MYSORE HIGH COURT

G. Govindaraju

Vs

State of Mysore

Writ Petns. Nos. 1248, 1267, 1269, 1294 to 1298, 1311, 1312, 1318, 1341, 1354, 1355, 1382 and 1384 of 1961

(A. Narayana Pai and G.K. Govinda Bhat, JJ.)

11.10.1962

JUDGMENT

Narayana Pai, J.

1. The petitioners in these 16 Writ Petitions were applicants for selection by the Mysore Public Service Commission for being appointed by the State Government as Assistant Engineers in the Public Works Department of the Government. The first respondent is the State Government, and the second the Mysore Public Service Commission. Some of the petitioners are Engineering Graduates seeking entry into Government Service for the first time and the others are already Junior Engineers in the Public Works Department of the Government, seeking appointment as Assistant Engineers by direct recruitment. None of the petitioners was selected by the Public Service Commission or appointed by the Government as Assistant Engineer. All of them pray that this Court may be pleased to quash by the issue of an appropriate Writ the Notification of the State Government bearing No. P. W. D. 10 SAG 59 dated 31st October 1961, whereby the Government appointed as Assistant Engineers 88 persons named therein. The said 88 persons are impleaded as respondents 3 to 90 in these Writ Petitions.

2. Before formulating the points of attack against the Notification of 31st October 1961, sought to be made on behalf of the petitioners, it is necessary to narrate briefly in chronological order the events leading up to the filing of these Writ Petitions.

3. There are in the State of Mysore two sets of what may be described as basic Rules containing principles of general application which govern recruitment to State Civil Services, viz., the Mysore State Civil Services General Recruitment Rules, 1957, promulgated by Notification No. GAU (OM) 2 GRR 57 dated 10th February 1958, and the Mysore Public Service Commission (Functions) Rules, 1957, promulgated by Notification No. GAD (OM) 2 PSC 57 dated 12th December 1957.

4. The General Recruitment Rules were made by the Governor of Mysore in exercise of the powers conferred by the proviso to Article 309 of the Constitution. They apply to all State Civil

Services except to the extent otherwise expressly provided for by or under any law for time being in force. Rule 3 of those Rules dealing with the method of recruitment states- "Recruitment to the State Civil Services shall be made by competitive examination, or by selection, or by promotion. The method of recruitment and qualifications for each State Civil Service shall be as set forth in the rules of recruitment of such service specially made in that behalf." The recruitment in the present case was by selection. Rule 4 of the Rules deals with the procedure of appointment. The portion of that Rule which relates to recruitment by selection reads as follows:

> "Subject to the provisions of these rules, appointments to the State Civil Services shall be made-
> (1) ** ** ** ** *
> (2) in the case of recruitment by selection, after giving such adequate publicity to the recruitment as the appointing authority may determine, in the order of merit of candidates as determined by the Commission, the Advisory or Selection Committee, or the appointing authority, as the case may be;
> * * * * * * * * *

The rest of the Rules dealing with such topics as disqualifications for appointment, age limits for appointment, special provisions for Scheduled Castes and Scheduled Tribes, etc., are not of relevance to the present case.

5. The Public Service Commission (Functions) Rules were also made by the Governor of Mysore. Though the source of the power is not cited in the relevant Notification, there can be little doubt that to the extent the Rules deal with the topic of regulating recruitment to Civil Services under the State, the source of the power could only be the proviso to Article 309 of the Constitution. Rule 4, among those Rules, which deals with recruitment by selection reads as follows :

> "When recruitment to a service or post is to be made by selection, and consultation with the Commission is required, the Commission shall-

1. advise the Government in regard to the conditions of eligibility of candidates;

2. after the rules to be made have been approved by Government and a requisition for recruitment is received, invite applications from intending candidates after giving due publicity to conditions of eligibility, nature of competition, number of vacancies to be filled where possible, and any other relevant material;

3. consider all applications received and when necessary interview such candidates as fulfil the prescribed conditions and whom it considers most suitable for appointment;
NOTE: Nothing contained herein shall preclude the Commission from considering the case of any candidate possessing the prescribed qualifications brought to its notice by Government, even if such a candidate has not applied in response to the advertisement of the Commission.

4. forward to the Appointing Authority a list consisting of such number as it may fix, of the

candidates whom the Commission considers most suitable for appointment in the order of preference:

> Provided that the Commission may invite Government to nominate an Officer to represent the Service or Department for which recruitment is being made, to be present at the interview referred to in clause (3) to assist the Commission in its work of selection."

6. No special Rules prescribing the method of recruitment and qualifications for the Civil Service in the Public Works Department in the State were made by the Governor till December 1960, to which we shall make reference later. But, even before the formulation of any such special Rules, steps appear to have been taken to recruit Assistant Engineers into that Department by selection resulting in the recruitment of respondents 3 to 90.

7. For the aforesaid purpose, applications were invited by the Mysore Public Service Commission.

8. In the first instance, the Commission issued Notification No. E. 3666-5859 PSC. dated 1st October 1958, inviting applications in respect of 40 posts of Probationary Assistant Engineers in the Executive Cadre of the Public Works Department. Para 2 of the Notification sets out the qualifications required of the applicants as follows:

> "Graduates in Engineering (Civil or Mechanical) or an equivalent examination.
>
> In addition to the above qualification, candidates must also have undergone practical training or rendered a service in the Technical cadre in the Public Works Department for a minimum period of not less than six months. A certificate to that effect issued by the Principal of the College or Superior Officer under whom they have undergone training, or are working must accompany the application." Paragraph 3 stated that during the period of probation which it was indicated would be for a period of two years, the selected candidates would be paid a stipend of ₹ 150/-, with the further statement that the question of absorption of the probationers in the available vacancies would be considered after satisfactory completion of the period of probation. Paragraph 4 dealing with the age limit stated as follows:
>
> "(a) Minimum - Eighteen years.
> (b) Maximum -
> (i) Thirty years in the case of candidates belonging to Scheduled Castes and Scheduled Tribes.
> (ii) Twenty eight years in the case of Backward Classes.
> (iii) Twenty five in the case of others;
> (iv) Thirty five years in the case of Government servants holding appointments substantively or who have been in continuous Government service for a period of not less than three years."

The date with reference to which the attainment of maximum prescribed age was to be computed was stated to be 20th November 1958 being the last date fixed for receipt of applications in the

light of R. 6 of the General Recruitment Rules.

9. On 4th March 1959, the State Government addressed a letter to the Public Service Commission from which it appears that there were a total of 196 vacancies in the Cadre of Assistant Engineers, that the Government had decided that the same should be filled by direct recruitment, by promotion from the cadre of Junior Engineers and by promotion from the cadre of non-graduate Supervisors in the ratio of 40%, 50% and 10% respectively. On this basis, the Government wanted that 80 such vacancies should be filled by direct recruitment and requested the Public Service Commission to take action to invite applications and send a list of 80 candidates in all for appointment as Probationary Assistant Engineers.

10. Apparently pursuant to this letter, the Public Service Commission issued another Notification No. 251-59-60-9-1-59 PSC. dated 4th May 1959, inviting applications for 80 posts of Probationary Assistant Engineers including the forty posts already advertised in the previous Notification of 1st October 1958. Paragraphs 2 and 3 thereof dealing respectively with qualifications and pay during the period of probation are substantially to the same effect as the corresponding paragraphs of the previous Notification. Excluding the reference made to relaxation of age limit in the case of political sufferers with which we are not concerned, paragraph 4 of the Notification read as follows :

> "Age Limits :- As on the last date of receipt of applications :

Minimum : Eighteen years Maximum: Applicable for these posts in Notification to GAD (S-l) 52 SRR 59 dated 4th March 1959.

> (i) 33 years in the case of candidates belonging to Schedule Castes and Scheduled Tribes.
> (ii) 31 years in the case of Backward Classes
> (iii) 28 years in the case of others
> (iv) 35 years in the case of Government servants holding appointment substantively or who have been in continuous Government service for a period of not less than three years.

The above age limits are also applicable to candidates who applied for the posts of Probationary Assistant Engineers in response to this office Notification No. E. 3666-58-59 P. S. C. dated 1st October 1958 and published in the Mysore Gazette dated 9th October 1958. NOTE: The candidates who have applied already in response to this office Notification E. 3666-58-59 PSC. dated 1st October 1958 and published in the Mysore Gazette dated the 9th October 1958 need not apply again but they may furnish additional particulars if any."

11. Another Notification was issued by the Public Service Commission which bears No. R(1) 1-60-B1/PSC 1-1-60 dated 1st April 1960. This Notification refers to recruitment of candidates to various posts in several departments of the Government of Mysore. The eighty posts of Probationary Assistant Engineers in the Public Works Department, in respect of which applications had already been invited by the two Notifications referred to above, are set out in Part A of this Notification. In the particulars stated with reference to these posts, the third Notification differs from the second one in two respects; in regard to age limit, the maximum of 28 years stated in respect of others was deleted and the maximum of 31 years stated for

Backward Classes was made applicable to all, retaining at the same time the limits of 33 years for Scheduled Castes and Scheduled Tribes and 35 years for persons in Government service. Secondly, it was indicated that the proposed recruitment was subject to reservation of 18% to Scheduled Castes and Scheduled Tribes and 25% to Backward Classes, leaving 57% for others.

12. In October 1960, the Public Service Commission is said to have interviewed about 887 persons who had applied for the posts of Assistant Engineers pursuant to the Notifications of 1st October 1958 or 4th May 1959. On 2nd November 1960, the Commission sent up to the Government a list of 80 candidates selected by them. It is not quite clear how and in what circumstances the further 8 candidates came to be appointed by the Government. All that is found stated in paragraph 14 of the Counter-affidavit of the Deputy Secretary to Government in the Public Works Department is that the State appointed as probationers 88 persons selected by the Public Service Commission.

13. On 3rd December 1960, the Governor for the first time promulgated special Rules to govern recruitment into the Public Works Department under Notification No. GAD 8 GRR 57 of the same date. The preamble and the first two paragraphs of those Rules read as follows :

> "In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of all previous rules on the subject, the Governor of Mysore, hereby makes the following rules namely :-

These rules may be called the Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960. In respect of each category of posts specified in column 1 of the Schedule, the methods of recruitment and the minimum qualifications, and the period of probation, if any, shall be as specified in the corresponding entries of columns 2 and 3 of the said Schedule." The relevant portion of the Schedule reads as follows :

SCHEDULE

Category of Posts.(1)	**Methods of recruitment(2)**	**Minimum qualifications and period of probation(3)**
Assistant Engineers	40 per cent by direct recruitment by the Public Service Commission after interview and oral test;	For direct recruitment Age; Must not be above 31 years
50 per cent by promotion from the cadre of Junior Engineers and 10 per cent by promotion from the cadre of supervisors.	A pass in Civil or Mechanical Engineering Graduation Examination or a Certificate or Diploma from the Institute of Engineers that the candidate has passed Parts A, B of the Associate Membership Examination of the Institute of Engineers of equivalent qualification with practical training for not less than six months during or after the course.	

Probation :	One year."

14. As already stated, though the Public Service Commission is said to have sent up a list of selected candidates in November 1960, appointments were actually made by the Government only on 31st October 1961.

15. In the interim, on 7th August 1961, the petitioner in Writ Petition No. 1248 of 1961 presented to this Court Writ Petition No. 856 of 1961 praying for the issue of an appropriate Writ or direction directing the State Government not to make or publish appointments of Probationary Assistant Engineers on the basis of the list or selection made by the Public Service Commission as aforesaid. The petitioner stated that because special Rules relating to recruitment into the Public Works Department were published only in December 1960, he expected that fresh action would be taken for making appointments in conformity with those Rules, but that on being reliably given to understand that the Government instead of doing so were proposing to make appointments in accordance with the list of selected persons prepared by the Public Service Commission before the promulgation of the special Rules, he was obliged to come to this Court seeking appropriate relief. In the counter-affidavits filed therein on their behalf, the State Government took up the position that the absence of special Rules did not disentitle them from making appointments in exercise of their executive power under Article 162 of the Constitution but that, on the contrary, in the absence of such Rules, Rule 4(2) of the Mysore Public Service Commission (Functions) Rules, 1957, could not be said to have become effective, thus leaving the Government free to act in exercise of their executive power under Article 162 of the Constitution.

16. In the course of the arguments in that petition, however, the further point was made by the Advocate-General on behalf of the State Government that the Public Service Commission having acted not upon a requisition under Rule 4(2) of the Mysore Public Service Commission (Functions) Rules, but on a request made by the State Government in exercise of their executive power under Article 162 of the Constitution, the Commission must be held to have acted only as an agent or delegate of the Government and that therefore it was open to the Government either not to appoint any of the persons selected by the Public Service Commission or to appoint only those who in their opinion should be appointed amongst them. In view of this statement of the Advocate-General that the State was not bound by the list prepared by the Public Service Commission, this Court dismissed Writ Petition No. 856 of 1961 as premature, without expressing its opinion on any of the points raised but observing that the occasion when those questions may be more appropriately considered and decided would arise only when the State Government makes appointments in accordance with the list prepared by the Public Service Commission if it decides to do so.

17. That order was pronounced on 29th September 1961.

18. On 23rd October 1961, the Governor amended the Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960. The amendments were published in Notification No. PWD 283 SAG 61 dated 23rd October 1961. That Notification reads as follows :-

"In exercise of the powers conferred by the proviso to Article 309 of the Constitution and all other powers enabling him in this behalf, the Governor of Mysore hereby makes the following amendments to the Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960, namely :-

In the said Rules,-

1. The first and the second paragraphs after the preamble shall be numbered and shall always be deemed to have been numbered as rule 1 and Rule 2 respectively.

2. In rule 1 as so numbered,

(i) The figures '1960' shall be omitted and shall be deemed always to have been omitted; and
(ii) at the end, the following words and figures shall be inserted and shall be deemed always to have been inserted, namely-
"and they shall be deemed to have come into force with effect from the first day of March 1958".
(3) To rule 2 the following proviso shall be added and shall be deemed always to have been added, namely-
"Provided that in respect of direct recruitment of Assistant Engineers for the first time under these Rules the percentages relating to direct recruitment and recruitment by promotion specified in column 2 of the Schedule shall not be applicable and the minimum qualifications and the period of probation shall be the following, namely-

Qualifications : The candidate must be a graduate in Engineering (Civil or Mechanical) or must have passed an equivalent examination and must have either undergone practical training or rendered service in a technical cadre in the Public works Department for a minimum period of not less than six months. A certificate to that effect issued by the Principal of the College or Superior Officer under whom he has undergone training or is working must be enclosed to the application; Age Limit: Must not be above-

(i) 35 years in the case of Government servants holding appointments substantively or who have been in continuous Government service for a period of not less than 3 years and political sufferers;
(ii) 33 years in the case of candidates belonging to Scheduled Castes and Scheduled Tribes;
(iii) 31 years in the case of Backward Classes;
(iv) 28 years in the case of others; on the last date fixed for the receipt of applications; Period of Probation:

Two years."

19. It is 8 days after this that the impugned Notification appointing respondents 3 to 90 was published by the Government. The first of the Writ Petitions now before us, viz., Writ Petition No. 1248 of 1961 was presented on the following day, viz., on 1st November 1961.

20. The arguments addressed on behalf of the petitioners in support of their prayer to quash the said appointments may be grouped under two heads, viz., (1) arguments to support the case that almost every step leading to the ultimate appointment of respondents 3 to 90 is vitiated by illegality or lack of power, and (2) arguments in support of the case that even otherwise, the appointments should be struck down as having been made mala fide on collateral considerations.

21. The arguments under the first head may be briefly summarized as follows :-

22. At the time the first step was taken for making selections, viz., the publication of the Notification dated l-10-1958 inviting applications such a step could not have been taken in view of the rules then in force, viz., the Mysore State Civil Services General Recruitment Rules and the Mysore Public Service Commission (Functions) Rules. According to Rule 3 of the General Recruitment Rules, the first step for making recruitment to any particular State Civil Service is to formulate the rules prescribing the method of recruitment and qualification. According to Rule 4(2) of the Public Service Commission (Functions) Rules, the Public Service Commission could proceed to call for applications from intending candidates only after the rules have been framed and a requisition for recruitment is received by the Commission from the Government. In this case, although it is not denied that the Government had sent a requisition to the Public Service Commission, no rules prescribing the method of recruitment or qualifications for service in the Public Works Department had been framed. The power to make rules regulating recruitment can, under the proviso to Article 309 of the Constitution, be exercised only by the Governor of the State or such person as he may direct. The Governor himself had not made any such rules so far as the Public Works Department is concerned. There is nothing to show that he had directed any person to make any such rules. The Public Service Commission by laying down in its Notifications the qualifications required of applicants has actually arrogated to itself the power to make rules regulating recruitment, which could be exercised only by the Governor. Apart from the fact that the Public Service Commission did not act and could not possibly have acted pursuant to the Mysore Public Works Engineering Department Services (Recruitment) Rules of 1960, the list of qualifications and other particulars set out by it in several Notifications being at variance with the provisions of the said 1960 Rules, the selections made by the Commission cannot possibly be supported on the basis of the 1960 Rules.
This is further clear from the fact that it was considered necessary to amend the said Rules on 23rd October 1961 with retrospective effect. The Governor acting under the proviso to Article 309 of the Constitution, has no power to make rules having retrospective effect, at any rate so far as the topic of recruitment is concerned. Even if the amendment can be said to be valid, there being no express validation thereby of the selections made by the Public Service Commission, the amendment is of no avail to the respondents to sustain the validity of the appointments.

23. Another argument confined to the case of Junior Engineers already in Government Service is that the amendment of 1961 itself is invalid to the extent it contravenes the proviso to sub-section (7) of Section 115 of the States Re-organization Act. The petitioners claim that, according to the Rules set out in Annexure 'B' to Writ Petition No. 1248 of 1961, 50 per cent of the posts of

Assistant Engineers were reserved for promotion and that the present amendment which states that percentages relating to direct recruitment and recruitment by promotion shall not apply to the first recruitment of Assistant Engineers, is one which alters their condition of service to their disadvantage and therefore is invalid for want of previous approval by the Central Government.

24. We do not see any substance in this argument on behalf of the Junior Engineers. It is no doubt true that in the erstwhile State of Mysore, there was Government Order No. P. W. 5695-5716 dated 25th February 1944, a copy whereof is produced as Ex. B providing, among other things, that not less than 50 per cent of the vacancies in the cadre of Assistant Engineers shall be filled by direct recruitment and the remaining vacancies by promotion from among the Surveyors according to seniority and merit.
It is, however, now well established that promotion cannot be claimed as of right, unless by virtue of any statutory rule a civil servant has actually acquired that right. The mere provision in a rule that a certain number of vacancies will be filled by promotion from a particular class of Government servants on the basis of seniority cum merit does not confer any such enforceable right on any one of the Government servants in the said class. It, therefore, the Government of the erstwhile State of Mysore cannot be said to have been bound to promote any one of the Junior Engineers who are petitioners before us or none of those Junior Engineers could have insisted as or right that they should have been promoted, it cannot be said that they have acquired any right flowing from an enforceable condition of service which alone is protected according to the rulings of this Court against alteration to the disadvantage of a civil servant by the proviso to sub-section (7) of Section 115 of the States Re-organization Act.

25. Regarding the first or the general argument questioning the legality of the selection leading to the impugned appointments, there could hardly be any controversy as to the facts on which it is based.

26. It is without doubt that when the Public Service Commission Issued the several Notifications inviting applications from intending candidates, there were only the Mysore State Civil Services General Recruitment Rules and no rules whatever governing the method of recruitment and qualifications for service in the Public Works Department of the Government. The legal consequence of this, according to the argument on behalf of the petitioners, is two-fold. Firstly, it is stated that no recruitment at all is possible unless rules specially relating to the Department in respect of which recruitment is sought to be made, are framed and promulgated as envisaged by Rule 3 of the General Recruitment Rules. Secondly, the Public Service Commission could proceed to call for applications only upon receipt of a requisition from the Government, and the Government themselves could make such a requisition only after rules have been framed in view Of Rule 4(2) of the Public Service Commission (Functions) Rules.

27. On the second point, the learned Advocate-General has argued that the Public Service Commission (Functions) Rules are clearly not Rules made in exercise of the powers conferred by the proviso to Article 309 of the Constitution. They should, according to him, be read as mere instructions of administrative nature. As they cannot be said to be Rules under the proviso to Article 309, he contends, they do not bind the Government.

28. The Rules themselves, as we have already pointed out, do not cite the source of the power. But, they were undoubtedly Rules framed by the Governor of Mysore and not by the

Government of Mysore. It is also without doubt that the first seven Rules expressly deal with the topic of recruitment. The different modes of recruitment dealt with therein, viz., by examination, selection, promotion or transfer, follow the pattern of the General Recruitment Rules which also state that recruitment to State Civil Services shall be made by competitive examination or by selection or by promotion. The first seven Rules of the Public Service Commission (Functions) Rules prescribe the procedure to be followed by the Public Service Commission while discharging one of its functions, viz., advising the Government on matters relating to recruitment. At any rate, to the extent the said Rules prescribe a procedure for the part of the process of recruitment in which the Public Service Commission participates, the Rules must be held to be those which regulate recruitment to State Civil Services. Such Rules having been made by the Governor the inference is inescapable that to the extent mentioned above, the Governor must have acted in exercise of the powers conferred upon him by the proviso to Article 309 of the Constitution. We find it difficult therefore to accept the contention of the learned Advocate-General that the said Rules do not bind the Government and that therefore the Government can take action in the matter of recruitment, totally ignoring those Rules.

29. On the first point, the argument of the learned Advocate-General is that the absence of rules does not necessarily disentitle the Government from making appointments in exercise of its executive power under Article 162 of the Constitution. We do not think that we need go into this larger question of the extent and nature of the executive power of a State in the matter of recruitment to State Civil Services or to examine the exact implication of the expression "subject to the provisions of this Constitution" occurring at the commencement of Article 162, for two reasons. The learned Advocate-General himself has not elaborated this aspect of the case in the course of his arguments but has relied as we shall point out later, largely if not solely, upon the validity of the amendment to the Rules carried out on 23rd October 1961. Secondly, we find that as a matter of fact, it cannot be said that the recruitment questioned in this case has been carried out purely in exercise of the executive power of the State under Article 162, without the assistance of any rules whatever. The two topics in respect of which rules are necessary, are the method of recruitment and the qualifications required of intending candidates for appointments. The method of recruitment adopted in respect of these 88 posts was undoubtedly one by selection, and the decision to adopt this method was taken by the Government, and not by the Governor. The qualifications for appointment both in respect of education and experience as well as in respect of age were prescribed by the Public Service Commission in its Notifications, and not by the Governor. There is no material placed before us to prove or even to suggest that the Governor had directed either the Government or any officer of the Government or the Public Service Commission to make those Rules regulating recruitment. According to the proviso to Article 309, such rules could have been validly made only by the Governor or such person as he may direct in that behalf. In the face of this clear effect of the Article, it has to be held that neither the Government nor any officer of the Government nor the Public Service Commission could have validly exercised the power of making rules regulating recruitment to Public works Engineering Department Service of the State. Obviously and admittedly, the Public Service Commission, when it actually made the selection and sent up its list in November 1960, acted pursuant to the Government's decision to make recruitment by selection and the Commission's own rules prescribing the qualifications. As neither the Government nor the Public Service Commission had the power, for the reasons stated, to make those rules, the conclusion is inevitable that the selection for recruitment in this case had originally been made on the footing of invalid rules made by authorities who had no power to make those rules and that therefore the

said selection is illegal. The next set of facts relied upon by the petitioners is also beyond controversy. It cannot, as a matter of fact, be asserted that a selection embodied in the list sent up by the Public Service Commission in November 1960 was made pursuant to the Rules promulgated subsequent thereto in December 1960. It is also obvious that the qualifications prescribed by the special Rules of 1960 and the qualifications prescribed by the Public Service Commission in its several Notifications differ from each other in material particulars. Whereas the Public Service Commission in its Notifications prescribed a degree in Engineering or an equivalent examination the 1960 Rules prescribed also a certificate or diploma from an Institute of Engineers as an alternative to a University degree. Whereas the 1960 Rules prescribe a single age limit of 31 years applicable to all seeking direct recruitment, the Notifications of the Commission prescribed different limits for different classes of applicants. It is also pointed out by the learned counsel for the petitioners that all that the Commission did before making the selection was to interview the candidates whereas the 1960 Rules prescribe direct recruitment by the Public Service Commission after interview and ora, test. It is argued that a mere interview is not equivalent to an oral test, especially when the Rules mention both an interview and an oral test.

30. It has to be held therefore that the selections by the Public Service Commission in this case were not made pursuant to the State Public Works Engineering Department Services (Recruitment) Rules of 1960, nor can they be said to be in conformity with the provisions of those Rules.

31. Indeed, as contended for on behalf of the petitioners, the amendment of 23rd October 1961 necessarily involves an admission by the State Government that the selections are not in conformity with the 1960 Rules. It should, in particular, be noted that the amendment in addition to providing for a fiction that the Rules must be deemed to have come into force with effect from the 1st day of March 1958 added a proviso to the second Rule specially applicable to direct recruitment of Assistant Engineers for the first time providing for minimum qualifications in respect of the said first recruitment in terms identical with those of the Notification issued by the Public Service Commission on 1st April 1960.

32. The main argument on behalf of the State addressed by the learned Advocate-General also has been that by virtue of the amendment of the Rules on 23rd October 1961, the Rules of 1960 as amended must be deemed to have been in force at the time the impugned selections were made and that if the selections are tested in the light of the Rules as amended, it would be found that the selections are in conformity with the Rules duly and validly made, and are therefore not open to attack.

33. Ultimately therefore, the validity or otherwise or the selections made by the Public Service Commission and of the appointments made by the Government consequent thereon depends upon the validity or otherwise of the amendment of the Rules made on 23rd October 1961. The validity or otherwise of the amendment depends upon whether or not the Governor acting under the proviso to Article 309 of the Constitution has the power to make retrospective rules or more accurately, rules having retroactive operation. According to the learned Advocate-General, the Governor has that power. According to the learned counsel for the petitioners, no such power can be said to have been conferred on the Governor by the proviso to Article 309 of the constitution.

34. On this point, the case of the petitioners as formulated in paragraphs 8 and 9 in the affidavit in support of Writ Petition No. 1248 of 1961 is that the Governor, who by virtue of the power conferred by the proviso to Article 309 can only regulate recruitment and conditions of service of persons appointed to public services in connection with the affairs of the State, has not got the power to validate the invalid selections made by the Public Service Commission by making an amendment to the rules already made and that what has been actually done is in effect a retrospective piece of legislation which is beyond the competence of the Governor. The answer on behalf of the State as stated in para 7 of the counter-affidavit of the Deputy Secretary to the Government in Public Works Department is as follows :

> "The power of the Governor to 'regulate the recruitment and conditions of service in connection with the affairs of the State' includes power to regulate with retrospective effect and to validate selections made by the Public Service Commission.
> * ** ** ** **

Under the proviso to Article 309 of the Constitution the Governor of a State is empowered to frame Rules regulating recruitment and conditions of service until provision in this behalf is made by or under an Act of the appropriate Legislature. Hence the power of the Governor to make such rules is co-extensive with the powers of the Legislature to legislate in the same matter, except for the fact that any enactment by the Legislature in the field will prevail. Hence the Governor in exercise of his power under this Article has all the powers of a Legislature which includes power to make retrospective legislation and to validate previous acts."

35. That the legislature in respect of any of the subjects placed within its legislative competence by the Constitution has the power or competence to legislate both prospectively and retrospectively, subject no doubt to constitutional prohibitions if any, is not disputed. What is disputed is the proposition that the power of the Governor under the proviso to Article 309 to make rules regulating recruitment and conditions of service of persons appointed to services or posts in connection with the affairs of the State is co-extensive with the power of the State legislature under the first paragraph of the Article to make a law on the same subject which, if accepted, should mean that the Governor acting under the proviso occupies in all respects the same position as the State legislature itself so far as the subjects dealt with in the Article are concerned.

36. Before examining the arguments addressed on both sides in respect of this point, it will be convenient to refer to three cases strongly relied upon by the learned Advocate-General, viz., *Mohammad Ghouse v. Andhra State*[1], *Anil Nath v. Collector of Central Excise*[2], and *Ram Autar Pandey v. State of U. P*[3].,

37. The first two cases mentioned above do not appear to be direct decisions on the point now under consideration.

38. In the Supreme Court case, the appellant Monammad Ghouse was a Subordinate Judge working in the State of Madras until he was allotted to the Andhra State constituted as from 1-10-1953. Though the Andhra State was constituted on 1-10-1953, the Madras High Court continued to exercise jurisdiction over that State until July 1954 when a separate High Court was

established therefor. A disciplinary enquiry was started by the Madras High Court prior to 1st October 1953 and final decision therein was taken by the Court in January 1954. One of the contentions raised by the appellant before the Supreme Court was that the Madras High Court lost jurisdiction with effect from 1st October 1953 and that according to the relevant rules, the enquiry should have been referred to the Disciplinary Proceedings Tribunal. It was undisputed that R. 4 of the Madras Civil Services Disciplinary Proceedings Tribunal Rules or 1948 did not make it obligatory to refer to the Tribunal disciplinary enquiries arising in Judicial Department in view of a proviso occurring at the end of that Rule. The corresponding Rule in the Andhra State also contained a proviso stating that cases arising in Judicial Department shall not be referred to the Tribunal. But, because the Andhra Rule contained two sub-rules and the proviso occurred in the second sub-rule, the appellant argued that the operation of the proviso must be restricted to the second sub-rule alone. Their Lordships of the Supreme Court, while conceding that there was force in the contention of the appellant having regard to the setting of the proviso, expressed their inclination to agree with the Judges of the

[1] AIR 1957 SC 246 [3]1962 All LJ 31 : AIR 1962 All 328 (FB)

[2] AIR 1958 Cal 407

Andhra High Court who had heard the Writ Petition of the petitioner out of which the appeal arose, that read as a whole, the Rule did not show any intention to depart from the procedure laid down in the Madras Civil Services Rules. Having said so, their Lordships made the observation on which the learned Advocate-General relies. They observed that the point was one of academic interest as the Andhra Rule had been amended in April 1955 with retrospective effect as from 1st October 1953. The amendment did not add anything to the Rule but merely converted the proviso into a separate sub-rule which in substance did no more than clarify what the learned Judges of the Andhra High Court had stated, viz., that there was no intention to depart from the position as under the corresponding Madras Rule. Their Lordships of the Supreme Court did not discuss file question now before us, and if we may say so with respect, the agreement expressed by their Lordships of the Supreme Court with the view taken by the Andhra High Court was itself sufficient to dismiss the appeal even on the footing of the Andhra Rule as it stood before the amendment referred to above. We might add that the same ruling of the Supreme Court was cited for the same purpose by the learned Advocate-General before another Bench of this Court in the case reported in *India Sugars and Refineries Ltd. Hospet v. State of Mysore*[4], and this Court at page 644 of the Report observed that in the case before the Supreme Court the question whether a statutory power to make rules can be exercised so as to make rules having retrospective operation was not actually raised before their Lordships of the Supreme Court.

39. In AIR 1958 Calcutta 407, the question of retrospective operation of any rule did not actually arise. The particular rule in question in that case was one which provided that a temporary employee, who remains absent from duty beyond a certain period and in certain circumstances, should be deemed to have resigned his appointment. This particular provision of the Rule was added to the Revised Leave Rules of 1933 by an amendment introduced in September 1953. The actual occasion for the application of this Rule in the case arose some time in 1956 after the date of amendment. The only argument on behalf of the Civil servant in that case was that he having joined service before the amendment was effected, the amendment could not be applied. That argument was rejected by the Court stating that a temporary Government servant accepts as part of his conditions of service the Revised Leave Rules as they from time to time are made and modified. That was also how the effect of the Calcutta decision was understood by a Bench of this Court in *Padmanabhacharya v. State of Mysore*[5],

40. The proposition stated by the learned Advocate-General that the powers of the Governor under the proviso to Article 309 are not different from the powers of a legislature under the first paragraph of the Article finds support from the observations of two out of the three judges who constituted the Full Bench in the Allahabad case relied upon by him, viz., 1962 All LJ 31 : AIR 1962 Allahabad 328. The petitioner in that case was a civil servant in uttar Pradesh who, according to Rule 56 of the U. P. Fundamental Rules, was due to retire on 3rd May 1961 on attaining the age of 55 years. The said Rule was amended by the Governor of the State acting under the proviso to Article 309 of the Constitution on 27th November 1957 by Substituting

[4]1960-38 Mys LJ 635

[5]1962-40 Mys LJ 146 at p. 159 : (AIR 1962 Mysore 280 at p. 288)

"58" for "55" years originally occurring in the Rule. On 25th May 1961, the Governor of the State issued two notifications under the proviso to Article 309. By the former, the original figure "55" was restored in the Rule and it further added a proviso to the Rule reading as follows :-

> "Provided that a Government servant who had not retired on or before June 17, 1957, but has subsequently attained the age of 55 years and has on May 25, 1961, not attained the age of 58 years, shall for the period he has continued to serve after attaining the age of 55 years be deemed to have been retained in service beyond the date of compulsory retirement, i.e., the age of 55 years, within the meaning of the Rule aforesaid."

By the other notification, it was provided that the Government servants falling within the classes described in column 1 of the Schedule thereto were enabled to continue in service till the date mentioned against them in column 2 of the Schedule. That Schedule read as follows :-

	Column I	**Column II**
1	Government servants who have on May 25 1961 crossed the age of 57 years.	Upto the date on which he attains the age of 58 years or upto December 31 1961 whichever is earlier.
"2.	Government servants who have on May 25,1961 crossed the age of 55 years but have not crossed the age of 57 years.	Up to December 31 1961.
3	Government servants who will cross the age of 55 years between May 25 1961 and December 30 1961.	Up to December 31 1961."

The petitioner's case was one which fell under Class 3 of the Schedule. The combined result was that the petitioner was enabled to continue in service till 31st December 1961. It was argued on behalf of the petitioner before the Allahabad High Court that the notifications of 25th May 1961 which purported to have retrospective effect were invalid and that therefore the petitioner was entitled to continue in service till May 1964 when he would complete the age of 58 years. Oak,

J., one of the members of the Full Bench, took the view that it was doubtful whether the Governor could make a rule on 25th May 1961 providing that the petitioner in that case should be deemed to have retired from service on 3rd May 1961, but considered it unnecessary to pursue the point because the petitioner was, however, enabled to continue in service till some time after the notifications, viz., up to 31st December 1961. The other two learned Judges, however, went into the question and took the view that under the proviso to Article 309, the Governor does have the power to promulgate Rules having retrospective operation. Srivastava, J. observed as follows in para 20 of his judgment.

> "It will be noticed that there was nothing in the Constitution Acts of 1919 and 1935 indicating that the rule making power conferred by those Acts could be exercised only prospectively and not retrospectively. The restriction is conspicuous by its absence in Article 309 of the Constitution also. In the Act of 1935 if a rule was altered to the disadvantage of an employee he had a right of appeal. Even this restriction was removed when Article 309 replaced Section 241 of the 1935 Act. The rule making power contended by Article 309 on the Governor or his nominee is, therefore, not confined to prospective rule making and appears to be wide enough to include the making of rules with retrospective effect. In fact, if rules regulating conditions of service can be made only with prospective effect and cannot be made applicable to persons already in Government employment administration may some times become impossible. A comparison of the language used in the main part of Article 309 with that used in the proviso will show that the power given to the Legislature for regulating the recruitment and conditions of service of persons is identical with the power given to the Governor or such person as he may direct in regulating the recruitment or conditions of service employed in services and posts in connection with the affairs of the State. The only difference is that the Legislature can make the regulation for all times and the Governor can do so only till the Act of the Legislature under the main part of the Article is passed. The Legislature, it is well settled, can legislate prospectively as well as retrospectively vide *J. K. Jute Mills Co., Ltd. v. State of U. P*[6]*.,* The powers of the Governor under the proviso to Article 309 being identical with that of the legislation under the main Article there is no valid reason why the Governor should not be able to make rules with similar effect."

In paragraph 22-A of the judgment his Lordship further observed as follows :-

> "The power to amend a rule and to change it, whether to the detriment or to the advantage of the employees concerned, appears to be inherent in the rule making power of the authority concerned. The circumstances in which the power can be exercised cannot be catalogued exhaustively. It all depends on what the exigencies demand. No one can say that because a particular rule exists in a particular form on a particular date it should remain in that form for all times to come and should not be changed even it as a matter of

policy the change is necessary."

Dwivedi, J. observed as follows at page 49 of the Report :-

> "The retrospective nature of the rule would not however condemn it, as the Governor is competent to enact a retrospective rule under the proviso to Article 309. If, as is not debatable, the U. P. Legislature could regulate conditions of service of State employees by a retrospective measure, otherwise legitimate, it is difficult to comprehend that the Constitution denies the

[6] AIR 1961 SC 1534

> Governor that means in the same field and for a similar end. Neither principle nor precedents would warrant the asserted denial of power to the Governor. At the outset it may be well to bear in mind that we are 'expounding' the Constitution and that considering its character, scheme and structure that construction of the proviso to Article 309 should be preferred which is most beneficial to the widest amplitude or power in the Governor. The proviso is expressed in broad strokes. The scheme and setting of it both suggest that the Governor is constituted a coordinate authority with the State Legislature, and is invested with as extensive powers as the Legislature itself for effective regulation of service conditions of State servants for public weal."

41. We have extracted these long passages from the judgments of the learned Judges of the Allahabad High Court not only because the learned Advocate General places strong reliance upon them but also because they correctly state, according to him, the proposition of law he is contending for in the present case. While conceding as he has to that, in the last analysis, the ambit or amplitude of the power should depend upon the language of the proviso to Article 309 which confers that power, the learned Advocate-General argues that while interpreting that language or trying to ascertain the real effect of that language, the Court should have regard for the object with which and the purpose for which that power is conferred and the circumstances or exigencies in which that power is expected to be exercised. Mr. M. K. Nambiar on behalf of the petitioners argues, on the other hand, that the said contention of the learned Advocate-General does no more than invoke the normal rule of interpretation that ordinarily the conferment of a particular power carries with it the conferment of every ancillary power necessary for a complete effectuation of the main power, but that in examining the question whether the power to make rules under the proviso to Article 309 carries with it the power to make rules batting retrospective operation also, regard should be had, not for the possible political necessities which may suggest themselves to a Government in a given situation, but for the character of the donee of the power. He states that while it is undoubted that the conferment on a legislature of a power to legislate in respect of a given topic or subject necessarily carries with it the power to legislate in respect of that topic or subject retrospectively, the conferment of power on any other authority, body or functionary to make rules does not carry with it by implication the power to make rules having retrospective operation. If it is intended to confer such a power on a rule making body other than a legislature, it is, according to him, necessary that it should be conferred in express terms. This difference, Mr. Nambiar points out, flows directly from the character of the donee of the power. It is a well established Constitutional principle that a legislature within the sphere of its legislative

competence has plenary powers of legislation, one of the essential attributes of which is the power to legislate retrospectively.

42. Before proceeding further, it is quite essential to ascertain what exactly is meant by 'retrospective legislation'. The mere fact that a law or a rule looks back and takes into account certain events that have already taken place does not necessarily mean that the said law or rule operates or acts from a date anterior to its promulgation. A law or rule may take into account the previous events or facts out may, nevertheless, operate only prospectively as from the date of its promulgation. Perhaps a more accurate expression to be used to describe a law which acts or operates as from a date anterior to its promulgation would be "retroactive legislation" or "ex post facto legislation". Such ex post facto legislation may either take away the rights created by previous transaction or validate what was in its inception invalid. Even when the rights acquired under previous transaction are taken away by a law, such law may leave intact all the consequences of the rights previously acquired up to the date of its promulgation and render these rights ineffective only from the date of its promulgation. In such a case, it will be noticed that the law is not in the real sense of the term retroactive. Commonest form of ex post facto legislation that we come across is legislation which validates what was in its inception invar. It is with this type of legislation by the Governor acting under the proviso to Article 309 that we are concerned in this cases.

43. Viewed in this light, the second amendment of the U. P. Fundamental Rule 56, with which the Full Bench of the Allahabad High Court was concerned in the case mentioned above, was not in the real sense of the term either retroactive legislation or ex post facto legislation. It will be noticed that while the said amendment changed the age of superannuation from 58 to 55 years, it took care to see that persons who had attained the age of 55 years before the date of the amendment were permitted to continue in service to a date subsequent to the date of the amendment. The real effect was that white the superannuation age prescribed by the amendment should have in the ordinary course applied to every person in the service of the Government, exceptions were made in favor of certain specified classes of Government servants who by reason of the age attained by them on the date of the amendment would have been adversely affected in a way peculiar to that class. The only questions for consideration therefore were whether the Government servants may be said to have acquired the right to continue in service till the age of 58 years in terms of the first amendment which right they should not be deprived of, and whether under the proviso to Article 309 the Governor could amend one of the service Rules so as to affect persons already in the service of the Government. On the first question, the view taken by all the three learned Judges constituting the Full Bench was that the Government servants could not be said to have acquired the right to continue in service till the completion of 58 years of age. The discussions contained in the judgments of Srivastava, J. and Dwivedi, J. are in actual effect directed towards showing that the Governor could amend a rule so as to affect persons already in the service of the Government.

44. On the facts of that case, therefore, the actual decision of the Court does not, in our opinion support the proposition sought to be made by the learned Advocate-General in the case now before us, viz., that the Governor has under the proviso to Article 309 the power to make a rule validating what was in its inception invalid.

45. In coming to the conclusion on the general question as to the extent of the Governor's powers under the proviso to Article 309, viz., that the said power includes the power of making rules

having retrospective or retroactive operation, both Srivastava, J. and Dwivedi, J. have equated the Governor acting under the proviso to Article 309 to the legislature itself only on the ground that there is no difference between the language of the first paragraph of the Article dealing with the powers of legislature and that of the proviso referring to the Governor. Their Lordships state that neither in relation to the legislature in the first paragraph nor in relation to the Governor in the proviso is there any express prohibition against retrospective legislation. The next step in the line of reasoning followed by their Lordships is that because it has never been doubted that the legislature has power to make retrospective legislation, the Governor acting under the proviso should also be held to have the same power. In other words, their Lordships have postulated with reference to the Governor the power to make retrospective rules by implication in the same way as such power may be implied in the case of a legislature.

46. With great respect, we find ourselves unable to accept the last mentioned proposition both on principle and on authority binding on us.

47. In *R. v. Burah*[7], their Lordships of the Privy Council explained the powers of the Indian Legislature in the following terms :-

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

That decision dealt with the powers of the Indian Legislature under the Indian Councils Act of 1861. Dealing with the position under the Government of India Act, 1935, the Federal Court of India in *United Provinces v. Atiqa Begum*[8], pointed out that legislation for the purpose of validation of executive orders must necessarily be regarded as subsidiary or ancillary to the power of legislation on the particular subjects in respect of which the executive orders may have been issued.

48. In 1960-38 Mys LJ 635 : AIR 1960 Mysore 326, a Bench of this Court after examining several cases, both Indian and English, pointed out that there is a difference between the powers of a legislative body and those of any other rule making body which is not a legislature and that whereas the legislative body can always legislate retrospectively unless there is any prohibition under the Constitution, any other rule making body cannot exercise its power retrospectively unless the law conferring that power expressly mentions that such power can be exercised retrospectively.

49. The principle, on which this distinction is founded, is that in democratic Constitutions where the law making power of the body politic is vested in legislatures, the legislatures acting within the sphere of legislative power allotted to them by the Constitution exercise a defined portion or part of the supreme sovereign power of the body politic. No such assumption is possible in the case of non-legislative bodies or any other organ of Government by reason only of the fact that such bodies or organs may be invested with the power of making rules having the

[7](1878) 3 AC 889

[8] AIR 1941 FC 16
force of law although while exercising those powers they are really exercising the power of legislation.

50. The proposition stated by Srivastava, J. in the case reported in 1962 All LJ 31 : (AIR 1962 Allahabad 328 FB) that the power to amend a rule or change it is inherent in the rule making power appears to us, with great respect, to have been stated in rather wide terms. If such a power was really inherent in the main power to make rules, it would have been unnecessary to enact Section .21 of the General Clauses Act which states, inter alia, that where by any Central Act or Regulation the power to make rules is conferred, the said power includes the power to add to, amend, vary or rescind any rules subject to the condition that such additional power should be exercised in like manner and subject to like sanction and conditions, if any, governing the exercise of the main power. That even such a power to amend does not include a power to amend in such a way as to give the amendment retroactive or retrospective operation is clear from *Strawboard Manufacturing Company Ltd. v. Gutta Mill Workers' Union*[9], where their Lordships distinctly pointed out that in view of the absence of any distinct provision in Section 21 of the General Glauses Act that the power of amendment and modification conferred by it may be so exercised as to give it retrospective operation, an order of amendment or modification cannot by virtue of the said section have that effect.

51. It is thus a well established proposition of Constitutional law that a power to make a law having retro-active operation is one of the attributes of the power of the legislature in democratic Constitutions and that no other body or organ of the Government can exercise that power unless it is expressly vested with that power.

52. The learned Advocate-General, however, argues that the principles discussed above are applicable only in cases where the rule making body is one which gets the power to make rules under a statute of the legislature and therefore exercises what may be described as a power of subordinate legislation. He contends that no such principle can be applied to the Governor acting under the proviso to Article 309 because he gets that power directly from the Constitution itself and not under or by virtue of any Act or statute of the State Legislature. According to him, the correct view to take is the one propounded by the learned Judges of the Allahabad High Court in the case referred to above, viz., that according to the scheme of our Constitution and the setting in which the Governor's rule making power now in question occurs or is stated, the Governor acting under the proviso to Article 309 must be held to be a legislature itself in all respects and for all purposes.

53. In our opinion, there is nothing in support of this view except the apparent similarity in the language employed in the main part of Article 309 and in the proviso and the absence of an express prohibition against retrospective legislation in either of them. The scheme of the Constitution, if carefully examined, points to quite the contrary conclusion.

54. The legislatures constituted by the constitution are Parliament for the Union and State Legislatures for the several federating States. The Constitution is clear in its
[9] AIR 1953 SC 95
terms as to what exactly it means by Parliament and state Legislatures. Article 79 states that there shall be a Parliament for the Union which shall consist of the President and two Houses to be

known respectively as the Council of States and the House of the People. Likewise, Article 168 states that the Legislature for every State shall consist of the Governor and two Houses in certain specified States and the House in other States. Articles 52 and 53 occurring in Chapter I of Part V of the Constitution dealing with the Union Executive declare that there shall be a President of India and that the Executive power of the Union shall be vested in the President. Similarly, in Chapter II of Part VI of the Constitution dealing with the State Executive, Articles 153 and 154 declare that there shall be a Governor for each State and that the Executive power of the State shall be vested in the Governor. Both the President and the Governor are required by the Constitution to exercise the Executive power vesting in them either directly or through officers subordinate to them in accordance with the Constitution. It is clear therefore that whereas the President along with the two Houses of Parliament constitutes the Legislature for the Union, the President by himself or individually is only the Executive head of the Union and that likewise whereas the Governor along with one or two Houses, as the case may be, constitutes the Legislature of a State, the Governor alone or individually is only the Executive head of the State. It follows therefore that wherever the constitution refers to the President alone or the Governor alone, reference must be taken to be only to the Executive head of the Union or the State, or the repository of the Executive power of the Union or the State, as the case may be. Even when the Constitution empowers the President to promulgate an ordinance by Article 123 or empowers the Governor to promulgate an ordinance by Article 213, neither the President nor the Governor actually becomes the Legislature, but the said power of promulgating an ordinance is described by the Constitution as legislative power of the President or the Governor as the case may be. The said Articles further state that an ordinance promulgated by the President shall have the same force and effect as an Act of Parliament, and an ordinance promulgated by the Governor shall have the same force and effect as an Act of the Legislature of the State assented to by he Governor. No such expressions equating a rule made by the Governor with an Act or Law made by a State Legislature are found either in Article 309 or in any other Article conferring the power of the Governor to make rules in respect of specified topics. It may also be noted that whereas the legislation by a legislature is referred to in the Constitution either as an Act or as a Law, legislation by the Governor is not called an Act or a Law but an ordinance or a rule. An ordinance, as already pointed out, is placed on par with an Act of the Legislature, but a rule is merely called a rule. This distinction is maintained in the proviso to Article 309 itself which concludes by stating that the rules made thereunder by the Governor are to have effect subject to the provisions of any Act of the State Legislature. It cannot be contended that this choice of phraseology adopted by the Constitution is without any significance.

55. In the light of the foregoing, the only conclusion possible is that the Governor acting under the proviso to Article 309 is not and does not become the State Legislature but is and remains the Executive Head of the State or the repository of the Executive power of the State exercising the power to make rules. It is not possible therefore in the absence of any express provision to that effect in the proviso to hold that the power to make rules under that proviso necessarily includes the power to make rules having retroactive operation.

56. Such is the position when examined from the point of view of the character of the done of the power. We should now examine the same from the point of view of the purpose or object with which the said power has been conferred on the Governor and the circumstances and exigencies in which it becomes necessary to exercise the same.

57. Mr. Advocate-General points out that in the matter of regulating public services, several problems of a complicated nature might arise, a proper solution of which in the interest of good government of the country may not be possible if the Governor could make rules which operate only prospectively. When once it is conceded that the rule making power read in the light of Section 21 of the General Clauses Act which applies to the interpretation of the Constitution includes also the power to add to, amend, vary or rescind any rules already made and that even according to the principles stated above such amendments or alterations may rightly be made applicable to persons already in the service of the Government, such alterations or amendments may call for adjustments being made in respect of the rights and liabilities of Government servants accrued or incurred under preexisting rules. For example, if rules relating to leave, travelling or other allowances are revised or amended, it may be necessary for ascertaining the exact effect of the amendments on individual Government servants to take into account the leave already taken by them or allowances already drawn by them in certain situations. Or it may be that where the Government takes a decision to confer certain additional benefits on its servants either in the matter of leave, allowances or pay scales but some time elapses after the taking of the policy decision before the actual details are worked out, the Government may in fairness to its servants decide to give effect to the finalised scheme of additional benefits as from the date of the original policy decision to grant additional benefits. Likewise, when certain rules regarding conditions governing the selection of persons for promotion are amended or altered or new rules in that regard promulgated, a position may arise wherein one or more Government servants could or should have been in the light of the new rules or amendments promoted some time prior to the actual promulgation of the new rules or amendments. In such a case, the Government may out of fairness to such persons make provision for their being treated as having been promoted with retrospective effect from a date anterior to the actual promulgation of the new rules or amendments.

58. It seems to us that none of these situations really calls for the exercise of the power to make retroactive rules or ex post facto rules. In every one of the cases mentioned above, the readjustment of rights and liabilities or the conferment of additional benefits takes place subsequent to the new rules or amendments. Both the rules and amendments actually operate prospectively. All that is done in actual fact is that the rule making power merely directs that in making the readjustment or conferring additional benefits in the light of the new rules or amendments, the facts or events that have already taken place shall also be taken into account. In the last analysis, the position is merely one in which a certain material or monetary advantage by way of additional grant or by way of compensation is made available to a Government servant in present in view of any service already rendered by him or any disadvantage already suffered by him. In all these cases, therefore, no question of retro-active or ex post facto legislation can at all arise.

59. As we have already pointed out at an earlier stage of this Order, retrospective or more accurately retroactive or ex post facto legislation in the real sense of the term is one in which rights already acquired under previous transactions or previous rules are taken away as from a date anterior to the promulgation of legislation of by which some thing that was invalid, when actually done, is sought to be validated. We have further pointed out that if rights are taken away not as from a date anterior to the promulgation of a law but only as from the date of its actual promulgation, such legislation cannot be described as retro-active legislation; it acts only prospectively. But the question whether a right can at all be taken away having regard to the

Constitutional or other guarantees which the State is bound to respect is a question which depends not upon the language employed in the proviso to the Article but upon the other provisions of the Constitution or a law or a contract binding on the State, as the case may be.

60. We hold therefore that the Governor acting under the proviso to Article 309 of the Constitution does not have the power to make a rule which takes away from Government servants a right already acquired by them under the pre-existing rules or previous transactions as from a date anterior to the promulgation of that rule or to make a rule validating what was invalid in its inception.

61. In the present case, we have already held that but for the amendment of the Rules made on 23 October 1961, the selections made by the Public Service Commission are invalid because they have been made on the footing of the Rules purported to have been promulgated partly by the Government and partly by the Public Service Commission, neither of whom has the authority to frame any such rules under the Constitution. The clear effect of the amendments of 23rd October 1961 was to validate those invalid selections by creating a fiction that the Rules actually made in December 1960 were in force as from 1st March 1958 and by adding a further proviso that the first selection under the Rules will be governed not by the qualifications prescribed by the 1960 Rules themselves but by a different set of qualifications set out in the proviso in terms identical with the qualifications prescribed by the Public Service Commission in its Notification of 1st April 1960.

62. The amendments of 23rd October 1961 which purported to validate the selections which were invalid must be held to be ultra vires the rule making power of the Governor under the proviso to Article 309 and therefore void and ineffective. We hold accordingly.

63. There is also another reason why the said amendments are unconstitutional. By virtue of the fiction sought to be created by the amendments, the position should be taken to be one in which the Rules were made on 1st March 1958 prescribing one set of qualifications in respect of the first recruitment to the posts of Assistant Engineers under the Rules and another set of qualifications in respect of subsequent recruitments under the Rules. It is not apparent on the face of the Rules nor is it possible to ascertain any intelligible criteria reasonably related to the object of the Rules on the basis of which this classification between the recruits at the first recruitment and the subsequent recruits has been made. All persons sought to be recruited in this category being Assistant Engineers and the clear object being that all Assistant Engineers should possess certain qualifications or capabilities for the work expected of them, there is no apparent reason why the first set of recruits should possess only certain qualifications and all other recruits should possess certain other qualifications when obviously the type of work all are expected to do after recruitment is the same or similar. As pointed out by their Lordships of the Supreme Court in *General Manager, Southern Railway v. Rangachari*[10], and by this Court in *M. A. Moqeem v. State of Mysore*[11], and connected cases, equality of opportunity guaranteed by Articles 14 and 16 of the Constitution requires that while making a selection either for initial recruitment or for promotion, same standards should be applied to all persons similarly situated. The classification sought to be made as aforesaid not having been shown to be one made upon criteria reasonably related to the object of the Rules, the prescribing of different standards for selection based on such unconstitutional classifications must therefore be held to be violative of the Fundamental Rights under Articles 14 and 16 of the Constitution.

64. The case of mala fides or of collateral considerations having prevailed in the selections is set out in paragraph 15 of the affidavit in support of Writ Petition No. 1269 of 1961 which reads as follows :

> "Further, selection made by the Public Service commission is arbitrary and out of collateral considerations. Amongst the selected candidates, the following candidates, viz., (1) Sri D. C. Channegowda, who is the son-in-law of the second Member of the Public Service Commission Shri Appajappa, an ordinary B. E. Graduate with only 49-8% of marks; (2) Shri Kancharase Gowda who is the son-in-law of the sister of II Member, a B. E. with 56% of marks; (3) Sri Hanume Gowda, who is the son-in-law of the brother-in-law of the second Member with 56% of marks, (4) M. N. Narse Gowda who is prospective son-in-law of the second Member, a M. E. with 57% of marks, (5) T. Krishna who is a relative of the Second Member; and many relatives of prominent members of the Local Legislature and of Parliament, to wit, (6) Shri A. B. V. Gowdh, who is the brother of Sri Alu Hanumanthappa, M.L. A., a B. E. with 48% of marks; (7) Shri L. Krishnamurthy, who is the son-in-law or Shri R. Subbanna, M. L. C., a B. E. with 51% of marks; (8) Shri N. Iyyunna, who is the son-in-law of Shri Mulka Govinda Reddy, M. P., a B. E. with 45% of marks, (9) Shri D. K. Basavarajappa, who is the son-in-law of Shri Siddananjappa, M. P., a B. E. with 46% of marks and relations of high placed officials including a Minister, viz., (10) Shri J. Mallappa, who is the son-in-law of Shri Beerappa, Divisional Commissioner, Mysore, a B. E. with 46% of marks, (11) Shri C. N. Nanjundappa, son-in-law of Shri Beerappa above-named, a B. E. with 45 per cent of marks, (12), Shri J. M. Patil who is the son-in-law of M. P. Patil former Minister for Revenue, State of Mysore, a B. E. with 43% of marks and several others have been selected to the exclusion of myself and several others who had superior and higher qualifications both

[10] AIR 1962 SC 36

[11] Writ Petn. No. 734 of 1961 : AIR 1963 Mys 219

> academically and by virtue of seniority in service."

65. The Second Member of the Public Service Commission having since died, these allegations are traversed in a common counter-affidavit filed by the Chairman of the Public Service Commission. The relevant paragraphs are paragraphs 3 and 4. In para 3, the Chairman states that when Channagowda, the son-in-law of the Second Member, was being interviewed, the Second Member abstained from participating in the said interview. Regarding the other persons said to be related to the Second Member, viz., Kancharase Gowda, T. Krishna, Hanume Gowda and Narasegowda, all that the Chairman states in his affidavit is that he was not aware at the time of selection that these persons were related to the Second Member. In paragraph 4 he likewise states that he was not aware of the relationship, if any, of the candidates with prominent members of the local Legislature or of Parliament or high placed officials including a Minister and an Ex-Minister. The Chairman of course denies explicitly that any collateral considerations prevailed while selecting the persons named in para 15 of the affidavit in support of Writ Petition No. 1269 of 1961. He adds that

"the dominant factor in making the selections was the performance of the candidate at the interview and the marks secured by the candidate in the Degree Examination was only one of the factors that was taken into consideration" (sic).

66. On these pleadings, the argument is that while no attempt has been made to deny the relationship of certain selected candidates with either the Second Member or Legislators, Ministers or Ex-Ministers, the adverse inference clearly flowing from the poor performance of these candidates at the University Examination is sought to be got over by saying that the dominant factor in making selections was the performance of the candidates at the interview. This disingenuous attempt at denying the allegations of collateral considerations having prevailed, taken along with the fact that there are as many as 12 candidates whose selection is thus open to suspicion, is according to the argument on behalf of the petitioners a very strong circumstance in support of their case.

67. The petitioners' learned counsel further argues that on the pleadings he has succeeded in making out a case of strong suspicion about the *bona fides* of the selections made by the Public Service Commission and that if this Court should be pleased to call for ail papers relating to the proceedings of the Public Service Commission, there is every likelihood of what now appears to be a mere suspicion turning out to be an almost inevitable inference of fact.

68. There is no denying the fact that the facts stated in the pleadings, especially in the light of the manner in which they are traversed in the counter affidavit of the Chairman of the Public Service Commission, do raise a strong suspicion. We, however, find it unnecessary to investigate further into this matter because our finding that the selections impugned are invalid and the attempt to validate them by the amendments of the Rules on 23rd October 1961 is ineffective is sufficient to dispose of these Writ Petitions.

69. Finally, we have to consider the contention on behalf of the State briefly stated in paragraph 19 of the affidavit of the Deputy Secretary to the Government in the Public Works Department and elaborated in the course of the arguments of the learned Advocate-General. The argument is that the State has embarked upon several projects of great magnitude and that because 88 respondents who have been appointed by the Government have taken charge several months ago, any order by this Court quashing the appointments will lead to considerable dislocation in the activities of the Public Works Department and make the State lose the benefit of experience gained by the appointees besides causing much hardship to the appointees themselves. It is stated that any order of this Court in favour of the petitioners being in substance in the nature of a Writ or Quo Warranto, this Court should not issue such a Writ if the mischief likely to be caused by the issue of such a Writ will far outweigh the mischief caused by permitting the appointees to continue in the posts to which they have been appointed.

70. We do not think that in the actual circumstances of this case, this argument can at all, with any propriety, be addressed by the State. It will be remembered that though the selections were made by the Public service Commission so early as in November 1960, the State Government did not find it necessary to make any appointments for nearly one year. Before the appointments were actually made, Writ Petition No. 856 of 1961 was filed, and was heard and disposed of

expeditiously by this court. In that Writ Petition the State took up the attitude that it was not bound by the selections made by the Public Service Commission, in view of which this Court dismissed that Writ Petition as premature. In the order of this court dismissing that petition, though no final opinion was expressed on any of the points raised on behalf of the petitioner, the available arguments questioning the legality of the selections were summarized. Even otherwise, the State was fully made aware of the necessity of examining the position in the light of the Constitution and law. Thereafter the State took the decision to validate the invalid selections by moving the Governor to promulgate the amendments of 23rd October 1961. Against this background the present argument of the State appears to us to amount only to this, that even when this Court after careful consideration comes to a definite conclusion that the act impugned in these Writ Petitions is illegal and opposed to the Constitution, it should refrain from giving effect to its decision because the illegality is now an accomplished fact.

71. We therefore allow these Writ Petitions and make an order quashing the Notification of the Government bearing No. P. W. 10 SAG 59 dated 31st October 1961 and that appointments made thereunder of respondents 3 to 90 as Assistant Engineers in the Public Works Department of the State Government.

72. We make no order as to costs.

Petitions allowed.