ANDHRA PRADESH HIGH COURT

P. Lakshmana Rao

Vs.

State of A.P

Writ Petns. Nos. 4703 of 1968, 2376, 2542, 2480 and 2259 of 1967, 83 and 645 of 1968, 1607 of 1969

(N. Kumarayya, C.J., Gopal Rao Ekbote and Sambasiva Rao, JJ.)

09.12.1970

JUDGMENT

Gopal Rao Ekbote, J.

1. In all these Writ Petitions, two questions of some importance are raised. The first question is whether as a result of the Supreme Court decision in *A. V. S. N. Rao v. State of Andhra Pradesh*[1], striking down Section 3 and Rule 3 made thereunder as unconstitutional, Section 2 of the Public Employment (Requirement as to Residence) Act, 1957, hereinafter called "the Public Employment Act" survives and consequently the mulki rules which were repealed by virtue of Section 2 continue to be repealed. Secondly if Section 2 of the Public Employment Act is found not to be surviving after Section 3 has been found to be void, whether mulki rules ceased to be effective after the formation of the Andhra Pradesh State on 1-11-1956 or thereafter.

2. In order to appreciate the implications of these contentions, it is useful to survey the historical background of the Public Employment Act. The Telengana area formerly was a part of the State of Hyderabad. The Hyderabad State comprised of three linguistic areas, Telengana, Marathwada and Karnatak. In 1919 the Nizam issued a Firman promulgating what has come to be known as mulki rules. These rules were contained in Appendix 'N' to the Hyderabad Civil Service Regulations. In fact the terms 'Mulki' and 'mulki rules' were used in Rule 39 of the said regulation. Appendix 'N' provided who should be considered mulki for purpose of appointment to any service in the former State of Hyderabad. Rule 39 provided :

> "No person will be appointed to any superior or inferior service without specific sanction of His Exalted Highness, if he is not a mulki in terms of the rules laid down in Appendix 'N'. Any person, whose domicile is cancelled under para. 9 of the mulki rules, will be considered to have been dismissed from his post from the date of such cancellation."

3. Appendix 'N' in all contains six rules. It is unnecessary to read them all fully here. It is perhaps enough for our purpose to read Rule 1 which defines the term 'mulki'.

[1] AIR 1970 SC 422

> "1. A person shall be called a mulki if :
> (a) By birth he is a subject of Hyderabad State; or(b) By residence in the Hyderabad State he has been entitled to be a mulki; or
> (c) His father having completed 15 years of service was in the Government service, at the time of his (child's) birth; or
> (d) She is a wife of a person who is a mulki."

Rule 2 states that a person shall be called a subject of the State by birth if his father was a mulki at the time of his birth.

4. Rule 3 which is relevant must be read in full :

> "A person shall be called a mulki who has a permanent residence in the Hyderabad State for at least 15 years and has abandoned the idea of returning to the place of his previous residence and has obtained a Certificate to that effect on a prescribed form attested by a Magistrate".

5. Rules 4 and 5 relate to the effect of marriage on the question of mulki.

6. Rule 6 prescribes the authorities who are competent to issue mulki certificates.
7. In November 1949, the Nizam by a firman confirmed the provisions relating to the mulki rules for purposes of appointment to a post under Government.

8. These rules had the force of law and remained effective till the Constitution of India came into force on 26-1-1950. On that date by virtue of the Constitution, the Hyderabad State was declared as Part 'B' State. In so far as the Mulki rules for appointments on the basis of residence were concerned, it is common ground that they were continued as law in force.

9. The Government in Circular Letter No. 7325/GAD. S/F 3-Cir/50 dated 14-6-1950 gave directions that the birth and descent qualifications for purposes of recruitment to services under the Government should not be insisted upon. It was made clear that after the advent of the Constitution, the qualification of residence of 15 years prescribed in the Mulki rules is saved and that those rules shall be continued to be applied for purposes of recruitment to services till a uniform policy in regard to residential qualification is decided upon by the Government. Further as the Mulki rules themselves provided that exception could be made by the order of the Nizam, the Government by this circular made it clear that such exceptions will be granted only by the Government.

10. The requisite qualification of residence for a mulki certificate was further clarified by Circular No. 7848/ GAD. S/2 Cir/50 dated 18-9-1951 and also by a Notification No. 6284/GAD. S/F. 8-Cir/53 dated 5-8-1953.

11. In 1955 the Rajpramukh of Hyderabad framed the Hyderabad General Recruitment Rules in supersession of all the previous rules and orders on the subject of prescribing inter alia

requirement as to residence for purpose of employment under the State Government. These rules were made under the proviso to Article 309 of the Constitution and were issued by Notification No. 279/GAD/19/ Gen S.R. C./52, dated 9-11-1955.

12. One of the rules laid down that domicile certificate would be necessary for appointment to a State or subordinate service and the issue of the domicile certificate depended upon residence in the State for a period of not less than 15 years. It reads;

> "No person will be eligible for appointment to a State or subordinate service, unless he is an Indian national, subject to the condition that such person should be in possession of a domicile certificate (Mulki certificate) issued by a competent authority in terms of the rules laid down in Schedule '3' in proof of his having resided in the State for a period of not less than 15 years :
> Provided that the Government may, in special cases, for reasons to be recorded in writing; authorise, subject to such conditions as they may impose, the employment of a person -
> (a) who is not an Indian national, or
> (b) who is unable to produce a domicile certificate."

The rules laid down in Schedule (3) merely reproduce the rules contained in Appendix 'N' of the Hyderabad Civil Service Regulations. There is an explanation attached to the schedule which makes it clear that these Rules should be read in conjunction with the modification contained in the Circular letters and Notifications issued by the Government in the Administration Department.

13. Two views are possible in regard to these rules issued under Article 309 of the Constitution. One is that since the Mulki rules were continued to be in force by virtue of Article 35 (b) they are incorporated in the said rules made by the Rajpramukh under Article 309 and thus continued them in force. The second view is that since the Rajpramukh of part 'B' State could not have made any rule relating to the employment on the basis of residence in view of Article 35 (a), the rule prepared by the Rajpramukh are ultra vires of the Constitution, with the result that the old Mulki rules which were continued because of Article 35 (b) continued to be in force. We will deal with this question at the appropriate stage.

14. It is at this point of time and stage that the States Reorganization Act came into force and on 1-11-1956 the State of Andhra Pradesh came into existence with Telangana region included in the said State. The three linguistic parts of the Hyderabad State went to three different States after the Hyderabad State was trifurcated; Marathwada went ultimately to Maharashtra and the Karnatak to Mysore. Section 119 of the States Reorganization Act provided that any law in force immediately before the new States came into existence continue to remain in force with respect to the territories to which it applied. The section categorically states that –

> "territorial reference to an existing State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

15. The effect of this provision was that the Mulki rules continued to be in force in all three linguistic parts which went to the three different States because that was the territory of the former Hyderabad State. That is how the mulki rules came to be continued in Telangana area of the Andhra Pradesh State.
16. Then came the Public Employment (Requirement as to Residence) Act, 1957 (Act 44 of 1957). It came into force on 21-3-1959. Section 2 of the Public Employment Act reads :

> "Upon the commencement of this Act, any law then in force in any State or Union territory by virtue of Clause (b) of Article 35 of the Constitution prescribing, in regard to a class or classes of employment or appointment to an office under the Government, of, or any local or other authority, within, that State or Union territory, any requirement as to residence therein prior to such employment or appointment shall cease to have effect and is hereby repealed."

Section 3 of the Act gave power to the Central Government to provide in regard to appointments to any subordinate service or post under a local authority, other than Cantonment Board within the Telangana area of Andhra Pradesh or within, the Union territories concerned any requirement as to residence within the Telangana area or the said Union territories as the case may be prior to such appointment.

17. The Government of India promulgated certain rules on 21-3-1959 by which it was laid down that a person shall not be eligible for appointment to a post within the Telangana area under the State of Andhra Pradesh or to a post under any local authority other than the Cantonment Board in the said area, unless he has been continuously residing within the said area for a period of not less than 15 years immediately preceding and produce before the appointing authority concerned, if so required by it, a certificate of eligibility granted under these rules.

18. These posts which were covered by these rules were all non-gazetted posts under the State Government of Andhra Pradesh within the Telangana area and the post of Tahsildar by whatever name designated within that area and any post under a local authority other than Cantonment Board within that area which carried a scale of pay, the minimum of which did not exceed Rs. 300 per month or a fixed pay not exceeding that amount. It also provided for certificate of eligibility under these rules as well as for exemptions for which power was given to the State Government. Besides this, special, provision was also made with respect to post in the Secretariat Department and the office of the Heads of Departments in the State of Andhra Pradesh situated in the twin cities of Hyderabad and Secunderabad by which every second vacancy in every unit of three vacancies was to be filled, subject to the requirement of residence for 15 years in the Telangana area.

19. Section 4 of the Public Employment Act directed that the rules made under Section 3 shall be laid on the table of House of Parliament and subject to such modifications as may be made by the Parliament, they shall be in force.

20. Section 5 then enjoined that Section 3 and the rules made thereunder shall cease to have effect on the expiration of five years from the commencement of the Act.
21. Section 5 of the Public Employment Act was subsequently amended by virtue of which

Section 3 and the rules made thereunder were to continue in operation till 1974.

22. G. O. Ms. No. 1936 dated 23-12-1960 in continuation of G. O. Ms. No. 593 GAD dated 20-4-1959 was then issued. This notification was issued under the proviso to Article 309 of the Constitution. It effected certain amendments to the Hyderabad General Recruitment Rules published with Notification No. 279 GAD dated 9-11-1955. As a result of this amendment, Schedule III was deleted.

23. G. O. Ms. No. 418 dated 7-3-1962 was then issued under Article 309 of the Constitution superseding the Andhra State and Subordinate Service Rules and the Hyderabad General Recruitment Rules, the Andhra Pradesh State and Subordinate Service Rules having come into force with effect from 7-3-1962.

24. Article 371 of the Constitution was substituted by the Constitution (7th Amendment) Act, 1956. According to this Article, the President by order may provide for the Constitution and functions of the Regional Committee of the Legislative Assembly of the State of Andhra Pradesh, for the modification in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of the Regional Committee.

25. In pursuance of the said Article the Andhra Pradesh Regional Committee Order, 1958 was made by the President.

26. Under Clause 3 of the Order, a Regional Committee of the Assembly for the Telangana region consisting of the Members of the Assembly representing that region was constituted. Clause 4 states that all schedule matters in so far as they relate to the Telangana region shall be within the purview of the Regional Committee.

27. We are not concerned with other matters, as nothing turns upon them in these cases.

28. While so, the validity of the eligibility certificate based on residence for appointment to posts in the Telangana area was challenged in Writ Petitions Nos. 2235, 3907 and 3962 of 1968. Chinnappa Reddy, J. held by his judgment dated 3-2-1969, Section 3 of the Public Employment Act void.

29. The Government of Andhra Pradesh preferred Writ Appeals Nos. 44, 45 and 49 of 1969 against that judgment of the learned Single Judge. The appeals were heard by Jaganmohan Reddy, C. J. (as he then was) and Sambasiva Rao, J. The Bench by its judgment dated 20-2-1969 held firstly, that even if the judgment of the learned Single Judge was sustained and Section 3 was held unconstitutional, even then the Mulki rules requiring 15 years' residence for appointment survived and were found to be in force after the Constitution came into force on 26-1-1950. These rules continued to be in force till they were repealed by the Public Employment Act on 21-3-1959. They secondly held that the Parliament had power to make a law in respect of any part of a territory of a State such as the Public Employment Act.

30. Earlier Manohar Pershad, C. J. (as he then was) and Kumarayya, J. (as he then was) considered the validity of Mulki rules in Writ Appeal No. 142 of 1965. They were mainly concerned with the residential qualification in Telangana area for purposes of admission to the

Colleges under the Osmania University. They nevertheless surveyed the position in relation to Mulki rules as they prevailed in regard to employment to posts under the Government etc.

31. The subsequent Bench decision referred to above followed this judgment considering it as an authority for the proposition that part of the Mulki rules which provided 15 years' residence survived after the Constitution by virtue of Article 35 (b) and was only repealed by the Public Employment Act.

32. In the meantime, a Writ Petition under Article 32 of the Constitution, No. 65 of 1969 was filed before the Supreme Court. This writ petition was disposed of by the Supreme Court on 28-3-1969, (*A. V. S. N. Rao v. State of Andh Pra) : (AIR 1970 Supreme Court 422)* (supra). The Supreme Court held that the Public Employment Act did not conform with the provisions of Article 16 (3) of the Constitution, as it speaks of a whole State as the venue for residential qualification and not districts, taluks, cities, towns or villages. Therefore it was held that –

> "Section 3 of the Public Employment (Requirements as to Residence) Act, 1957 in so far as it relates to Telangana (and we say nothing about the other parts) and Rule 3 of the rules under it are ultra vires the Constitution."

33. It was argued before the Supreme Court that the Mulki rules existing in the former Hyderabad State must continue to operate by virtue of Article 35 (b) in the said area. The Supreme Court, however, said :

> "This point is not raised by the petitions under consideration and no expression of opinion by us is desirable."

34. The result of this decision is that it was held by the Supreme Court that Article 16 (3) read with Article 35 (a) which gave power to Parliament to make any law prescribing in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within a State or Union territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment, only authorised Parliament to fix residential qualification which would apply to the entire State and it was not open to Parliament to fix the residential qualification with respect to a part of the State only. Consequently as the Act was found not to have been enacted in conformity with the provision of Article 16 (3), the Act therefore was ultra vires of the Constitution.

35. After Section 3 and the rules made thereunder were thus struck down, the question which now arises is whether Section 2 of the Act survives. It was common ground that as Sections 4 and 5 are inextricably connected with Section 3 and are inseparable from the invalid Section 3, Sections 4 and 5 also become void. What remains of the Act is only Section 2. Section 2 repeals in so far as we are concerned Mulki Rules. If Section 2 continues to be valid in spite of Sections 3 to 5 being found as void, then the Mulki rules which stood repealed on 21-3-1959 continue to be so repealed. On the other hand, if Section 2 is inseparable from the other Sections of the Act, then that section also has to go along with the other sections.

36. Now it is not uncommon that a single Act may be found partially valid and partially invalid. Whether or not the decision of the Supreme Court resulting in partial invalidity will so

disembowel the Act that it must fall as a whole or whether valid portion will be enforced separately is undoubtedly an important question.

37. In deciding the severability of the Act, as in any problem of statutory construction, the ultimate decision must necessarily rest upon finding out the legislative intent. The problem thus posed is twofold. The Parliament must have intended that the Act be separable and secondly the Act in fact must be capable of separation. Although the legislative intent is thus a determining factor, since there is no precise formula or standard which can be set out by which to establish legislative intent, ordinarily a rule of reasonableness in such cases is invoked and in evolving that, general principles have been determined and some presumptions are made in determining the said question.

38. Since what the legislative intent was or would have been is at best a canny, a judicial guess. It has to be based on certain presumptions and principles. It must, however, be remembered that the law that has grown up about this branch of statutory construction is not susceptible of clear-cut rationalisation, despite its frequent use in ramification. Separability cases have, therefore, to be decided in the light of established principles. It is, however, understood that each case rests largely upon its own particular facts and circumstances.

39. Primarily it is from the Act itself that the Court must find a manifest or apparent intent to continue the valid portion in force irrespect of the invalidity of the remainder of the Act. It is, however, legitimate to take into account the history of the legislation, its object, the title and the preamble to it. It is also permissible to keep in view the circumstances under which the particular Act was passed and the object sought by the Legislature in enacting the same.

40. It is in this background that we propose to examine the question in the light of the principles evolved in that behalf.

41. The test which normally followed is whether or not the Legislature would have passed the valid provisions, Section 2 in this case, had it been presented with the invalid Sections 3 to 5 removed. It is difficult to assume that the Parliament would have ever intended to enact Section 2 alone. From the history of the enactment to which we have made a detailed reference and the circumstances under which the Public Employment Act was passed, one must be bold enough to assert that the Parliament would have enacted Section 2 alone. If it is remembered that the existing Mulki rules were continued by virtue of Article 35 (b) and as per Article 35 (a) read with Article 16 (3), the Parliament is given the power to enact a law on that subject, it becomes difficult to hold that the Parliament could have merely intended to repeal the Mulki rules without in any way replacing them by a re-enacted law which it was competent to enact on the subject. That was what was done when it enacted the Public Employment Act. If the intention was to merely repeal the Mulki rules, even the President could have done it under Article 372 read with Article 35 (b). Mulki rules were continued by Article 35 (b) subject to any adaptation or modification that may be made under Article 372. And under that Article, the modification includes even repeal, since that power was not exercised and instead a law on the subject was enacted, it would not be unreasonable to infer that the Parliament would not have enacted Section 2, if it were aware of the invalidity of Sections 3 to 5. In this view, all the sections are clearly dependant on each other. They are intended to be operated upon together for achieving a specific purpose. All the sections are so connected together that it is difficult to presume that the

Parliament would have passed Section 2 without enacting Sections 3 to 5. The invalid and the valid portions of the Act seem to us to have been conditions, considerations and compensation for each other. They were presented as one whole scheme to the Parliament.

42. The invalid portion, in our opinion, was an important inducing cause for the passage of the Public Employment Act. It is to be borne in mind that the invalid part need not be the sole inducing cause. If it is in some important aspect an inducing cause for the passage of the Act, that must be considered enough. The Chief inducement was to substitute the Mulki rules by the provisions of the Public Employment Act, albeit the life of Section 3 and the rules made thereunder was for a temporary period.

43. By sustaining only Section 2 as we are asked to do, we would be altering or changing the purpose of the Act and that is not permissible. The Act was designed to accomplish a definite purpose, that is to say, to continue the employment opportunities on the basis of the residential qualification at least till 1974. If Section 2 alone is continued, that purpose will be defeated. Instead the Mulki rules which were in existence would also be taken away. Thus the purpose of the Act by allowing Section 2 to remain valid cannot be accomplished. Section 2 must therefore go along with the other sections. It may be that Section 2 is distinct and separate from the other invalid sections. But all of them together form part of a single scheme and no one can have any doubt that it was intended to be operating as a whole. That is why we said that they are dependent upon each other. If so, then the invalidity of Sections 3 to 5 must result in the failure of the whole Act. It cannot be ignored that if the invalid portion is expunged from the statute, what remains is only the repealing provision without re-enactment on the subject. It will be contrary to the intention of the Parliament to continue Section 2 alone in force. The statute has to be held entirely void because it is evident from the contemplation of the statute and from the purpose which it sought to accomplish. We are satisfied that the statute would not have been passed at all, except as an entirety. Otherwise, the general purpose of the Parliament would be defeated if the statute is held valid only to the extent of Section 2 while condemning the other sections.

44. The dominant purpose of the Act is writ large on the face of the Act. The title, the preamble and the purview of the Act bear full testimony as to what the dominant purpose of the Act was. The historical background and the circumstances under which it was passed clearly bring out the main purpose of the Act. It was to repeal and re-enact on the subject and not merely to repeal. We are, therefore, satisfied that the valid part of the Act i. e. Section 2 cannot be separated from the invalid part of the Act. The Act as a whole, therefore, has to be necessarily held invalid.

45. We are not impressed with the contention that since Section 3 was only operative for five years by virtue of Section 5, Section 2 can be taken as an independent provision. It is already noted that because of subsequent amendment, if Sections 3 and 5 were valid, they would have continued till 1974. Whatever may be the life of Section 3, it substituted the Mulki rules and because of this substitution alone the Mulki rules were repealed. All the Sections, therefore, must go together as part of the same scheme.

46. The other contention was that Section 2 is a general provision which applies not only to Andhra Pradesh but to certain other States and Union territories. Section 2 cannot therefore fall along with Section 3. What is overlooked in advancing that contention is that Section 3 also has been struck down only in respect of its applicability to Telangana region, though it is also a

general provision. Section 2, although it is general, can on, parity of reasons be declared invalid in its application to the repeal of Mulki rules which were in force in the Telangana area. When Section 3 as a result of the Supreme Court decision can validly be separated in its application to Telangana area, we fail to see why Section 2 similarly cannot be held invalid in its application to the Mulki rules in vogue in Telangana Area.

47. This partial invalidity is based upon the principle of severability in application or separability in enforcement The Supreme Court in *R. M. D. Chamarbaugwalla v. Union of India*[2]. on severability applied this principle to the definition of prize competitions. And on the same principle the Supreme Court in AIR 1970 Supreme Court 422 (supra), has held that Section 3 is ultra vires in its enforcement or application to Telangana area. And on the same principle we hold that Section 3 is bad in its enforcement or application to the Mulki rules prevailing in Telangana area. We are, therefore, satisfied that the impugned part of the Act i. e. Section 2 cannot be separated from the invalid part of the Act. The Act as a whole therefore has necessarily to be held invalid.

48. That is the view which Jaganmohan Reddy, C. J. (as he then was) and Sambasiva Rao, J. took in Writ Appeals Nos. 44, 45 and 49 of 1969 decided on 20-2-1969 (Andh Pra).

49. Another Bench of this Court consisting of Sharfuddin Ahmed and Vaidya, JJ. agreed with this view in Writ Petns. Nos. 1053 of 1967 and batch, D/- 27-7-1970 (Andh Pra).

50. Krishna Rao, J. in Writ Petn. No. 2270 of 1968, D/- 10-6-1970 (Andh Pra) seems to have taken a contrary view. With due respect to the learned Judge we find ourselves unable to agree with the learned Judge in that behalf.

51. The result of the foregoing is that Section 2 in so far as it operates to repeal Mulki rules prevalent in Telangana area being inseparable from the rest of the invalid part of the Act must fall. Consequently the Mulki rules will be deemed to have been not repealed. They continue to be in force as if the Public Employment Act had not been enacted at all.

52. The next question then is whether the Mulki rules cease to be operative as law after the formation of the State of Andhra Pradesh on 1-11-1956. The argument naturally involves internally some conflict. When we considered the first contention i. e., whether

[2] AIR 1957 SC 628

Mulki rules were revived after the striking down of Section 3 by the Supreme Court, it was assumed that the Mulki rules continued as valid law till they were repealed by the Public Employment Act which came into force on 21-3-1959. The present argument, however, implies that Mulki rules had not survived on the day when they were repealed by the Public Employment Act; but had actually ceased to be operative as law on 1-11-1956 itself.

53. The argument evidently has appealed, but in a different form to our learned brother Krishna Rao, J. who decided Writ Petal. No. 2270 of 1968 on 10-6-1970 (Andh Pra). He observed that the question is "whether the said rules continued to be valid to-day in view of the provisions of Article 35 (b) of the Constitution of India." The learned Judge thought that the answer to that question turns upon the true interpretation of Article 35 (b). The learned Judge thought that the expression 'law in force' appearing in Article 35 (b) is qualified in two respects. (1) The law is

one which is immediately in force and (2) the law should relate to any of the matters referred to in sub-clause (1) of clause (a). He thought that the first requirement was satisfied, but not the second. The learned Judge then observed –

> "the test is not whether the Government of erstwhile Hyderabad State should have made a law in respect of the entire area of what is now regarded as Andhra Pradesh. But the determining factor under Article 35 (b) of the Constitution is whether on the day when the validity of any pre-constitutional law has to be tested, the definition of the State as it exists to-day should be taken into consideration. In fact the decision of the Supreme Court proceeds upon the footing that the word 'State' in Article 16 (3) refers to the entire State of Andhra Pradesh taken as one unit and not the region known as Telangana area which formed part of the erstwhile State of Hyderabad. I, therefore, hold that the principle underlying sub-clause (3) of Article 16 should equally apply to interpreting the provisions of Article 35 (a) and (b). Judged by this test, the only possible conclusion is that the Mulki rules cannot be regarded as a law which continues in force today."

54. The learned Judge tested the validity of the Mulki rules on the basis of two considerations. (1) The validity of the Mulki rules is tested in the light of the position of law on the day when the validity was being tested and (2) that the principle underlying Article 35 (b) is that

> "only such of the existing laws which conform to the law to be made by the Parliament under Article 35 (a) are declared to be in force and to continue as valid until they are repealed by Parliament."

55. The said argument also seems to have appealed to Sharfuddin Ahmed and Vaidya, JJ. in Writ Petn. No. 1053 of 1967 (Andh Pra), and batch decided on 27-7-1970. The learned Judges, however, did not agree with the reasoning of Krishna Rao, J. although they reached the conclusion that Mulki rules did not survive after the formation of Andhra Pradesh State on 1-11-1956. They have not based their conclusion on the ground that the validity of the Mulki rules can be tested in the light of the position as it sood on the day when challenge is made. They have, however, agreed with the other reasoning of the learned Judge viz., that the Mulki rules must continue to satisfy the requirement of Article 16 (3) of the Constitution and since on the day when Andhra Pradesh State came into existence, Mulki rules which were applied to a part of the State of Andhra Pradesh i. e. Telangana region cease to conform with the essential requirement of Article 16 (3) i. e. that the law must apply to the whole State and not part of it as laid down by the Supreme Court. The Mulki rules consequently cease to be operative as law, as they were not in accord with Article 16 (3) of the Constitution.

56. The contention of Sri H. S. Gurraja Rao, the learned counsel for the petitioner, however, was that the existing law on the date of the Constitution continued by virtue of Article 35 (b). Such an existing law i. e., Mulki rules could be repealed only by two methods : (1) in pursuance of the power of Adaptation of laws conferred by Article 372 of the Constitution and (2) by Parliament altering, repealing or amending it in pursuance of the legislative power exclusively conferred on it by Article 35 (a) read with Article 16 (3). He further contended that the existing law need not conform to all the requirements of Article 16 (3). If the existing law in pith and substance is on

the subject mentioned in Article 16 (3), then it is saved by Article 35 (b). Alternatively, he argued that even if it is assumed that the existing law must satisfy the requirements of Article 16 (3), the Mulki rules satisfied those requirements as they were applicable to the whole of the State of Hyderabad and not a part of it. And once in view of such conformity with Article 16 (3), the Mulki rules continued as valid law in the State of Hyderabad under Article 35 (b) it cannot become invalid because of the formation of the Andhra Pradesh State on 1-11-1956 as is held by the Bench. Nor can it be said to have become invalid on the day when its validity was challenged in the Court as is held by the learned single Judge.

57. We have therefore to see which of the two views is correct. As any answer to the question posed depends upon the true construction of Article 35 (b) that Article must be read in full :

> "35. Notwithstanding anything in this Constitution :
> (a) Parliament shall have, and the Legislature of a State shall not have power to make l aws :-
> (i) with respect to any of the matters which under clause (3) of Article 16, clause (3) of Article 32, Article 33 and Article 34 may be provided for by law made by Parliament; and
> (ii) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

> (b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.
> Explanation :- In this Article, the expression "law in force" has the same meaning as in Article 372."

58. A careful and close analysis of the said Article would disclose that the non obstante clause not only governs clause (a), but also governs clause (b). This was not disputed before us. Secondly the term 'law in force' it was common ground, would include Mulki rules as they were promulgated by the Nizam under a Firman. Thirdly, clause (b) postulates that the law in force should be with respect to any of the matters referred to in sub-clause (1) of clause (a) of Article 35. In the language of clause (a), the law in force must be with respect to any matters which under clause (3) of Article 16 may be provided for by law made by Parliament. In its turn in the language of Article 16 (3) it means that the law in force must be a law with respect to any of the matters prescribing in regard to a class or classes of employment to an office under the Government of or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment. Fourthly, such a law in force shall continue in force subject to the terms thereof. Fifthly, it shall continue subject to adaptations and modifications that may be made therein under Article 372, Finally such a law shall continue in force until altered or repealed or amended by the Parliament.

59. It is however plain that since the non obstante clause governs clause (b) also, a law in force with respect to the subject just now stated shall continue in force, notwithstanding any thing in the Constitution. In other words, such a law if it falls within the ambit of clause (b), then, however inconsistent it may be with any provision of the Constitution including Article 16, it shall continue in force. The validity of such a law cannot consequently be challenged on the ground that it violates any other provision of Part III of the Constitution and is therefore void under Article 13.

60. Once it is not doubted that Mulki rules were the law in force immediately before the commencement of the Constitution in the State of Hyderabad, which is a part of the territory of India within the meaning of that term, then what has to be seen is whether the Mulki rules is the law with respect to the subject referred to in Article 16 (3) in regard to which the Parliament may provide by law.

61. Now the expression "with respect to" is used not only in Article 35 (a) and (b), it is used in Article 246 as well as in several other Articles of Part XI of the Constitution. The expression indicates the ambit of the law in force as regards the subject-matter comprised in Article 16 (3). In other words, while Article 35 (a) confers power on the Parliament to legislate, Article 16 (3) refers to the subject-matter in regard to which Parliament can make law. Article 246 likewise confers power on the Parliament or the State Legislature to make laws, and the relevant entries indicate the field of legislation. The terms "with respect to" can only mean 'in relation to'. Both these terms explain the nature of connection that must exist between a legislation and the subject-matter referred to in Article 16 (3) or in an entry. In either case, it means the legislative power under which the law purports to have been made. A power to make laws with respect to a specific subject is as wide a legislative power as can be created. No form of words could be suggested which would give a wider power. But the power is primarily one with respect to the specified subject.

62. In *Bank of New South Wales v. Commonwealth*[3], the High Court observed:-

[3](1948) 76 CLR 1 at p. 186

> "A power to make laws with respect to a subject-matter is a power to make laws which in reality and substance are laws upon the subject-matter. It is not enough that a law should refer to the subject-matter or apply to the subject-matter. For example, Income-tax laws apply to clergymen and to hotel keepers as members of the public but no one would describe an Income-tax law as being for that reason, a law with respect to clergymen or hotel keepers. Building regulation apply to buildings created for or by Banks; but such regulations could not properly be described as laws with respect to Banks and Banking."
>
> In *Subramanyam v. Muttuswami*[4], in the same strain it was observed :
>
> "In view of the large number of items in the legislative lists, it is almost impossible to prevent a certain amount of overlapping. Absolutely sharp and distinct lines of demarcation are not always possible.....to avoid such difficulties, Parliament has thought fit to use the expression 'with respect to' which obviously means that looking at the legislation as a whole it must substantially be with respect to matters in one list or the other. A remote connection is not enough." To the same effect are the following cases :

State of Rajasthan v. G. Chawla[5]*, Bombay Corporation v. K.C. Sen*[6]*,* and *Godavaris Misra v. Nandakisore*[7]*,*

63. What follows is that the nexus between the power to make laws and the subject-matter in regard to which the law is made should not be too remote or slender. In other words, the validity of a law should not be judged upon the basis that it can be said to 'touch and concern'. Nor it is necessary that it should in all respects conform with it or be identical in every respect. What is to be seen is whether in its substance it is a law on the subject-matter in question. In determining whether an enactment is a legislation with respect to a given power, what is relevant is not the consequences of the enactment on the subject-matter or as to how it affects it. If the true nature and character of the Act relates to that subject, that should be enough. Once the legislation is found to be with respect to the legislative entry or the subject-matter of Article 16 (3), the power would be unfettered. (See *Bhola Prasad v. King Emperor*[8]*,* Thus the expression involves the principle of pith and substance in the matter of interpreting either the entry in a legislative list or field of legislation mentioned in Article 16 (3). The contention, therefore, that clause (b) of Article 35 requires the law in force, if it is to be continued, to satisfy each and every requirement of Article 16 (3) or that it should conform in all respects to Article 16 (3) cannot be accepted, obviously because any acceptance of such argument can be only possible if one completely disregards the expression 'with respect to' appearing in Article 35 (b). If the Constitution makers intended that not only the future law made by the Parliament should in every respect conform to Article 16 (3), but the law in force must also conform with it, nothing could have prevented them from saying so expressly. The fact that they did not say so and instead used an expression 'with respect to' an expression which is also used in Article 246 in a similar situation clearly indicates that the intention was to continue the law in force, if in substance it relates to any requirement as to residence for employment or appointment to an office under the Government, local or other authority.

64. That the Constitution makers did not require conformity of the law in force with Article 16 (3) if it is to be continued, is clear from the language of Article 35 (b). It could

[4] AIR 1941 FC 47 [6] AIR 1952 Bom 209 [8]1942 FCR 17 : (AIR 1942 FC 17)
[5] AIR 1959 SC 544 [7] AIR 1953 Ori 111

not have expected conformity in every respect, obviously because neither the Parliament was in existence at the time when the law in force was made, nor there existed any State or Union territory, residence within which as a whole and not part at the time when the law in force was enacted could have been made a condition. These terms have a definite connotation under the Constitution and it is unimaginable that the Constituent Assembly expected conformity of the law in force with the residential qualification within a State which never existed when the law in force was passed. Thus, full conformity with Article 16 (3) for the law in force is an impossibility.

65. There is yet another difficulty in agreeing with the contention that the existing law should also have to conform with Article 16 (3). That is possible only if we fully ignore the non obstante clause appearing at the outset of the Article. On a plain reading of that non obstante clause with clause (b), no one can be left in doubt that the existing law need not confirm with any provision of the Constitution including Article 16 (3). What Clause (b) does is to refer to the subject on which the law in force should have been, in order to continue it. It is a piece of legislation by

reference and no more can be read in it in order to justify the argument relating to conformity with Article 16 (3). In fact any such reading or construction of Article 35 (b) would negative the effect of the non obstante clause. Merely because clause (b) while indicating the subject of the law in force, refers to clause (a), which clause in turn refers to Article 16 (3) it would be incorrect to read into clause (b) any requirements to be complied with for the purpose of making a law by Parliament in pursuance of Article 35 (a) read with Article 16 (3). Any such reading will be contrary to the plain wording of Article 35 (b). That is possible, as stated earlier, if we can ignore the non obstante clause as well as the expression 'with respect to'.

66. It is true that the Supreme Court in the above said decision held while construing Article 16 (3) that those provisions gave power to Parliament to make any law prescribing in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment, only authorized the Parliament to fix residential qualification which would apply to the entire State and it was not open to the Parliament to fix residential qualification with respect to a part of the State only. That decision is obviously confined to the consideration of the language of Article 16 (3). It has very little bearing upon the language of Article 35 (b) which merely refers to Article 16 (3) for the purpose of finding out as to on what subject substantially the law in force should be, if it is to continue after the Constitution came into force. It is pertinent to note that the Supreme Court expressly declined to go into the question as to whether mulki rules would be revived and continue to remain in force by virtue of Article 35 (b).

67. It must be remembered that the 'laws in force' or 'existing laws' at the time the Constitution came into force are continued in general by virtue of Article 372. According to that Article, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent legislative authority. But their continuation is made subject to the other provisions of the Constitution. If the Constitution did not want saving of any law on the subject mentioned in Article 16 (3) in a special manner, there was no necessity to save such laws in force under a special Article 35 (b). They could have left it to the operation of the general Article 372. The intention was, however, to continue the laws in force coming within the ambit of Article 35 (b) notwithstanding any provision in the Constitution. That is why such laws are saved with the non obstante clause. That is the difference between Articles 372 and 35 (b). (See *S. I. Corporation (P.) Ltd. v. Secy. Board of Revenue*[9],). It is needless to point out the difference between the terms 'subject to' and 'notwithstanding'. The power to repeal by the adaptation of laws conferred by Article 372 and the power to repeal the law in force under Article 35 (b), notwithstanding any provision in the Constitution, are two different concepts altogether.

68. It is true that in appreciating the exact scope of the non obstante clause, it must first be ascertained what the enacting part in this case, Article 35 (b) provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in the relevant existing laws - in this case the provisions of the Constitution - it is inconsistent with the new enactment - in this case the Mulki rules which were the law in force. (See *Aswini Kumar v. Arabinda Bose*[10], and *A. V. Fernandez v. State of Kerala*[11], Thus if the words of the enactment i. e., Article 35 (b) are capable of only one interpretation on a plain and grammatical construction

of the words thereof the non obstante clause must be given full effect. It cannot be allowed in any way to limit the ambit and scope of the operative part of the enactment. When once it is found that Article 35 (b) refers to the subject-matter referred to in Article 16 (3) for the purpose of finding out whether in pith and substance the law in force is one on that subject and if Mulki rules, in pith and substance, are found to be such a law, then full effect must be given to the non obstante clause. If the effect is to be so given, it would be incorrect to insist that the law in force must conform with all the requirements of Article 16 (3) even with regard to the fixing of residential qualification applicable to the entire State and not to a part of the State only. That would amount to cutting down the amplitude and limiting the scope of the non obstante clause. The non obstante clause with which clause (b) of Article 35 begins makes it clear that all the other provisions of the Constitution are subject to this provision (See *Golak Nath v. State of Punjab*[12].).

69. We are not impressed with the argument that non obstante clause read with the marginal note of Article 35 would indicate that it applies in regard to Parliament's power of legislation and to no more. This argument firstly goes counter to the submission that the non obstante clause governs clause (a) as well as clause (b). If it is true that the subject-matter of the two clauses is separate and different, then the scope and function of the non obstante clause with respect to these two clauses must necessarily be different and separate. The difference between the two clauses is patent. While clause (a) deals with the power exclusively conferred on the Parliament to enact a law in accordance with Article 16 (3) clause (b) saves the existing law with respect to the subject referred to in Article 16 (3). Thus while clause (a) of Article 35 is an enabling provision empowering the Parliament to make laws in future according to what is stated in Article 16(3), clause (b) continues the law in force with respect to that subject until it is repealed by a law made in pursuance of Clause (a) by the Parliament. The purposes of the two clauses thus are

[9] AIR 1964 SC207 at p. 214 [11] AIR 1957 SC 657 at p. 662
[10] AIR 1952 SC 369 at p. 376 [12] AIR 1967 SC 1643 at p. 1646

separate. It may perhaps legitimately be contended that clause (a) relates to the power of the Parliament when it enacts that legislation concerned can be passed only by the Parliament and not by the State Legislature. The non obstante clause may, therefore, concern itself with such of the provisions of the Constitution which may have stated contrary and that is why the power to legislate on such a matter is conferred on the Parliament notwithstanding any such provision to the contrary. It is, however, difficult to relate the question of power of Parliament to clause (b). What all it states is that the law in force shall continue notwithstanding any other provision of the Constitution. The last limb of the clause limits the continuance of such" existing law when it states that it shall continue until repealed by the Parliament, obviously under a law made in pursuance of the powers conferred upon it by Article 35(a) read with Article 16(3). The contention, therefore, that since it relates only to the power of Parliament and the non obstante clause is limited only to that extent, the validity of the existing law in order to continue in force can be tested on the anvil of the fundamental rights under Article 13, is devoid of any substance.

70. It will be clear from the decision of the Supreme Court that the decision applies to a law which the Parliament can make in pursuance of the power vested in it under Article 35(a) read with Article 16(3). The ratio of that case applies to a law which the Parliament is to make after the Constitution. That decision, therefore, cannot govern the case relating to clause (b) of Article 35. The interpretation of clause (a) and that of Article 16(3) for the purpose of determining the

scope of the Parliament's power in making such a law evidently cannot be applied to find out whether the law in force is saved by virtue of Clause (b) of Article 35. The language of Article 35(b) must primarily weigh in its construction.

71. The result of the above said discussion is that in order to validly continue a law in force immediately before the commencement of the Constitution under Article 35(b), it is not necessary that such an existing law should in all respects satisfy the requirements of Article 16(3) or strictly conform with it. If it in pith and substance is a law relating to matter prescribing residential qualification in regard to employment or appointment to an office under the Government or any authority, that is enough for its continuance under Article 35(b) and its validity thereafter cannot be challenged on the ground that it is obnoxious to any Article in the Constitution including Article 16.

72. Even if it is assumed that the law in force must also satisfy the test of Article 16(3) in regard to residential qualification of the entire State and not of a part of the State, even then the Mulki rules satisfied the test on the day when the Constitution came into force. At that time Hyderabad State was in existence and the Mulki rules required residential qualification within the State of Hyderabad, not within a part of the State. That test having been satisfied, Mulki rules continued as valid law after the Constitution in the State of Hyderabad till it was trifurcated on 1-11-1956. Once the Mulki rules satisfied, even the said test and when by virtue of Article 35(b) it continued as a law it can be repealed by Parliament and by no other process. It could have been modified or amended under Article 372 but it was not so modified or altered. The only course of amending or repealing which was then left was to enact either a law which substitutes it or by simply repealing it. The last limb of Article. 35(b) is express and mandatory in its language when it says that such a law shall continue in force until altered or repealed or amended by Parliament and it is trite to say that when the Constitution wants such a law to be put an end to by Parliament alone, it cannot be repealed or brought to an end by any other authority or in any other manner than by an enactment of the Parliament. That was done by the Parliament when the law on the subject was enacted. As the re-enacted law has been found bad as a whole, the Mulki rules continue in force as if they have not so far been altered, repealed or amended by the Parliament.

73. It is difficult to agree with the view that because of the trifurcation of the Hyderabad State the Mulki rules cease to be effective as law. All the laws which were in force in the State of Hyderabad were continued by force of Section 119 of the States Reorganization Act. Section 119 categorically states that

> "the provisions of Part II (territorial changes and formation of new States), shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to an existing State shall until otherwise provided by a competent legislature or other competent authority be construed as meaning the territories within that State immediately before the appointed day."

74. The consequence of this provision was that the Mulki rules continued as a valid law in all the three parts of the State which were separated and made part of the three new States. It may be that as a result, the Mulki rules continue in force only in that part of the former Hyderabad State

which was attached to the new State. In our case it continued in the Telangana area, which is attached to the Andhra Area forming the Andhra Pradesh State. But that does not mean that Mulki rules on that account cease to be operative after the formation of the Andhra Pradesh. There is no shadow of justification for any such contention. No provision was brought to our notice which produces that result. Article 35 (b) does not produce that result. There are no words in Article 35 or anywhere else which permit the scrutiny of law which continued in force under Article 35 (b) periodically or as and when the boundaries of a State undergo some changes. The position has to be seen on the date when the Constitution came into force only and not at any time thereafter. If on the day of the Constitution, the law in force fell whithin the purview of Article 35(b), by force of that Article it continued in force. It could be repealed only by the process indicated in Article 35 (b). It does not lose its validity because of the reorganization of the State; nor its validity can be considered on the day when its validity is challenged before the Court. It was a valid law when it was continued on the inauguration of the Constitution and does not become invalid because of the territorial changes subsequently brought about. In fact Section 119 does not permit of any such contention. We have already rejected the contention that the law in force must have fixed residential qualification of a whole State and not part of a State in order to continue as a valid law under Article 35 (b) on 1-11-1956 or thereafter. At the time of the Constitution even if it required it, it satisfied that test. Thus, once it continued by force of the Constitution, the subsequent territorial changes would not alter that position. We are, therefore, satisfied that the Mulki rules which were saved by Article 35(b) continued in force as law in the former State of Hyderabad. After the Hyderabad State was trifurcated, it continued as law in the former area of Hyderabad which means in this case, the Telangana area. It has not ceased to be a law because of the formation of the Andhra Pradesh State. Its validity cannot be doubted merely because it continues in force in Telangana area and that the law is not applicable to the whole State of Andhra Pradesh. We find ourselves quite unable to agree with the view expressed by Sharfuddin Ahmed and Vaidya, JJ. in Writ Petn. No. 1053 of 1967 (Andh Pra), and batch decided on 27-7-1970 and also with the view of Krishna Rao, J. taken in Writ Petn. No. 2270 of 1968, D/- 10-6-1970 (Andh Pra). In our opinion, Jagan-mohan Reddy, C. J. (as he then was) and Sambasiva Rao, J. in Writ Appeals Nos. 44, 45 and 49 of 1969 (Andh Pra) and batch dated 20-2-1969 took a correct view in holding that the Mulki rules continued in force till they were repealed by the Public Employment Act and that they revived and continued in force after Section 3 of the Act was struck down by the Supreme Court.

75. In our opinion, the Mulki rules in so far as they fix the residential qualification of 15 years for purposes of appointment to a post under the Government or other authority still continue as valid law in force. It is not necessary for us to express any opinion in regard to that part of the Mulki rules which do not relate to the appointment on the basis of residential qualification, as that question does not arise in this case.

76. The question then is as to which was the law in force on the day of the Constitution. The Mulki rules formed part of the Civil Service Regulations and were referred to in Rule 39 and Appendix 'N' to the said rules and as confirmed by the notification by a Firman issued in November, 1949. These were the rules which were in force on the day when the Constitution came into vogue. These rules are saved by Article 35(b). In view of the fact that these rules could have been altered, modified or repealed only by the Parliament and not by the State legislative authority, any amendment or alteration made by any legislative authority of the State therefore would be ineffective. Thus, the rules made by the Rajpramukh in 1955 although made under the

proviso to Article 309, cannot be said to have been validly made. If the rules which are saved by Article 35(b) are merely incorporated in the rules made by Rajpramukh under the Proviso to Article 309, perhaps no exception can be taken to such incorporation because it does not amount to making new rules, but amounts to merely incorporating the saved rules in the body of the set of rules made under Article 309. If those rules however are modified or altered or made in supersession of the previous rules, to that extent the rules would be obviously illegal because they would be deemed to have been made without any authority in that behalf.

77. That this is so is supported by a decision of the High Court of Madhya Bharat in *State v. Kishan*[13], We do not however consider that *Raghunadha Rao v. State of Orissa*[14], with due respect to the learned Judges, lays down the law correctly in that behalf.

78. It is in the light of the said conclusions on the two main points which were common to all these writ petitions, that we have to consider the other points raised severally in these cases.

79. In Writ Petn. No. 4703 of 1968, the following two reliefs are claimed :

> (1) To prepare the integrated seniority list of the Supervisors including the Junior Engineers selected in 1958 following Rule 22 of the Andhra Pradesh State and Subordinate Service and rules of reservation between candidates belonging to

[13]AIR 1955 Mad Bha207

[14] AIR 1955 Ori 113

> Telangana and Andhra regions after holding that the list communicated by the Chief Engineer as illegal;
>
> (2) To grant an ad-interim injunction against respondents 1 and 4 restraining them from reverting the petitioner from the post of Assistant Engineer.

80. In so far as the second relief is concerned, the learned Government Pleader assured us that the Government is not intending to revert the petitioner. There is, therefore, no necessity to give any direction in that behalf.

81. In regard to the first relief, we are satisfied that the impugned list was in reality prepared by the Andhra Pradesh Public Service Commission and not by the Chief Engineer as was alleged by the petitioner.

82. According to Rule 3 of the rules of procedure of the Andhra Pradesh Public Service Commission, the serial number of the candidates selected by the Public Service Commission have to be arranged in order of merit on the results of examination. This list, of course, has to be arranged further in accordance with Rule 22 which relates to special reservation. The rule essentially relates to the representation to the Scheduled Castes, physically handicapped persons and Scheduled Tribes. It lays down an order of rotation specified in that rule in every cycle of 25 vacancies. It is not disputed that the list was prepared accordingly. The petitioner does not belong to any of the three reserved classes and therefore can have no interest in that regard. It is true that after the common list was prepared on merit, keeping in view Rule 3 and Rule 22 as above, two separate lists were then prepared on the basis of this common list, one for the Telangana region which comprised all candidates belonging to that region and intended to be posted in the

Telangana area. And secondly, the list although called of Andhra Region, in truth it comprises all the candidates selected on the basis of open competition in which any Indian citizen including a person from Telangana can compete. These two lists have necessarily to be again, prepared keeping in view Rule 3 and Rule 22 mentioned above.
There was some difficulty in understanding the correspondence between the Public Service Commission and the Government. After carefully going through G. O. Ms. No. 355 dated 27-2-1962, the letter of Andhra Pradesh Public Service Commission to the Chief Secretary dated 7-5-1963 suggesting preparation of list on roster system and G. O. Ms. No. 644 dated 4-6-1963, we are satisfied that this correspondence in effect lays down the procedure of preparing the list as stated above. For purposes of promotion, however, the common list prepared by the Public Service Commission in accordance with R. 3 and Rule 22 referred to above has to be followed. It could not be pointed out as to how this method of appointment or promotion offends in any manner the Mulki rules. The method, in our view thus is in accordance with the said rules as well as the Mulki rules.

83. The contention that the list was not served upon the petitioner so that he could raise his objection is disputed. It is asserted that the list was served upon the petitioner. The petitioner, however, insists on his assertion. It is not possible for this Court to decide that disputed question of fact. It is open to the petitioner to represent his grievance to the Government and we have no reason to suppose that if satisfied about its correctness, a copy of the list would be supplied to the petitioner providing him a reasonable opportunity of being heard in that behalf and then decide the objections raised if any.
84. Subject to the above said observation in regard to both the reliefs, the writ petition is dismissed; but, without costs. Advocate's fee : Rs. 100/-.

85. In Writ Petitions Nos. 2376, 2542 and 2480 of 1967, the following reliefs are claimed :

1. To hold the retrenchment of the petitioners as illegal;
2. To direct the respondents to fill the posts in Telangana by Telangana candidates.

86. In so far as the first relief is concerned, we were assured that the Government has no desire to retrench the petitioners. In view of this assurance, there is no need to issue any direction. We were also assured that the posts in Telangana area are and will be filled and occupied by persons belonging to that region. No direction in that behalf is also called for. Since no retrenchment is being carried out, it is futile to go into the question whether the Government in retrenching has followed the principle of last man to go first.

87. Subject to the above observations, the writ petitions are dismissed; but, without costs. Advocate's fees Rupees 100/- in each.

88. In Writ Petition No. 83 of 1968, the petitioner belongs to Electricity Department. The petitioner asked for the following reliefs :

> (1) To hold that his retrenchment is illegal and his contention was that in some of the posts of the Telangana region, persons not satisfying the residential qualifications are working and

(2) If these posts are considered vacant, there will be no need to retrench the petitioner who has been working since 1955.

89. In the circumstances, the Electricity Department should examine the allegations made by the petitioner and if found true or if in the meanwhile some vacancies have occurred, then to post the petitioner in one of those posts and thus avoid the miseries consequent upon the retrenchment which the petitioner will be required to undergo after working in the department for over five years.

90. Subject to the above observations, this Writ Petition is also dismissed; but without costs. Advocate's fee Rupees 100/-.

91. In Writ Petition No. 645 of 1968 the petitioners are the Government employees in the department of Panchayati Raj. They want this Court to hold that the retrenchment order is illegal and want a direction to be given to the respondents, to fill all the posts of the Telangana Engineers and Supervisors in the Telangana area by persons belonging to that region.

92. In paragraph 2 of the counter it is in a way conceded that as –

"sufficient number of candidates were not forthcoming with domicile qualification, the remaining posts were filled up temporarily with persons who did not possess such qualification, in the interests of administration."

It is also said that such emergency candidates have been ousted from service and action is being taken to replace regular candidates by persons who possess domicile qualifications.

93. It will thus be clear that there are quite a few vacancies in the department. It is difficult to understand when the petitioners, who, it is not disputed, are qualified to hold such posts as to why they are being retrenched although they satisfy the domicile qualification and as to why they are not regularized or at least continued. To oust the persons irregularly appointed and to retrench the petitioners who are qualified cannot certainly be in the interest of administration. Nothing is said against any one of the petitioners. It is plain that retrenchment can be effected only when the posts on which the petitioners are working are abolished or that the ad hoc puspose for which they were temporarily appointed no more remains. Both the things are wanting in this case. When quite a few posts are already vacant, it is desirable that the petitioners who have been working for some years should be regularized or in any case not retrenched on the ground that there are no vacancies. The respondents, therefore, in the light of paragraph 2 of their counter, will examine the question of their regularization and till then not retrench them. The writ petition is, therefore, ordered accordingly. We do not, however, make any order as to costs. Advocate's fee Rs. 100/-.

94. In Writ Petitions Nos. 1607 of 1969 and 2259 of 1967 the petitioners are temporarily appointed as Supervisors. Some of them were appointed as long before as 1958. They have been working temporarily without being regularised. All of them, it is not disputed, are qualified to hold the posts which they are occupying. Their main grievance is that although there are vacancies available and although they are working as Supervisors between five to twelve years, instead of confirming them the respondents have appointed, respondents 3 to 30 who were

working as Extension Officers as Supervisors exempting them under Rule 47 from the requirement of one year's practical experience. Their appointments are also made temporarily under Rule 10(a)(i) just like the petitioners. It is complained that though these respondents have been appointed only in 1967 as temporary Supervisors their services as such are being regularized and if so regularized they would become senior and no attention is paid to regularization of the services of the petitioners.

95. In the counter filed by respondents 1 and 2, in regard to the petitioners it is said that the posts of Industrial Inspectors since re-designated as Supervisors of Industries are in the purview of the Andhra Pradesh Public Service Commission and as such the services of the petitioners can be regularized only when they are selected by the Andhra Pradesh Public Service Commission for regular appointment. In regard to the respondents while it is denied that they are appointed under Rule 10(a)(i) by transfer, it is asserted that the said respondents were regular employees as Extension Officers and they cannot be treated as junior to the petitioners who are appointed to temporary posts from time to time on a temporary basis. In G. O. Ms. No. 314 dated 25-3-1969 it is expressly stated that as these Extension Officers were about to be retrenched, in order to enable them to be appointed to the post of Supervisors on regular basis, they are exempted from the operation of Rule 6 of the said rules. It is also stated in the counter that the posts of Supervisors are under the purview of the Andhra Pradesh Public Service Commission and therefore the petitioners can be regularized only when they are selected by the Andhra Pradesh Public Service Commission. Since the respondents were Extension Officers and were regularly recruited and were due to be retrenched, the Government granted them exemption, their services being regularized. The petitioners have no right to claim regularization.

96. It is in the light of these contentions that we have to decide whether any relief can be granted to the petitioners. Although it is denied that respondents 3 to 30 were appointed by transfer under Rule 10(a)(i), the counter admits that so far they have not been regularized as Supervisors. The orders of their appointment as Supervisors by transfer have not been produced. It is not clear that if as asserted by the petitioners that these respondents were appointed under Rule 10(a)(i) is not true and if they are also not regularized, nor their services are lent on deputation, then in what capacity they are working as Supervisors since their transfer. No rule was brought to our notice which permits the department to regularize or appoint the respondents regularly by transfer without the consent by the Andhra Pradesh Public Service Commission, while those temporary Supervisors who have been working for several years cannot be regularized without being selected by the Andhra Pradesh Public Service Commission. If these posts are under Public Service Commission then apparently there is no reason to discriminate between the persons appointed by transfer and regularization of temporary persons. Either both categories should be within the purview of the Public Service Commission or both are outside its purview. In spite of our request the learned Advocate for the respondents could not cite any rule in support of such varying treatment. If the Extension Officers have to be provided as they were facing retrenchment, the petitioners who have been working for years also are required to be regularized. Both categories demand human approach and one need not be discriminated against the other. Both can be given fair treatment. While the petitioners have no right to claim regularization, nor they can take any exception to the exemption granted to respondents 3 to 30 under Rule 6 of the special rules read with Rule 47 of the Service Rules, they can surely complain of discriminatory treatment meted out to them. In these circumstances, the least that can be expected of the Government is to examine the contentions of the petitioners and since

quite a few posts are admittedly vacant, they can be regularized. As the respondents have not so far been regularly appointed by transfer, the Government should settle the question of the petitioner's regularization before the respondents are so appointed. We are not at all impressed with the argument that since in the cadre of Extension Officers or in the lower cadre the respondents were permanently appointed, they can claim in that basis any seniority over the petitioners. The petitioners, if regularised, their services shall have to be computed from the date of their first appointment to the post of Supervisors. Some of the petitioners also claim that they were likewise permanent in the lower cadre. Instead of complicating the question of inter se seniority and instead of meting out differential treatment, in our view, it is reasonable that the Government should consider first the regularisation of the petitioners on the posts which are admittedly available for them and then regularly appoint respondents 3 to 30. That will not only be fair and reasonable, but would lend stability and security to the petitioners as well as to respondents 3 to 30 in their services. With this observation, we dismiss the Writ Petitions but without costs, Advocate's fee Rs. 100/-.

Sambasiva Rao J.

97. I agree, with respect, with the conclusions arrived at by my learned brother Gopalrao Ekbote J. I agree with my brother in holding that the 'Mulki Rules' revived on the Supreme Court striking down, in AIR 1970 Supreme Court 422, Section 3 of the Public Employment (Requirements as to Residence) Act and Rule 3 made thereunder in so far as Telangana area was concerned, as unconstitutional. I am also one with him in the view that the Mulki Rules survive under Article 35(b) of the Constitution of India.

98. I would, however prefer to rest the later conclusion on the ground that since the said rules undoubtedly satisfied the test of Article 16(3) on the day when the Constitution came into force, they continued and will continue to be in force until altered, or repealed or amended by the Parliament, as provided under Article 35(b). They did not lose their validity on account of the reorganisation of the State. The Parliament did, in fact, repeal the Rules by enacting the Public Employment (Requirement as to Residence) Act, but with the striking down of the material provisions of that Act, by the Supreme Court, the Mulki Rules as I have said, revived and they will continue in force until the Parliament alters, or repeals or amends them again.

99. I would only like to guard myself against the view that if a law, in pith and substance, is one relating to a matter prescribing residential qualification in regard to employment or appointment to an office under the Government or any authority, that is enough for its continuance under Article 35(b), and its validity thereafter cannot be challenged on the ground that it is obnoxious to any Article in the Constitution including Article 16. I do not wish to express any opinion on this aspect of the problem.

100. In other respects I agree, as I have said, with Gopalrao Ekbote J., and concur with the results he has just pronounced.
Order accordingly.