwise is not necessary as Sehgal and Chopra law is the law of the land by Article 141 and no more is needed for them.

74. The question, therefore, arises : what is the consequence vis-a-vis promotees? Whether the legislature is competent to enact the Act with retrospective effect? At this stage, we would reiterate that the State Legislature does has the power to enact the Act under Article 309 as well as under Article 245(1) read with Entry 41 of List II of the Seventh Schedule of the Constitution. The question only is : whether it can enact the Act with retrospective effect and what would be its consequence? At this stage, it is relevant to note the Statement of Objects and Reasons of the Act which read as under :

"There were separate rules regulating service conditions and fixation of seniority in the Engineering

Services in P.W.D., B and R, Public Health and PWD Irrigation Branch. These rules although different for the three branches were on identical lines with minor variations. These rules have been interpreted in the Supreme Court in the case of A. N. Sehgal v. R. R. Sheoran and S. L. Chopra v. B. D. Sardana. Subsequently, the judgment has been interpreted further in the case of A. N. Sehgal v. R. R. Sheoran by an order dated 31st March, 1995 of the Supreme Court in a Contempt petition filed by Shri R. R. Sheoran. In the Public Health side, the seniority list prepared under the directions of the Supreme Court in S. L. Chopra v. B. D. Sardana's case was challenged in the High Court which struck down the list. Thereafter, an appeal was filed by the State in the Supreme Court against the order of the High Court in the case State v. B. D. Sardana. The appeal was admitted by the Supreme Court and the operative portion of the judgment of the High Court was stayed. The matter is pending for final decision in the Supreme Court and meanwhile the seniority list prepared by the State is being operated by Public Health Branch.

2. Meanwhile, consequent to the directions given by the Supreme Court in the case of A. N. Sehgal v. R. R. Sheoran and orders of the Supreme Court dated 31st March, 1995 in the Contempt Petition filed by R. R. Sheoran subsequently the seniority list had to be redrawn in the case of B and R Branch, which was totally at variance with the manner in which the seniority was drawn up in the case of Public Health Branch. Thus, the directions of the Supreme Court in the case of B and R Branch had created a lot of administrative problems with certain very junior officers getting undue seniority and becoming senior to the officers under whom they were previously working. The (This) naturally resutled in severe groupism and tension between officers of the department in their day-to-day working.

3. In order to have uniform rules for all the three branches of Engineering Services and to clarify the position in an unambiguous manner so as to have uniformity and clarity in interpretation, it became necessary to make certain amendments with retrospective effect. This was possible only by enacting a legislation in this regard. As the Haryana Vidhan Sabha was not in Session, it was decided to achieve the purpose through issue of an Ordinance on 13th May, 1995. The Ordinance replaced the existing rules for all the three branches of the PWD and the common enactment was to govern the service matters of Class-I Service of B and R Branch, Public Health Branch and Irrigation Branch."

75. As stated earlier, in para 4 of the Statement of Objects and Reasons, reference is made to the judgments rendered by this Court in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases pendency of the litigation in the High Courts and in this Court. Para 2 postulates that pursuant to the orders passed by this Court in the Contempt Petition filed by R. R. Sheoran on March 31, 1995 this Court directed to prepare the seniority list in accordance with the mandamus issued thereunder. It is stated that "thus, the direction of the Supreme Court in the case of B and R Branch had created a lot of administrative problems with certain very junior officers getting undue seniority and becoming senior to the officers under whom they were previously working. This naturally resulted in severe groupism and tension between officers of the department in their day-to-day working". Para 3 states that in order to have uniform rules for all the three branches of Engineering Services and to clarify the position in an unambiguous manner so as to have uniformity and equality in interpretation, "it became necessary to make such amendments with retrospective

effect. This was possible only by enacting a legislation in that regard". It would, thus, indicate in unmistakable brazen terms that the reason for the enactment was that the declaration of law of this Court became unworkable and caused hardship to senior officers as junior officers gained undue advantage under the law declared by this Court. The object was to undo it and they wanted to declare the law in unambiguous terms by enacting the Act. Thereby uniformity was sought to be achieved with retrospective effect. The attempt of the counsel for promotees and the State of Haryana, to totally ignore the Statement of Objects and Reasons to enact the law, is impermissible. Preamble is the key to open the mind of the maker of the law; if the Act read with its Preamble would indicate the object which the legislature seeks to achieve in enacting the Act and its intention becomes plain and manifest. It is settled law that if the language in the Act/Section/clause is clear and unambiguous it is not necessary to fall back upon the Statement of Objects and Reasons of the Act to cull out the intention. Therefore, we need not burden the judgment by citing copious precedents in this behalf.

76. India is a sovereign, socialist, secular democratic republic. It is axiomatic to reiterate that the preamble, as its integral part, is the basic feature of the Constitution. It assures to every citizen social, economic and political justice, stated liberties, equality of status and of opportunity with dignity of person to all the segments of the society residing in all the States as administrative units of the Union of India in an integrated Bharat. The founding fathers of the Constitution distributed our sovereign power through "We the people of India" among the Legislature, Executive and the Judiciary.

77. In order to achieve fruition of the above goals, as its bastion, the power of judicial review has expressly been conferred on this Court and the High Courts and the independence to the Judges is secured under the Constitution itself. Democracy and rule of law are two arches of the Constitution. Constitutional duties and responsibilities are of the constitutional courts and the Judges are enjoined, in terms of their oath taken under the Third Schedule to the Constitution, to uphold the Constitution and the law and to administer justice without fear or favour, ill-will or affection. The constitutionalism and rule of law breath and disseminate their vitality through judicial review which is their life-breathe.

78. The Constitution is the supreme law; the legislature derives the sovereign will of the people to enact the law subject to the Constitution and their powers are derived under Articles 245 and 246 and related Articles read with the Seventh Schedule and the relevant Entries in the respective Lists I, II and III of the Seventh Schedule of the Constitution. The rule of law, maintenance of the assured fundamental freedoms, the rights and privileges guaranteed as the Fundamental Rights under Chapter III and the Directive Principles of the State Policy under Chapter IV, are pillars to make meaningful the rights to justice, equality of status and of opportunity, and dignity of person assured to every citizen of the country; common citizenship is uniform to all citizens of the country irrespective of their region, religion, race, caste, sex or place of birth or any of them. The fundamental freedoms are secured to all citizens and each is entitled to the protection and enforcement according to their needs, avocation, profession etc. Rich and middle class man is entitled to protection of his person and property and right to pursuit of profession, avocation or

business of his choice. Poor man is equally entitled to make his right to life, guaranteed under Article 21, meaningful by securing adequate means of livelihood, right to health, education, of residence or shelter etc., which are essential and unavoidable components of life for enjoyment of fundamental freedoms. Therefore, the rights and entitlements vary according to the need and requirement (due to vastness of the country). Regional imbalances, hierarchical social structure and division of the people on account of their professing different religions of their choice, or on account of their living in different regions or speaking varied languages and scripts, need to be integrated and social justice and economic empowerment are provided to all weaker sections of the society.

79. In Kartar Singh v. State of Punjab, (1994) 3 SCC 569 : (1994 Cri LJ 3139), a Constitution Bench (to which one of us, K. Ramaswamy, J., was a member was to consider the constitutionality of the TADA Act. In that behalf, in a separate but partly concurring and partly dissenting judgment, the following as concurrent, it was held in para 373 at page 715 that the foundation of Indian political and social democracy, as envisioned in the preamble of the Constitution, rests on justice, equality, liberty, and fraternity in secular and socialist republic in which every individual has equal opportunity to strive towards excellence and of his dignity of person in an integrated egalitarian Bharat. Right to justice and equality and stated liberties which include freedom of expression, belief and movement are the means for excellence. The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality.

80. Article 21 of the Constitution protects the most precious right, viz., right to life in a civilized society. Liberty, equality and fraternity, the trinity, always blossom and enliven the flower of human dignity. One of the gifts of democracy to the mankind is the right to personal liberty. Life and personal freedom are the prized jewels and Article 19 conjointly assures by Articles 20 to 22 of the Constitution freedom of movement. Freedom can never exist without order. In order that freedom and order co-exist, it is essential that freedom should be exercised under authority and order should be enforced by authority which is vested solely in the executive.

81. Fundamental rights are means and Directive Principles are essential ends in a welfare State. The evolution of the State from police State to a welfare State is the ultimate measure and accepted standard of democratic society which is an avowed constitutional mandate. Though one of the main functions of the democratic Government is to safeguard liberty of the individual unless its exercise is subject to social control, it becomes anti-social or undermines the security of the State. The Indian democracy wedded to role of law aims not only to protect the fundamental rights of its citizens but also to establish an egalitarian social order. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty.

82. Liberty cannot stand alone but must be paired with a companion virtue; Liberty and morality; liberty and law; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rational individual has to live in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty should not always be an absolute licence but must arm itself within the confines of law. In other words, there can be no liberty without social restraint. Liberty, therefore, as a social conception, is a right to be assured to all members of a society. Unless restraint is enforced on and accepted by all members of the society, the liberty of some must involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organising re- straint which society controls over the individual. Therefore, liberty of each citizen is borne of and must be subordinated to the liberty of the greatest number; in other words, common happiness as an end of the society; lest lawlessness and anarchy will tamper social weal and hamper harmony and powerful courses or forces would be at work to undermine social welfare and order.

83. Thus, the essence of civil liberty is to keep alive the freedoms of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution. Liberty, equality and fraternity are not to be treated as separate entities but a trinity. They form the union in that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Equality cannot be divorced from liberty. Nor can equality and liberty be divorced from fraternity. Without equality, liberty would produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Courts, as sentinel on the qui vive, therefore, must strike a balance between the changing needs of the society for peaceful transformation with order and protection of the rights of the citizen. This could be achieved through securing and protecting liberty, equality fraternity with social justice and economic empowerment and political justice to all citizens only under rule of law.

84. In His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala, (1973) Supp SCR 1 : (AIR 1973 SC 1461), a thirteen-Judge Bench (then Full Court) held that separation of powers between legislature, the executive and the judiciary is also basic feature of the Constitution; the grounds given in support thereof in various judgments were diverse and varied. In Special Reference No. 1 of 1964, (1965) 1 SCR 413 : (AIR 1965 SC 745), Chief Justice Gajendragadkar, speaking for the majority of seven-Judge Bench, upheld judicial review on the anvil of the distribution of the sovereign power among the three organs of the State and express absence of power of judicial review in the Legislature; conversely, its conferment on the judiciary as a ground, to exercise judicial review of legislative acts and executive actions. In Minerva Mills v. Union of India, (1980) 3 SCC 625 : (AIR 1980 SC 1789) also, this Court declared judicial review as one of the basic features of the Constitution but reasons again were not uniform. In L. Chandra Kumar v. Union of India, (1997) 3 SCC 216 : (1997 AIR SCW 1345), a seven-Judge Bench (to which two of us, K. Ramaswamy and S. Saghir Ahmad, JJ., were members), speaking through Ahmadi, C.J.I., surveyed the entire reasoning and pithily put the functional efficacy as main ground, holding that the conferment of the power of judicial review and assurance of security of tenure and the nature of judicial functions, are the formidable grounds for distribution of sovereign power of the people and

its location in each of the three organs of the State; i.e. legislature, executive and judiciary as only demarcating lines. It was held that judicial review is the basic feature of the Constitution and is the function of the Constitutional courts. The Parliament is devoid of power, by operation of Articles 323A and 323B, to deprive this Court of power of judicial review under Article 32 and the High Courts under Article 226/227. The Constitutional courts, viz., this Court and the High Courts, have fundamental duty and, therefore, they exercise the power of judicial review of legislative Acts, administrative actions and quasi-legislative orders.

85. In S. R. Bommai v. Union of India, (1994) 3 SCC 1 : (1994 AIR SCW 2946), a nine-Judge Bench of this Court considered the constitutionality of the proclamation of Emergency issued by the President of India exercising the power under Article 356 of the Constitution. In that behalf, one of us, K. Ramaswamy, J., a member of the Bench, dealt with the power of judicial review of this Court over the constitutional act done by the President. In paras 255 and 256 at page 207 (of SCC) : (Paras 190 and 191 at p. 3125 of AIR), it was held that judicial review is the basic feature of the Constitution. This Court and the High Courts have constitutional duty and responsibility to exercise judicial review as sentinel on the qui vive. Judicial review is not concerned with the merits of the decision but with the manner in which the decision is taken. The exercise of power under Article 356 is a constitutional exercise of the power of the President. Therefore, judicial review must be distinguished from the justiciability by the court. The power of judicial review is a constituent power and cannot be abdicated by judicial process of interpretation. However, justiciability of the decision taken by the President is one of exercise of the power by the Court hedged by self-imposed judicial restraint. It is a cardinal principle of our Constitution that no one, howsoever, lofty, can claim to be sole judge of the power given under the Constitution. Its actions are within the confines of the powers given by the Constitution. In para 257 (of SCC) : (Para 192 of AIR), this Court held that this Court as final arbiter in interpreting the Constitution, declares what the law is. Higher judiciary has been assigned a delicate task to determine what powers the Constitution has conferred on each branch of the Government and whether the actions of that branch transgress such limitations, and it is the duty and responsibility of this Court/High Courts to lay down the law. It is the constitutional duty to uphold the constitutional values and to enforce the constitutional limitations as the ultimate interpreter of the Constitution. Judicial review, therefore, extends to examination of the constitutionality of the Proclamation issued by the President under Article 356. In Kishore Hollohan v. Zachillhu, (1992) Supp (2) SCC 651, the Constitution Bench, per majority, had undertaken judicial review of Tenth Schedule to the Constitution of its constitutionality and parameters of power of judicial review, though judicial review was expressly excluded. The minority negated the power to the Parliament to enact the law excluding judicial review. Majority read limitations into it.

86. It would thus be clear that the constitutional Courts alone are competent and is their primary constitutional duty to exercise the power of judicial review to pronounce upon the constitutionality of the Act, Rules and Orders. Judicial review, therefore, is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people's sovereign power for their protection and establishment of egalitarian social order under the rule of law. The judicial review, therefore, is an integral part of the Constitution as its basic structure.

87. Though Article 13 of the Constitution is the charter for Judicial Review, Article 32 and Articles 226/227 are the express source under which this Court and the High Court concerned, exercise the power of judicial review. Dr. Ambedkar, the father of the Constitution in his closing remarks on the Draft Constitution, when asked for, stated that "the soul" and "heart" of the Constitution lie in Article 32 and mutatis mutandis in Articles 226 and 227 of the Constitution. The reason is that each administrative unit is provided with High Court, but is subject to final decision by Union judiciary, i.e., this Court, in a unity form. The object of judicial review is to maintain constitutionalism and to uphold the constitutionality of the legislative Acts, administrative actions and quasi-legislative orders within the confines of the Constitution. It is basically directed against the actions of the State or its instrumentalities.

88. Democracy is the basic structure. Judicial review stems from federal structure to pass upon constitutionality of legislative or administrative acts either to enforce valid Acts or to refuse to enforce the acts found unconstitutional. Therefore, it is a constitutional mechanism for protecting basic features of the Constitution fundamental freedoms and the rule of law. Judicial review is necessary in a constitutional democracy to maintain the conditions of democratic, sovereignty and as an insurance against the potential abuse of executive or legislative power.

89. In a Parliamentary democracy where constitutional supremacy prevails, Constitution remains a living moral and intellectual force only by judicious exercise of judicial power; the moral and intellectual binding force can be enforced. Judicial review being the arch of democracy and the rule of law - life - breathe of constitutionalism, it would succeed in moulding the governmental process and help to regulate the social and economic structure of the society under rule of law. The Legislature derives its authority measured by the Constitution, and they do it within the constitutional parameters; nothing more and nothing less. The competence of legislature, though flows from Articles 245, 246 and related Articles and legislative heads are derived from relevant Entries in respective Lists of the Seventh Schedule to the Constitution as their fountain source of power, it is subject to the other provisions of the Constitution, i.e., judicial review. So, the constitutionality of the legislative and executive acts should be tested on the anvil of constitutionalism and the ingrained principles. Equity steps in where the law has left yawning gap. In interpreting the Constitution provisions dealing with distribution of powers between the Legislature, the Executive and the Judiciary, neither equity nor equitable considerations play any role much less meaningful role, though ultimately inequitable results may emerge. Application of equitable considerations in delineating the spheres of powers between the three organs of the State would tend to denigrate the constitutional objectives and destroy the balance and disturb the harmony of power.

90. By oath, the legislator and the executive solemnly undertake to uphold the Constitution. The legislature and the executive are enjoined by the Constitution to remove social imbalances, reduce social tensions and reorganise social and economic structure of the society by suitable legislative or administrative actions as well as political urges of the time that need attention. If the law made by the legislator is in conflict with the Constitution, it would be obvious that it is no good law and the Constitution has imposed a solemn duty on the judiciary to determine constitutionality and the

legality of all laws and executive actions on the touchstone of the Constitution and appropriate principles laid within the parameters of the Constitution itself. The Constitution is enjoined to maintain and preserve harmony between the rulers and the ruled and be a useful instrument to fulfil economic and social needs, adjusting ever-changing social requirements by reconciling the conflicting claims of diverse social segments. Judicial review thereby creates harmony between the fundamental law, i.e., the Constitution and the legislative enactment. The judicial review in a democracy thus becomes useful instrument embedded in the Constitution for the welfare of the people, social progress and peace and order.

91. The process of judicial scrutiny of the legislative Acts on the touchstone of the Constitution is technically called "Judicial Review". Its historical and philosophical approach leads to test the enactment of only legal laws based on ethical and rational thinking, which protects and maintains individual liberty and fundamental freedoms, creates social and economic harmony and has the glorious role of reconciling political imbalances and deny democratic desputism by establishing constitutional balance and justice in the society. The fundamental object of judicial review is to exert a great moral force upon the legislature/executive to remain within the limits of the Constitution and to save the people from the democratic tyranny. The Constitution being the Supreme, all the organs owe their existence to it.

None can claim superiority over the other and each has to function within the four corners of the constitutional provisions and implied limitations arise therefrom. Implied limitations built in the exercise of the power is founded upon higher values to enrich the democratic functioning as an essential aid to civilised living and existence and as also for smooth transaction of business by respective wings of the State. Therefore, implied limitations be send into the exercise of the powers by all the organs of the Constitution. To ensure an effective working of judicial review, it is necessary to keep in forefront the history of our Constitution itself, geographical conditions, social structure, economic development, social and religious composition of the people of India, the needs of the time, the history of the impugned legislation, necessity of its enactment, the ethical background as well as its social effects, and as also its impact on individual citizens. All these combine to facilitate a right conclusion about the constitutionality of law in the process of judicial review. It is always to bear at the back of our mind that where the system of judicial review prevails, it contributes greatly to the constitutional development of the country, social stability and the progress. The legislature has to enact laws forsaken of legislative hibernation and in conformity with the will of the sovereign people, embodied in the Constitution. Legislative Acts which are repugnant to the will of the sovereign people, i.e., which are against the constitutional limitations, restrictions and prohibitions, are void or becomes violable on a proper declaration of the Court and have no legal sanctity.

92. The Courts, however, adopt judicial self-restraint in discharging their functions of judicial review in order to maintain harmony between the Judiciary, the Legislature and the Execution. The power of judicial review of legislative Acts vested in the High Courts and this Court, must be exercised with wisdom and self-restraint and not in a spirit of cold war between Parliament or State Legislatures and Courts. Non-interference with the view of the majority in Parliament with regard to

what is reasonable and interference with what is prohibited by the Constitution may perhaps, be harmonious path for peaceful transition for glorious future. Of course, it cannot be denied that the harmonious working of the Judiciary, the Legislature and Executive would always advance the cause of democracy. In any written Constitution, sovereignty vests in the people as represented by three wings - the Legislature, the Executive, and the Judiciary and no wing can claim supremacy over and other wing. Their spheres are well defined with balances and counter-balances. When we angulate the problem in this true spirit and perspective, there may be no occasion for conflict; on the other hand, it would develop mutual respect and harmony in otherwise grueling joints.

93. The tradition of judicial self-restraint requires some workable change. Certain innovations in the scope of judicial review require attention, and as such, in India, the role of this Co urt and of the High Courts is that of nation-builders. They have to evolve indigenous and more democratic system of judicial review, which may be helpful in lessening hyper sensitivity and resolve social tensions. The judicial review keeps the law on even keel, enables the citizens of this great democracy to live in a free and just society with pride and dignity of person; strengthens respect for judicial review; creates salutary effect on social weal. Realistic and luminous efforts on the part of our judiciary articulates the correct perspective with glory would certainly elongate the aspirations of the people. The task of judicial review for constitutional judges is really heavy and onerous, but the working of judicial review with vigilant and searching mind would greatly lighten the burdens. Unconstitutionality of a statute or executive action may arise from violation of principle of distribution of powers or separation of powers; violation or suppression of fundamental rights or freedoms; or violation of some constitutional limitations/restrictions.

94. The tendency in the growth and prolixity of the unconstitutional spate of legislation in India, like the Act, unquestionably signifies a matter of great concern and it requires alertness in determination to inculcate the habit of enacting laws in conformity with the Constitution. The supremacy of the Constitution would be vindicated through the process of judicial review.

95. The founding-fathers very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and fundamental freedoms and to help to create a healthy nationalism. The function of judicial review is a part of the constitutional interpretation itself. It adjusts the Constitution to meet new conditions and needs of the time. The system of judicial review developed by this Court, as final arbiter, has not only a constitutional basis but it has also a philosophical and ethical foundation to maintain democracy and to alert the other wings of the State to abstain making unconstitutional acts/actions. The vitality of this system stands rooted mostly on our historical perspectives, social and economic view of life of all our people, and also on the persuasive conscience of the judiciary itself. Even Lord A. L. Goodhari, representing the English concept and sentiment of law, has stated in preface to English Law and the Moral Law Hamlyen Lectures, 1952 series that where the system of judicial review of legislative Acts does not prevail that law which is divorced from morality, tends to wither and becomes ineffective. Judicial review stands to bring harmony and happiness to the mankind. It seems manifestly clear that for the

ultimate benefit of people the judicial vision in judicial review of legislative and executive acts has necessarily to be wider and flexible for the preservation of liberty and fundamental freedoms to all people, for the growth of the nation, individual culture and civilisation, which are essential to individual's striving and opportunity with stated reasonable restrictions.

96. Thus, on a pragmatic approach, judicial review is an unavoidable necessity wherever there is a constant danger of legislative or executive lapses, and appalling erosion of ethical standards in the society. The absence of judicial review in the Indian Constitution would have created extreme social and economic revolutions leading to the complete annihilation of democracy and once again loss of sovereignty leading the country into perpetual slavery. We have to make continuity with the past under rule of law as a necessary concomitant to peace and progress and equally put suitable limitations on excessive legislative or executive lapses.

97. So long as Constitutional democracy prevails, judicial democracy is sure to have a firm stand. The judiciary needs to be firm in its performance of duty and enforcement of the constitutional obligations; and the result of its decision must be towards the ultimate benefit of the nation. The Court should always be Sentinel on the qui vive as the guardian of the rights, liberties and fundamental freedoms of the citizens of India. The judiciary cannot forsake its constitutional duty to determine finally the constitutionality of an impugned statute/action. India owes its great heritage to America for the modern concept of judicial review. Indian statesman, founding fathers of the Constitution and the Judges of this Courts made the concept of judicial review a living reality to our nascent sovereign, secular, socialist democracy to help the plant of fundemantal freedoms grow and blossom social, economic and political democracy with equal status and dignity of person to all, rich or poor alike to flourish and operate the law on even keel. The plant of judicial review has grown into a clear vision, more healthy plant by introducing several judicial principles like basic structure, and due process of law with protective discrimination in the Constitution itself as viable principles. Judicial review, thus, has a great impart on the social structure of India. It has helped to develop the personal rights of the individual, be it rich or poor, treating them alike as per needs and has strengthened social, economic and political democracy as well. As stated earlier, unbridled individualism and the unbalanced social growth are not healthy signs of the social progress and happiness and peace in the society. They hamper and retard progress and peace. Judicial review has become linking force between the individual and the social interest and political stability and ethical considerations have often been counter-balanced the ultra vires acts by judicial decisions. Judicial review has exerted immensely to raise the level of social morality. Moral and phllosophical adjustment is not a mere pious wish, but has foundation on the constitutional sanction and the Court has a constitutional obligation in this regard as well. Besides protecting the individual's rights, the Court, by upholding the validity of the law, has advanced social and economic progress, agrarian refomes and social justice and economic empowerment. The judges, therefore, are per force judicial statesmen.

98. The unconstitutionality of a statute/executive action arises from various constitutional violations such as the violation of the rules of distribution of power, separation of powers, as also from the infringement of fundamental rights and from violation of other constitutional

restrictions/limitations. Various constitutional doctrines have been evolved, which afford guidance to the Court in the scrutiny of unconstitutionality. Thus, judicial review is a moral guarantee wrapped in legal commands. In a welfare State like India, healthy nationalism consists in evolving such socio-economic philosophy for the reconstruction of the society which may be beneficial to the nation and for this the Court is the best adjunct to filtrate and advance such dynamic principles for developing the nation through judicial review as united Bharat.

99. In discharging the functions of judicial review this Court and the High Courts have constitutional duty and obligation to interpret the Constitution to enable all citizens enjoy the rights and fundamental freedoms and foster availment of facilities and opportunities for individual and collective excellence so that nation constantly rises to higher levels of endeavour and achievements; declare the law as unconstitutional if found to be contrary to the Constitution; to protect the fundamental rights and fundamental freedoms guaranteed by the Constitution, maintain and observe federal structure built in by the Constitution and harmonious relationship between the Union of India and the States or the States inter se if they go against delegation of essential legislative powers by the Legislature to the Executive; maintain the balance between the Executive and the Legislature; relieve the people from legislative excesses or hybernation; maintain harmony between members of society to maintain social orders provide appropriate relief to the citizens by refusing to apply the unconstitutional acts, actions or orders.

100. The Judicial reviews, thus, alerts the legislature/executive to conform to the constitutional requirements and to avoid constitutional lapses; to act as a check to balance the competing powers without being encroached upon by the other agencies of the State including the Court itself to generate and develop socio-economic structure and to help in the establishment of egalitarian social order; provide equality of opportunity and of status to all citizens on even keel by developing appropriate principles of social engineering and at the same time maintain judicial discipline by self-imposed restriction and keep their own power of judicial review within the constitutional parameters. As an essential concomitant, they inculcate faith and confidence in the efficacy of rule of law and enforcement of law and render justice to all citizens justly, fairly within noted equity jurisdiction. Law must harmonise social and economic conditions at the given time, Constitution being the paramount law, and social imbalances and its restructure would be brought about by legislative Acts, administrative actions or quasi-judicial orders for social good in an egalitarian system of governance.

101. As stated earlier, the Constitution is founded on ethical consideration, high public morality socio, economic and political urges of the given time. They require alterations for which the Constitution prescribes rights, duties and functions of different governmental organs. Constitution confers powers on each organ of the Government, apart from constitutional compulsions, as moral obligation to obey the limitations and restrictions imposed by the Constitution. A good and virtuous Constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produces good legislators and good citizens. The constitutional Courts as sentinel on the qui vive, therefore, function objectively and dispassionately to correct imbalances and keep check on every wing of the

State without trespassing upon the field assigned or powers conferred upon the other wings and at the same time maintain delecate balance on even keel.

102. The question, therefore, emerges; whether the legislature has been invested by the Constitution with power to nullify a mandamus issued by this Court or a High Court by legislative amendment? American Jurisprudence (2nd Edn.) Section 9 at page 318, deals with the principle of Legislative interference with the judgments of the Courts. It is stated that the general rule is that the legislature may not destroy, annul, set aside, vacate, reverse modify, or impair the final judgment of a Court of competent jurisdiction, so as to take away private rights which have become vested by the judgment. A statute attempting to do so has been held unconsti-tutional as an attempt on the part of the legislature to exercise judicial power, and as a violation of the constitutional guarantee of due process of law. The legislature is not only prohibited from reopening cases previously decided by the Courts, but is also forbidden to affect the inherent attributes of a judgment. That the statute is, under the guise of an act affecting remedies, does not alter the rule. It is worthy of notice however, that there are cases in which judgments requiring acts to be done in the future may validly be affected by subsequent legislation making illegal that which the judgment found to be legal, or making legal that which the judgment found to be illegal. In Section 10 at page 319, dealing with "judgment as to public right", it is further elaborated that "with respect to legislative interference with a judgment, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment concerning a public right. Even after a public right has been established by the judgment of the Court, it may be annulled by subsequent legislation".

103. The question of power of annulment of judgment or order of this Court or of the High Courts by the legislature is no longer res intergra. A two Judge Bench of this Court [to which two of us, K. Ramaswamy and G.B, Pattanaik, JJ., were members] in Indian Aluminium Ltd. v. State of Kerala, (1996) 7 SCC 537 : (1996 AIR SCW 1051) considered the controversy in extenso. This Court reviewed the entire case law on the validity of validating Act and laid down nine principles, culled out from various judgments of this Court, obviating the need to review those cases afresh. The principles as laid down, were set down at pages 662-63 (of SCC) : (at pp. 1067-68 of AIR) thus :

[1] The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the Court to give effect to them;

[2] The Constitution delineated delicate balance in the exercise of the sovereign power by the Legislature, Executive and Judiciary;

[3] In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh

Schedule to make the law which includes power to amend the law.

[4] Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free-play in their joints so that the march of social progress and order remain unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overjealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The Court, therefore, need to carefully scan the law to find out; (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not the encroachment on judicial power.

(8) In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffecive by enacting valid law on the topic within its legislative field fundamentally altering of changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The Legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the Legislature is competent to recover the invalid tax validating such a tax or removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the Legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the Court of the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make

the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.

104. All the judgments, except M. M. Pathak v. Union of India, (1978) 8 SCR 334 : (AIR 1978 SC 803) declared by this Court were found to be either valid or invalid in accordance with law under consideration but the revalidation Act came to be made to remove by employing appropriate language like the doctrine of non obstante clause, the base upon which the validity of the statute or invalidity of the Act was pointed out in the judgment by way of removal of the defect. The invalidity pointed out in the judgment was suitably removed and law was made revalidating the Act which was made consistent with the law declared by this Court. By that process it nullified the effect of the judgment removing the base or foundation upon which the judgment was rendered. In that altered situation, the Court could not have rendered the previous judgment. There is no decision of any court having upheld the power of the legislature to enact a law making previous decision of the declaration of the law, as was found consistent with the Constitution and the statutory rule as invalid. The Act is a class by itself and we hope that it finds no companion to its tally to seek as precedent by any other legislature to enact the law directly overruling the judgment of the Court.

105. It is true that definition of the "member" of the service was introduced in Section 2 (12) of the Act and an Explanation thereto was supplied which has already been dealt with. Equally, a proviso was added to sub-section (2) of Section 5 which also has been dealt with. On seniority, Section 12 replacing Rule 12 of the repealed Rules provided two provisos and an Explanation to sub-section (4) which did not find place in repealed Rules relating to Building and Roads and Public Health Branches. Their effect has already been considered and the same needs no reiteration. Even the usual non obstanteclause found in every validating Act does not find place in the Act. The Act itself is not a validating Act for the reason that this Court did not point out any illegality/invalidity in the Rules nor made any declaration as to unconstitutional of any part of the Rules. As has been seen from the Statement of the Objects and Reasons to the Act, there was no mining of the words and in unequivocal terms it is stated that the judgments of this Court in Sehgal (AIR 1991 SC 1406) and Choptra (1991 AIR SCW 1028) cases and the order dated March 31, 1995, to be the foundation for alleged discharmony between claiming promotees and claiming direct recruits as if this Act alone finally quenches the disharmony, enacted the law said to be consistent with their good sense of justice. In other words, they took no pains to hide that they enacted the law to overrule the judgments of this Court. The question is: can, by any stretch of imagination, it be said that this is the Act for removing the base pointed out in the judgment and validating any invalidity pointed out by this Court? Obviously, no. On the other hand, the true nature and purpose of the Act as revealed by the Statement of Objects and Reasons is to take away the effect of mandamus issued by this Court and to see that the relief to direct recruits is denied by taking legislative colour. The purported exercise of the power is to ensure their ultimate object, namely, to nullify the judgment of Supreme Court and compliance with the mandamus/directions contained in the judgment by the executive, is unnecessary.

106. The crucial question, therefore, is: whether such an attempt can be supported on any constitutional principle of law? This Court has upheld the power to validate the acts done under a

particular provision, largely in fiscal matters. This Court has consistently been of the view as was laid down in Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, AIR 1970 SC 192. The legislature can exercise its undoubted powers of re-defining the "rate" so as to equate it to a tax on capital value and convert that tax purported to be collected as a rate into a tax on land and building. The principal justification for such revalidation is that the legislature not only equated the tax collected as a tax on land and building which it had the power to levy but also interpreted rate giving a new meaning to the expression 'rate' which doing so, it put out of action the effect of the decision of this Court to the contrary. The exercise of the power by the Legislature was thus valid because the legislature does possess the power to levy tax on lands and buildings based on capital value thereof and validating the levy as tax on that base; the implication of the use of the word 'rate' was effectively removed and instead of rate the tax on land and building was imposed. The tax, therefore, can no longer be questioned on the ground that Section 73 of Bombay Borough Act spoke of 'rate' and the imposition was not of a rate as properly understood but a tax on capital value. The ratio in that behalf finds place not only in Indian Aluminium Ltd., case (1996 AIR SCW 1051) but also in Sasa Musa Sugar Works v. State of Bihar, (1996) 9 SCC 681 : (1996 AIR SCW 4355), P. Kannadasan v. State of Tamil Nadu, (1996) 5 SCC 670 : (1996 AIR SCW 3189) and Comorin Match Industries (P) Ltd. v. State of Tamil Nadu, (1996) 4 SCC 281 : (1996 AIR SCW 2251). It is not necessary to traverse the law; nor to go into the facts of all the cases. Suffice it to state that all relate to fiscal enactments.

107. R. L. Arora v. State of Uttar Pradesh, (1964) 6 SCR 784 : (AIR 1964 SC 1230) related to the validation of the declaration under Section 6 of the Land Acquisition Act which was declared invalid in R. L. Arora v. State of U. P., (1962) Supp (2) SCR 149 : (AIR 1962 SC 764), wherein this Court had held that the Government was devoid of power to publish more than one declaration under Section 6 of that Act. After the amendment of the Principal Act by Amendment Act of 1962, the base on which Section 6 was declared unconstitutional, was removed. That was upheld by this Court in 1964 since the legislature had the power under the Act to validate the invalidity declared by this Court, by removing the base. After amendment, this Court could no longer declare such a declaration to be unconstitutional. Shri Rajeev Dhavan placed strong reliance on a recent judgment of this Court in Meerut Development Authority v. Satbir Singh, (1996) 11 SCC 462 (464) : (1997 AIR SCW 167), to which one of us, K. Ramaswamy, J. was a member. Therein, the Land Acquisition Act, the Central Act, was amended by the State Legislature which received the assent of the President of India and thereafter the declarations which were found invalid were validated with a non obstante clause. This Court upheld the constitutionality not only of the Act but also of the notifications issued thereunder. It is thus seen that the base on which the invalidity pointed out, was removed and acts done under the invalid Act were validated legalising the illegal action. As stated earlier, the effect of the validating Act is to legalise a law declared and/or a mandamus issued in furtherance thereof, by this Court to be illegal, invalid or unenforceable. The ratio in these cases is not apposite to the fact-situation in the present case. Though Shri Rajeev Dhavan placed reliance on other decisions viz., Udai Ram Sharma v. Union of India, (1968) 3 SCR 41 (51) : (AIR 1968 SC 1138); M/s. Utkal Contractors and Joinery (P) Ltd. v. State of Orissa, (1987) Supp SCC 751 : (AIR 1987 SC 2310); Vijay Mills Co. Ltd. v. State of Gujarat, (1993) 1 SCC 345 : (1994 AIR SCW 1271); and Bhubaneshwar Singh v. Union of India, (1994) 6 SCC 77, it would be futile to refer to them in detail and elucidate the same principles culled out in Indian Aluminium case (1996 AIR SCW 1051) to avoid needless burden on the judgment.

108. Shri Rajiv Dhavan further contended that in Section 25, the word 'except' should be supplied by employing the doctrine of casus omissus that the Court has the power to supply that omissions to make the Act a consistent whole. In support thereof, he placed reliance on various decisions of this Court, and English Courts v., Nokes v. Doncaster, (1940) 3 All ER 549; W/s, Pyarchand Kesarimal Porwal Bidi Factory v. Onkar Laxman Thenge, (1969) 2 SCR 272 : (AIR 1970 SC 823) and JNU v. Dr. K. S. Jawatkar, 1989 Supp (1) SCC 679 : (AIR 1989 SC 1577).

109. Though in an appropriate case, the Courts adopted the device of supplying the omissions, the doctrine of casus omissus to read the Act to make Act/Section as a consistent scheme of the Act, on the facts in the case, the ratio becomes inapplicable. The reason is obvious. The legislate did not intend to introduce exception in view of the fact that they cannot directly overrule the decision in Sehgal (AIR 1991 SC 1406) and Chopra (1991 AIR SCW 1028) cases. So, what they cannot directly do, cannot indirectly be allowed to be done. When such being the case the Court cannot compound the camaflouge by supplying the so-called omission deliberately omitted by the legislature. It is not an unintentional one. It would appear from the Joint signatures of the Chief Minister and the Law Secretary on the statement of objects and reasons, which is a strange feature, they were in dilema and cought two horns of unwealdy bull and no one was singly prepared to share the responsibility. In that backdrop scenerio, the so-called omission, if suggested 'except' is not an accidental slip. In the smithy of ironing the creases, we cannot strengthen it as it became too hard to meddle, whatever would be the consequence of the use of the word 'except' in Section 25.

110. In Madan Mohan Pathak v. Union of India, (1978) SCC 50 : (AIR 1978 SC 803). Section 49 of the LIC Act, empowers Central Government to make regulations consistent with the provisions of the Act. Regulation 58 empowers the Corporation to grant non-profit sharing bonus to its employees subject to such directions as the Central Government may issue pursuant thereto, several settlements were effected with the Union of the employees. One of the settlements dated January 24, 1974 was for payment of bonus to Class-III and Class-IV employees and grant of bonus also was approved by the Central Government. Since payment was not made which is in violation of Section 18(1) of the Industrial Disputes Act, the employees filed a writ petition for a declaration and direction. The High Court had held that non-implementation violated settlement and direction was given for payment of the bonus. An appeal was preferred against the judgment to the Division Bench of the High Court and was pending. The LIC (Modification and Settlement) Act, 1976 was enacted. The LPA was dismissed as withdrawn. The writ petition was filed under Article 32 impugning the validity of the 1976 Act which would take away the effect of the writ of mandamus dated May 2, 1976 issued by the High Court against the LIC. Per majority, Justice Bhagwati, speaking on behalf of himself, V. R. Krishna Iyer and D. A. Desai, JJ. held that if the contention of the Union-stood accepted, there was a little dout subject, of course, to the constitutional challenge to the validity of the impugned order that the judgment of the learned single Judge would have been set aside on the basis of altered law and the writ petition got dismissed by Division Bench of the High Court.

111. Bhagwati, J. pointed out that it is significant to note that there was no reference to the judgment of the Calcutta High Court in the Statement of Objects and Reasons, nor any non obstante clause referring to a judgment of a Court found in Section 3 of the impugned Act. The attention of the

Parliament does not appear to have been drawn to the fact that the Calcutta High Court had already issued a writ of mandamus commanding the LIC to pay an amount of bonus for the year 1st April, 1975 to 31st March, 1976. It appears that unfortunately, the judgment of the Calcutta High Court remained almost unnoticed and the impugned Act was passed in ignorance of the judgment. The settlement became enforceable by the writ of mandamus granted by the judgment and is not based on settlement to annual cash bonus. This right under the judgment was not sought to be taken away by the impugned Act. The judgment continued to subsist and the LIC is bound to pay annual bonus to Class III and Class IV employees in obedience of the writ of mandamus. The error committed by the LIC was that it withdrew the LPA and allowed the judgment of the learned single Judge to become final. By the time the LPA came up for hearing, the impugned Act had already come into force and the LIC would have successfully contested the LPA. If such a contention had been raised, there is a little doubt, subject, of course, to any constitutional challenge to the validity of the impugned Act that the judgment of the learned single Judge would have been up turned down and the writ petition dismissed. But on account of some inexplicable reasons which is difficult to appreciate, the LIC did not press the LPA and the result was that the judgment of the learned single Judge granting writ of mandamus became final and the LIC is not absolved from the obligations imposed by the judgment to carry out a writ of mandamus of relying on the impugned Act. Beg, J. (then, Chief Justice concurring with the above learned Judges had held that the rights of the citizens under the settlements passed into the judgment and the settlement became basis of a mandamus from the Court. It could not be taken away in indirect fashion by enacting some ordinary Act of Parliament.

112. This Court, therefore, held that by reason of the factual or legal situation, the judgment was not rendered ineffective. So long as the judgment stands, it must be obeyed by the LIC. "We are, therefore, of the view that anything irrespective of the validity upon, the LIC is bound to obey that writ of mandamus issued by the High Court and to pay the bonus in terms of settlements." Beg, Chief Justice aggreeing with the three learned Judges in para 27 at page 84 it was held that it would be unfair to adopt legislative procedure to undo settlement which had become the basis of the decision of the High Court. Even the legislature can be the basis of a decision to do it, by an alteration of general rights of the class but not by simply excluding those specific settlements between the Corporation and its employees from the purview of Section 18 of the Industrial Disputes Act which had been held to be non-violative and enforced by a writ of mandamus issued by the High Court. Such a selected exclusion would also affect Article 14, V. V. Chandrachud, J. (as he then was) speaking for himself, S. Murtaza Fazal Ali and P. N. Shinghal, JJ. did not express any opinion on the consti-tutional invalidation but upheld the majority view on the ground that the writ of mandamus issued by the High Court was not violated the provisions of Article 31(2) of the Constitution. In Janapada Sabha, Chhindwara v. Central Provinces Syndicate Ltd. (1970) 3 SCR 745 : (AIR 1971 SC 57), a Constitution Bench of this Court was called upon to consider the constitutionality of an Act making the earlier decision of the Court invalid. In 1935, the Independent Mining Local Board, Chindwara was constituted. It resolved to levy cess on coal extracted within its area at 3 pies per ton. The sanction of the Local Government as required by Section 51(2) of the C. P. Local Self-Government Act, 1920 was not obtained before levy. So, it was declared invalid. The validity was challenged and this Court in appeal held that increased levy was unconstitutional. Thereafter, the State Legislature enacted Madhya Pradesh Koyala Upkar (Manyatakaran) Adhiniyam, 1964 and validated the levy. On a writ petition filed under Article 32, a Constitution Bench of this Court had held at page 751 (of SCR) : (at P. 61, Paras 10 and 11 of AIR) thus :

"On the words used in the Act, it is plain that the Legislature attempted to overrule or set aside the decision of this Court. That, in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court. That judgment was binding between the parties and also by virtue of Article 141 binding on all Court in the territory of India. The Legislature could not say that the declaration of law was either erroneous, invalid or ineffective either as a precedent or between the parties."

113. In State of Tamil Nadu v. M. Rayappa Gounder, (1971) 3 SCC 1 : (AIR 1971 SC 231) a Bench of three Judges considered the validity and effect of the Madras, Entertainments Tax Amendment Act, (20 of 1966) and declared it invalid insofar as it attempted to validate invalid assessments without removing the basis of its invalidity. It was held that Section 7 did not change the law retrospectively. The effect of the provision is to overrule the decision of the Madras High Court and not to change the law retrospectively. What the provision says is that notwithstanding any judgment of the Court, the assessment invalidly made must be deemed to be valid. The Legislature has no power to enact such a provision. The appeal, therefore, was dismissed.

114. In Municipal Corporation of the City of Ahmedabad v. New Shorock Spg. and Wvg. Co. Ltd., (1971) 1 SCR 286 : (AIR 1970 SC 1292), a Bench of two Judges was to consider the validity of Section 152A of the Bombay Provincial Municipal Corporation Act, 1949. The appellant had assessed the immovable properties of the respondents to property tax under the Act which was declared invalid. Amendment Act titled "the Bombay Provincial Municipal Corporation (Gujarat, Amendment) Act, 1968" was passed introducing Section 152-A which was not brought to the notice of the Court at the time when the decision was rendered in the first instance; but when a demand was made for refund of the amount, it was justified on the ground that the demand for refund was invalid under Section 152-A. That the purport of Section 152-A was the tax calculated would be retained but interest would be paid thereon to the assessee. By operation of sub-section (3) of Section 152A, the Corporation refused to refund the amount illegally calculated, despite the orders of the High Court. When an appeal was filed, this Court stated that it made a direct inroad into the judicial powers of the State. The legislature under the Constitution has, within prescribed limits, power to make laws prospectively as well as retrospectively. By exercise of those powers the legislature can remove the basis of a decision rendered by a competent Court and thereby render the decision ineffective. But, no legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by Courts. Section 152A(3), therefore, was held repugnant to the Constitution.

115. In I. N. Saksena v. State of Madhya Pradesh, (1976) 3 SCR 237 : (AIR 1976 SC 2250), the appellant, a District Judge, challenged his compulsory retirement. The Memorandum issued by the

Governor, empowered the Government to retire a Government servant, on his attaining the age of 55 years, though the age of superannuation was 58 years, raised under the statutory rules issued under proviso to Article 309 of the Constitution. No provision was made in the Rule to retire the Government servant on his attaining the age of 55 years by way of compulsory retirement. Since he was retired at the age of 55 years, he challenged the order of compulsory retirement by filing a writ petition in this Court. It was held that the appellant will be deemed to have continued in service of the Government in spite of the order. However, since he attained the age of superannuation in the meanwhile, no direction for reinstatement was issued. It was, however, held that he was entitled to the consequential benefits. An Ordinance, following by an Act of legislature was made and validated the retirement of certain Government servants including the appellant, despite the judgment of this Court. Validation Act was made with retrospective effect w.e.f. March 1, 1963 and it empowered the Government to retire a Government servant on his attaining the age of 55 years. The appellant again filed a writ petition in the High Court which was dismissed. But, on appeal, a Bench of four Judges of this Court had held that the Act gives naked power to the authorities to retire any employee after his attaining the age of 55 years without providing any guidelines for the exercise of the power. The impugned Act was held ultra vires the Constitution since it seeks to validate the retirement of the appellant. In doing so, the legislature has overstepped the limits of the legislative power. Even on proper construction of the Act, the Act did not vacate the decree of this Court.

116. In Ex. Capt. K. C. Arora v. State of Haryana, (1984) 3 SCC 281 : (AIR 1987 SC 1858) a Bench of three Judges of this Court was to consider the retrospective amendment of the service law. Under the Punjab Government National Emergency (Concessions) Rules, 1965 a right was accrued to the appointment and seniority. Subsequently, the Haryana Government, by a notification dated March 22, 1976, amended Rule 2 with retrospective effect restricting benefit of Military Service up to June 10, 1966, the date on which the emergency was lifted, with the result that the rights which accrued to the petitioner in 1969-70 and 1971 had been taken away. Considering the question in para 15, it was held that a provision which touches a right in existence at the passing of the statute is not to be applied retrospectively in the absence of express enactment or necessary intendment. The Governor can also exercise the same powers under Article 309 of the Constitution and there was not the slightest doubt that the impugned amendment brought in had been made retrospective. The legislature is undoubtedly competent to legislate with retrospective effect, to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution. Taking into account the accrued or acquired rights of the parties today, the law cannot say that 20 years ago, the parties had no rights. Therefore, the requirements of the Constitution will not be satisfied if the law is dated back to 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history.

(Emphasis supplied)

Today's equals cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitu-tional consequences cannot be tampered with that way. A law which, if made today, would be plainly invalid as offending constitutional provisions in the context of the existing situation, it cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (sic) (unconstitutional) by making retrospective laws. The Court was, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 was unconstitutional, as it offended Articles 311 and 14 and was arbitrary and unreasonable.

117. In State of Gujarat v. Raman Lal Keshav Lal Soni, (1983) 2 SCC 33 : (AIR 1984 SC 161), prior to the Amendment Act, 1978 by operation of the Panchayat Acts, the ex-member employees were allocated to the Panchayat service. The Secretaries, officers and servants of the Gram and Nagar Panchayat had achieved the status as a Government servants. Subsequently, the Act was amended to restitute the former municipal employees to the status of Gram and Nagar Panchayat Employees. A Constitution Bench was to consider whether such an amendment was valid in law. This Court had held that once they had achieved the common stream of service to perform the same duties, it is clearly not permissible to make any classification on the basis of their originl. Such a classification would be unreasonable and entirely irrelevant to the object sought to be achieved. It is to navigate around these two obstacles of Article 311 and Article 14 that the amending Act was sought to be made retrospective, to bring about an artificial situation as if the erstwhile municipal employees never became Government servants. This Court put a question thus : "Can a law be made to destroy today's accrued constitutional rights by artificially reverting to a situation which existed 17 years ago? The answer was no.

118. These two decisions relied on by Shri Rajendra Sachhar, learned senior counsel for the direct recruits, are apposite to the points in controversy and be applicable to the facts of this case, though these passages were not relied on. Since the mandamus issued by this Court became final and the declaration of law is consistent with the statutory Rules, any amendment to the Act with retrospective effect cannot take away the effect of the mandamus and the Act is unconstitutional and impermissible and a legislative judgment is a trespass into the judicial review; which it is not vested in the legislature; the working of the legislature has to be confined within the parameters set by the Constitution. It cannot indirectly say that Courts in exercise of power of judicial review under Articles 32 and 226 of the Constitution or under appellate jurisdiction of this Court under Article 136 of the Constitution created inequiteous results and resultantly acted to remove injustice arisen from the judgment of the Court to the promotees.

119. In State of Haryana v. Karnal Co-operative Farmers' Society Ltd., (1993) 2 SCC 363 : (1993 AIR SCW 3432), this Court considered the validity of the Punjab Village Common Lands (Regulation) Act, 1961 and held that Shamllat deh land was not vested in the gram panchayat. By the Amendment Act, 1980 Sections 3, 4, 5 and 7 and proviso to Section 7 (1) and new Sections 13-A to 13-D were amended/introduced into the principal Act with retrospective effect. A Bench of two Judges of this Court was to consider the object of the Act, the effect of the legislature judgment on

the judicial verdict and held that under Articles 245 and 246 the legislature was not competent to declare an earlier decision as invalid or not binding. It was held that the power of the amendment, though may be exercised prospectively, but it cannot be made retrospective to render ineffective an earlier judicial decision by removing or altering or neutralising the legal basis in the unamended law on which decision was founded, even retrospectively. The effect of such a law is to declare an earlier judicial decision as invalid or not binding for such power, if exercised, would not be a legislative power but a judicial power which cannot be encroached upon by the legislature under our Constitution.

120. In the matter of Cauvery Water Disputes Tribunal, 1995 Supp (1) SCC 96 : (1992 AIR SCW 119) a Constitution Bench was to consider the validity of the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991. The Constitution Bench had held that the Central Water Board constituted under Inter State Water Disputes Act, 1956 issued interim awards directing Karnataka State to release the water to Tamil Nadu, the Tower riparian State. Though, that order could have been nullified in appeal under Article 136 to this Court, the legislature of Karnataka had no power to nullify the order of the Water Board. It amounts to interference with the judicial power of the Court vested in the Board. The reference on other point was also answered accordingly.

121. In S. R. Bhagwat v. State of Mysore, (1995) 6 SCC 16 : (1995 AIR SCW 3918), the employees working in the Forest Service a Deputy Conservators of Forests were governed by the Mysore State Civil Services (Regulation of Promotion, Pay and Pension) Act, 1973. They challenged violation of their right on the basis of Section 115 of States Reorganisation Act since they were employees of former State of Hyderabad, claiming that their rights arose under the Hyderabad Civil Services Regulations. The High Court had upheld their right, but the Karnataka Civil Services (Regulation of Promotion, Pay and Pension) Act was amended with retrospective effect. The question arose: whether the legislature was competent to validly invalidate the decision of the Court under the exercise of the power judicial review? This Court exercising the power under Article 32 of the Constitution declared the law invalid, holding that the order of mandamus was sought to be nullified by the impugned legislation which is clearly impermissible legislative exercise. This is also an answer to the proposition relied on by Shri Rajiv Dhawan, i.e., not to rely on Statement of Objects and Reasons, as held at page (of SCC) : (at P. 3923 of AIR) on Statement of Objects as under :

"A mere look at the third and fourth paragraph of this preamble shows the legislative intent to bypass the final directions contained in the Division Bench judgment of the High Court."

122. Keeping in view the aforesaid key to the passing of the Act, the Court proceeded to examine the relevant provisions of the Act and held it to be invalid.

123. In Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan, (1996) 2 SCC 449 : (1996 AIR SCW 855), the State of Rajasthan issued a notification under Section 7(1) of the Raiasthan Town

Municipalities Act, 1951, proposing to extend the limits of the Kota Municipality so as to include within its limits Rajpura village. The provisions of Rajasthan Municipal Act, 1959 relating to the power of delimitation of the municipalities was questioned. The High Court declared that the requirement of the law was not met in dealing with the municipalities and extending limits of the Kota Municipalities under that Act; subsequently, Kota Municipality Limits Extension and Validation Act was passed. Section 3 of the validating Act, with a non obstante clause contained in Sections 4 to 7 of the 1954 Act, took away the effect of any judgment, decree or order or direction of any other Court in the matter of extension of the limits of Kota municipality to include Raipura and Ummedganj so that they could be deemed always to have been continued to exist within the limits of Kota Municipality. This Court considered its validity and held that the defect pointed out by the Court was not validly removed by the validating Act, which is an essential requisite for passing a validation Act. It was, accordingly declared as invalid by a Bench of three Judges. In Peddinti Venkata Muraliranganatha Desika Iyengar v. State of A. P., (1996) 3 SCC 75 : (1996 AIR SCW 408), this Court was to consider the constitu-tionality of Section 76 of A. P. Charitable and Hindu Religious Institutions and Endowments Act, 1987. The question that arose was whether the legislature, by a side wind, without suitably amending the Inams Abolition Act, as interpreted by the High Court, or repealing it, could directly nullify the said law laid by the Court and divest, under Section 76 of the Act, the vested right and declare that the land was not covered by the said ryotwari patta or shall not be transferred or shall be deemed never to have been transferred thereunder and would treat such persons as encroachers? "Religious endowments is defined under Section 2(22). A Bench of two Judges, (to which one of us K. Ramaswamy, J, was a member) had declared the said provisions ultra vires the power of the Legislature though the legislature was competent to enact the law. The foundation on the basis of which the Ryotwari Patta was granted under Inam Abolition Act was not admittedly removed. Law was enacted to take away the vested rights by a side wind. Accordingly, exercises of the legislative power under Section 76 read with Explanation II of Section 2 (22) of the Act was held unconstitutional. In K. Sankaran Nair (Dead) through LRs. v. Devaki Amma Halathy Amma, (1996) 11 SCC 426, the Kerala Land Reforms Act, 1963 barred creation of leases. A judgment was rendered by the Court declaring that such leases were invalid and that the tenants did not acquire any right thereunder. Section 6-C was introduced by Kerala Land Reforms (Amendment) Act, 1979 with effect from 7-7-1979. The same came to be questioned and this Court had held that Section 6-C could not be pressed into service by the original appellant for displacing the binding judgments rendered by the Tribunal, the High Court and the Supreme Court in the earlier tenancy proceedings wherein his claim for tenancy of the suit had come to be repelled and those judgments became final and binding and were not in any way legally displaced by any competent piece of legislation by the Kerala Legislature.

124. A further resume of these precedents would firmly lay the tests that the legislature has power to alter the language in the statute by employing an appropriate phraseology; to put up its own interpretation inconsistent with that put up by this Court in an earlier judgment on the basis of pre-existing law; and to suitably amend or alter the law removing the base on which the previous decision was founded. In the altered structure of the statute, the Court in the first instance, had that phraseology been available on the statute, the Court could not have declared the Act as invalid or otherwise of the previous law. Thus, the previous law was rendered as invalid was made valid and ineffectual and the consequential executive action, unenforceable.

125. In suitable, cases, giving retrospective effect to such validating law was permissible by legislative exercise of the power; this Court accepted the retrospective validation in fiscal statutes and rarely in other laws relating to procedural facets in the respective legislative Entries in Lists I, II and III of the Seventh Schedule to the Constitution and rarely in areas of divesting vested rights had under the judgment. But all the decisions related to retrospectively declaring and validating by legislation as valid law by removing the base and of the declaration of an invalid law as valid and make the base of removal as legal. In no case a valid declaration of law was attempted to be made invalid or illegal by retrospective legislation. In some cases, the Court upheld the power of making even a fresh legislation provided the law was made removing the base as pointed out in the previous judgment which would no longer be available for future application and given prospective operation. Such law was made to apply to future cases. The rights acquired, or accrued or the benefits accrued under such declaratory law were not taken away except in fiscal statutes or on some procedural aspects of dealing with the rights of the parties. It is equally settled law that no one has vested right in procedure.

126. In Ex. Capt. K. C. Arora's case (AIR 1987 SC 1858) and Raman Lal Keshav Lal Soni's case (AIR 1984 SC 161), this Court did not approve of retrospective legislation to take away vested rights which accrued over 20 to 17 years prior to validation this Court point out that a deeming fiction cannot be set on foot to set at naught a situation existing over the years. Legislature is competent and has power to render a decision ineffective by fundamentally altering the character of law curing the defects pointed out in the previous decision and give it retrospective operation. If the legislation is otherwise constitutional and within competence, legislature can remove the defects but not have power to directly adjudicate it.

127. It is seen that in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases, this Court had issued mandamus directing the State Government to prepare the seniority list inter se between the direct recruits and the promotees in accordance with the repealed statutory Rules as interpreted in the judgments which became final and B. D. Sardana, one of the respondents, in Chopra's case in whose favour a direct mandamus was issued for compliance. The rights of the parties are founded on declaration of law under Article 141 and mandamus and consequential directions to inter parties. The Statement of Objects and Reasons and the Preamble to the Act do clearly indicate a brutal frank admission that attempt was to overrule the judgment of this Court by amending Section 2(12) (c) and introducing an explanation thereto by amending Section 5(2) with a proviso added thereto and Section 12 for preparation of the seniority. As seen earlier, this Court did not find any provision of the Rules ultra vires though the observation came to be made that normal rules of service jurisprudence of continuous length of service were not followed in the repealed Rules relating to Buildings and Roads and Public Health Branches of the Service. That observation cannot be torn of the context with an attempt to overrule the judgment. It renders the previous litigation and resulted judgment fruitless. The mandamus or direction remains a right embedded in the judgment like an ornament without reaping fruit thereof. The respective legislation alters the seniority position and starts replay by redoing promotion once over. This exercise gets repeated time and again as soon as a judgment is rendered playing havoc with the service. The officer would never know his real position in seniority committing him to political masters rather than the constitution and rule of law and judicial review. Therefore, the Amendment Act is a direct affront to the mandamus issued by this Court. Though a facade of attempt was made to remove the base, the real

result of the legislation was to set at naught the effect and direct result of the mandamus issued by this Court. Therefore, it is impermissible by a legislative judgment to render the mandamus issued by this Court ineffective and valid declaration of law to become illegal. Therefore, by an indirect side track, the legislature cannot take away the effect of the mandamus.

128. It is true, as contended by Shri Rajeev Dhawan, that the legislature is entitled to put up interpretation different from the one taken by the Court; the legislature can by employing appropriate and suitable phraseology, remove the base on the altered situation which the Court did not find in the statute existing at the time; otherwise, the Court would not have rendered the first judgment and would not have taken that view in the judgment at that time. Such an alteration or removal of the base by legislative amendment certainly is permissible. But such an attempt must not be a colourable attempt to trench upon the judicial power. This Court in Prithvi Cotton Hills case (AIR 1970 SC 192) and recently in Indian Aluminium (1996 AIR SCW 1051) and Meerut Development Authority (1997 AIR SCW 167) cases etc. pointed out that the legislature, sometimes, may give its own meaning and interpretation of the law in the legislative field of action and make the new meaning bind-ing on the Courts. But the legislature in itscolourable exercise of legislative power again cannot trespass into or encroach upon the power of judicial review expressly conferred on this Court and the High Courts, so as to give a different meaning and directly overrule the binding decision. The Court can take into account the real consequences while judging the width of the power nor can the Court ignore the consequences flowing from particular construction ascertaining the limits of the provision that granted the power. It is seen from the record, that apart from the Statements of Objects and Reasons, specific stand was taken by the Government in the counter-affidavit filed in the High Court in the writ petition and the Financial Commissioner in his order while determining the inter se seniority, had expressed himself that the interpretation in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases created inequitous situation favourable to direct recruits creating heart-burning among the promotees. That would indicate that brazen attempt was made by the executive to mask their stand through legislative intervention. The legislature did not adopt a proper device in enactment of the Act and we have no doubt that had it been brought to its notice of the legislature that the impact of the Act would lead to conflict between judicial review and legislative judgment, as stated hereinbefore, legislature would not have found it expedient or attempt to enact the law to deflate the mandamus making it ineffective and rendered the correct declaration of law as illegal.

Such an attempt has never come across in any of the decision decided previously. As stated earlier, perhaps this case may stand as a class by itself without any companion to its tally.

129. It is true that this Court with a view to sustain the validity of the validation Act applied in some cases, the doctrine of pith and substance and in some cases of incidental or ancillary and subsidiary power to validate the law declared invalid by this Court. The Federal Court in United Provinces v. Atiga Begum, AIR 1941 FC 16 and this Court in Mr. Jadao v. Municipal Committee, Khandwa, AIR 1961 SC 1487 at 1490, para 10 and host of other decisions, many of which have been considered in Indian Aluminium's case (1996 AIR SCW 1051), upheld the validation Act on the principles of ancillary and subsidiary power of the legislature to deal with a particular subject specified in the

respective lists of the Seventh Schedule. But the said power cannot be used to directly nullify the declaratory law made by this Court in exercise of the power of judicial review to make a specific direction or a mandamus which has become final. Ineffectual unless its invalidity, as has been pointed earlier judgment/order, is properly removed by employing appropriate language so as to make a new law. Such power is generally given in fiscal statutes and cases of exceptional nature but not otherwise to trench upon the power of judicial review in which event it would create disillusionment to a successful litigant or inculcate in him apathy in the efficacy of rule of law and the judicial process. The writ of mandamus or other directions merely remain a pious platitude to rule of law or profligacy to avail power of judicial review. Care and circumspection should always be taken to clearly demarcate the line between validating legislation removing the base on which the foundation of the previous judgment rests and the Act which clearly, through colourable attempt of removing the base, renders the judgment ineffective or illegal, the writ of mandamus or direction issued by the constitutional Court by legislature fiat.

130. Here, we may point out that if the legislature finds that the declaration of law by this Court/High Court is not consistent with the public policy envisaged in the Act and the interpretation stems to defeat the public interest or public justice, certainly the legislature would be entitled to formulate its legislative policy consistent with the constitutional scheme and enact the law/amend even the law declared by this Court. But such an enactment must be applicable prospectively and not to the cases which have become final and the rights having accrued to the parties for long under the judgment cannot be taken away except in the cases of fiscal statutes or cases relating to procedural facets of the Act. For instance, in Indra Sawhney v. Union of India, (1993) Supp (3) SCC 210 (217) : (1992 AIR SCW 3682), this Court interpreted Article 16 and held that the word 'employement' would not include 'promotion' and reservation in promotion upheld in Rangachari's case (AIR 1962 SC 36) and followed in other cases was declared unconstitutional. Those cases were overruled but simultaneously suggestion was made to the legislature to enact suitable law within five years from the date of the judgment. The Constitution (77th Amendment) Act, 1995 was enacted introducing Article 16(4A) expressly empowering the State to make any provision for reservation in matters of promotion in any class or classes of posts in the service under the State in favour of Dalits and Tribes which in the opinion of the State are not adequately represented in the service under the State. Such prospective legislation is always permissible but retrospective legislation, thereby, is clearly illegal.

131. Shri Rajiv Dhavan contended that the law enacted by the Haryana Legislature is in substance and in reality is a law on the subject of regulating the service conditions of the officers of respectives Branches of Haryana Service of Engineers, Class I, PWD. No motives or mala fides can be attributed to the Legislature. There is a presumption in favour of the constitutionality of the statute. The Legislature would be colourably exercising the power if it seeks to do indirectly what cannot be done directly. Therefore, it is fraud neither on power nor on the Constitution, nor a colourable exercise of the power seeking to overturn the judicial interpretation given by this Court. We find to force in the contention. In T. Venkata Reddy v. State of Andhra Pradesh, (1985) 3 SCC 198 at 211 : (AIR 1985 SC 724 at P. 731), para 14, this Court had held that no mala fides can be attributed to the legislature. Equally, it is settled law that there is a presumption in favour of the constitutionality of a statute as held in V. M. Syed Mohammad and Co. v. State of Andhra Pradesh, 1954 SCR 1117 at 1121 : (AIR 1954 SC 314 at p. 316), and bead roll of precedents grown around it;

the same need no reiteration.

132. The doctrine of incidental power is founded upon the principle that in a case where on the face of a statute, it appears that the legislative subject falls both in the Union as well as the State List, but on a careful scrutiny it becomes clear that it falls merely incidentally in one List but substantially in another List, to relieve the statute from its invalidity or unconstitutionality, this Court founded the principle of incidental power. However, it cannot be regarded as the case of substantial encroachment trespassing into another field. The incidental or initial encroachment, therefore, means that in enacting a legislation, the legislature has not traverse beyond the legislative field allotted to it by the arrangements of distribution of powers in the respective Entries in the concerned list in the Seventh Schedule. There has been merely incidental encroachment on the federal/State power of the respective legislature in the respective Lists, but such incidental encroachment does not affect the main scheme of the distribution of the powers in the Seventh Schedule. It is not concerned with the repository of power granted to the legislature under Article 245 or Article 246 or related Articles in that behalf.

133. Colourable legislation would emerge only when a legislature has no power to legislate on an item either because it is not included in the List assigned to it under the respective Entries in the Seventh Schedule of the Constitution or on account of limitations imposed either under Part III of the Constitution relating to Fundamental Rights or any other power under the Constitution. As the legislature enacts a statute on an assumption of such power, but when on examination, if it is found that it has travelled beyond its power or competence or in transgression of the limitations imposed by the Constitution itself, such an enactment is called a colourable legislation. It has reference only to the legislative incompetence and not to the power as such. If the legislature enacts law in the pretext of the exercise of its legislative power, though actually it did not possess such power, the legislation to that extent becomes void as the legislature makes its Act only in presence of and in purported colourable exercise of its power.

134. The doctrine of fraud on power means that the legislature really has the power but does not exercise that power. It merely pretends to have exercised the power. In the eye of the law, such an Act is not a law at all, but it is mere pretence of law and the Court will not take notice of such law. The doctrine of fraud on the Constitution is altogether a different facet and a serious charge. It would mean that when there is a constitutional restriction or prohibition to make a legislative enactment but the legislature in spite of the prohibition and restriction makes such law, it is a fraud on the Constitution. Therefore, the distinction between the fraud on power and the fraud on the Constitution is clear and unambiguous. The doctrine of fraud on power cannot be confused with the doctrine of the fraud on the Constitution. The principle of fraud on power is applicable when the legislature has power to enact but does not exercise that power as elucidated upon. On the otber hand, the doctrine of fraud on the Constitution means that when the legislature has no power and in spite of the constitutional limitation or prohibition, it makes enactment in pretence of its power. It would therefore, be necessary to examine each of these concepts in the light of the related subject, the legislative history, the respective Entries in the concerned Lists of the Seventh Schedule and the power of the legislature.

135. As stated already, the legislature of Haryana does has power to make a law either under Article 309 or under Entry 41 of List II of the Seventh Schedule to the Constitution to regulate, the recruitment and conditions of service of its employees. It is seen that the substantive power is under Article 245(1) but the exercise of the power therein is subject to the Constitution. It is already seen that in Chapter IV of Part V of the Constitution, "the Union Judiciary" and in Chapter V of Part VI, all "the High Courts of the States" are the sources under which this Court and the High Court came to be constituted and the Judges are appointed under Article 124 or Article 217; the conditions of service of the Judges appointed under the respective Chapters are secured subject to the only power of removal under Article 124(6) and the Rules made therein and in accordance with the procedure laid down therein or to regulate the aberrations of the conduct with "in house procedure" as was held by this Court in C. Ravichandran Iyer v. A. M. Bhattarcharjee, (1995) 5 SCC 457 : (1995 AIR SCW 3768). The power of judicial review has been expressly conferred by Articles 32 and 226/227 of the Constitution on this Court and the High Courts respectively. Even the judgment of the High Court is subject to further appeal to this Court under Article 136 or on leave granted by the High Court under the respective Articles like 133/134-A etc. Thus, the power of Judicial review is an inbuilt and ingrained constitutional power expressly conferred on the constitutional Courts and also their constitutional duty and responsibility to exercise the power of judicial review of legislative or executive actions and of other orders of quasi-judicial bodies/authority. The law laid down by this Court is law of the land under Article 141 and it binds all Courts within the territory of India. The declaration of law, therefore, is the law of the land which binds all parties and all the Courts in the country and all the other wings of the State, namely, the legislature and the Executive, subject to the suitable amendments made to the law as recognised by this Court in Prithvi Cotton Mill's case (AIR 1970 SC 192) and hosts of decisions followed thereafter. In the light of the above constitutional limitations, the question emerges : whether the Act is a fraud on the Constitution or a colourable legislation?

136. It is then contended by counsel for the appellants that right to promotion is not a vested right. The employee has only a right to be considered for promotion in accordance with the rules/law. The Rules framed in exercise of the power under proviso to Article 309 are held to be legislative in character and retroactivity thereof has been upheld in several decisions. The right to promotion is required to be considered in accordance with law at the time of making the promotion. Similarly, seniority list has to be prepared in accordance with the existing law. Sri Rajeev Dhawan further contents that the seniority list of 1992 in compliance with the mandamus issued by this Court had already been prepared and, therefore: the effect of the mandamus issued by this Court got exhausted. Subsequently, when the Act was made, the seniority list was required to be prepared in accordance with law. The seniority, therefore, prepared by the State Government was wrongly set aside by the High Court. So, it is not in accordance with the law. Therefore, it required interference. Proviso to Rule 5(2) of repealed Rules vis-a-vis Irrigation Branch provided for confirmation and, thereby, under those Rules, unlike in Buildings and Roads and Public Health Branches, the promotees become a members of the Service from the date of their promotion. Once they are confirmed in accordance with Rules, their seniority dates back from the date of continuous officiation. The promotion was made in accordance with the Rules. Therefore, the service rendered, though within the quota of the direct recruits, is not fortuitous. In support thereof, he places reliance on B. S. Yadav v. State of Haryana, 1980 Supp SCC 524 : (AIR 1981 SC 561). For the retroactivity and for continuous officiation, he placed reliance on the ratio of the Constitution Bench Judgment of Direct

Recruits Case (AIR 1990 SC 1607).

137. The contention of Shri Rajiv Dhavan that after the preparation of the seniority list in 1992, the mandamus issued by this Court got exhausted and the Acts would take hold of the field and the seniority list would be required to be drawn in accordance with the Act, is clearly unsustainable. A mere pretence of compliance of the direction relating to preparation of the seniority list is not a compliance of the mandamus. It is required to be complied with in the letter and spirit as directed therein. Otherwise, it may amount to contempt of the Court to be dealt with in accordance with the relevant law or under suo motu power of this Court or of the High Court. That apart the Government does not rely on the compliance of the mandamus; until it is duly modified by a judicial order of the Court in an appropriate forum known to law, the State cannot, seek shelter under the provisions of the Act to decline preparation of seniority list in accordance with the mandamus. Even after the date of the prospective enactment, it needs to be complied with. The reason is obvious that the seniority has to be worked out not in accordance with the law made in the Act but in accordance with the declaration of the law in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) case and the mandamus issued respectively thereunder and similar compliance of the High Court's order in related cases of Irrigation Branch. Even for future appointments, as rightly pointed by Shri Altaf Ahmad, they cannot create imbalances and upset the quota prescribed between the direct recruits and the promotees. The contention that the Government acted upon a suggestion made by one of the learned Judges of that High Court that quota should be done away with, has no legal or constitutional foundation. This Court constantly has upheld the principle of blending youth with their experienced counter-part promotees, i.e., direct recruitment and promotion drawn from two different sources, to augment efficiency in Service as a constitutional principle. For instance, for All India Services, direct recruitment of IAS, IPS etc. would be inducted from open market and promotee officers drawn from the respective States Services are their trainee officers. The direct recruit, many a time, works as a probationer under the promotee officer but on his reaching senior scale, they steal a march over the former senior promotee officr, and sit over the promotee officer. The ground of heart-burning and of junior overtaking senior find no constitutional base and this pretext of frustration and heart-burning is for negation of the constitutional and statutory base for recruitment through two different sources, namely, induction of young blood by direct recruitment and promotion of mature and experienced officers from the other sources, to fuse into Service, as a valid classification, just, reasonable and fair procedure for augmenting public purpose, namely, efficiency of the service. Therefore, the equitable considerations strongly, fervently and repeatedly put forth by Shri D. D. Thakur and Rajeev Dhavan do not get their play in the factual zone.

138. Equally, the contention of Shri Rajeev Dhavan that the legislature would be justified to defeat, by enactment of the Act, the right of a single individual, namely, Dr. G. D. Sardana to benefit the large group of promotee officers, on the higher principle of equity and ethics, does not get acceptance for the reasons already mentioned. It is true that a direct recruit steals a march over the promotees, but so long as the operation of law is within the clay (play) of law and the Constitution, the consequences are inevitable and the plea of continuous length of service gets obliterated and thereby arbitration does not get, sustenance over majesty of Constitution and lend colour to overcome writ of mandamus issued by this Court.

139. At this juncture, as stated earlier, we may deal with the effect of the operation of the repealed Rules relating to PWD Irrigation Branch prior to the Act. It is true that under the said Rules, the promotees, in excess of the quota of 75% for eight years and 50% thereafter, would be members of the Service and confirmation of probation shall be made under proviso to sub-rule (2) of Rule 5 of Irrigation Branch Rules. The effect of the Amendment Act has already been considered and needs no reiteration. It was held that until they are duly appointed substantively to the service in accordance with sub-section (9) of Section 8 of the Act or corresponding repealed Rules, they do not become members of the Service, though they are confirmed probationers. Availability of the cadre post within quota was a pre-condition to become a substantive member of the Service. Though at first blush, we were impressed with the argument of Shri Rajeev Dhavan, on deeper probe, we find it difficult to accept the contentions on true and proper construction of the language. Though we did not substantially interpret the Irrigation Branch repealed Rules in the earlier judgments, it makes little difference, except to the small extent of making a probationer or officiating promotee Executive Engineer a member of the Service, for the purpose of computation of the period of probation and for awaiting appointment in a substantive capacity to any post available within the quota. This conclusion gets manifested by reading the relevant provisions in the repealed Rules vis-a-vis Irrigation Branch thus :

140. Rule 2 (12) defines "member of the service", to mean an officer appointed, substantively to a cadre post and includes (a) in the case of a direct appointment an officer on probation, or such an officer who, having successfully completed his probation, awaits appointment to a cadre posts (b) in the case of an appointment by promotion an officer on probation or such an officer who having successfully completed his probation "awaits appointment to a cadre post". Rules 5(2), 8(12) and 12(6) read as under :

"5. Recruitment to service

(a) . . . . .

(b) Recruitment to the service shall be so regulated to the number of posts filled by promotion from Class II Service shall not exceed fifty per cent of the number of posts in the Service, (excluding the posts of Assistant Executive Engineers).

Provided that till such time as an adequate number of Assistant Executive Engineers, who are eligible and considered fit for promotion, are available, the actual percentage of officer promoted from Class II service may be larger than fifty per cent.

8(12) Appointment by promotion may be made to an ex-cadre post, or to any post in the cadre in an officiating capacity from the list prepared under this rule.

12(6) Subject to the provisions of sub-rules (7) and (8) below, the year of allotment of an officer who is initially appointed to the service as Executive Engineer, shall be the same as that of the junior most officer in the service whether officiating or confirmed as Executive Engineer before the former's appointment.

Explanation - If an officer appointed to the Service as officiating Executive Engineer, later on reverts from that post and is again promoted to it, for purpose of this rule, the year of allotment shall be determined taking into consideration the date of his latest appointment on the post of the Executive Engineer."

141. A conjoint reading of these Rules would indicate that the appointment in a substantive capacity to a cadre post is necessary to become full member of the Service. The inclusive definition of Rule 2 (12) (b) makes one a member of the Service on appointment as probationer or on successful completion thereof "awaits appointment to a cadre post". So, both the main clauses and this deeming clause of the definition in their turn posit appointment to a cadre post but temporary breather is provided, unlike in Buildings and Roads and Public Health Branches, to enable the promotees to be probationers to complete their probation and on successful completion, to await appointment in a cadre post to a substantive capacity within the quota. Equally, Rule 5 (2) does not advance the case of the promotees any further. The proviso to Rule 5 (2) gives power to the State Government to give promotion obviously prior to appointment to a cadre post, within the quota of direct recruits, to promote Class II officers in excess of the actual percentage i.e., larger than 50%. Equally, this elbow power given to the State is hedged with the condition that the promotee Class II officers shall not exceed 50% of the number of cadre posts in the service excluding the post of Assistant Executive Engineers. Rule 8(12) equally does not advance the case any further. It merely enables a promotee to be appointed to an ex-cadre post or to any post in the cadre in an officiating capacity from the approved list. Again, with a view to enable the promotees either to complete the probation, he has to await appointment as a full member in a substantive capacity or the cadre posts. But for this elbow power, the promotee has no right like the promotee in Buildings and Roads and Public Health Branches, to get into the Service even on probation or in officiating capacity. If so read, Rule 12(6) or Rule 12(9) does not give them the year of allotment over the direct recruits in excess of 50% quota reserved for direct recruits nor would he be eligible to steal a march over the direct recruit. Any period of service earlier to the appointment in a substantive capacity to a cadre post within the percentage not exceeding 50% of the number of cadre posts excluding the period in the post of Assistant Executive Engineer, thus, becomes fortuitous. In this behalf, it may be relevant to note some of the previous judgments rendered by the Constitution Benches or three Judges Benches in that perspective.

142. In S. C. Jaisinghani v. Union of India, (1967) 2 SCR 703 : (AIR 1967 SC 1427), the celebrated

judgment in these field of service jurisprudence, involving conflicting seniority between direct recruits and promotees, the Constitution Bench speaking through V. Ramaswami, J. had held that the direct recruits appointed to Class I, Grade II service after successfully completing the competitive examination for members of the Service, are members of Service from inception. There is a distinction between direct recruits and promotees. It was a case of recruitment from two different sources and the adjustment of seniority between them. The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on differences between the two sources, and the said differences have a reasonable relation to the nature of the office, it can legitimately be sustained on the basis of a valid classification. The direct recruits were introduced with a view to improve the efficiency of services. The reason for the classification was that the higher echelons of the service should be filled by experienced officers possessing not only a high degree of ability but also first-rate experience. A rule which gives seniority to outstanding officers on considerable experience and selected on the basis of merit and limiting the promotion to a percentage not exceeding the prescribed limit, cannot be regarded as unreasonable. The net effect of the rule is that the direct recruit stand to have an edge over the promotee with a lesser period of probation and service and, therefore, the deemed promotion given to Class II, Grade III officers was held unconstitutional. The object of rule of promotion to the direct recruits with three years' experience is to carry out the policy of Rule 1(f) (iii) and not to allow it to be defeated by the requirement of five years service in Class-I, Grade-II itself before consideration for promotion to Class-I, Grade-I. Otherwise, a promotee certified as fit by the Departmental Promotion Committee will be senior to direct recruits who completed their probation in that year but the seniority would be an empty formality. If the officer is not allowed to count his period service in Class-II for the purpose of promotion to Grade-I, he would have to wait for a long period to go to Grade-I, Class-I the direct recruits who completed their probation would go to Grade I, Class I by counting five years' service from the date on which they were placed on probation. The writ of mandamus was accordingly issued directing the respondents to adjust the seniority of the appellant and other officers similarly situated to prepare a fresh seniority list adjusting the recruitment for the period specified between 1951 and 1956, always in accordance with the quota rule. Similar directions were given for the subsequent periods to prepare seniority between direct appointees and promotees, the details of which are not material. The point in issue is that preferential treatment to the direct recruits as against the promotees was held to be reasonable to improve the efficacy of service and seniority determined within the quota between the period specified in the Rules.

143. E. D. Helms v. Mohan Chandra Joshi, AIR 1972 SC 2627 is again a case of Income-tax Officers Class I, Grade I Service. The question again pertained to the inter se seniority between direct recruits and the promotees within the ratio of one-third and two-third. The Constitution Bench considered the question and held that it is for the Government under Rule 4 to determine the appropriate methodology for filling up particular vacancies and the number of candidates to be recruited by each method. The vacancy for any particular year being ascertained, not more than one-third of the same are to go to the promotees and the rest to the direct recruits. The ratio is not dependent on whether any direct recruit was appointed in any particular year or not; following the ratio in Jaisinghani's case (AIR 1967 SC 1427), the Constitution Bench upheld the ratio between direct recruits and promotees and vacancies for the direct recruits whether or not they were recruited in that order, were directed to be preserved for direct recruits. In para 6, it was further pointed out that since at the time of entry into Class I, Grade II service the recruitment was from two different sources, no question of infringement of Articles 14 or 16 (i) arose. On facts, there was no sufficient

material before the Court to decide whether or not the appointment of the promotees were or were not in excess of the quota of 33-1/3% of permanent vacancies available to the promotees. Accordingly, the mandamus was issued directing the Central Government to identify the vacancies and fill up the vacancies in accordance with law and within quota. We may point out, at this state, that no distinction between a post and vacancy was founded by this Court. This Court always treated vacancies as posts and when the direct recruitment is to be made it is always to the posts. Similarly, when the appointment by promotion is made, it is made to posts as vacancies in the posts as indiscriminately called vacancies and the ratio of 50% is required to be filled up between direct recruits and the promotees and in the case of the irrigation Branch for first eight years, 75% posts were reserved for the promotees and 25% to the direct recruits. The nail on the principle of equity and heart-burning and consequent acrimony was firmly put by these two Constitution Bench judgments which were blissfully forgotten.

144. In Bachan Singh v. Union of India, (1972) 3 SCC 898 : (AIR 1973 SC 441), another decision of a Constitution Bench, the inter se seniority between the promotees and direct recruits was the question. The appellants were confirmed promotees while the contesting respondents were the direct recruits. It was held that the appointment to Class I service by interview was made by the Government in consultation with the Union Public Service Commission, due to emergency subsequently, some of them from both the categories were recruited by the Union Public Service Commission as direct recruits. The amendment of the Rules provided for the appointment by interview. Both the direct recruits and the promotees stand on different footings. No grievance with regard to confirmation was raised. Departmental promotees can be made but they are entitled to occupy post within their quota and they get the seniority in their order within the quota. They cannot occupy the vacancy of the direct recruits. The direct recruits consisting of those recruited by competitive examination as well as Union Public Service Commission occupy posts within their quota. Dispute of fixation of the seniority between the years 1959 and 1963 inclusive of the quota, fixed for the departmental promotees arose for consideration. Inter se seniority was directed to be confirmed within the respective ratio and seniority was directed to be determined on that basis.

(Emphasis supplied)

145. In V. B. Badami v. State of Mysore, (1976) 1 SCR 815 : (AIR 1980 SC 1561), a Bench of three Judges was to consider the inter se seniority between the direct recruits and the promotees. This Court laid down six principles in determination of the inter se seniority as under (Para 29 and 34 of AIR) :

"The principles generally followed in working out the quota rules are (1) where rules prescribe quota between direct recruits and promotees confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre; (ii) confirmed persons are senior to those who are officiating; (iii) as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service; (iv) direct recruitment is possible only by

competitive examination which is the prescribed procedure under the rules. In promotional vacancies, the promotion is either by selection or on the principle of seniority-cum-merit. A promotion could be made in respect of a temporary post or for a specified period, but direct recruitment has generally to be made only in respect of a clear permanent vacancy, either existing or anticipated to arise at or about the period of probation is expected to be completed; (v) if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies which are within the quota of direct recruits, when the direct recruitment takes place, the direct recruits will occupy the vacancies within their quota. Promotees who are occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of the case; and (vi) as long as the quota rule remains, neither promotees can be allotted to any of the substantive vacancies of the quota of direct recruits nor direct recruits can be allotted to promotional vacancies."

146. This decision was followed by this Court in Sehgal's case (AIR 1991 SC 1406). In Keshav Chandra Joshi v. Union of India, (1992) Supp (1) SCC 272 : (AIR 1991 SC 284), a Bench of three Judges of this Court (to which one of us, K. Ramaswamy, J. was a member) considered Rule 5 of those Rules which is pari materia to Section 5(2) of the Act or Rule 5(2) of the repealed Rules and held that in order to be a member of the service, the officer must hold the post in substantive capacity, appointment to this post must be according to rules and within the quota. The membership to the service must be preceded by an order of appointment to the post validly made. Then only an employee can be a member of the service. It was held that the promotee cannot claim advantage of seniority over the direct recruit by virtue of the promotion in excess of their quota. The theory of breaking down of the Rule profounded in Narender Chadha v. Union of India, (1986) 1 SCR 211 : (AIR 1986 SC 638); Baleshwar Das v. State of U. P., (1981) 1 SCR 448 : (AIR 1981 SC 41) and M. K. Chauhan v. State of Gujarat, (1977) 1 SCR 1037 : (AIR 1977 SC 251), has fallen apart and no longer gets respite in the light of all the decisions following the Badami's case (AIR 1980 SC 1561). The spinning of the breaking down principle was started with the decision in Gonnal Bhimappa v. State of Karnataka (AIR 1987 SC 2359). It was followed in all the subsequent decisions. The confirmation of probation, therefore, does not automatically amount to appointment to service unless a cadre post within the quota is available and appointment is made in accordance with the repealed Rules vis-a-vis Irrigation Branch made or as per the declaration of law in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases. The law in Sehgal and Chopra cases was given acceptance in Section 8 of the Act.

147. It is true that the Rules made under the proviso to Article 309 of the Constitution can be issued by amending or altering the Rules with retrospectivity as consistently held by this Court in catena of decisions viz., B. S. Vadera v. Union of India, (1968) 3 SCR 575 : (AIR 1969 SC 118); Raj Kumar v. Union of India, (1975) 3 SCR 963 : (AIR 1975 SC 1116); K. Nagaraj v. State of Andhra Pradesh, (1985) 1 SCC 523 : (AIR 1985 SC 551); T. R. Kapur v. State of Haryana, (1986) Supp SCC 584 : (AIR 1987 SC 415) and host of other decisions. But the question is : whether the Rules can be amended taking away the vested right? As regards the right to seniority, this Court elaborately considered the incidence of the right to seniority and amendment of the Act in the latest decision in Ashok Kumar Gupta v. State of U. P., (1997) 3 SCALE 289 relieving the need to reiterate all of

them once over. Suffice it to state that it is a settled law that a distinction between right and interest has always been maintained. Seniority is a facet of interest. The rules prescribe the method of selection/recruitment. Seniority is governed by the existing rules and is required to be worked out accordingly. No one has a vested right to promotion or a seniority but an officer has an interest to seniority acquired by working out the Rules. It would be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects the promotion of a person relates to conditions of service. The rule merely affecting the chances of promotion cannot be regarded as varying the conditions of service. Chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service.

148. But the above principle has no application to the facts in this case. We are concerned in the present case with the result of the declaration of law and the mandamus issued by this Court in the preparation of seniority list. As a result of the mandamus issued by this Court, the direct recruits acquired judicially recognised right to a particular position in the service inter se with promotees to be worked out as per the law declared findings recorded and mandamus and directions issued for enforcement. It has already been held that the legislature cannot, by colourable exercise of the power and fraud on the Constitution, take away the right to be considered in preparation of seniority as per law and for promotion, if found fit, by virtue of a mandamus issued by this Court, unless the rule of law is suitably and validly altered so as to make the mandamus ineffectual. It is already held that a prospective amendment could be brought about removing the base by a constitutionally valid law. It is already seen that confirmation of probation does not ipso facto amount to appointment to a service or in a substantive capacity in Irrigation Branch. It requires to be examined in each case as to when a promotee substantively becomes a member of the Class I service by operation of the repealed Rules/Act. He does not become a member of the service in a substantive capacity until he is duly appointed in accordance with Rule 8(9) of the repealed Rules or Section 8(9) of the Act. Officer in Irrigation Branch remains a confirmed probationer awaiting appointment to a service in a substantive capacity within quota. Until an order of appointment is so made, he does not become a member of the service substantively. The seniority then is required to be reckoned in accordance with the Rules. The law under the Act prospectively does not have the effect of divesting the vested right had by the direct recruits under the declaration of law given by this Court. The consequence, therefore, would be that though promotee officer of Class-II service in Irrigation Branch was confirmed after completion of probation, he does not become member of the service in substantive capacity until he is duly appointed within 75% quota for eight years after Irrigation Branch repealed Rules came into force and 50% thereafter. Any promotee appointed in excess of the quota does not get a continuous service but only becomes a confirmed probationer awaiting appointment to the cadre post of Class-I service as Executive Engineer within the quota. The result of the repealed Rules was that they became confirmed probationer awaiting appointment to the service into a cadre post in a substantive capacity within their quota in accordance with the Rules. The entire continuous officiation in a post reserved for the direct recruits becomes fortuitous the moment they are appointed to a cadre post out side the quota.

149. This Court in K. C. Ganpat Narayan Deo v. State of Orissa, 1954 SCR 1 : (AIR 1953 SC 375) relied on by Shri Dhavan had considered the validity of the colourable legislation. Therein, a Bill relating to Orissa State was published on January 3, 1950. It contained a provision that any sum

payable for agricultural income-tax for the previous year should be deducted from the gross asset of an estate for the purpose of arriving at its net income on the basis of which compensation was payable to the estate owners. On January 8, 1950, a Bill to amend the Orissa Agricultural Income-tax Act, 1947 so as to enhance the highest rate of tax from 3 annas in the rupee to 4 annas and reduce the highest slab from Rs. 30,000/- to Rs. 20,000/-, was published. The Bill was subsequently dropped by the next Chief Minister. On July 22, 1950, another Bill was introduced enhancing the highest rate of 12 annas 6 pies in the rupee and reduced the highest slab to Rs. 15,000/-. This was transformed into law in August, 1950. It was contended that the rise in agricultural income-tax was a fraud on the Constitution and is a colourable legislation to affect the determination of the compensation payable under the Orissa Estate Abolition Act. This Court held that the question whether it was a colourable legislation and as such void, did not depend on the motive or bona fides of the legislature to pass that particular law. What the Court has to determine in such a case is whether the legislature has purported to act within the limits of the power. It has in substance and reality a transgress on the powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise. The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. The impugned Act was in substance and form a law in respect to the taxing of agricultural income; the Legislature was competent to legislate on this subject; the Act was not void and the fact that the object of the legislature was to accomplish another purpose, namely, to reduce the compensation payable under the Estate Abolition Act, cannot render this law a colourable legislation and void as such as the ulterior object itself was not beyond the competence of the legislature. The consequence of the legislation, assuming that there is no absolute rule of law that whatever is affixed to or built on the soil becomes a part of it. On the facts of that case, it was held that the object of the Act was to reduce the taxable maximum exemption that is within the legislative competence.

150. It is seen that when this Court exercise the power of Judicial review in an appeal arising from the order of the High Court passed under Article 226 of the Constitution, it declared law and issued the mandamus. This exercise of the power of judicial review is expressly conferred by the Constitution on the constitutional Courts, viz., this Court and the High Courts. The Legislature when it exercised the power under Article 245(1), though has the legislative competence under legislative Entry 41 in List II of the Seventh Schedule, the purported exercise is to declare by legislative Judgment a law made by this Court as invalid; enforcement of mandamus consequently is rendered ineffective. As held earlier, the attempt made was to remove the base of the declaration of law and mandamus and to give retrospective effect. The power of Judicial review is a basic structure and by a colourable exercise of the legislative power, legislature is prohibited from repealing, by legislative judgment, the judicial decision. Therefore, it is the legislature which trampelled upon the power of judicial review, transgressed its limits and trespassed into the field of judicial review and given declaration under the Act emasculating the vitality and efficacy of judicial review. It would, therefore, be clear that the enactment of the Act with retrospective effect is not only a colourable legislative exercise but also as fraud on the Constitution. However, prospective operation of the Act may be valid.

151. In T. R. Kapur's (AIR 1987 SC 415) (supra), a two-Judge Bench was to consider whether retrospective effect to a Rule made under proviso to Article 309 of the Constitution has the effect of divesting the vested right. It was held that in Rule 6(b) of the Punjab Service of Engineers, Class I,

PWD Irrigation Branch Repealed Rules conferred a vested right on persons like the appellant or direct recruits which could not be taken away by retrospective amendment of Rule 6(b). As has already been held, affecting the right of a person to be considered for promotion amounts to affecting the conditions of service; though affecting mere chance of promotion may not. The power to frame rules to regulate the conditions of service under the proviso to Article 309 carries with it the power to amend or alter the rules with retrospective effect. However, it is well settled principle that the benefits acquired under the existing Rules cannot be taken away by an amendment with retrospective effect, that is to say, that there is no power to make such a rule under proviso to Article 309 which affects or impairs vested rights. It would, thus, be clear that a right has been vested in the direct recruits to have their seniority determined under the repealed Rules, as a result of the mandamus issued which became final, which still is available even after the Act has come into force with retrospective effect since the retrospective effect has already been held unconstitutional as saved by operation of Section 25 of repealing provisions. As a consequence, they are entitled to have their seniority determined accordingly. It is true that in B. S. Yadav's case (AIR 1981 SC 561), the Constitution Bench of this Court had considered retrospective effect of the Rules. In para 57 relied on by Shri Rajeev Dhavan, it was held that insofar as rule of seniority is concerned, under the aforesaid amendment, the inter se seniority of the members of the Service is to be determined by the length of continuous service on a post in the Service irrespective of the date of confirmation. That principle requires to be understood in the light of the Rules available therein. At page 524 in para 78, it was clearly held that retrospective effect to the Rules creates frustration and discontentment since the just expectations of the officers are falsified; settled seniority, thereby, is unsettled giving room to long drawn out litigation between promotees and direct appoints. That breeds indiscipline which is to be deprecated. In para 76, it was observed that the giving retrospective effect to the Amendment amounted to hitting the allotted officers below the belt. It is already stated that under the Rules, though a promotee Class II service officiated as Executive Engineer in Haryana Service of Engineers, Class-I, his seniority in Irrigation Branch, though he was a member of the service prior to the Act, was required to be determined with effect from the date of appointment to the cadre post in Class-I Service as Executive Engineer, if available, within the quota. Entire other service, though as a confirmed probationer, stands denuded as fortuitousfor the purpose of inter se sensitivity and consequential promotion.

152. In State of Maharashtra v. Chandrakant Anant Kulkarni, (1981) 4 SCC 130 : (AIR 1981 SC 1990), a Bench of three Judges made distinction between chances of promotion and right to consideration for promotion. The chances of promotion was held not a condition of the service. Passing of departmental examination confers no right to be promoted under the relevant rules. Hence the promotee was not able to challenge. The ratio therein is inapplicable to the facts of this case. The ratio in Vinod Gurudas Raikar v. National Insurance Co. Ltd., (1991) 4 SCC 333 : (1991 AIR SCW 2503), is also equally inapplicable. Therein, Rule 6(c) of the General Clauses Act on the effect of the repeal was considered and it was held that the vested right acquired for compensation under the Motor Vehicles Act, 1939 was not taken away by virtue of the repeal in Motor Vehicles Act, 1986. Therefore, it was held that the owners of truck are entitled to compensation under the repealed Act. The ratio therein too has no application to the facts of this case. The ratio in Zohrabai v. Arjuna, (1980) 2 SCC 203 : (AIR 1980 SC 101), equally is inapplicable to the facts in this case. In that case, though the provision in Section 28(1) of the Hyderabad Tenancy and Agricultural Land Act, 1950, as applicable to Maharashtra, was amended in 1960, the landlord had not taken advantage of the Act by following the procedure in amended provision. In that context, it was held that mere right to take advantage to the provision of the Act is not a vested right. Far from helping

the promotees, as contended by Shri Rajeev Dhawan, it clearly indicates that the law existing as on the date of the declaration is required to be complied with that is the implication arising from this judgment.

153. It is true that in direct recruits case (AIR 1990 SC 1607), a Constitution Bench, to which one of us (K. Ramaswamy, J.) was a member, had considered propositions A and B in paragraph 47 of the conclusions and held that if an appointment to a post according to Rules has been made, seniority is to start from the date of appointment and not with reference to the date of the confirmation. Therein, the rules were not concerned with the quota. The question related to the inter se seniority between direct recruits and promotees. In that backdrop, this Court considered the interplay of confirmation and the consequences arising therefrom. It was held that if the appointment came to be made in accordance with the Rules, though on ad hoc basis, after considering the claims, of all the eligible persons, the seniority is required to be considered from the date of initial appointment and not from the date of confirmation. But, if it is not made in accordance with the Rules, the appointment on ad hoc basis and the service becomes fortuitous service. In the context and in the background of the case, the above ratio is required to be understood. As explained earlier, the Class-II officer promoted as Executive Engineer, though was officiating in Irrigation Branch and from the date of the officiation, became a member, his seniority was required to be considered only if he was appointed to a cadre post within the quota under Rule 8(9) of repealed Rules or Section 8(9) of the Act in a substantive capacity and in that event his seniority is counted from the day of his probation or officiation when appointed from the approved list as Executive Engineer. Accordingly, he is required to be considered.

154. In Bishan Sarup Gupta v. Union of India, (1975) 1 SCR 104 : (AIR 1974 SC 1618), the Constitution Bench was to consider the inter se seniority of the direct recruits and promotees of the Income-tax Department. The President issued two Rules under the proviso to Article 309 of the Constitution with effect from 16-1-1951. Rule 3 dealing with seniority of officers provided that among the promotees, inter se seniority shall be determined in the order of selection for such promotion. The seniority of direct recruits inter se shall be determined by the order of merit in which they are selected. The relative seniority among the promotees and direct recruits shall be in the ratio of 1:1 and the same shall be so determined and regulated in accordance with a roster maintained by the Government for the purpose. When the seniority list was prepared by the Government giving the quota from 1956 to 1958 during which period the quota was not in vogue, this Court directed that the seniority list prepared for that period on the basis of quota was wrong but from 1959 onwards the quota would be required to be worked out. Seniority list from that date was required to be maintained within the quota. Far from helping the promotees, this case goes in favour of the direct recruits. The direct recruits are entitled, from the date when the rules had come into force, to be considered in a block and the inter se seniority should be prepared in accordance with the Rules.

155. Our conclusion on diverse questions, put in a nutshell, are as under:

A. The Haryana Service of Engineers Class I (Buildings and Roads) and (Public Health) Branches

of P.W.D. Rules, now repealed, as interpreted by this Court in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases, is the law under Article 141 of the Constitution. It binds not only inter-parties, but also the other wings of the State, namely, the Legislature and the Executive and all. The mandamus issued therein along with direction to prepare the seniority list and its implementation operates inter-parties and binds the State of Haryana.

B. The Legislature of Haryana was competent to enact the Act 20 of 1995 under Article 309 or Entry 41 of List II (State List of the Seventh Schedule to the Constitution on the subject regulating the conditions of Service and recruitment of its employees in Haryana Service of Engineers Class I in PWD buildings and Roads, Public Health and Irrigation Branches respectively. In an appropriate situation, the Legislature is also empowered to give retrospective effect to the law so enacted. However, the Legislature is not competent to declare with retrospective effect that the law declared by this Court under Article 141 in Sehgal and Chopra cases is illegal; nor is it empowered to make the mandamus and directions issued therein as ineffective and unenforceable, except in given circumstances as laid down by this Court in this decision and several decisions referred to in the judgment.

C. The Haryana Service of Engineers Class I Public Works Department, Buildings and Roads, Public Health and Irrigation Branches respectively, Act [20 of 1995] has with retrospective effect, in substance and in effect, declared the law laid down by this Court in Sehgal and Chopra's cases as unenforceable by an indirect side track process of legislative fiat which is unconstitutional. The Constitution being supreme, all the organs and bodies owe their existence to it. None can claim superiority over the other and each has to function within the four corners of the constitutional provisions, and implied limitations.

D. The judicial review is the basic feature of the Constitution which has been entrusted to the Constitutional Courts, namely, the Supreme Court of India and High Courts under Article 32 and Articles 226 and 227 respectively. It is the constitutional duty and responsibility of the Constitutional Courts, as assigned under the Constitution, to maintain the balance of power between the Legislature, the Executive, and the judiciary. In a Parliamentary democracy, for the Constitutional democracy to remain a living moral and intellectual force, it would be enforced through judicial review as an arch of democracy and rule of law.

E. The judicial review is life-breath of constitutionalism. Judicial review passes upon constitutionality of legislative Acts or administrative actions. The Courts either would enforce valid Acts/actions or refuse to enforce them when found unconstitutional.

F. Judicial review does not concern itself with the merits of the Act or action but of the manner in which it has been done and its effect on constitutionalism. It, thereby, creates harmony between fundamental law, namely, the Constitution and the executive action or legislative Act. Its

fundamental object is to exert moral force upon the Legislature and the Executive to remain within the limits set by the Constitution and to save the people from tyranny of the Legislative/executive actions. It protects personal liberties of the people, their fundamental freedoms and creates social and economic harmony maintaining constitutional balance and justice in the Society, equality of opportunity and of status with dignity of person Social stability, progress and order under rule of law are the goals set by the Constitution.

G. The Constitutional Courts as sentinel on the qui vive, have fundamental duty and responsibility to build up an egalitarian social order under rule of law. In the exercise of the power of judicial review the Judges of the Constitutional Courts must, of necessity, be judicial statesmen. The judicial review is a linkage between the individual liberties and social interest, political stability to counter balance the ultra vires the Acts or actions by judicious decision. Separation of power among the Legislature, the Executive and the judiciary is also basic feature of the Constitution. The unconstitutionality of the Acts/actions arises from violation of the fundamental rights, separation or distribution of powers under the Constitution between the three wings of the State or to prevent violation of constitutional limitations or restrictions. In adjudicating the constitutionality of an Act/action the Courts evolve diverse principles wrapped up with constitutional ethos to pass on its Constitutionality. Thereby, Judicial review alerts the Legislature/the Executive that their Acts/actions, should conform to the constitutional requirements or avert the constitutional lapses without trenching upon or trespassing into the field assigned to the other wings of the State and develop mutual respect for each other's powers and functions. It is settled law that if the language in the Act/Section/clause is clear and unambiguous. It is not necessary to fall back upon the Statement of Objects and Reasons of the Act to cull out the intention. Therefore, we need not burden the judgment by citing copious precedents in this behalf. In adjudging the constitutionality of an Act or action, it is their function to find out whether the vice pointed out by the Courts or invalidity suffered by the previous law, is cured, complying with the Constitutional/legal requirements as was pointed out in the previous judgment by applying the primary tests viz., whether legislature is competent to enact the law and whether the Act is consistent with the Constitutional requirements. The Legislature has no power to overrule the decision of a Constitutional Court by mere declaration, without properly and constitutionally removing the base upon which the previous decision was founded; nor has it the power to direct that the decision of the Court does not bind the State or its instrumentalities.

H. In a democracy governed by rule of law, the legislature exercises its power under Articles 245 and 246 and other companion Articles read with the specified entries in the respective lists of the Seventh Schedule to the Constitution. Power to legislate law would include the power to amend the law, to enact a new law, and in an appropriate case, with retrospective effect. The legislature in enacting new law or amending the existing law or revalidating the law has power to alter the language in the statute by employing the appropriate phraseology and to put up its own interpretation inconsistent with that put up by the Court in an earlier judgment on the basis of the pre-existing law and to suitably make new law, amend the law or alter the law removing the base on which the previous decision was founded. If a legislature finds that the interpretation given by the Court to the existing law is inconsistent with the constitutional or public policy or the objects of the Act intended to be achieved, the legislature has power to enact new law, or amend the law consistent with Constitutional or public policy sought to be achieved by the statute. Such an enactment must

generally be prospective and not retrospective in nature.

I. In order to pass on the Constitutionality, the Court is required to carefully scan the impugned law to find out (a) whether the vice pointed out by the Court or the invalidity suffered by the previous law is cured complying with the legal and constitutional requirement, (b) whether the legislature has competence to enact the law to validate the law; and (c) whether such enactment of Act or validation is consistent with the constitutional principles or within limitations set by the Constitution or fundamental rights enshrined in Part III of the Constitution or basic structure of the Constitution. The Court can taken into account the real consequences while judging the width of the power nor can the Court ignore the consequences flowing from particular construction ascertaining the limits of the provisions that granted the power.

J. The legislature in enacting the law cannot without anything more, by a mere declaration, directly overrule, revise or override a judicial decision. It can render the judicial decision ineffective only by enacting valid law on the subject within its legislative competence fundamentally altering or changing the character prospectively or retrospectively. The changes or altered conditions have to be such that the previous decision would not have been rendered by the Court had those conditions existed at the time of declaration of the law in the previous decision as invalid. It is also empowered to give effect to the Acts so enacted or revalidated prospectively or retrospectively with a deemed date or with effect from a particular date.

K. The legislative judgment, by a facade of compliance or removal of the base, cannot render the decision or mandamus issued by the Court ineffective or invalid by a declaratory law that the previous decision of the Court is illegal or inequitous. Such a declaration is not conclusive, but is subject to judicial review. The real test is the effect of the legislation tested on the touch-stone of the Constitution and its direct result on the declaration of law as interpreted earlier or the mandamus/direction issued by the Court in the previous litigation.

L. The Courts have applied the doctrine of "pith and substance" and in some cases the doctrine of "incidental" or "ancillary" or "subsidiary power" of the legislature to uphold the law or to validate the law declared by the Courts as invalid. Thereon, one of the doctrines is applied when the Court finds that the law in pith and substance is within the legislative competence but incidentally trenches upon another subject of legislation. Equally, the doctrine of "ancillary or subsidiary power" of the legislature is applied when the Court records a finding that the impugned Act is substantially within the legislative competence or within the assigned field of legislation dealt with under a particular subject specified in the respective lists of the Seventh Schedule to the Constitution, but incidentally it trenches upon another subject of legislation assigned either to the Parliament or the legislature of a State as the case may be. However, the said doctrines cannot be employed to uphold a law that directly nullifies the declaratory law made by the Court in exercise of the power of judicial review or to make the writ of mandamus or direction ineffective or unenforceable, unless its invalidity is properly and constitutionally removed by employing the appropriate language so as to make a new

law within the constitutional limits or limitations or competence of the legislature.

M. The doctrine of incidental or ancillary power is founded upon the principle that on the face of the Constitution, the Legislative subject falls both in the Union as well as the State lists, but on a careful scrutiny of the subject of enactment, it becomes clear that it falls merely incidentally in one list, but substantially in another list. The Courts should always take care and examine whether the Act is within the permissible and constitutional principles. The Court would also clearly demarcate the line between validating legislation removing the base on which the foundation of the previous judgment rests and the Act which through colourable attempt of removing the base, renders the judgment of a Court ineffective or illegal.

N. The Writ of Mandamus or direction issued by the Court cannot be nullified by a legislative fiat, unless the base is removed within the constitutionally permissible limits. However, the doctrine of incidental power, cannot be extended to the exercise of the legislative power colourably or by fraud on the Constitution.

O. Colourable legislation is one where the legislature has no power to legislate on an item either because it is not included in the List of the respective Entries in the Seventh Schedule to the Constitution in respect of which it has competence to enact the law, or on account of limits imposed either in Part III of the Constitution relating to fundamental rights or any other power under the Constitution or in violation of the principle of basic structure of the Constitution. If on an examination of the Act, the Court finds that the legislature has travelled beyond its power or competence or in transgression of the limits imposed by the Constitution itself, such an enactment is called colourable legislation. In other words, it has a reference to the legislative incompetence and not to the power of the legislature as such. If the legislature enacts the law in the pretext of the exercise of the legislative power though actually it does not possess such power, the legislation to that extent either is void or, become voidable on a declaration to that effect by a Constitutional Court. It would, therefore, be said that the Legislature enacts the law in purported colourable exercise of its power.

P. The doctrine of fraud on legislative power means that the legislature really has the power, but does not exercise that power. It merely pretends to have exercised the powers. In the eye of law, such an Act is not a law at all, but is a mere pretence of law and the Courts will not take notice of such a law.

Q. The doctrine of fraud on the Constitution is altogether a different principle and a serious charge. When there is a Constitutional prohibition to make an Act, but the legislature, in spite of the Constitutional prohibition or restriction to make such a law, enacts such a law, it is a fraud on the Constitution. Therefore, the distinction between the fraud on power and fraud on the Constitution is clear and unambiguous (sic).

S. The principle of fraud on legislative power is applicable when the legislature has power to enact, but has not exercised that power as envisaged upon. On the other hand the doctrine of fraud on the Constitution means when the Legislature has no power and in spite of the Constitutional limitation/prohibition, it make an enactment in pretence of or purported exercise of the power. It would be necessary to examine all these concepts in the light of the related subject to determine whether the legislature has competence to enact law or enacted it by playing a fraud on the Constitution/ colourable exercise of power.

T. This Court in Prith; Cotton Mills Case (AIR 1970 SC 192), Indian Aluminium's case (1996 AIR SCW 1051) and host of other decisions, permitted the Legislature to remove the base upon which the previous decision was founded by appropriate phraseology of the law applied therein, but it could not be by a side-track or by fraud on the Constitution or colourable exercise of the power to overrule a declaratory judgment of the Court.

U. The Statement of Objects and Reasons and the Preamble of an Act opens the minds of the makers in enacting the law. It cannot altogether be eschewed from consideration of the relevant provisions of the Act, when its constitutionality is tested and objects of the Act sought to be achieved.

V. On an examination of the provisions of the Act, it is clear that though the Legislature of Haryana was competent to make Act 20 of 1995 regulating the conditions of Service and recruitments of the Haryana Service of Engineers Class I PWD, Buildings and Roads. Public Health and Irrigation Branches respectively; the Act made with retrospective effect is a fraud on the Constitution; a colourable exercise of power; transgression of and trespassing into the power of judicial review expressly conferred in the Constitutional Court, namely, Supreme Court of India under Article 32 and High Courts under Article 226/227 of the Constitution.

W. The object of inducting young blood by direct recruitment into the Service and experienced officers by promotion is constitu-tionally permissible and valid to augment efficiency of service to inculcate discipline, honesty, integrity and excellence in higher echelons of service.

X. The prescription of the ratio between direct recruits and promotees is equally constitutionally permissible and the permissible limits shall not be altered by executive action, unless the Executive has power. For exercise of such power it should give proper, valid and satisfactory explanation in writing prior to exercise of the said power, for deviation of the quots rules and that too as a short term arrangement to tide over administrative expedience.

Y. The concerned Rules are required to be interpreted as regards the operation and effect of the deviation of the quota rule and its effect on the main principle of prescribing quota and integration of the promotee officers into the service on strict compliance with the relevant provisions of the Act/Rules.

Z. In an appropriate case, the quota may be relaxed temporarily with a view to meet the administrative exigencies by manning the posts by the promotees. The promotion of the promotee officers to an ex-cadre post or cadre posts would only be to meet the administrative expedience. That would be done, so long as the direct recruit Assistant Executive Engineers, who are members of the Service in junior scale of pay are not available for promotion as Executive Engineer and upwards in accordance with the Rules. If relaxation vis-a-vis length of service of other incidental qualifications is given, it should be given uniformly to promotees and direct recruits for reasons to be recorded. The reasons should be relevant and germane to achieve efficiency and excellence of service.

AA. As soon as the direct recruits become available, the inter seniority between the direct recruits and the promotees as Executive Engineers or upward shall be determined. Before determination thereof, the rights of the parties are founded upon substantive appointment to the service and to the post, if available, in accordance with the Rules and within the prescribed quota. On that basis and in accordance with the principles laid down in the concerned sections/Rules, the seniority shall be determined between direct recruits inter se and promotees inter se and thereafter the fusion of direct recruits and promotees shall be made again in accordance with the Rules/Act.

AB. The appointment by promotion, declaration of the probation and confirmation thereof of the promotee officers of Class II Service as Executive Engineers in Irrigation Branch was only to enable them to perform the duties of the post as probationers and confirmation of the probation made them eligible to continue to officiate in the cadre/ex-cadre posts. But substantive appointment to a cadre post, if available within the quota to the promotees, was a pre-condition. As soon as the direct recruits become available, the inter se seniority shall be determined between the direct recruits and the promotees in accordance with the Rules/Act within the respective quota. Any appointment in excess of quota is invalid and the service rendered thereunder becomes fortuitous

AC. A distinction between right to be considered for promotion and an interest to be considered for promotion has always been maintained. Seniority is a facet of interest. The rules prescribe the method of recruitment/selection. Seniority is governed by the rules existing as on the date of consideration for promotion. Seniority is required to be worked out according to the existing rules. No one has a vested right to promotion or seniority. But an officer has an interst to seniority acquired by working out the rules. The seniority would be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects chances of promotion of a person relates to conditions of service. The rule/provision in an Act merely affecting the chances of promotion would not be regarded as varying the conditions of

service. The chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service. However, once a declaration of law, on the basis of existing rules. Is made by a Constitutional Court and a mandamus is issued or direction given for its enforcement by preparing the seniorit list, operation of the declaration of law and the mandamus and directions issued by the Court is the result of the declaration of law but not the operation of the rules per se.

AD. When an Act is made or an amendment to the law is made or revalidation of law is made by colourable exercise of the power or fraud on the Constitution, it does not affect the vested rights. The right accrued by the declaration of law or the mandamus or directions issued by the Court cannot be taken away by such law or a valid law by retrospective operation since in the earlier litigation, the Court did not declare any law as invalid or unconstitutional. This Court merely declared the law and directed the Haryana State Government to implement the law.

AE. Preparation of seniority list in accordance with the declaration of law and the mandamus/direction issued is required to be complied with by the State Government unless it is properly revised or reversed by a Constitutional Court in hierarchy of appeals etc. Once the judgment attains finality the directions given should be followed thereunder. The law is required to be implemented in its true spirit and not by mere pretence or facade of compliance.

AF. The Act No. 20 of 1995 is unconstitutional to the extent of retrospective operation of the Act. The prospective operation does not have any effect on the settled rights of the parties to these litigations since the repealed Rules are saved under Section 25 of the Act and would continue to apply to them. Even otherwise, the rights secured by declaratory law were not affected.

AG. The prospective operation of the Act from the date of the coming into force of the Act, namely, 30th November, 1995, would be worked out in the light of the declaration of law in this judgment and be applicable to the other persons in the Service on and from that date or for the purpose of future promotions under the Act to those officers who were not parties to the litigation.

AH. Even if relaxation by way of promotion in excess of the quota is temporarily made by the State Government, the State Government shall record reasons in support of its action. However, such temporary deviation does not have any effect on the ratio prescribed under the Act/repealed Rules except that the promotee officers from Class II Service belonging to Irrigation Branch are enabled to acquire the probationary status as Class I officers on a cadre/excadre post. The confirmation of the probation awaits the substantive vacancy. Until then, the promotees from Irrigation Branch do not become members of the Service in a substantive capacity. The same position has been created under the Act uniformly to all officers.

AI. The prospective operation of the Act in the present case has already been considered and it has been (held) that substantive appointment to a cadre post within quota, if the post is available to the promotee, is a pre-condition. The Act has not advanced the rights of the promotees any further. It is true, as was contended by Shri K.T.S. Tulsi, that so long as the Act is not declared invalid or unenforceable, it is required to be given effect to. Technically, he is correct. Shri Altaf Ahmad, when initially appeared and argued for the State of Haryana, fairly did not attempt to take the technical stand but confined to the question that the mandamus issued by the declaratory judgment of this Court was not affected by the Act and required enforcement. He was correct in placing reliance on Section 25. Therefore, the stand taken by Shri K.T.S. Tulsi has enabled us to strike a lethal blow on the unconstitutionality of retrospective operation of the Act. As has been held earlier, the promotee becomes a member of the Service under the repealed Rules vis-a-vis Buildings and Roads Branch or Public Health Branch only when he is appointed substantively in accordance with rule 8(9) of the respective Rules including Irrigation Branch within the quota. The declaration of law in Sehgal (AIR 1991 SC 1406) and Chopra's (1991 AIR SCW 1028) cases remains unaffected under the Act and continues to be in force. Similarly, any appointment made and weightage given to the promotees in excess of their quota, as contended in quorus, does not have any legal effect on the right to the seniority and the promotees within their quota alone are entitled to count their entire length of service from the respective dates of probation, without break. When appointed as Assistant Executive Engineer by direct recruitment, his seniority starts from the date on which he starts discharging duties of the post as probationer be it in a substantive vacancy or on ex-cadre post. His seniority remains unaltered. He continues to be a member of the Service of junior scale of pay even before being appointed as Executive Engineer, i.e., in the senior scale of pay to a cadre/ex-cadre post; after his promotion as Executive Engineer on probation being declared, if the prescribed minimum period of service is completed or if the same is relaxed by the State Government uniformly to the promotees and the direct recruits, as was done in the case of G.S. Sardana, his seniority would continue to start from 1971 as was held in Chopra's case. Therefore, his seniority has to be determined and promotion given within the quota of the direct recruits as Executive Engineer and above in a substantive capacity. The Class II officers became eligible for promotion as Executive Engineers only after the Committee prepared the list of the eligible officers in accordance with the Rule 8 of the repealed Rules/Section 8, after approval by the Public Service Commission and the State of Haryana. Class II officers whose names find place in the approved list shall be appointed by promotion as Executive Engineers and upwards as probationers in the order in the list. Appointment on probation and declaration thereof does not get ripened into appointment substantively to a cadre post. Appointment to a cadre post available within quota is a condition precedent to become a member of the Service in a substantive capacity. The inter se seniority of the direct recruits and promotee Class II Executive Engineers then shall be determined in accordance with the Rules. It requires to be worked out on that basis.

AJ. The Division Bench of the High Court, therefore, was not correct to say that 10 posts of the promotees in Public Health Branch occupied from the date of initial constitution, is not challengeable and was not challenged and, therefore, the contention that all the 10 posts would be occupied by the promotees in the cadre post, is fallacious and incorrect. Only 50% of the promotees (75% for 8 years in Irrigation Branch) allotted by the State of Punjab to the Haryana Service of Engineers, Class I on and with effect from 1st day of November, 1966, shall be retained within their quota and the balance five posts in Public Health Branch, shall be made over to the direct recruits. The fair stand taken and correctly advised by Shri Altaf Ahmed should be worked out. The preparation of seniority on that basis is perfectly consistent with the mandamus issued by this Court,

Equally, the direction issued by the High Court with regard M.L. Gupta in Irrigation Branch and the other direct recruits in Buildings and Roads, Public Health and Irrigation Branches respectively would be applied the same principles as applied to other direct recruits. They should be carried out accordingly.

AK. Dr. B.D. Sardana has neatly made out a case during his arguments on merits that the seniority list was not correctly drawn consistent with the mandamus issued, Choora's case (1991 AIR SCW 1020), he has given us various details from the record but we decline to go into that aspect. Instead, we direct the State Government to draw the seniority list afresh in the light of the above law and directions within sixty days from the date of the receipt of the judgment. Any sort of excuse for delay shall not be countenanced.

156. Civil Appeal No. 423 of 1994 of respondent Dr. B.D. Sardana stands allowed. Civil Appeal Nos. 422, 424, 1448-49, 1452-55 of 1993 and W.P. 582 of 1995 of the promotees and the State Government stand dismissed. The directions of the two Division Benches of the Punjab and Haryana High Court are confirmed with the modification referred to hereinabove. The Transfer Case Nos. 40 and 44-46 of 1986, writ petitions filed in the High Court, stand disposed of in the light of the declaration of law made and directions given above.

157. In view of the facts and circumstances, we direct the parties to bear their own costs throughout.

158. **S. SAGHIR AHMAD, J. (AGREEING WITH PATTANAIK, J**.) :-I have had the advantage of going through the judgment prepared separately by Brother Ramaswamy and Brother Pattanaik. I agree with Brother Pattanaik on all the questions involved in this case, but I want to add a few words of my own without setting out the facts of the case which have already been reproduced in the two Judgments.

159. To declare what the law is or has been is a judicial power. To declare what the law shall be is a legislative power. This is the principle deducible from the decision of the Federal Court in Basanta Chandra v. Emperor, AIR 1944 FC 86 (90) and Ogden v. Black Ledge 1804 (2) Lawyers Edition 276 (278).

160. It would be within the exclusive domain of judiciary to expound the law as it is and not to speculate what it should be as it is the function of the Legislature. It is also within the exclusive power of the judiciary to hold that a Statute passed by the Legislature is ultra vires. The Legislature in that situation does not become a helpless creature as it continues to remain a living pillar of a living Constitution. Though it cannot directly override the judicial decision, it retains the plenary powers under Articles 245, 246 and 248 to alter the law as settled or declared by judicial decisions.

This is what was observed by this Court in M/s. Anwar Khan Mahboob Co. v. State of Madhya Pradesh, (1966) 2 SCR 40 : (AIR 1966 SC 1637), which had the effect of indirectly overruling its previous decision in Firm C.J. Patal and Co. v. State of Madhya Pradesh, AIR 1953 SC 108. The Legislature can also validate an Act which was declared invalid by the Court or amend it with retrospective effect so as to remove the grounds of its invalidity. (See : Rai Ramkrishna v. State of Bihar, (1964) 1 SCR 897 : (AIR 1963 SC 1667) and Mt. Jadao Bhuji v. Municipal Committee, Khandwa, AIR 1961 SC 1486.

161. The power to make a law includes the power to give it retrospective effect subject to the restriction imposed by Article 20(1) that a Legislature cannot make retrospective penal laws. It would be valid for the Legislature to make any other enactment with retrospective effect provided no Fundamental Right is infringed by reasons of its taking away the vested right. Under the scheme of the Constitution, it is competent for the Legislature to put an end to the finality of a judicial decision and, therefore, it would be competent for the Legislature to render ineffective the judgment of a Court by changing the basis of the Act upon which that judgment was founded (See : Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, (1970) 1 SCR 388 : (1969) 2 SCC 283 : (AIR 1970 SC 192); In re : Cauvery Water Disputes Tribunal, AIR 1992 SC 522 : (1993) Supp 1 SCC 96. Hidayatullah, C.J. in Shri Prithvi Mills case (AIR 1970 SC 192 at p. 195, para 4) observed as under :

"When a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legslative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances."

This decision was considered in Madan Mohan Pathak v. Union of India, (1978) 3 SCR 334 : (1978) 2 SCC 50 : (AIR 1978 SC 803), but was not doubted by the majority view in that case.

162. In Bhubaneshwar Singh v. Union of India, (1994) 6 SCC 77, it was observed that any action in exercise of the power under an enactment, which has been declared invalid by a Court, cannot be made valid by merely saying so unless the defect which has been pointed out by the Court is removed with retrospective effect. It was further observed that the Validating Legislation must remove the cause of invalidity. It was further observed that till such defect as was pointed out by the Court in a Statute was removed by the subsequent enactment with retrospective effect, the binding nature of the judgment of the Court cannot be ignored. In a situation of this nature, it would be open to the Legislature to pass a Validating Act, even with retrospective effect, removing the defect or the

ground on which the Statute was held to be bad or ultra vires.

163. Where, however, the statutory provision is interpreted by the Court in a particlar manner and directions are issued for implementing the judgment in the light of the interpretation placed on the statutory provisions, the Legislature need not pass a Validating Act. In this situation, the Legislature, in exercise of its plenary powers under Articles 245, 246 and 248 can make a new Act altering fundamentally the provisions which were the basis of the judgment passed by the Court. This can be done with retrospective effect. So far as service conditions are concerned, they can be altered with retrospective effect by making service rules under Article 309 or by an Act of the Legislature.

164. In the instant case, the judgments rendered by this Cout in the earlier decisions relating to the seniority of the present incumbents were founded on the service rules then existing. These service rules have since been replaced by the impugned Act which has been enforced with retrospective effect. The various aspects of merits have been considered by my Brother Pattanaik and I cannot usefully add any further words on merits. I fully agree and endorse that in view of the settled legal position, specially those set out in the decisions referred to earlier as also in Comorin Match Industries (P) Ltd. v. State of Tamil Nadu, (1996) 4 SCC 281 : 1996 AIR SCW 2251), Indian Aluminium Company v. State of Kerala, (1996) 7 SCC 637 : (1996 AIR SCW 1051); and Meerut Development Authority v. Satbir Singh, (1996) 11 SCC 462 : (1997 AIR SCW 167), the impugned Act, namely, the Haryana Act XX of 1995 is valid to the extent indicated by Brother Pattanaik. In this case the rule of seniority has been altogether altered and replaced by a new law made with retrospective effect so as to do away the mischief under which an undue advantage was being provided to a direct recruit, which was wholly inequitous and not sustainable on the principles of equity.

165. I also agree that the judgments of the Punjab and Haryana High Court are liable to be set aside, with a direction to the State Government to re-determine the question of seniority in the light of this judgment and the Haryana Act XX of 1995.

166. The Civil Appeals, the Writ Petition and the Transferred Cases are disposed of accordingly with no order as to costs.

167. **PATTANAIK, J (S. Saghir Ahmad, J.** concurring) (Majority view). :- I have gone through the erudite judgment prepared by Brother Ramaswamy. J. and having given an anxious consideration to the conclusions arritved at I am in respectful disagreement with the same. Taking into account the fact the Brother Ramaswamy, J. would be demiting his office on 13th of July, 1997, and the short time I have at my disposal I have not been able to be as elaborate as my borther. But the two broad features which have persuaded me to take a contrary view are that the implementation of the conclusions arrived at by Brother Ramaswamy, J. would lead to a situation where a direct recruit like Mr. B.D. Sardana as an Assistant Executive Engineer in the year 1977 would become

senior to the promotees like Shri S. S. Bhola who were promoted as Executive Engineer way back in 1971 long before the entry of Mr. Sardana into the service. Further when the legislatures being aware of the aforesaid gross inequities and anomalous situation have come forward with a legislation by enacting an Act and giving it retrospective effect from the date the State of Haryana came into existence the Court should try to sustain the Act unless the Act is found to be repugnant to any of the constituional provision. With the aforesaid background I have endeavoured broadly with the questions that arose for consideration.

168. These appeals by Special Leave as well as the Transfer Cases relate to the age old problem in almost all services i.e. determination of inter se seniority between the direct recruits and promotees within a cadre. These case arise out of the earlier directions of this Court in two cases, namely, A. N. Sehgal v. Raje Ram Sheoran, 1992 Supp (1) SCC : 304 (AIR 1991 SC 1406) and S. L. Chopra v. State Haryana, 1992 Supp (1) SCC 391 : (1991 AIR SCW 1028) and the seniority list drawn up by the Government of Haryana pursuant to the aforesaid direction and the intervention by the legislators in enacting an Act called the Haryana Service Engineers, Class I, Public Works Department (Buildings and Roads Branch), (Public Health Branch) and (Irrigation Branch) Act, 1995 (hereinafter referred to as "the Act"). Civil Appeals Nos. 422/93, 423/93 and 424/93, Writ Petition No. 582/95, and Transfer Case No. 44/96 relate to Public Health Branch and the orders passed by the State Government determining the inter se seniority in the said Branch. Out of these three Civil Appeals one is by the State of Haryana and two others are by the promotee affected officers belonging to the Public Health Branch and they are aggrieved by the judgment of the Division Bench of the Punjab and Haryana High Court in Letters Patent Appeal. Writ Petition No. 582/95 is by direct recruit B.D. Sardana under Article 32 of the Constitution challenging the validity of Act and praying for direction to grant him seniority just below the 10 officers who initially constituted the service when the State of Haryana came into existence. Transfer Case No. 44/96 had also been filed by direct recruit in the Punjab and Haryana High Court challenging the validity of the Act which was been transferred pursuant to the orders of this Court. Civil Appeals Nos. 1448/49/93 filed by the State and Civil Appeals Nos. 1452-53/93 filed by the promotee officers belonging to the Irrigation Branch are directed against the judgment of the Division Bench of the Punjab and Haryana High Court in Letters Patent Appeal which arose out of a Writ Petition filed by one M.L. Gupta who was directly appointed as an Assistant Executive Engineer on 27-8-1971. Transfer Case No. 40/96 is the Writ Petition filed by Shri Gupra challenging the validity of the Act which stood transferred to this Court pursuant to the orders of this Court. The brief facts leading to the enactment of the Act may be stated as under:-

The separate State of Haryana came into existence on 1-11-1966. When Punjab and Haryana was one State, the recruitment and conditions of service of Engineers in the State was being regulated by Rules framed by the Governor of Punjab in exercise of powers conferred by proviso under Article 309 of the Constitution. The set of Rules dealing with the Engineers of the Public Health Branch was called "The Punjab Service Engineers, Class I, Public Works Department (Public Health Branch Rules 1961.) A similar set of Rules had also been framed by the Governor under Proviso to Article 309 of the Constitution for the Engineers belonging to the Roads and Buildings Branch called the Punjab Service of Engineers, Class I, Public Works Department (Roads and Buildings Branch) Rules, 1960. The provisions of these two rules are almost identical. A third set of Rules also had been framed by the Governor for Engineers belonging to the Irrigation Branch, called "The Punjab

Service of Engineers, Class I, Public Works Department (Irrigation Branch) Rules. After the formation of the State of Haryana the Government of Haryana adopted all the aforesaid three Rules to deal with the service conditions of the Engineers belonging to the three branches, namely, the Public Health Branch, the Roads and Buildings Branch and the Irrigation Branch. The dispute relating to the fixation of seniority of promotees and direct recruits in the Roads and Buildings Branch came up for consideration before this Court in the case of, A. N. Sehgal v. Raje Ram Sheoran 1992 Supp (1) SCC 304 : (AIR 1991 SC 1406) and this Court after thorough analysis of different provisions of the Rules relating to the Roads and Buildings Branch interpreted the Rules of seniority and directed the Government of Haryana to determine the cadre post regularly from time to time and to issue orders appointing substantively to the post within the quota and determine the inter se seniority between the promotees and the direct recruits in the respective quota cadre post of Executive Engineer. The provisions of the Public Health Branch Rules came up for consideration in the case of, S. L. Chopra v. State of Haryana, 1992 Supp (1) SCC 391 : (1991 AIR SCW 1028) and the dispute in that case also was the determination of inter se seniority between the direct recruits and the promotees. This Court also interpreted the relevant provisions of the Rules for determination of inter se seniority in the Public Health Branch and directed the State Government to determine the cadre strength in Haryana Service of Engineers, Class I, PWD (Public Health Branch) Rules of the posts of Executive Engineer, Superintending Engineer and Chief Engineer and consider the cases of the appellant in the said case as well as the respondents for promotion to the senior posts of Executive Engineers, Superintending Engineers and Chief Engineers respectively with the respective quota of 50 per cent and make appointment if found eligible and fit for promotion. It may be stated that the Rules relating to Irrigation Branch which is slightly different from both the aforesaid Rules, namely, the Public Health Branch and Roads and Buildings Branch had never cropped up for consideration. After the aforesaid two judgments of this Court and pursuant to the directions issued, the State Government began the exercise of fixing the cadre strength during each year commencing from 1966 and also began determination of inter se seniority of the promotees and direct recruits in the different posts within the service and also drew up the seniority list of the employees. The first set of seniority list was drawn up on 6-4-92 and being aggrieved by the said seniority list Writ Petitions were filed and the Punjab and Haryana High Court having quashed the same, Special Leave Petitions were filed in this Court. During the pendency of the Special Leave Petitions in this Court and prior to the hearing of the cases two other sets of seniority lists had been drawn up, one on 13-3-1997 and another on 19-3-97 and streneous arguments had been advanced in support of and against the aforesaid lists drawn up by the Government. The main attack to the aforesaid list is that the earlier directions issued by this Court in, Sehgal's case (AIR 1991 SC 1406) (supra) as well as, Chopra's case, (1991 AIR SCW 1028) (supra) have not been duly followed in drawing up the seniority list. Subsequent to the judgment of the Punjab and Haryana High Court striking down the seniority list prepared by the Government pursuant to the directions of this Court in, Chopra's case (supra), the Haryana Legislators enacted the Act to regulate the recruitment and conditions of service of persons appointed in all the three branches and the validity of the said Act had been challenged in the Writ Petition filed in Punjab and Haryana High Court. Those Writ Petitions have been transferred to this Court and have been numbered as Transfer cases. Elaborate arguments were advanced by the counsel for parties challenging the validity of the aforesaid Act basically on the ground that it seeks to merely annul the judgment of this Court in, Sehgal's case (supra) and in Chopra's case (supra) which is not permissible in law. It may be stated that if the Act is held to be valid then necessarily the seniority list drawn up by the State Government pursuant to the directions of this Court in, Sehgal's case (supra) and Chopra's case (supra) will not hold good and a fresh seniority list has to be drawn up as the Act in question has been given retrospective effect with effect from the date of the formation of the State of Haryana in November 1966. If the

Act is held to be ultra vires then also it has to be examined whether the seniority list drawn up by the State Government is in accordance with the earlier direction given by this Court in, Sehgal's case (supra) and Chopra's case (supra) and if not what further directions are necessary? It is in this context it must be borne in mind that in the earlier cases only the principles of determination of inter se seniority between the direct recruits and the promotees had been considered and adjudged but as to how the initial allottees to the services would be considered there was no adjudication in as much as that question did not crop up for consideration.

169. So far as the public health branch is concerned, on the date of the formation of the State of Haryana 14 persons were brought from the erstwhile Punjab cadre of Engineers to constitute the initial cadre in the State of Haryana and since the cadre strength of the service in Haryana was only 10 four of these persons were adjusted against ex-cadre post. While bringing persons from the erstwhile Punjab cadre to Haryana the relevant Rules and the quota of direct recruits and promotees in the service had not been borne in mind and officers were brought from the erstwhile Punjab cadre depending upon the domicile of the employees. In other words, those who belonged to the Haryana State were brought over to Haryana cadre and in regulating the cadre strength the ratio between direct recruits and promotees as per Recruitment Rules then in force has not been observed. In the aforesaid premises a question which would arise for consideration and ultimate decision would be as to how these 10 officers who were brought over from the erstwhile Punjab State and constituted the initial cadre strength of service in Haryana would be dealt with ? This question had not been dealt with either in Sehgal's case or in Chopra's case referred to supra. At this stage it would be appropriate to notice as to what was decided by this Court in Sehgal and Chopra. Sehgal deals with roads and building branch. In that case, one, R. R. Sheoran challenged Gradation List and the seniority assigned to Sehgal and others by filing a writ petition in Punjab and Haryana High Court. The Division Bench of the High Court came to hold that Sheoram was a member of the service from the date of his initial appointment as Assistant Executive Engineer whereas Sehgal and others who were promoted were not members of the service. This decision was challenged by Sehgal, a promotee officer and it was agreed between the parties that this Court would decide the principle on consideration of the Rules and leave the matter for the State Government to determine the inter se seniority by applying the law. This Court considered Rule 3(1), Rule 3(2), Rule 5(1)(a), Rules 6 and 7, Rule 11(1), Rule 12(3) and sub-rule(12) of Rule 2. This Court came to conclusion that a direct recruit would always he recruited and appointed to a substantive vacancy and from the date he starts discharging the duty attached to the post he is a member of the service subject to his successfully completing the probation and declaration thereof at a later date and his appointment relates back to the date of initial appointment, subject to his being discharged from service on failure to complete the probation within or extended period of termination of the service according to rules. So far as a promotee is concerned it was held that a promotee would have initial officiating promotion to a temporary vacancy or substantive vacancy and on successful completion and declaration of the probation, unless reverted to lower posts, he awaits appointment to a substantive vacancy. Only on appointment to a substantive vacancy he becomes a member of the service. It was also held that a direct recruit appointed to an ex-cadre post alone is a member of the service even while on probation and Rule 2(12)(a) applies to them and it does not apply to a promotee from Class II service. This Court also held:

"on a conjoint reading of Rules 12(3) and 12(5) it is clear that the year of allotment of the Assistant

Executive Engineer in the post of Executive Engineer, shall be the calendar year in which the order of appointment as Assistant Executive Engineer had been made. Thus his seniority as Chief Engineer, by fiction of law, would relate back to his date of initial appointment as Assistant Executive Engineer and in juxtaposition to Class II officers seniority as Executive Engineer is unalterable."

170. Since Shri Sheoran was appointed as an Assistant Executive Engineer on August 30, 1971, it was directed that his seniority as Executive Engineer shall accordingly be reckoned. While interpreting Rule 5(2) and proviso thereto it was held that the intendment appears to be that so long as the direct recruit Assistant Executive Engineer, eligible and considered fit for promotion is not available, the promotee from Class II service in excess of the quota is eligible to occupy in officiating capacity the senior posts, i.e., Exectutive Engineers and above. The moment direct recruits are available, they alone are entitled to occupy 50 per cent of their quota posts and the promotees shall give place to the direct recruits. On the question what is the date from which the seniority of a promotee as Executive Engineer shall be reckoned, the Court held that a promotee within quota under Rule 5(2) gets his seniority from the initial date of his promotion and the year of allotment, as contemplated in Rule 12(6) shall be the next below the juniormost officer in the service whether officiating or confirmed as Executive Engineer before the former's appointment counting the entire officiating period towards seniority, unless there is break in the service or from the date of later promotion. Such promotee, by necessary implication would normally become senior to the direct recruit promoted later. Combined operation of sub-rules (3) to (5) of Rule 12 makes the direct recruit a member of the service of Executive Engineer from the date of year of allotment as an Assistant Executive Engineer. The result is that the promotee occupying the posts within 50 per cent quota of the direct recruits, acquired no right to the post and should yield to direct recruit, though promoted later to him, to the senior scale posts i.e., Executive Engineer, Superintending Engineer and Chief Engineer. The promotee has right to confirmation in the cadre post as per Rule 11(4) if a post is available to him within his quota or at a later date under Rule 5(2) read with Rule 11(4) and gets appointment under Section 8(11). His seniority would be reckoned only from the date of the availability of the post and the year of allotment, he shall be next below to his immediate senior promotee to that year or the juniormost of the previous year of allotment whether officiating or permanent occupying the post within 50 per cent quota. The officiating period of the promotee between the dates of initial promotion and the date of the availability of the cadre post would thus be rendered fortuitous and stands excluded. A direct recruit on promotion within the quota, though later to the promotee is interposed in between the periods and interjects the promotee's seniority snaps the links in the chain of continuity and steals a march over the approved promotee probationer. Harmonious construction of Rules 2(1), 2(3), 2(7), 2(10), 2(12), 2(12)(a), 5(2)(a), 8, 9(2), 11, 12(3), 12(5) to 12(7) would yield to the above result, lest the legislative animation would be defeated and the rules would be rendered otiose and surplus. It would also adversely affect the morale and efficiency of the service. Mere officiating appointment by promotion to a cadre post outside the quota; continuous officiating therein and declaration of probation would not clothe the promotee with any right to claim seniority over the direct recruits. The necessary conclusion would, therefore, be that the direct recruit shall get his seniority with effect from the date of the year of the allotment as Assistant Executive Engineer which is not alterable. Whereas the promotee would get his seniority w.e.f. the date of the availability of the posts within 50 per cent quota of the promotees. The year of allotment is variable and the seniority shall be reckoned accordingly. Appointment to the cadre post substantively and confirmation thereof shall be made under Rule 8(11) read with Rule 11(4) of the Rules. A promotee Executive Engineer would only then become member of the service. Appointed substantively within the meaning of

Rule 2(12)(a) shall be construed accordingly. We, further hold that the seniority of the promotee from Class II service as Executive Engineer shall be determined with effect from the date on which the cadre post was available to him and the seniority shall be determined accordingly." Ultimately this Court directed the Government of Haryana to determine the cadre posts, if not already done, regularly from time to time including the post created due to exigencies of service in terms of Rule 3(2) read with Appendix 'A' and allot the posts in each year of allotment as contemplated under Rule 12 read with Rule 5(2)(a) and issue orders appointing substantively to the respective posts within the quota and determine the inter se seniority between the appellants therein who were promotees and Sheoran, direct recruits in the respective quota cadre posts of Executive Engineer. The Court also held that the inter se seniority of the direct recruits and promotees shall be determined in accordance with the principles laid down.

171. In S. L. Chopra's case, (1991 AIR SCW 1028), which deals with Public Health Branch, this Court held that direct recruits get seniority from the date of appointment as Assistant Executive Engineer and it is unalterable. But the promotee's seniority is variable by operation of Rules 8(11) and 11(4); 2(12)(a) and 5(2) of the Rules. The State Government was accordingly directed to determine the cadre strength in the Haryana Service of Engineers, Class I PWD (Public Health Branch) under the rules, Executive Engineers, Superintending Engineers and Chief Engineers and consider the cases of the appellants therein as well as the contesting respondents B.D. Sardana, F.L. Kansal for promotion to the senior posts of Executive Engineers, Superin-tending Engineers and Chief Engineers respectively with the respective quota of 50 per cent and make appointment if found eligible and fit for promotion. In the said case the appellant was a promotee and the respondents were direct recruits.

172. The seniority list which was drawn up on 6-4-92 assumed that out of ten incumbents who originally constituted the service in the Public Health Branch five have to be treated as direct recruits fictionally under Rule 5(3) and 5 as promotees so that the disparity in the ratio will not influence the future promotion. The seniority list which was drawn up on 19-3-1977 took the ten incumbents originally constituted service belonging to the quota of promotees since factually all of them were promotees under the Punjab Rules and then determined the inter se seniority of direct recruits and the promotees by application of law laid down by this Court in, Sehgal's case, (AIR 1991 SC 1406) (supra) and Chopra's case (1991 AIR SCW 1028) (supra).

173. In course of his submission, Mr. Tulsi appearing for the State demonstrated that the Seniority List which was drawn up on 19-3-1977 topsy-turvy the position to such an extent that a direct recruit as Assistant Executive Engineer who was not even born on the cadre when a promotee had been appointed as the Executive Engineer, such direct recruit became senior to the promotee Executive Engineer. Such gross inequity which was resulted on account of giving effect to the Rules in force and interpreted by this Court in Sehgal and Chopra presuaded the legislature to intervence by enacting the Act and giving it retrospective effect.

174. Let us now examine the validity of the Act itself which was challenged by the direct recruits in filing writ petitions in the High Court of Punjab and Haryana and those writ petitions stood transferred to this Court. Mr. Sachar, the learned counsel appearing for the writ petitioners direct recruits contended that the Act is nothing but an usurpation of judicial power by the legislature to annul the judgments of this Court in Sehgal and Chopra and it merely declares the earlier judgments to be invalid without anything more and as such is invalid and inoperative. Further the Act takes away the rights accrued in favour of the direct recruits in pursuance of the judgments of this Court in Sehgal, (AIR 1991 SC 1406) and Chopra (1991 AIR SCW 1028) and consequently the Act must be struck down. The learned counsel also urged that the mandamus issued by this Court in Sehgal and Chopra has to be complied with and the State Legislature has no power to make the mandamus ineffective by enacting an Act to override the judgment of this Court which tantamounts to a direct inroad into the sphere occupied by judiciary and consequently the Act has to be struck down. This argument of Mr. Sachar was also supported by Mr. Mahabir Singh, the learned counsel appearing for the petitioners in T.P. (Civil) No. 46 of 1997 in his written submissions and it was urged that in any view of the matter the legislatures could not have given retrospective operation to the Act itself with reference to a situation that was in existence 25 years ago and such an act of the legislature must be held to be invalid as was held by this Court in the case of, State of Gujarat v. Raman Lal Keshav Lal Soni, (1983) 2 SCC 33 : (AIR 1984 SC 161). In elaborating the contention that the Act merely purports to override the judgment of this Court in Sehgal and Chopra the learned counsel referred to the Objects and Reasons of the Act as well as the affidavit filed on behalf of the State Government which would unequivocally indicate that the Act was enacted to get over the judgments of this Court in Sehgal and Chopra.

175. Mr. K.T.S. Tulsi, the learned senior counsel for the State of Haryana and Mr. D.D. Thakur and Dr. Rajeev Dhawan, learned senior counsel appearing for the promotee respondents on the other hand contended that the power of the State Legislature under Articles 245 and 246 of the Constitution is wide enough to make law determining the service conditions of the employees of the State and it is undisputed position of law that the legislature can make law giving it retrospective effect. According to the learned counsel the legislature having been aware of the inequitous situation which have been the result of the Rules which were operating for determination of the inter se seniority between the direct recruits and the promotees as interpreted by this Court in Sehgal and Chopra, intervened in enacting the Act to remove the aforesaid inequities not by merely declaring the interpretation given by this Court to the relevant provisions of the Rules in Sehgal and Chopra to be invalid but by making substantial alterations and changes to the basis itself and as such the legislatures cannot be said to have encroached upon the field of judiciary nor the legislation can be held to be an act of usurpation of judicial power by the legislatures. According to the learned counsel the basic changes made in the Act are by altering the definition of service by addition of sub-clause (c), by providing the quota of promotees could exceed beyond 50% as per proviso to Section 5(2) and by changing the very criterion for determination of seniority namely the continuous length of service as engrafted in Section 12(2) and these changes having been made and the legislative competence not having been assailed, the Act must be held to be valid piece of legislation. It was also contended by the learned counsel that in deciding the constitutionality of the Act the Court can look into the Objects and Reasons of the Act only when there is ambiguity in the substantive provisions of the Act itself, but where there is no ambiguity in the language of the Act which declares the intention of the legislature, the Court would not be justified in looking to the Objects and Reasons for the enactment or the affidavit filed by the State Government to hold that the legislatures have usurped the judicial power and have enacted the Act merely to get over the

judgment of this Court and mandamus issued by this Court in Sehgal and Chopra. According to the learned counsel in enacting the Act the legislature has taken into account the needs of the administration and laid down the principles for determining the inter se seniority in consonance with the accepted norms of service jurisprudence namely determination of seniority on the basis of length of continuous service in the cadre which was also observed by this Court in the two earlier cases while interpreting the Rules of 1961 which was operative in determination of inter se seniority of the employees. The learned counsel further urged that no vested right of any employee has been taken away by the Act inasmuch as to obtain a particular position in the seniority list within a cadre is neither a vested right of an employee nor can be said to be fundamental right under Part-III of the Constitution. Mr. Tulsi, learned counsel appearing for the State of Haryana in this context said that by operation of the Act no employee whether a direct recruit or a promotee would be reverted to any lower post from the post to which promotion has already been made even if he is found to be junior to others in the rank of Executive Engineer and as such the contention of Mr. Sachar and Mr. Mahabir Singh that it takes away a vested right of the employees is incorrect in law. Lastly, it was contended that the legislative competence having been conceded and the Act not having been found to be country to any of the fundamental rights under Part- II of the Constitution the only question that requires consideration is whether it tantamounts to usurpation of judicial power by the legislature and for the contentions already advanced the Act not being one merely declaring a law laid down by this Court to be invalid, there has been no usurpation of judicial power, and therefore, the same is a valid piece of legislation determining the service conditions of the employees in the State of Haryana and this Court will not be justified in holding the Act to be invalid. A large number of authorities were cited at the Bar in support of their respective contentions which we will notice while examining the correctness of the rival submissions.

176. At the outset it must be borne in mind that in the case of Sehgal, (AIR 1991 SC 1406) (supra) as well as Chopra, (1991 AIR SCW 1028) (supra) this Court had not invalidated any provisions of the recruitment rules but merely interpreted some provisions of the Rules for determining the inter se seniority between the direct recruits and the promotees. The Act passed by the legislatures, therefore, is not a validation Act but merely an Act passed by the State Legislature giving it retrospective effect from the date the State of Haryana came into existence and consequently from the date the service in question came into existence. The power of the legislature under Article 246(3) of the Constitution to make law for the State with respect to the matters enumerated in List II of the VIIth Schedule to the Constitution is wide enough to make law determining the service conditions of the employees of the State. In the case in hand there has been no challenge to the legislative competence of the State legislature to enact the legislation in question and in our view rightly, nor there has been any challenge on the ground of contravention of Part III of the Constitution. Under the constitutional scheme the power of the legislature to make law is paramount subject to the field of legislation as enumerated in the Entries in different Lists. The function of the judiciary is to interpret the law and to adjudicate the rights of the parties in accordance with law made by the legislature. When a particular Rule or the Act is interpreted by a Court of law in a specified manner and the law making authority forms the opinion that such an interpretation would adversely affect the rights of the parties and would be grossly inequitous and accordingly a new set of rule or Law is enacted, it is very often challenged as in the present case on the ground that the legislatures have usurped the judicial power. In such a case the Court has a delicate function to examine the new set of laws enacted by the legislatures and to find out whether in fact the legislatures have exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the legislatures have altered and changed the character of the legislation

which ultimately may render the judicial decision ineffective. It cannot be disputed that the legislatures can always render a judicial decisions ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively as was held by this Court in the case of, Indian Aluminium Company v. State of Kerala, (1996) 7 SCC 637 : (1996 AIR SCW 1051). What is really prohibited is that legislature cannot in exercise of its plenary power under Articles 245 and 246 of the Constitution merely declare a decision of a Court of Law to be invalid or to be inoperative in which case it would be held to be an exercise of judicial power. Undoubtedly under the scheme of Constitution the legislature do not possess the same. Bearing in mind the aforesaid principles it is necessary to examine the legality of the Act in question. If we do not examine the substantive provisions of the Act and merely go by the object and reasons as given for the enactment of the Act as well as the counter affidavit filed on behalf of the State then the Act would be possibly held to be an intrusion to the judicial sphere by the legislature. The Statement of Objects and Reasons while introducing the Bill in Haryana Vidhan Sabha is extracted hereinbelow in extenso:-

"There were separate rules regulating service conditions and fixation of seniority in the Engineering Services in P.W.D., B and R., Public Health and PWD Irrigation branch. These rules although different for the three branches were on identical lines with minor variations. These rules have been interpreted in the Supreme Court in the case of A. N. Sehgal v. R.R. Sheoran, (AIR 1991 SC 1406) and S. L. Chopra v. B. D. Sardana, (1991 AIR SCW 1028). Subsequently, the judgment has been interpreted further in the case of A. N. Sehgal versus R. R. Sheoran by an order dated 31st March, 1995 of the Supreme Court in a Contempt Petition filed by Shri R. R. Sheoran. In the Public Health side, the seniority list prepared under the directions of the Supreme Court in S. L. Chopra versus B.D. Sardana's case was challenged in the High Court which struck down the list. Thereafter, an appeal was filed by the State in the Supreme Court against the order of the High Court in the case of State versus B.D. Sardana. The appeal was admitted by the Supreme Court and the operative portion of the judgment of the High Court was stated. The matter is pending for final decision in the Supreme Court, and meanwhile the seniority list prepared by the State is being operated by Public Health Branch.

2. Meanwhile, consequent to the directions given by the Supreme Court in the case of A. N. Sehgal v. R. R. Sheoran and others of the Supreme Court dated 31st March. 1995 in the Contempt Petition filed by R. R. Sheoran subsequently the seniority list had to be re-drawn in the case of B and R Branch, which was totally at variance with the manner in which the seniority was drawn up in the case of Public Health Branch. Thus, the directions of the Supreme Court in the case of B and R Branch had created a lot of Administrative problems with certain very junior officers getting undue seniority and becoming senior to the officers under whom they were previously working. This naturally resulted in severe groupism and tension between officers of the department in their day today working.

3. In order to have uniform rules for all three branches of Engineering services and to clarify the position in an unambiguous manner so as to have uniformity and clarity in interpretation, it became necessary to make certain amendments with retrospective effect. This was possible only by enacting

a legislation in this regard. As the Haryana Vidhan Sabha was not in Session, it was decided to achieve the purpose through issue of an Ordinance on 13th May, 1995. The Ordinance replaced the existing rules for all the three branches of the PWD and the common enactment was to govern the service matters of Class-I service B and R Branch. Public Health Branch and Irrigation Branch."

177. The relevant portion of the affidavit of Shri S. N. Tanwar, Joint Secretary to the Government of Haryana filed in the Punjab and Haryana High Court indicating the grounds which impelled the legislature to enact the legislation in question may be extracted hereinunder:-

"This interpretation by the Hon'ble Supreme Court has caused great hardships to the promotees. In order to remove this hardship to the promotees an Ordinance was issued on 13-5-1995 which has now become an Act No. 20 of 1995 after assent of the Governor of Haryana on 30-11-1995. If this Ordinance/Act is not issued the net result of the Order of the Hon'ble Supreme Court would be that the directly recruited Assistant Executive Engineer would be considered to be Executive Engineer from the date he was recruited as Assistant Executive Engineer. The interpretation of the judgment of the Supreme Court creates such a situation that persons who were promotees and were working as Executive Engineer years before even the Assistant Executive Engineers were recruited became junior to the latter when the latter was promoted as Executive Engineer. This was somehow considered by the Government to be very seriously hampering proper working of the department. Giving such a seniority to a person recruited as Assistant Executive Engineer have affected adversely the effective working of the department because the persons who are occupying the posts much higher to the Executive Engineer and above could become junior to Assistant Executive Engineer who is recruited even after the promotees have been discharging their duties on these higher posts. If such a situation will continue to prevail the promotees will not be able to work in that capacity when they would be considered to be junior to the persons who were recruited to Class I service much later than their promotions. Moreover, the Government of Haryana always considered that the Assistant Executive Engineer directly recruited would deem to be having a seniority from the date when he is actually promoted as Executive Engineer. Since the Supreme Court did not accept this interpretation it became essential for the Government of Haryana inter alia for the reasons mentioned above to issue this Act retrospectively."

178. If these materials are alone considered then one may be persuaded to accept the submission of Mr. Sachhar, the learned senior counsel appearing for the direct recruits - Writ Petitioners, that the Act in question was merely to declare the earlier decisions of this Court in Sehgal, (AIR 1991 SC 1406) (supra) and in Chopra, (1991 AIR SCW 1028) (supra) as invalid and as such is usurpation of the judicial power by the legislature. But it is a cardinal rule of interpretation that Objects and Reasons of a statute is to be looked into as an extrinsic aid to find out legislative intent only when the meaning of the statute by its ordinary language is obscure or ambiguous. But if the words used in a statute are clear and unambiguous then the statute itself declares the intention of the legislature and in such a case it would not be permissible for a Court to interpret the Statute by examining the Object and Reasons for the Statute question.

179. In the case, of, Aswini Kumar Ghosh v. Arabinda Bose, 1953 SCR 1 : (AIR 1952 SC 369), Patanjali Sastri, J., speaking for the majority of the Court, emphatically ruled out the Objects and Reasons appended to a Bill as an aid to the construction of a statute. It was observed (At p. 378 of AIR) :

"As regards the propriety of the reference to the Statement of Objects and Reasons, it must be remembered that it seeks only to explain what reasons induced the mover to introduce the Bill in the House and what objects he sought to achieve. But those objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. The Bill may have undergone radical changes during its passage through the House or Houses, and there is no guarantee that the reasons which led to its introduction and the objects thereby sought to be achieved have remained the same throughout till the Bill emerges from the House as an Act of the Legislature, for they do not form part of the Bill and are not voted upon by members. We, therefore, consider that the Statement of Objects and Reasons appended to the Bill should be ruled out as an aid to the construction of the statute."

180. In the case of, Central Bank of India v. Their Workmen, (1960) 2 SCR 200 : (AIR 1960 SC 12), S. K. Das, J., reiterated the principle (At p. 21, para 12 of AIR):

"The Statement of Object and Reasons is not admissible, however, for constuing the section far less can it control the actual words used."

181. Sinha, J., in the case of, State of West Bengal v. Union of India, (1964) 1 SCR 371 : (AIR 1963 SC 1241 at p. 1247, para 13), held:-

"It is well settled that the Statement of Object and Reasons accompaying a Bill, when introduced in Parliament cannot be used to determine the true meaning and effect of the substantive provisions of the statute. They cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation."

182. In the case of, Tata Engineering and Locomotive Co. Ltd. v.Grampanchayat, Pimpri Waghere, (1976) 4 SCC 177 : (AIR 1976 SC 2463), this Court did not accept the recital in the Statement of Objects and Reasons that the amendment was made for the reason that the Panchayats could not levy tax on buildings and held that the word 'houses' as originally used was comprehensive enough to include all buildings including factory buildings and that the amendment only made explicit what was implicit."

183. The general rule of interpretation is that the language employed is primarily the determining factor to find out the intention of the legislature. Gajendragadkar, J., as he then was, in the case of, Kanailal Sur v. Paramnidhi Sadhukhan, (1958) 2 SCR 360 : (AIR 1957 SC 907), had observed that "the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself." In the case of, Robert Wigram Crawford v. Richard Spooner, (1846) 4 MIA 179 (PC) p. 187. Lord Brougham had stated thus". If the legislature did intend that which it has not expressed clearly; much more, if the legislature intended something very different; if the legislature intended pretty nearly the opposite of what is said, it is not for judges to invent something which they do not meet within the words of the text." Thus when the plain meaning of the words used in a statute indicate a particular state of affairs the Courts are not required to get themselves busy with the "supposed intention" or with "the policy underlying the statute" or to refer the objects and reasons which was accompanied the Bill while introducing the same on the floor of the legislation. It is only when the plain meaning of the words used in the statute creates an ambiguity then it may be permissible to have the extrinsic aid of looking to the Statement of Objects and Reasons for ascertaining the true intention of the legislatures. In the aforesaid state of affairs to find out whether the impugned Act is a usurpation of judicial power by the legislature it would not be permissible to look to the Statement of Objects and Reasons which accompanied the Bill while introducing the same on the floor of the legislation nor the affidavit filed by an officer of the Government would control the true and correct meaning of the words of the statute. It would, therefore, be necessary to examine the Act itself and the changes brought about by the Act and the consequences thereof in relation to the decisions of this Court in Sehgal, (AIR 1991 SC 1406) and Chopra (1991 AIR SCW 1028) interpreting the Rules of seniority which were in force and which stood repealed by the Act itself.

184. The Preamble of the Act which is a key to the enactment clearly indicates that it is an Act for consolidation of rules relating to different Branches. It reads thus:-

"to regulate the recruitment and conditions of service of persons appointed to the Haryana Service of Engineers, Class I Public Works Department (Building and Roads Branch), (Public Health Branch) and (Irrigation Branch) respectively."

185. A comparative study of the provisions of the 1961 Rules framed by the Governor in exercise of power under the proviso to Article 309 of the Constitution and 1995 Act passed by the Haryana Legislature indicate the following changes which have been brought about by the Act:

(a) The definition of member of service in Rule 2(12) of 1961 rules has been amended. Sub-clause (c) has been inserted in clause 12 of Section 2 of 1995 Act by which an officer awaiting appointment to a cadre post has been made a member of service.

(b) A proviso has been added to Section 5 (2) of 1995 Act which expressly provides for exceeding

the quota of 50% of officers promoted to the post of Executive Engineers in the event, adequate number of Assistant Executive Engineers are not available.

(c) The percentage of quota has been altered from 50% to 75% in the case of Irrigation Branch by incorporating a second proviso to Section 5(2) of the Act.

(d) The rule with regard to determination of seniority has been completely changed from the one that existed in 1961 rules. While under the 1961 rules, according to Rule 12, no member of service could enjoy the benefit of service except in accordance with the quota prescribed under Rule (sic) under Clause 2 of Section 12 of the Act, length of continuous service for the post of executive engineers, has been made the sole determining factor for the fixation of seniority."

186. The aforesaid changes and alterations in the Act itself and giving it retrospective effect w.e.f. the date when the State of Haryana came into existence and consequently the service of engineers came into existence. rendered the earlier decisions of this Court in Sehgal and Chopra ineffective. The provisions of the Act and the definition of "service" in Section 2(12)(c), proviso to Section 5(2) and the criteria for promotion which was engrafted in Section 12(2) and making it retrospective w.e.f. 1-11-1966, when interpreted lead to the only conclusion that this Court could not have rendered the decision in Sehgal and Chopra on the face of the aforesaid provisions of the Act. It is, therefore, not a case of legislature by mere declaration without anything more overriding a judicial decision but a case of rendering a judicial decision ineffective by enacting a valid law within the legislative field of the legislature. It would be appropriate to extract a passage from the judgment of this Court in, Indian Aluminium Co. v. State of Kerala, (1996) 7 SCC 637 : (1996 AIR SCW 1051), to which two of us were parties (Ramaswamy, J. and Pattanaik, J.) (Para 56 of AIR):

"In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law. Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained. In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made."

187. It would be appropriate now to examine the different citations made at the Bar. Mr. Sachar, the learned senior counsel in support of his contention that the impugned judgment is essentially a usurpation of the judicial power by the legislature relied upon the decisions of this Court in, B. S. Yadav v. State of Haryana and Pritpal Singh v. State of Punjab, 1980 (Supp) SCC 524 : (AIR 1981

SC 561), State of Gujarat etc. v. Raman Lal Keshav Lal Soni, (1983) 2 SCC 33 : (AIR 1984 SC 161) Ex. Capt. K. C. Arora v. State of Haryana, (1984) 3 SCC 281 : (AIR 1987 SC 1858), T. R. Kapur v. State of Haryana 1986 (Supp) SCC 584 : (AIR 1987 SC 415), P.D. Aggarwal v. State of U. P. (1987) 3 SCC 622 : (AIR 1987 SC 1676), Madan Mohan Pathak etc. v. Union of India, (1978) 2 SCC 50 : (AIR 1978 SC 803). In B.S. Yadav's case, (AIR 1981 SC 561), (supra) the question for consideration before this Court was whether Governor could frame rules relating to conditions of service of judicial officers, and if so, then whether such rule contravenes Article 235 of the Constitution? This Court held that a combined reading of Article 309 and Article 235 would lead to the conclusion that though the legislature or the Governor has the power to make Rules regulating the recruitment and the conditions of service of judicial officers of the State and thereby regulate seniority of judicial officers by laying down rules of general applications, but that power cannot be exercised in a manner which will lead to interference with the control vested in the High Court by the first part of Article 235. In paragraph 76 of the judgment the Court examined the amended rule and the retrospectivity of the same and held that since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provisions. But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period and no nexus is shown in the present case on behalf of the State Government. On the aforesaid reasonings the Court came to the conclusion that the retrospective effect that was given to the rules is bad in law. In the said case neither this Court examined the question of legislature invalidating a decision of a competent Court of law nor the question whether there has been any intrusion by the legislature into the judicial sphere. We fail to understand how this case is of any assistance to the petitioners in the Writ Petitions challenging the validity of the Act.

188. In Raman Lal's case (AIR 1984 SC 161) (supra) the employees of the Panchayat Services filed a Writ Petition in Gujarat High Court claiming that they are entitled to the benefit of revision of scales of pay which were made on the basis of the recommendation of the Pay Commission. The State of Gujarat resisted those petitions on the ground that the members of the Panchayat Service were not government servants and, therefore, they are not entitled to claim the relief asked for. The High Court of Gujarat allowed the Writ Petition on coming to the conclusion that the members of the Panchayat Service belonging to the local cadre were government servants and directed the State Government to make suitable orders under Gujarat Panchayat Service (Absorption, Seniority; Pay and Allowance) Rules, 1965 and several other directions to fix the pay scales and allowance and other conditions of service of those employees in par with the State Government servants. The State had filed appeal against the said judgment in the Supreme Court and during the pendency of the appeal an Ordinance was passed which was later on replaced by the Act. The constitutional validity of the amending Act was challenged by filing the Writ Petition by the ex-Municipal employees who were included in the local cadre. This Court came to the conclusion that the Panchayat Service constituted under Section 203 of the Gujarat Panchayat's Act is a Civil Service of the State and the members of the service are government servants. The Court, however, examined the validity of the Amending Act and came to the conclusion that before the Amending Act was passed the employees who had been allocated to the Panchayat Service had achieved the status of Government servants under the provisions of the principal Act of 1961 and that status as government servant cannot be extinguished so long as the posts are not abolished and their services were not terminated in accordance with the provisions of Article 311 of the Constitution. It is in this context it was observed (Para 52 of AIR):-

"The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and to have conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislate cannot legislature today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history."

189. Thus the Amending Act was held to have offended the constitutional provisions of Article 14 and Article 311 and, therefore, was struck down.

190. Thus in Raman Lal the amending Act had the effect of depriving the ex-Municipal employees of their status of membership under the State without any option to them which was considered to be unconstitutional. In the case in hand the impugned Act and its retrospectivity merely alters the seniority within a cadre and such an alteration neither contravenes any constitutional provision nor it affects any right under Part-III of the Constitution. In this view of the matter the aforesaid decision is of no assistance to the direct recruit petitioners who have assailed the legality of the Act. In K. C. Arora's case, (1984) 3 SCC 281 : (AIR 1987 SC 1858), the amended provisions being given retrospective effect was found to have affected the accrued fundamental rights of the parties. Following the earlier judgment of this Court in State of Gujarat v. Raman Lal Keshav Lal Soni, (1983) 2 SCC 33 : (AIR 1984 SC 161), this Court held that the Government cannot take away the accrued rights of the petitioners and the appellants, by making amendment to the rules with retrospective effect. In the aforesaid case under the rules in force the seniority had been determined by counting the period of military service. Under the amended rules by giving it retrospective effect the aforesaid benefit had been taken away. This Court, therefore, held that in view of the rules in force and the assurances given by the Government the accrued right of considering the military service towards seniority cannot be retrospec-tively taken away. In the case in hand no such accrued rights of the direct recruits are being taken away by the Act. On the other hand on account of gross inequitous situation the legislatures have enacted in Act in consonance with the normal service jurisprudence of determining the seniority on the basis of continuous length of service in a cadre. The aforesaid decision, therefore, cannot be said to be a decision in support of the contention that legislature have usurped the judicial power nor is it a decision in support of the contention that by the impugned Act any fundamental rights of the direct recruits have been infringed. In the case of, T.R. Kapur v. State of Haryana, 1986 (Supp) SCC 584 : (AIR 1987 SC 415), when the validity of Punjab Service of Engineers, Class I, PWD (Irrigation Branch) Rules, 1964 as amended by State of Haryana by notification dated June 22, 1984 came up for consideration this Court found that the said rule is violative of Section 82(6) of the Punjab Reorganisation Act, 1966, as the prior approval of the Central Government had not been taken. On the question of power of the Governor to frame Rules under proviso to Article 309 and to give it retrospective effect the Court held that though the rules can be amended retrospectively but any benefit accrued under existing rule cannot be taken

away. In other words a promotion which has already been held in accordance with the rules in force cannot be nullified by the amended rules by fixing an additional qualification for promotion. By the impugned Act the Haryana Legislatures have not purported to nullify any promotion already made under the 1961 Rules which was in force prior to being repealed by the impugned Act. Even Mr. Tulsi, appearing for the State, submitted that no promotion already made under the pre-amended rules will be altered in any manner by giving effect to the provisions of the Act. In this view of the matter, the aforesaid decision is also of no assistance to the direct recruits. In Madan Mohan Pathak v. Union of India, (1978) 2 SCC 50 : (AIR 1978 SC 803), a seven Judge Bench of this Court considered the question of the power of the legislature to annul a judg-ment of the Court giving effect to rights of a party. There has been some observations in the aforesaid case which may support the contention of Mr. Sachar inasmuch as this Court observed tha the rights which had passed into those embodied in a judgment and became the basis of a mandamus from the High Court could not be taken away in an indirect fashion. The main plank of Mr. Sachar's argument is that after the judgment of this Court in Sehgal and Chopra interpreting the rules of seniority between the direct recruits and promotees, the direction of this Court to re-draw the seniority list according to the principle laid down by this Court has been taken away by the enactment of the legislature and thus there has been an in-road of the legislature into the judicial sphere. But a deeper scrutiny of the decision of this Court in Pathak will not sustain the arguments advanced by Mr. Sachar. In Pathak's case in accordance with Regulation 58 a settlement had been arrived at for payment of bonus to Class III and Class IV employees on 24th of January, 1974 and the said settlement had been approved by the Central Government. Notwithstanding the settlement when the Life Insurance Corporation did not pay bonus, the employees approached the Calcutta High Court. The High Court, therefore, issued a writ of mandamus on 21st of May, 1976 calling upon the Life Insurance Corporation to pay the bonus in accordance with the settlement in question. Against the judgment of the learned single Judge a Letters Patent Appeal was preferred and while the said appeal was pending the Life Insurance Corporation (Modification of Settlement) Act, 1976 came into force on 29th of May, 1976 and Section 3 thereof purported to nullify the judgment of the Calcutta High Court by the non-obstante clause in relation to provisions of Industrial Disputes Act. In other words the Calcutta High Court while issuing mandamus had held the settlement has a binding effect once approved by the Central Government and the same cannot be rescinded. But the impugned Act purported to nullify the rights of the employees working under Class III and Class IV to get annual cash bonus in terms of such settlement. It is in this context in the majority judgment of the Court delivered by Bhagwati, J., it was observed (at pp. 817-18 of AIR):

"that the judgment given by the Calcutta High Court is not merely a declaratory judgment holding an impost or tax to be invalid so that a validation statute can remove the defect pointed out by the judgment amending the law with retrospective effect and validate such impost or tax. It is a judgment giving effect to the right of the petitioners to annul cash bonus under the settlement by issuing a writ of mandamus directing the LIC to pay the amount of such bonus. If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed by the LIC. Therefore, in any event, irrespective of, whether the impugned Act is constitutionally valid or not, the LIC is bound to obey the writ of mandamus issued by the Calcutta High Court and pay annual cash bonus for the year April 1, 1975 to March 31, 1976 to the Class III and Class IV employees."

191. In making the aforesaid observation the Court did not consider the constitutionality of the Act but went by theory that the mandamus issued by the Court calling upon a party to confer certain benefits to the adversary unless annulled by way of appeal or review has to be obeyed. This principle has no application to the case in hand as the nature of mandamus which has been issued by this Court in Sehgal, (AIR 1991 SC 1406) and Chopra, (1991 AIR SCW 1028), was merely a declaration of the principles of seniority as per 1961 Rules and the State Government was to draw up the seniority list in accordance with the said Rules. The legislature by enacting the Act and giving it retrospective effect made several vital changes both on the definition of service as well as the criteria for determining the inter se seniority between the direct recruits and promotees. The impugned Act as has been stated earlier has not taken away any accrued rights of the direct recruits, and therefore, the aforesaid observation in Pathak's case really will be of no assistance in deciding the question as to whether the Act purports to have made an in-road into the judicial sphere. The majority judgment came to hold that the impugned Act is violative of Article 31 Clause (2) as the effect of the Act was to transfer ownership debts due owing to Class III and Class IV employees in respect of annual cash bonus to the Life Insurance Corporation and there has been no provision for payment of any compensation for the compulsory acquisition of these debts. It may be stated that the majority judgment did not consider the question as to whether the legislatures by enacting the Act have usurped the judicial power and have merely declared the judgment of a competent Court of law to be invalid. Beg. C.J. in his concurring judgment in paragraph 32 of the judgment, however, has observed:

"that the real object of the Act was to set aside the result of the mandamus issued by the Calcutta High Court, though, it does not mention as such, and therefore, the learned Judge held that Section 3 of the Act would be invalid for trenching upon the judicial power."

192. Three other learned Judges, namely; Y. V. Chandrachud, S. Murtaza Fazal Ali and P. N. Shinghal, JJ. agreed with the conclusion of Bhagwati, J, but preferred to rest their decision on the sole ground that the impugned Act violates the provisions of Article 31(2) of the Constitution and in fact they considered it unnecessary to express any opinion on the effect of the judgment of the Calcutta High Court in Writ Petition No. 371 of 1976. Thus out of seven learned Judges, six learned Judges rested their decision on the ground that the impugned Act violates Article 31(2) of the Constitution and did not consider the enactment in question to be an act of usurpation of judicial power by the legislature. The observation of Beg C.J., in paragraph 32 does not appear to be in consonance with the several authorities of this Court on the point to be discussed hereafter. Thus the aforesaid decision cannot be pressed into service in support of Mr. Sachar's contention. In the aforesaid premises the authorities cited by Mr. Sachar in fact do not support the contention urged by the learned senior counsel and on the other hand a series of authorities of this Court to be discussed hereafter are directly on the point unequivocally indicating that the power of the legislature to enact law and giving it retrospective effect which may factually render a decision of a competent Court of law ineffective cannot be whittled down.

193. In, I. N. Saxena v. State of Madhya Pradesh, (1976) 3 SCR 237 : (AIR 1976 SC 2250), a contention had been raised with regard to the validity of an Act to the effect that the Act has been

passed to overrule a decision of this Court which the legislature has no power to do. In that case the State of Madhya Pradesh had raised age of compulsory retirement for government servants from 55 years to 58 years but the very Memorandum increasing the age of super-annuation also empowered the Government to retire a government servant after the servant attains the age of 55 years. Thereafter Rules under proviso to Article 309 of the Constitution were framed whereby the age of superannuation was raised to 58 years and there was no provision in the Rules empowering the government to retire a government servant after the age of 55 years. The employee concerned, however, was retired from service on completion of 55 years and the said order on being challenged the Supreme Court held that the appellant will be deemed to have continued in service in spite of the order till he attains the age of 58 years and since the appellant had already attained the age of 58 years it is not possible to direct that he should be put in service. But he will be entitled to such benefits as may accrue now to him by virtue of the success of the Writ Petition. After the judgment of the Supreme Court an Ordinance was promulgated which later on became an Act of the State of Madhya Pradesh and the said Act validated the retirement of the government servants including the appellant Saxena despite the judgment of the Court. The Act was given retrospective effect and it empowered a government to retire a government servant on his attaining the age of 55 years and the Amending Act was challenged on the ground that the legislature has usurped the judicial power. The Court had negatived the said contention and held (Paras 21 and 22 of AIR):-

"The distinction between a "legislative" act and a "judicial" act is well known, though in some specific instances the line which separates one category from the other may not be easily discernible. Adjudication of the rights of the parties according to law enacted by the legislature is a judicial function. In the performance of this function, the Court interprets and gives effect to the intent and mandate of the legislature as embodied in the statute. On the other hand, it is for the legislature to lay down the law, prescribing norms of conduct which will govern parties and transactions and to require the Court to give effect to that law.

While, in view of this distinction between legislative and judicial functions, the legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray, C.J. in Indira Nehru Gandhi v. Raj Narain, (AIR 1975 SC 2299) the rendering ineffective of judgments or orders of competent Courts and tribunals by changing their basis by legislative enactment is a well-known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power."

194. In the case of, M/s Utkal Contractors and Joinery (P) Ltd. v. State of Orissa, 1987 (Supp.) SCC 751 : (AIR 1987 SC 2310), a similar contention had been raised but negatived by this Court. In that case the right to collect, sale and purchase of sal seeds had been given to the petitioner and during the subsistence of the contract Orissa legislature passed an Act called Orissa Forest Produce (Control of Trade) Act 1981. Under the provisions of the said Act the State issued Notification on 9-12-1982 which had the effect of rescinding the contract of the petitioner. That order was challenged by filing a Writ Petition which, however, was dismissed by the Orissa High Court. On an appeal this

Court reversed the decision of the Orissa High Court and held that the Act does not apply to sal seeds on government land. A declaration was made by this Court that the Act and the Notification issued under the Act do not apply to the forest produce grown in government forest and that it was, therefore, open to the government to treat the contract dated 29th May, 1987 as rescinded. The judgment of this Court is reported in (1987) 3 SCC 279 : (AIR 1987 SC 1454). Thereafter on 29th May 1987 an Ordinance was promulgated, called the Orissa Forest Produce (Control of Trade) (Amendment and Validation) Ordinance, 1987 and it was given retrospective effect as a result of which the earlier decision of this Court became ineffective. The petitioner, therefore, challenged the validity of the same on the ground that the legislature have encroached upon judicial power and set aside the binding judgment of this Court. Negativing the said contention this Court held (at p. 2315 of AIR) :-

"The legislature may, at any time, in exercise of the plenary power conferred on it by Articles 245 and 246 of the Constitution render a judi-cial decision ineffective by enacting valid law. There is no prohibition against retrospective legislation. The power of the legislature to pass a law postulates the power to pass it prospectively as well as retrospectively. That of course, is subject to the legislative compe-tence and subject to other constitutional limitations. The rendering ineffective of judgments or orders of competent Courts by changing their basis by legislative enactment is a well known pattern of all validating acts. Such validating legislation which removes the causes of inefffectiveness or invalidity of action or proceedings cannot be considered as encroachment on judicial power. The legislature, however, cannot by a bare declaration, without more, directly overrule, reverse or set aside any judicial decision."

This case is to a great extent in pari materia with the case in hand where this Court had earlier interpreted the Rules determining the inter se seniority between the direct recruits and promotees and thereafter the Haryana legislatures have enacted the Act giving it retrospective effect as a result of which earlier decisions of this Court in Sehgal (supra) and Chopra (supra) have become ineffective. In, Bhubaneshwar Singh v. Union of India, (1994) 6 SCC 77, a three Judge Bench of this Court held:

"It is well settled that the Parliament and State Legislatures have plenary powers of legislation on the subjects within their field. They can legislate on the said subjects prospectively as well as retrospectively. If the intention of the legislature is clearly expressed that it purports to introduce the legislation or to amend the existing legislation retrospectively, then subject to the legislative competence and the exercise being not in violation of any of the provisions of the Constitution, such power cannot be questioned."

The Court also further held:-

"that the exercise of rendering ineffective the judgments or orders of competent Courts by changing

the very basis by legislation is a well known device of validating legislation and such validating legislation which removes the cause of the invalidity cannot be considered to be an encroachment on judicial power."

195. In rendering the aforesaid decision, this Court relied upon heavily on the Constitution Bench decision of this Court in, Shri P. C. Mills Ltd. v. Broach Borough Municipality, (1969) 2 SCC 283 : (AIR 1970 SC 192). The Court also relied upon the decisions of this Court in West Ramnad Electric Distribution Company Ltd. v. State of Madras, (1963) 2 SCR 747 : (AIR 1962 SC 1753), Udai Ram Sharma v. Union of India, (1968) 3 SCR 41 : (AIR 1968 SC 1138), Krishna Chandra Gangopadhyaya v. Union of India, (1975) 2 SCC 302 : (AIR 1975 SC 1389) and Hindustan Gum and Chemicals Ltd. v. State of Haryana, (1985) 4 SCC 124 : (AIR 1985 SC 1683). In Comorin Match Industries (P) Ltd. v. State of Tamil Nadu, (1996) 4 SCC 281 : (1996 AIR SCW 2251), the same question again came up for consideration. In this case an assessment order under the Central Sales Tax was set aside on the basis of the decision of Madras High Court in the case of Larsen and Tubro. In Larsen and Tubro certain provisions of the Act were declared ultra vires. In an appeal against the judgment of Madras High Court the Supreme Court held that the provisions of the Central Sales Tax Act which had been declared ultra vires by Madras High Court were validly enacted. The Central Sales Tax Act was amended and the Amending Act was given retrospective effect declaring all assessments made up to 9-1-1969 valid and binding. This was challenged on the ground that it tantamounts to overriding a decision of this Court by Legislatures. Rejecting the said contention this Court held:

"this is not a case of passing a legislation trying to nullify the interpretation of law given in the judgment of a Court of law. This is a case of changing the law itself on the basis of which the judgment was pronounced holding that the assessment orders were erroneous in law."

196. In the case of Indian Aluminium, (1996 AIR SCW 1051) (supra), to which two of us Brother Ramaswamy, J and Pattanaik, J were parties a similar contention had been raised after considering a large number of authorities of this Court and explaining the decision in the case of Madan Mohan Pathak v. Union of India, (AIR 1978 SC 803), this Court negatived the contention and held that when the legislatures enacting the Act has competence over the subject matter and when the said enactment is consistent with the provisions of Part III of the Constitution and the earlier defects pointed out by the Court have been removed by the legislatures then the enactment is a valid place of legislation and cannot be struck down by the Court on the ground that it encroaches upon the judicial sphere. A relevant passage from the aforesaid decision has already been quoted in the earlier part of the judgment.

197. In, Meerut Development Authority v. Satbir Singh, (1996) 11 SCC 462 : (1997 AIR SCW 167), on a similar contention being raised this Court negatived the same and held (Para 10 of AIR):-

"It is well settled that when the Supreme Court in exercise of power of judicial review, has declared a particular statute to be invalid, the legislature has no power to overrule the judgment, however, it has the power to suitably amend the law by use of appropriate phraseology removing the defects pointed out by the Court and by amending the law consistent with the law declared by the Court so that the defects which were pointed out were never on statute for effective enforcement of the law."

198. A similar view has been expressed by this Court in the case of State or Orissa v. Gopal Chandra Rath, (1995) 6 SCC 242. In view of the aforesaid legal position when the impugned Act is examined the conclusion is irresistible that the said Act cannot be said to be an Act of usurpation of the judicial power by the Haryana Legislature, but on the other hand it is a valid piece of legislation enacted by the State Legislature over which they had legislative competence under Entry 41 of List II of the VIIth Schedule and by giving the enactment retrospective effect the earlier judgments of this Court in Sehgal (supra) and Chopra (supra) have become ineffective. But since this does not tantamount to a mere declaration of invalidity of an earlier judgment and nor does it amount to an encroachment by the legislature into the judicial sphere the Court will not be justified in holding the same to be invalid. Needless to mention that the impugned Act has neither been challenged on the ground of the lack of legislative competence nor has it been established to have contravened any provisions of Part III of the Constitution. Consequently Mr. Sachhar's contention has to be rejected and the Act has to be declared intra vires. Necessarily, therefore the seniority list drawn up on different dates in accordance with the earlier Rules of 1961 will have to be annulled and fresh seniority list has to be drawn up in accordance with the provisions of the Act since the Act has been given retrospective effect with effect from 1-11-1966. It may, however, be reiterated that any promotion already made on the basis of the seniority list drawn up in accordance with the Recruitment Rules of 1961 will not be altered in any manner.

199. An ancillary question which arises for consideration is whether on account of the impugned Act any accrued or vested right of any of the direct recruits to the service is being taken away? This consideration is relevant inasmuch as though the legislature may be empowered to enact law and give it retrospective effect but such law cannot take away any accrued or vested rights of the employees. Under the 1961 Rules as interpreted by this Court in the case of Sehgal and Chopra, a direct recruit gets the year of allotment as the year in which he is recruited as Assistant Executive Engineer but so far as promotees are concerned they become a member of the service only after they are appointed substantively to a cadre post and the quota of promotees can't exceed 50% of the total number of posts in the service excluding the posts of Assistant Executive Engineers to which direct recruitments are made. Inter se seniority between direct recruits and promotees is regulated by Rule 12(6) and (7). As a necessary consequence a direct recruit when promoted as Executive Engineer from the post of Assistant Executive Engineer was getting seniority over the promotee Executive Engineers and this situation has been avoided by the impugned Act by changing the definition of "service" in Rule 2(12) of the 1961 Rules, by providing the quota for promotees to exceed 50% in certain contingencies like non-availability of direct recruits to man the post of Executive Engineer and by changing the criteria for determination of inter se seniority and in place of determination of year of allotment, by providing length of continuous service to the post of Executive Engineer to be the determining factor. Necessarily, therefore, by the impugned Act a direct recruit in the rank of Executive Engineer would come down in the gradation list than what was assigned under the Rules of 1961. The question, therefore is that, is the right of a government servant to get a particular

position in the gradation list is a vested or accrued right? The answer to this question has to be in the negative. As early as in 1962 this Court in the case of High Court of Calcutta v. Amal Kumar Roy, (1963) 1 SCR 437 : (AIR 1962 SC 1704), in the Constitution Bench considered the question whether losing some places in the seniority list amounted to reduction in rank, and came to hold (Para 8 of AIR):-

"In the context of Judicial Service of West Bengal, "reduction in rank" would imply that a person who is already holding the post of a subordinate Judge has been reduced to the position of a Munsif, the rank of a Subordinate Judge being higher than that of a Munsif. But Subordinate Judge in the same cadre hold the same rank, though they have to be listed in order of seniority in the Civil List. Therefore, losing some places in the seniority list is not tantamount to reduction in rank. Hence, it must be held that the provisions of Article 311(2) of the Constitution are not attracted to this case."

200. To the said effect the judgment of this Court in the case of State of Punjab v. Kishan Das, (1971) 3 SCR 389 : (AIR 1971 SC 766) wherein this Court observed:

"an order forfeiting the past service which has earned a Government servant increments in the post or rank he holds, howsoever adverse it is to him, affecting his seniority within the rank to which he belongs or his future chances of promotion does not attract Article 311(2) of the Constitution since it is not covered by the expression reduction in rank."

201. Thus to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a Government servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion gets delayed thereby. It was urged by Mr. Sachar and Mr. Mahabir Singh appearing for the direct recruits that the effect of re-determination of the seniority in accordance with the provisions of the Act is not only the direct recruits lose a few places of seniority in the rank of Executive Engineer but their futute chances of promotion are greatly jeopardise and that right having been taken away the Act must be held to be invalid. It is difficult to accept this contention since chances of promotion of Government servant are not a condition of service. In the case of State of Maharashtra v. Chandrakant Anant Kulkarni, (1981) 4 SCC 130 : (AIR 1981 SC 1990), this Court held (para 16 of AIR):

"Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not."

202. To the said effect a judgment of this Court in the case of K. Jagadeesan v. Union of India, (1990) 2 SCC 228 : (AIR 1990 SC 1072), wherein this Court held (para 7 of AIR):

"the only effect is that his chances of promotion or his right to be considered for promotion to the higher post is adversely affected. This cannot be regarded as retrospective effect being given to the amendment of the rules carried out by the impugned notification and the challenge to the said notification on that ground must fail."

203. Again in the case of Union of India v. S. Dutta, (1991) 1 SCC 505 : (AIR 1991 SC 363), this Court held (Para 17 of AIR):

"in our opinion what was affected by the change of policy were merely the chaces of promotion of the Air Vice-Marshals in the Navigation stream. As far as the posts of Air Marshals open to the Air Vice- Marshals in the said stream were concerned, their right or eligibility to be considered for promotion still remained and hence, there was no change in their conditions of service."

204. In, Zohrabi v. Arjuna, (1980) 2 SCC 203 : (AIR 1980 SC 101), this Court observed that

"a mere right to take advantage of the provisions of an Act is not an accrued right."

205. The aforesaid observation would equally apply to the case in hand since the only argument advanced on behalf of the direct recruits was that the advantage which they were receiving under the 1961 Rules to get their seniority in the rank of Executive Engineer is being taken away by the impugned Act. Since the said right is not an accrued right the legislatures were well within their power to make the law.

206. In the aforesaid premises, it must be held that the direct recruits did not have a vested right nor any right had accrued in their favour in the matter of getting, a particular position in the seniority list of Executive Engineers under the pre-amended Rules which is said to have been taken away by the Act since such a right is neither a vested right of an employee nor can it be said to be an accrued right. Thus there is no bar for the legislature to amend the law in consequence of which the inter se position in rank of Executive Engineer might get altered. Consequently, we see no invalidity in the enactment of the Haryana Service of Engineers, Class I, Public Works Department (Building and Roads Branch) (Public Health Branch) and (Irrigation Branch) Respectively Act, 1995. Though the Act in question is a valid piece of legislation but it is difficult to sastain Section 25 of the Act in toto since a plain reading of the said provision does not make out any meaning. Section 25 of the Act is quoted hereinbelow in extenso:-

"25, The Haryana Service of Engineers Class I, Public Works Department (Buildings and Roads Branch), (Public Health Branch) and (Irrigation Branch) Respectively Ordinance, 1995 (Haryana Ordinance No. 6 of 1995), is hereby repealed. The Punjab Service of Engineers, Class-I, Public Works Department (Building and Roads Branch) Rules, 1960, the Punjab Service of Engineers, Class-I, Public Works Department (Public Health Branch) Rules, 1961. The Punjab Service of Engineers Class I, Public Works Department (Irrigation Branch) Rules, 1964, in their application to the State of Haryana, are also hereby repealed to the extent that these rules shall continue to apply to the persons who were members of the Service before 1st day of November, 1966;

Provided that such repeal shall not effect

(a) any penalty or punishment imposed as a result of disciplinary proceedings;

(b) any disciplinary action or proceedings initiated or pending under the rules so repealed;

(c) any relaxation in qualifications granted to any member of the service under the rules so repealed;

(d) the benefits accrued to the persons who have retired from service during a period commencing from the 1st day of November, 1966 and ending with the date of promulgation of the Haryana Service of Engineers, Class I, Public Works Department (Buildings and Roads Branch). (Public Health Branch) and (Irrigation Branch) respectively Ordinance, 1995.

and the Punjab Service of Engineers, Class I, Public Works Department (Building and Roads Branch) Rules, 1960, the Punjab Service of Engineers, Class I, Public Works Department (Punjab Health Branch) Rules, 1961 and the Punjab Service of Engineer, Class I, Public Works Department (Irrigation Branch) Rules, 1964, shall continue to be in force as if the same had not been repealed."

207. The aforesaid provision repeals the previous Rules framed under proviso to Article 309 of the Constitution as well as repealed the Ordinance of 1995. It also saves the action taken in respect of matters enumerated in Clause a to d. It further purports to indicate that the earlier Rules would apply to the persons who were members of the service before 1st day of November 1996 though on a plain reading of the main part of Section 25 really does not convey the aforesaid meaning. The learned counsel appearing for the State of Haryana could not indicates as to what is the true meaning of Section 25, Dr. Rajiv Dhawan, learned senior counsel, however, in course of his arguments contended that though on plain grammatical meaning being given to Section 25 is not susceptible of representing the true intention of the Legislature and in fact it conveys absolutely no meaning but the Court should fill up the gap by applying the principle of casus omissus and provide the word "except" in the first part of Section 25 after the word "to the extent and such filling up being done the provisions of Section 25 would convey the true intention of the legislature. Though on principles Mr. Dhawan, learned senior counsel may be right in his submission that Court can apply the principle of casus omissus and fill the gap by adding certain words when the Statue does not convey the correct meaning. But in the case in hand we do not think it appropriate to apply that principle,

inasmush as the Act itself having been given retrospective effect with effect from 1st November, 1966 the date on which the State of Haryana came into existence there is no rational to apply the pre existing rules to those employees who were members of the service before that date even after the pre-existing rule is being repealed by the Act. In this view of the matter we hold that the expression to the extent that these rules shall continue to apply to the persons who were members of the Service before 1st day of November, 1966 is invalid and is accordingly struck down. Remaining part of Section 25 as well as the proviso to the said Section will, however, remain operative.

208. Though in view of our conclusion that that the Act is intra virus, the inter se seniority of the concerned officers are required to be redetermined in accordance with the Act itself, subject however, to the restrictions that promotions already made will not be annulled but since the judgment of the Punjab and Haryana High Court in favour of the direct recruit B. D. Sardana was rendered by interpreting the Recruitment Rules of 1961 and relying upon the earlier decisions of this Court in Sehgal and Chopra (supra) it would be appropriate for us to also deal with the said judgments since an appeal has been carried to this Court by the promotees in Civil Appeal No. 422 of 1993. After the judgment of this Court in Sehgal, (AIR 1991 SC 1406), (supra) and Chopra, (1991 AIR SCW 1028) (supra) when the State Government drew up the seniority list in the rank of Executive Engineers on 6-4-92 Shri Sardana who had been appointed directly as an Assistant Executive Engineer on 7-12-1997 challenged the said seniority list claiming therein that initially 10 officers having formed the cadre when Haryana became a separate State and all of them being promotees and as such the quota of promotees was in excess of the 50% which is the permissible quota under the Recruitment Rules, he should be given the position just after 10 persons who constituted the initial cadre irrespective of the fact that he was recruited on 7-12-1977. The further contention before the High Court was that the State Government was not entitled to re-determine the cadre strength each year after the judgment of this Court in Sehgal (supra) and Chopra (supra). The High Court by the impugned judgment appears to have been persuaded to accept both these contentions and the promotes, therefore, have assailed the legality of the same. Mr. D. D. Thakur, learned senior counsel appearing for these promotees as well as Dr. Rajiv Dhawan, learned senior counsel appearing for some of the promotees urged that the High Court was in error to hold that the State Government was not entitled to redetermine the cadre strength each year retrospectively subsequent to the judgment of this Court in Sehgal (supra) and Chopra (supra). It was contended that 10 persons who constituted the initial cadre when the State of Haryana was formed and all those 10 persons having been allocated to Haryana from the erstwhile State of Punjab on the basis of their domicile it would be reasonable to construe and apply the Recruitment Rules which was in force in Punjab and which had been adopted by Haryana by fictionally holding the recruitment of 10 persons to be the initial recruitment to the cadre and by fictionally holding that the Recruitment Rules which was adopted by Haryana was in fact came into existence so far as the State of Haryana is concerned on 1-11-1966. According to the learned counsel unless such a construction is given the position will be very anomalous and direct recruits like Shri Sardana will be senior to promotees who had been promoted even in the year 1968 or 1969 even though Sardana was recruited as an Assistant Executive Engineer only on 7-12-1977. According to the learned counsel the rule in question cannot be construed in such a manner to bring about gross inequities and, therefore, a reasonable construction should be made. Mr. Sachhar, learned senior counsel and Mr. Mahabir Singh, learned counsel appearing for the direct recruits and Mr. Sardana, appearing in person, on the other hand, submitted that it was not necessary for the State Government to re-determine the cadre strength every year retrospectively since the judgment of this Court in Sehgal,(AIR 1991 SC 1406) (supra) and Chopra (1991 AIR SCW 1028) (supra) merely authorises the Government to determine the

cadre strength if it has not already been done. According to the learned counsel such re-determination of cadre strength every year has been mala fidely done by increasing the strength of the cadre so as to accommodate the promotees within 50% quota available for them under the Recruitment Rules and, therefore, such re-determination must be struck down and the High Court has rightly struck down the same. It was also contended on their behalf that the initial cadre having been constituted on 1-11-1966 and the entire cadre being filled up by application of the provisions of the Recruitment Rules, 5 of them were beyond the permissible limit of 50% quota in the service. Consequently until the cadre strength is so maintained so as to bring down the ratio of 50% so far as the promotees are concerned any direct recruit may during the intervening period must be held to be senior to such promotees and, therefore, the High Courts was fully justified in holdings that Mr. Sardana should rank below 10 persons who constituted the initial cadre irrespective of the hardship that may be caused to the promotees. According to the learned counsel while interpreting a particular rule the Court is not required to look into the hardship which the interpretation may cause so long as the rules are unambiguous. It was ultimately contended that the High Court has rightly struck down the seniority list that has been drawn on 6-4-1992 as well as the determination of cadre strength made by the State Government and, further the list that was drawn up on 15-4-1997, while the appeals were pending in this Court is the gradations list reflecting the inter se seniority of the direct recruits and promotees correctly in accordance with the interpretation of the rules given by this Court in the case of Sehgal (supra) and Chopra (supra). The rival submissions require a careful examination of the relevant provisions of Rule of 1961 as well as in the light of the earlier decisions of this Court in Sehagal (supra) and Chopra (supra). Before examining the same it may be stated that the Division Bench of the Punjab and Haryana High Court in the impugned judgment came to the conclusion that the State Government was not entitled to re-determine the cadre strength retrospectively and by such action of the State Government by increasing the cadre strength promotees have been given undue advantage and direct recruits like B. D. Sardana have lost their vested right and, therefore, such an order cannot be sustained in law. The High Court also further came to the conclusion that on carving of State of Haryana when the initial cadre was fixed at 10 and 10 persons brought over from erstwhile State of Punjab the Recruitment Rules 1961 must be made applicable to them and consequently the quota of promotees cannot exceed 50%. In this view of the matter since all he 10 persons who constituted the cadre in 1966 were promotees and thus far beyond the permissible quota of 50% the first direct recruit in the cadre Shri Sardana must be given 11th position in the seniority list and he would be senior to all those promotees who were promoted after the initial formation of the cadre irrespective of their date of promotion as an Executive Engineer and irrespective of the date on which Mr. Sardana was appointed directly as an Assistant Executive Engineer on 7-12-1977. As has been stated earlier, this Court in A. N. Sehgal's case (supra) on considering the recruitment rules decided the principles for determination of inter se seniority between the direct recruits and the promotees and left the matter for the State Government to re-determine the same by applying the law as declared by this Court. While interpreting the provisions of the Rules the Court came to hold that a promotee within quota under Rules 5(2) gets his seniority from the initial date of this promotion and the year of allotment, as contemplated in Rule 12(6) shall be the next below the junior most officer in the service whether officiating or confirmed as Executive Engineer before the former's appointment counting the entire officiating period towards seniority, unless there is break in the service or from the date of later promotion. Such promotee, by necessary implication, would normally become senior to the direct recruit promoted later. Combined operation of sub-rule (3) to (5) of Rule 12 makes the direct recruit a member of the service of Executive Engineer from the date of year of allotment as an Assistant Executive Engineer. The Court further held that necessary conclusion would, therefore, be that the direct recruits shall get seniority with effect from the date of the year of the allotment as Assistant

Executive Engineer which is not alterable. Whereas the promotee would get his seniority with effect from the date of the availability of the posts within 50% quota of the promotees and the year of allotment is variable and the seniority shall be recknoned accordingly. In concluding paragraph of the judgment the Court directed the Government of Haryana to determine the cadre posts regularly from time to time including the post created due to exigencies of service in terms of Rule 3(2) read with Appendix 'A' and allot the posts in each year of allotment as contemplated under Rule 12 read with Rule 5(2),(a) and issue orders appointing substantively to the respective posts within the quota and determine the inter se seniority between the promotees and direct recruits in the respective quota cadre posts of Executive Engineers etc. In Sehgal, (AIR 1991 SC 1406), (supra) the Court was dealing with the service of Engineers Class I PWD (Roads and Building) Branch. Similarly in Chopra, (1991 AIR SCW 1028) (supra) the Court dealt with the service of Engineers (Public Health Branch), the rules of Public Health Branch being the same as the rules in Roads and Building Branch. In concluding paragraph of the said judgment through an affidavit had been filed by one of the appellants that the state Government had determined the cadre strength but this Court declined to go into the question and left it open to the Government to determine the seniority after giving opportunity to all parties in the light of the law laid down in the case. In Chopra's case (supra) in paragraph 10 of the judgment this Court had observed that under Rule 3(2) read with Appendix 'A' the State Government is enjoined to determine the cadre Post from time to time and during the first 5 years on first day of January every year and later from time to time and divide the posts as per the ratio of the available cadre posts to the promotees and the direct recruits and shall make appointment in a substantive capacity.

209. In course of argument Mr. K. T. S. Tulsi, learned senior counsel appearing for the State of Haryana had pointed out that the State Govenment had taken steps for making direct recruitment to the cadre but as no competent people were available, per force the cadre was to be managed by filling up the posts by promotees and it was done in the public interest. The learned counsel had urged that there is no justification in the arguments advanced by the counsel for direct recruits that the promotees were in fact given undue favour. We are, however, really not concerned with this submission while interpreting the relevant provisions of the Rules and the Rules having been framed under the proviso to Article 309 of the Constitution the same has to be scrupulously followed. But at the outset on going through the two earlier decisions of this Court in Sehgal, (AIR 1991 SC 1406) and Chopra, (1991 AIR SCW 1028) (supra) there should be no hesitation to come to the conclusion that the High Court was in error to hold that the State Government was not entitled to re-determine the cadre strength retrospectively every year and such re-determination is invalid and inoperative. On the other hand since the cadre strength had not been determined regularly though it was enjoined upon the State Government to do so this Court had called upon the State Government to re-determine the cadre strength and thereafter determine the inter se seniority of the direct recruits and promotees in terms of Rule 12 of Recruitment Rules bearing in mind the law laid down by this Court interpreting the different provisions of the Rules. The said conclusion of the High Court, therefore, must be quashed.

210. Now coming to the question as to how the initial appointees to the service are to be dealt with since in the two earlier cases this Court had never considered this question, the question assumes a greater significance.

211. The Rules framed under the proviso to Article 309 of the Constitution came into force w. e. f. the 9th June, 1961, the date on which the Rule was published in the official Gazette. Under sub-rule (1) of Rule 3, it is stipulated that the service shall comprise of such number of posts of Assistant Executive Engineers, Executive Engineers, Superintending Engineers and Chief Engineers as may be specified by Government from time to time. Under sub-rule (2) of Rule 3 the strength of the service for the first five years after the commencement of these rules shall be determined each year on the 1st day of January or soon thereafter as may be practicable according to the provisions of Appendix A and the strength so determined shall remain in force till it is revised, Sub-rule (2) of Rule 5 stipulates that the recruitment to the service shall be so regulated that the number of posts filled up by promotion from Class II Service shall not exceed fifty per cent of the number of posts in the Service, excluding the posts of Assistant Executive Engineers. Proviso to sub-rule (2) provides that till adequate number of Assistant Executive Engineers eligible and considered fit for promotion are not available the actual percentage of officers promoted from Class II service may be larger than 50%. Sub-rule (3) of Rule 5 speaks of a fictional situation namely in the service as constituted immediately after the commencement of these rules, it shall be assumed that the number of persons recruited by promotion from Class II Service shall be 50% of the senior posts in the Service and future recruitment shall be based on this assumption. Sub-rules (1) and (2) of Rule 3 and sub-rules (2) and (3) of Rule 5 of 1961 Rules may be extracted hereinbelow in extenso :

"3. Strength of Service: (1) the Service shall comprise of such number of posts of Assistant Executive Engineer, Executive Engineers, Superintending Engineers and Chief Engineers as may be specified by Government from time to time.

(2) Without prejudice to the generality of the provisions of sub-rule (1) the strength of the Service for the first five years after the commencement of these rules shall be determined each year on the 1st day of January or as soon thereafter as may be practicable according to the provisions of Appendix A. The strength so determined shall remain in force till it is revised.

5. Recruitment to service : (2) Recruitment to the service shall be so regulated that the number of posts filled by promotion from Class II Service shall not exceed fifty per cent of the number of posts in the Service, excluding the posts of Assistant Executive Engineers;

Provided that till such time as an adequate number of Assistant Executive Engineers, who are eligible and considered fit for promotion, are available, the actual percentage of Officers promoted from Class II Service may be larger than fifty per cent.

(3) In the Service as constituted immediately after the commencement of these rules, it shall be assumed that the number of recruited by promotion from Class II Service is fifty per cent of the

senior posts in the service and further recruitment shall be based on this assumption."

From a combined reading of the aforesaid provisions of the following situation emerges:-

(a) That the Rules came into force w. e. f. 9th of June, 1961 but the service existed even prior to the said date;

(b) On constitution of the service immediately after the commencement of the Rules by operation of a fiction it was assumed that number of persons recruited by promotion from Class II service is 50% of the senior posts in the service. This fictional situation emerges in view of sub-rule (3) of Rule 5, so that, the future recruitment to the service can be regulated appropriately under sub-rule (2) of Rule 5: and

(c) A duty was enjoined upon the State Government to determine the strength of the service each year on the 1st of January or soon thereafter as may be practicable for the first five years after the commencement of the Rules and the strength thus determined year to year would remain in force till it is revised.

212. When recruitments were being made without determination of the cadre strength and statutory rules came into the force for the first time on 9th June, 1961 the Rules cast a duty on the Government to determine the cadre strength each year and thereafter make recruitment in terms of Rule 5 regulating the manner of filling up the post in the service subject to the provisions contained in sub-rule (2) of Rule 5, Rule 12 is rules for determination of seniority. This Rule has already been interpreted by this Court in Sehgal and Chopra indicating the manner in which the seniority has to be determined inter se between the promotees and direct recruits. When State of Haryana came into existence and persons were serving in the erstwhile State of Punjab were drafted into State of Haryana and constituted the initial cadre strength of the service in the State of Haryana and the Government of Haryana adopted the Punjab Rules of 1961 for determining the service conditions of the employees it would be reasonable to hold that so far as the State of Haryana is concerned the Recruitment Rules came into force on 1-11-1966 and since the persons who constituted the service came from erstwhile State of Punjab depending upon their domicile it would be further reasonable to construe that they constituted the service soon after the rules were adopted by the State of Haryana and thereafter Rule 5 (3) should be attracted in respect of those 10 officers who constituted the service and by such application, by a fiction 50% should be treated to be promotees and on so treating them further recruitment to the service was required to be regulated in accordance with sub-rule (2) of Rule 5 and it is then the inter se seniority has to be determined under Rule 12. In other words, out of 10 persons who were brought over from the erstwhile State of Punjab and constituted the service in the State of Haryana 5 will be assumed to have been recruited by promotion from Class II service by application of sub-rule (2) of Rule 5 even if factually all the 10 were promotees while they were recruited under the Punjab Rules. Since the initial cadre strength was only 10 in the year 1966 and since under Rule 5 (2) the promotees cannot exceed 50% of the total number of posts in the services, the Recruitment Rules by fiction held 50% of the persons constituted the service immodiately after the commencement of the Rules to be promotees. Thereafter the State

Government was duty bound to determine the cadre strength every year in the first five years as per sub-rule (2) of Rule 3 and in fact this direction had been given in the earlier judgments in the case of Sehgal and Chopra and after such determination of the cadre strength if in a particular year it is found that the promotees have usurped the quota of direct recruit then such promotee cannot be held to be senior to the direct recruit notwithstanding their earlier recruitment to the service. If these principles are borne in mind then the gradation list which had been prepared by the State Government on 6-4-1992 was possibly the correct gradation list and the High Court was in error to quash the said gradation list on a conclusion that the earlier direction of this Court in Sehgal (AIR 1991 SC 1406) and Chopra (1991 AIR SCW 1028) has not been followed. Obviously, the High Court misunderstood the directions of this Court in the case Sehgal and Chopra. We are, however, not going to examine the said gradation list that was prepared on 6-4-1992 or any other gradation list which had been prepared subsequently during the pendency of these appeals, since in our view the act having been come into force and the act have been given retrospective effect the seniority has to be drawn up afresh in accordance with the provisions of the Act.

213. So far as the rules dealing with Irrigation Branch is concerned, the said rules namely Punjab Service of Engineers (Irrigation Branch) Class I Service Rules, 1964 has not been considered earlier by this Court at any point of time. One Shri M. L. Gupta was appointed to the post of Assistant Executive Engineer as a direct recruit on 27-8-1971, pursuant to the result of a competitive examination held by the Haryana Public Service Commission in December, 1970. Said Shri Gupta was promoted to the post of Executive Engineer on 17-9-1976. He made representation to the State Government to fix up his seniority in accordance with the service rules but as the said representation was not disposed of for more than three years he approached the High Court of Punjab and Haryana by filing C. W. P. No. 4335 of 1984. That petition was disposed of by the High Court on the undertaking given by the State that the seniority will be fixed up soon. The said undertaking not having been complied with, said Shri Gupta approached the High Court in January 1986 by filing Contempt Petition. In September, 1986 the State Government fixed the inter se seniority of said Shri Gupta and other members of the service and Gupta was shown at serial No. 72. Two promotees had been shown at serial No. 74 and 75. Those two promotees filed a writ petition challenging the fixation of inter se seniority between the direct recruits and promotees and High Court of Punjab and Haryana by its judgment passed in May 1987 quashed the order dated 29-9-1986 whereunder the seniority of the direct recruits and promotees has been fixed and called upon the State Government to pass a speaking order assigning position in the gradation list. The State Government issued a fresh notification on 24-7-1987 giving detailed reasons re-affirming the earlier seniority which had been notified on 29-9-1986. Prior to the aforesaid notification of the State Government Shri Gupta had filed a writ petition in the Punjab and Haryana High Court which had been registered as CWP No. 6012 of 1986 claiming his seniority at No. 22 instead at 72 which had been given to him under the notification dated 29-91986. The promotees also filed a writ petition challenging the Government order dated 24-7-1987 which was registered as CWP No. 5780 of 1987. Both the writ petitions, one filed by the direct recruit- Shri Gupta (CWP No. 6012 of 1986) and the other filed by the promotees(CWP No. 5780 of 1987) were disposed of by the learned single Judge by judgments dated 24th January, 1992 and 4th March, 1992 respectively, whereunder the learned Single Judge accepted the stand of the promotees and Shri Gupta was placed below one Shri O. P. Gagneja. Said Shri Gupta filed two appeals to the Division Bench against the judgment of the learned Single Judge, which was registered as Letters Patent Appeal Nos. 367 and 411 of 1992. The aforesaid Letters Patent Appeals were allowed by judgment dated 27th August, 1992. This judgment of the Division Bench of Punjab and Haryana High Court was challenged by the State of Haryana in

the Supreme Court which has been registered as CA Nos. 1448-49 of 1993. This Court granted leave and stayed the operation of the judgment in the matter of fixation of seniority. The promotees also challenged the said judgment of the Division Bench in this Court which has been registered as CA Nos. 1452-1453 of 1993. During the pendency of these appeals in this Court, an Ordinance was promulgated on 13-5-1985 as Ordinance No. 6 of 1995 and the said Ordinance was replaced by the impugned Act of 20 of 1995 by the Haryana Legislature. The validity of the Act was challenged by said Shri Gupta and pursuance to the order of this Court the said writ petition having been transferred to this Court has been registered as T. C. No. 40 of 1996. So far as the validity of the Act is concerned, the question of any usurpation of judicial power by the legislature does not arise in relation to Irrigation Branch inasmuch as the Recruitment Rules of 1964 framed by the Governor of Punjab in exercise of power under proviso to Article 309 of the Constitution which has been adapted by the State of Haryana on and from the date Haryana was made separate State had not been considered by this Court nor any direction has been issued by this Court. The legislative competence of the State legislature to enact the Act had also not been assailed and in our view rightly since the State legislature have the powers under Entry 41 of List-II of the Seventh Schedule to frame law governing the conditions of service of the employees of the State Government. That apart Article 309 itself stipulates that the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State subject to the provisions of the Constitution. Proviso to Article 309 confers power on the President in connection with the affairs of the Union and on the Governor in connection with the affairs of the State to make rules regulating the recruitment, and the conditions of service until provision in that behalf is made by or under an Act of the appropriate Legislature under Article 309 main part. In this view of the matter, the legislative competence of the State legislature to enact the legislation in question is beyond doubt. The only question which, therefore, arises for consideration and which is contended in assailing the validity of the Act is that under the Act the direct recruits would lose several positions in the gradation list and thereby their accrued and vested rights would get jeopardised and their future chances of promotion also would be seriously hampered and such violation tantamounts violation of rights under Part - III of the Constitution. For the reasons already given while dealing with the aforesaid contention in connection with the Public Health Branch and the Roads and Building Branch the contention raised in the Transfer Case cannot be sustained and, therefore, the Transfer Case would stand dismissed. The Act in question dealing with the service conditions of the engineers belonging to the Irrigaiton Branch must be held to be a valid piece of legislation passed by the competent legislature and by giving it retrospective effect no constitutional provision has been violated nor any right of the employee under Part - III of the Constitution has been infringed requiring interference by this Court.

214. So far as the four appeals are concerned, one at the instance of the State and other at the instance of the promotee engineer, even though it is not necessary to examine those appeals since the inter se seniority of the members of the service will have to be re-drawn up in accordance with the provisions of the Act, yet arguments having been advanced by the learned advocates appearing for the parties, we may briefly deal with the same. The Division Bench of the Punjab and Haryana High Court in disposing of the Letters Patent Appeal in favour of the direct recruit has come to the conclusion that the interpretation given by the Supreme Court to the Recruitment Rules dealing with the Public Health Branch and the Roads and Building. Branch in Sehgal and Chopra would equally apply to the Irrigation Branch. In coming to the aforesaid conclusion the learned Judges of the High Court have failed to appreciate the difference between the rules dealing, with the Irrigation Branch and the two sets of rules dealing with the Public Health Branch and the Roads and Building Branch.

So far as the rule dealing with the Irrigation Branch is concerned, Rule 2(12)(c) makes a promotee officer on probation or having successfully completed his probation awaiting appointment to a cadre post to be a member of the service which was not the position in the Public Health Branch as well as in the Roads and Building Branch. Then again under Rule 5(2) the percentage of promotees was required to be so regulated so as not to exceed 75% of the number of posts in the service for the first 10 years from the date of the commencement of the Rules and thereafter it shall not exceed 50% of the number of posts in the service excluding the posts of Assistant Executive Engineer. Proviso to the aforesaid rule also entitles the Government to grant permission beyond 75% during the first 10 years of the commencement of the rules and beyond 50% therafter in case sufficient number of direct recruits-Assistant Executive Engineers are not available and considered fit for promotion. Rule 12 which deals with the determination of inter se seniority is also somewhat different than the similar rule for the Public Health Branch and the Roads and Building Branch which had been considered by this Court in the cases of Sehgal and Chopra. In this view of the matter, the Division Bench of the Punjab and Haryana High Court was not justified in disposing of the appeal relying upon the earlier decisions of this Court in A. N. Sehgal's case. The learned Judges have not focussed their attention to the difference in the rules meant for the Irrigation Branch and the Rules meant for the Public Health Branch and Roads and Building Branch. The impugned judgment, therefore, passed by the Division Bench of the Punjab and Haryana High Court is erroneous and cannot be sustained. But as has been stated earlier it is not necessary to delve into the question in a more detailed manner since the Act having come into force and the Act being made effective retrospectively w.e.f. 1-11-1966, the date on which the State of Haryana was formed, the inter se seniority has to be determined in accordance with the provisions of the Act. Consequently, the judgment of the Punjab and Haryana High Court in LPA Nos. 367 and 411 of 1992 is set aside and the State of Haryana is directed to re-determine the inter se seniority of the members of the service belonging to the Irrigation Branch in accordance with the provisions of the Act. Civil Appeal Nos. 1448-1449 of 1993, 1452-1453 of 1993 and T. C. No. 40 of 1996 are disposed of accordingly.

215. In the ultimate result, therefore, we hold Haryana Act 20 of 1995 is intra vires except part of Section 25 which has been held to be ultra vires. The Act having been given retrospective effect with effect from 1-11-1966 the inter se seniority of direct recruits and promotees in each of the services, namely, the PWD Branch, the Public Health Branch and the Irrigation Branch will have to be re-drawn up in accordance with the provisions of the Act. The seniority lists already drawn up subsequent to the judgment of this Court in the case of Sehgal and Chopra and as well as during the pendency of these appeals in this Court are of no consequence in view of the Act coming into force. It is, however, made clear that any promotion already given on the basis of seniority determined by the Government under the pre-existing rules will not be annulled notwithstanding any change in the seniority to be determined under the Act. The impugned judgments of Punjab and Haryana High Court are set aside. The State Government is directed to re-consider the question of seniority of the employees of the three Branches under the Act within a period of six months from today and to give consequential promotion on that basis soon thereafter.

216. All the appeals and the transfer cases are disposed of accordingly.

Order accordingly.