APPELLATE CIVIL

Before D. Falshaw, C. J. and Harbans Singh, J.

BHOLA AND OTHERS,—*Appellants.*

versus

JHUNDOO AND OTHERS,—*Respondents.*

Execution Second Appeal No. 425 of 1963.

1963

December, 20th

Transfer of Property Act (IV of 1882)—S s. 76 and 111—Tenant settled on mortgaged land by mortgagee—Whether ceases to be tenant after redemption of the mortgage—Pepsu Tenancy and Agricultural Lands Act (XIII of 1955)—S s. 7 and 7A—Tenant settled by mortgagee—Whether entitled to protection against ejectment.

Held, that the ordinary rule is that a lease created by the mortgagee will come to an end on the redemption of the mortgage. The only exception is a permissible settlement by the mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period. An agricultural lease created by the mortgagee may be binding on the mortgagor even after the redemption of the mortgage provided it is of such a character that a prudent owner of property would enter into it in the usual course of management.

Held, further that if a mortgagee is authorised under the law to settle a tenant on the land which is mortgaged with him, then the mortgagee is a landowner within the meaning of the Pepsu Tenancy and Agricultural Lands Act, 1955, and such a tenancy created by the mortgagee cannot be terminated except in accordance with the provisions of sections 7 and 7A of that Act.

Execution Second Appeal from the order of Shri Gurbachan Singh, District Judge, Sangrur, dated the 21st March, 1963, reversing that of Shri Harkishan Malik, Sub-Judge, 1st Class, Narwana, dated the 6th October, 1962 and directing that the decree-holders be delivered actual physical possession of the land in dispute as against the respondents objectors, i.e., Bhola Singh, Ramji Lal and Jawahra also and the respondents shall pay the costs of this appeal.

D. C. Gupta and J. V. Gupta, Advocates, for the Appellants.
G. P. Jain and S. S. Mahajan, Advocates, for the Respondents.

JUDGMENT

Harbans Singh, J.

Harbans Singh, J.—This execution second appeal raised an important point of law for the decision of which the matter has been placed before this Bench.

The facts necessary for the decision of this case, which have been given in my reference order, may briefly be recapitulated here. Jhandu and others, respondents before us (hereinafter referred to as the mortgagors) represent the original owners of the land in dispute which was mortgaged with possession by their predecessors-in-interest with the predecessors-in-interest of Molu, etc. (hereinafter referred to as the mortgagees). As a result of the proceedings taken by the mortgagors, a final decree for possession by redemption was passed against the mortgagees on 25th of April, 1962. When execution was sought to be taken, objections were raised on behalf of Bhola and others, who are now appellants before us, claiming that they had been cultivating the land in dispute under the mortgagees for a number of years and were in actual possession as such and that the decree-holder-mortgagors were not entitled to get actual physical possession and were entitled only to symbolical possession as owners. In other words, their claim was that they cannot be dispossessed except in accordance with the existing tenancy laws. The trial Court upheld these objections on the interpretation of Order 21, Rule 35, Civil Procedure Code, holding that the objector-tenants not being parties to the suit, were not bound by the decree irrespective of the fact whether they can be treated as tenants of the decree-holders or as trespassers. The decree-holders went up in appeal and the learned District Judge, Sangrur, found in their favour and directed warrants to be issued in execution of the decree for actual physical possession

of the land in dispute. Before the lower appellate Court, one of the objections raised on behalf of the tenants was that no appeal lay under section 47 of the Civil Procedure Code. This was negatived by the Court holding that all questions between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree can be determined by the Court executing the decree and not by a separate Court. He further held that the word "representative" as used in this section would cover the tenants, who claimed an interest in the property created by the mortgagees-judgment-debtors. On merits, he came to the conclusion, on consideration of the authorities cited before him, that on redemption of the mortgage, the tenancy created by the mortgagees came to an end. The present appeal has been filed by the tenants challenging this order.

With regard to the question as to whether an appeal lay under section 47 or not, hardly any arguments were addressed and I am inclined to hold that even on their own showing, the appellants' claim is based on their having been inducted as tenants over the land by the mortgagees and, consequently, they are claiming in a sense as representatives of the mortgagees-judgment-debtors.

The real qustion, however, is as to the effect of redemption on the rights of the appellants. This requires the determination of the effect of sections 76 and 111 of the Transfer of Property Act. The relevant portions of these sections may be reproduced as follows:—

"76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(b) ... ...

(c) ... ...

(d) ... ...

(e) he must not commit any act which is destructive or permanently injurious to the property.

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111. A lease of immovable property determines—

(a) ... ...

(b) ... ...

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event."

The effect of these two provisions has been given by the Supreme Court in *Mahabir Gope* v. *Harbans Narain* (1), at page 206, in the following words:—

"The general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further the mortgagee who takes possession of the mortgaged property must manage as a person of ordinary prudence would manage it if it were his own; and he must not commit any act which is destructive or permanently injurious to the property; see section 76, sub-clauses (a) and (e) of the Transfer of Property Act. It follows that he may grant leases not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption. A mortgagee cannot during the subsistence of the mortgage, act in a manner detrimental to the mortgagor's interest such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the land thereby defeating the mortgagor's right to 'khas' possession; it would be an act which would fall within the provisions of section 76, sub-clause (e) of the Transfer of Property Act.

A permissible settlement by a mortgagee in possession with a tenant in the course of

(1) A.I.R. 1952 S. C. 205.

prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether. It is an exception to the general rule. The tenant cannot be rejected by the mortgagor even after the redemption of the mortgage. He may become an occupancy 'raiyat' in some cases and a non-occupancy 'raiyat' in other cases. But the settlement of the tenant by the mortgagee must have been a *bona fide* one. This exception will not apply in a case where the terms of the mortgage prohibit the mortgagee from making any settlement of tenants on the land either expressly or by necessary implication."

The present appeal was completed and put up for hearing without the records, the same being an execution second appeal. However, it was not suggested that in the mortgage deed there was either any express prohibition or express power given to settle tenants on the land and for the present, therefore, I would proceed on the hypothesis that there is no express provision either way.

As laid down by the Supreme Court, the ordinary rule is that a lease created by the mortgagee will come to an end on the redemption of the mortgage. The only exception, referred to above, is "a permissible settlement by the mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period". The argument on behalf of the learned counsel for the appellants was that the settlement of a tenant-at-will on the land did amount to a prudent management of the land in question, particularly in view of the fact that mortgagees were non-agriculturists and were not expected to cultivate the land themselves, and that once the tenancy in favour of the appellants is considered to be a "permissible settlement," then in view of the provisions of sections 7 and 7 A of the Pepsu Tenancy and Agricultural Lands Act, 1955 (hereinafter referred to as the Pepsu Act), they cannot be ejected except in accordance with the provisions of those sections.

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These matters, in a way, have been dealt with exhaustively by a Bench of the Bombay High Court in *Dinkar Bhagwant* v. *Rau Babaji* (2). It is not necessary to deal with all the arguments which were addressed in that case and ably met with by the learned Judges. Dealing with the effect of section 76 of the Transfer of Property Act, it was, *inter alia, observed as follows*:—

> "The first thing to be noticed, however, is that this clause 76(a) finds mention not in clauses which enumerate the powers of the mortgagee but which enumerate his liabilities. The clause merely reproduces the provision of the English law that the mortgagee must, at his peril, manage the mortgaged property as a person of ordinary prudence would manage it as if it were his own. *The clause confers no powers whatever upon the mortgagee. If, consequently, it is intended to argue that any lease which was created by the mortgagee in possession is binding upon the mortgagor after the redemption, there must be found either a statutory power in the mortgagee to make such a lease or an express power.*"

With regard to the other question as to whether any right could spring up in the tenant in consequence of a statute based on the nature of land and possession for the requisite period, the learned judges considered the provisions of the Bombay Tenancy Act under which, it was argued, a tenant was entitled to retain the property even after the mortgagees' interest came to an end and came to the conclusion that those provisions did not confer upon the tenant any right to retain the land as a tenant of the mortgagor after redemption and one of the reasons given by the learned judges for coming to this conclusion was that under section 5(3) of the aforesaid Act a tenant, in order to get protection, must be "a tenant under a proprietor 'de facto' or 'de jure' and that a mortgagee was not included in the definition of a proprietor".

(See observations at page 113 of the report).

The learned counsel for the appellants urged that the judgment of the Bombay High Court in *Dinkar Bhagwant's*

(2) 59 Bom. L. R. 101.

case is completely distinguishable on both the points. With regard to the second point he urged that the decision, no doubt, is correct so far as it goes and even the Supreme Court in *Harihar Prasad* v. *Deonarain Prasad* (3), came to the similar conclusion with regard to the provisions of the Bihar Tenancy Act, which were more or less identical with those of the Bombay Act. In head-note (g) it was observed as follows:—

> "Before a person can claim occupancy rights under section 21, he must establish that he is a raiyat as defined in section 5(2) and (3). Where, therefore, the lessees acquire the right to hold the lands for the purpose of cultivation from the mortgagees and not under the mortgagors, they are not raiyats as defined in section 5(3) and can claim no rights under section 21. A mortgagee is no doubt the transferee of an interest in immovable property, and may in a loose sense be said to be the owner of that interest. But the definition of a proprietor requires that he should own the estate or part thereof and not merely an interest therein. It would be a contradiction in terms to say of a mortgagee that he owns the estate over which he owns an interest. Further where the lands were under the personal cultivation of the mortgagors at the time when they were mortgaged, the mortgagees cannot be taken to be the tenure-holders."

The learned counsel, however, urged that the relevant provisions of the Punjab Tenancy Act are altogether different. Clause "f" of section 2 defines 'landowner' as having the same meaning as is assigned to it under the Punjab Land Revenue Act, 1887, and includes an allottee. The explanation added, however, is to the following effect:—

> "In respect of land mortgaged with possession, the mortgagee shall be deemed to be a landowner."

It was, therefore, urged that the defect that was found in both the Bombay and the Bihar Acts does not exist in

(3) A.I.R. 1956 S. C. 305.

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the Pepsu Act and, thus, a tenant under a mortgagee shall be a tenant for all purposes of the Act. Section 7 provides as follows:—

> "No tenancy shall be terminated except in accordance with the provisions of this Act or except on any of the following grounds * * *." (it is not necessary to refer to the grounds).

Section 7-A merely gives additional grounds for termination of tenancy in certain cases, which is also not relevant for the decision of the point before us.

The contention of the learned counsel for the appellants, in short, therefore, is that if a mortgagee is authorised under the law to settle a tenant on the land which is mortgaged with him, then the mortgagee is a landowner within the meaning of the Pepsu Act and such a tenancy created by the mortgagee cannot be terminated except in accordance with the provisions of sections 7 and 7A. I feel that there is force in this contention. *Dinkar Bhagwant's* case loses its force so far as this point is concerned because the provisions that were being considered by the learned judges of the Bombay High Court were materially different from those in the Pepsu Act. The latter Act makes no distinction between the mortgagor and the mortgagee and both of them are landowners within the meaning of the Act, and the only question for determination, therefore, is whether the tenant, who claims protection under the Act, is one whose settlement by the mortgagee was permissible.

In this respect also, the argument which appealed to the learned judges in *Dinkar Bhagwant's case* does not hold good because of the clear observations by the Supreme Court in *Asa Ram* v. *Mst. Ram Kali* (4). That was a case in which the mortgagees admitted certain persons as tenants under a *qabuliat* dated the 26th of May, 1936, in their favour at an annual rent of Rs 112 per annum. In 1945 the mortgage was redeemed by payment of the amount as a result of the redemption decree. They were, however, resisted by the tenants when they sought actual possession. The matter was taken up by the successor-in-interest of the mortgagors before the revenue authorities

(4) A.I.R. 1958 S. C. 183.

and ultimately the board of Revenue came to the conclusion that the "settlement of tenants" was at a reasonable rate because the circle rate was Rs. 76-6-0 per annum, and held the settlement binding on the mortgagors being one for "prudent and economic rent". The Supreme Court remanded the case for trial of the following two issues—

(1) whether the lease deed dated May 26, 1936, by the mortgagees in favour of the respondents is true and legally valid; and

(2) whether the said lease is binding on the appellants.

With regard to the second issue, which was found by the Board of Revenue in favour of the tenants, even after remand, it was observed by the Supreme Court at page 185 of the report as follows:—

> "The law undoubtedly is that no person can transfer property so as to confer on the transferee a title better than what he possesses. Therefore, any transfer of the property mortgaged, by the mortgagee must cease, when the mortgage is redeemed. Now, section 76(a) provides that a mortgagee in possession 'must manage the property as a person of ordinary prudence would manage it if it were his own'. *Though on the language of the statute, this is an obligation cast on the mortgagee, the authorities have held that an agricultural lease created by him would be binding on the mortgagor even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property would enter into it in the usual course of management.* This being in the nature of an exception, it is for the person who claims the benefit thereof, to strictly establish it."

Facts of the case were then examined and, on merits, it was held that the mere fact that the rent fixed was more than the Circle rate was not decisive of the question whether the settlement was reasonable or not, and came to the conclusion that the settlement not being reasonable and proper was not binding on the mortgagors. The observations reproduced above, particularly those underlined by me (italicised herein) negative altogether the

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argument utilised in *Dinkar Bhagwant's case* by the Bombay High Court that section 76 does not confer any right on the mortgagee. In view of the above observations, it must be held that the agricultural lease created by the mortgagees may be binding on the mortgagor even after the redemption of the mortgage "provided it is of such a character that a prudent owner of property would enter into it in the usual course of management".

As I have already stated above, records are not before us and, in any case, the Courts below have given no finding whatever (1) as to whether any lease was, in fact, created by the mortgagees in favour of the appellants and (2) if so, whether, taking all the cricumstances into consideration, it is binding on the mortgagors, being of a character that a prudent owner of the property would enter into it in the usual course of management.

In view of the above, therefore, I feel that the only course open to us is to remand the case for the trial of these two issues.

On behalf of the respondents, we were referred to a recent judgment of a Division Bench of this Court in *All-India Film Corporation Ltd.* v. *Shri Raja Gyan Nath*, Regular First Appeal No. 281 of 1960, decided on 19th of March, 1963, in which the view taken was that a lease created by the mortgagee of urban property, in the absence of any express provision to that effect, would not be binding on the mortgagor, who, on redemption, would be entitled to actual physical possession of the property. It was urged that this decision ran counter to the observations of the Supreme Court in *Asa Ram's case*. This case was referred to by Mahajan, J., who delivered the judgment in the regular first appeal, referred to above, in the course of an exhaustive discussion of all the authorities, and distinguished the same on the ground that the case before the Supreme Court related to agricultural land. For the present case, it is not necessary for me to examine the question whether this distinction was rightly made or not because, in any case, this case of *All-India Film Corporation* is no authority for the proposition that a lease created by a mortgagee of agricultural land would, in no case, be binding on the mortgagor in the absence of any express provision to that effect in the deed.

Grover and the Hon'ble Mr. Justice Inder Dev Dua on 21st December, 1964.

Petition under Article 226 of the Constitution of India praying that an appropriate writ, order or direction be issued quashing the bifurcated lists of School and College Cadres in P.E.S. Class II and quashing the order of the Punjab Government. dated 29th September, 1961, and also further ordering the Punjab State to determine the seniority of the petitioner and respondents No. 2 to 7 as also of others according to Punjab Services Integration Rules, 1957.

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H. L. SIBBAL AND S. C. SIBBAL, ADVOCATES, for the Petitioner.

M. S. PUNNU, DEPUTY ADVOCATE-GENERAL FOR THE STATE AND J. S. WASU, ADVOCATE, for the Respondents.

ORDER

KHANNA, J.—In the present and seven connected petitions Nos. 1089, 1090, 1091, 1092, 1093, 1114 and 1115 of 1962 under Article 226 of the Constitution of India the Division Bench, consisting of Mehar Singh, J., and myself, referred the following two questions for decision by a larger Bench:— **Khanna, J.**

"(1) Whether the order of the Punjab Government dated 29th September, 1961, bifurcating the P.E.S. (Class II) into School and College Cadres is violative in whole or in part of the principle of preserving *inter se* seniority embodied in rule 16 of the Punjab Services Integration Rules, 1957 ?

(2) Are the promotions to P.E.S. (Class I), in the wake of the aforesaid bifurcation of the respondents who were originally junior to the petitioners in the joint P.E.S. (Class II) list in preference to the petitioners on the sole ground of the nature of vacancy in P.E.S. (Class I) violative of the said Rule and Article 16 of the Constitution ?"

The petitioners filed these petitions on the allegations that there were two classes of gazetted officers in the Education Department in the Punjab before the merger of Pepsu and Punjab States. The P.E.S. (Class I) comprised

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all officers at the headquarters, Principals of Colleges, Professors and Divisional Inspectors of Schools. In P.E.S. (Class II) there were included all the Senior Lecturers, Deputy and District Inspectors of Schools and those Headmasters who were holding gazetted posts. The normal rule of promotion from Class II to Class I was that seniormost person in Class II was promoted to Class I, and it made no difference whether, at the time he was promoted, he held the post either of a Senior Lecturer or a post which had something to do with the Schools. The position was, however, different in Pepsu State and there was in that State one cadre for schools and another cadre for colleges in P.E.S. (Class II). When the question of merger of Pepsu with Punjab came up, one of the matters that needed determination was the seniority of the persons working in P.E.S. (Class I) and P.E.S. (Class II) in Punjab and Pepsu after their merger. On 29th September, 1961, the Governor of Punjab ordered the bifurcation of the Punjab Educational Service (Class II) into two cadres, i.e., (1) College Cadre and (2) School and Inspection Cadre (hereinafter referred to as the School Cadre) with effect from 1st November, 1956, as per order reproduced below:—

"PUNJAB GOVERNMENT
EDUCATION DEPARTMENT
Notification

Dated Chandigarh, the 29th September, 1961.

No. 7687-EDI-61/22306. The Governor of Punjab is pleased to order the bifurcation of the Punjab Educational Service (Class II) into two cadres, viz., (1) College Cadre and (2) School and Inspection Cadre with effect from the 1st November, 1956."

The method adopted for bifurcation was that if a person was working on 1st November, 1956, on the school and Inspection side in P.E.S. (Class II), he was placed in the School Cadre of P.E.S (Class II), but if he was working on that date in a college he was placed in the College Cadre of P.E.S. (Class II). Separate lists of School Cadre and College Cadre in P.E.S. (Class II) were, accordingly, prepared. The petitioners, who were the members of P.E.S. (Class II) and were working in colleges on 1st November,

1956 were shown in College Cadre, while the names of respondents other than respondent No. 1 (which is the State of Punjab) in the various petitions were included in the list of School Cadre of P.E.S (Class II) because those respondents were on that date working on the School and Inspection side. Actually the Punjab Government started implementing the order dated 29th September, 1961, long before that order was issued. It may be added that the petitioners as well as the respondents (other than respondent No. 1, which is the Punjab Government) were members of the P.E.S. (Class II) in the Punjab before its merger with Pepsu.

The name of Brij Lal Goswami, petitioner, in petition No. 1088 of 1962 was in order of seniority at No. 35 in the joint seniority list of P.E.S. (Class II) before bifurcation, while those of respondents Nos. 2 to 7 were at Nos. 37, 50, 63, 65, 69 and 70 in that list. Respondents Nos. 2 to 7 were after bifurcation promoted to P.E.S. (Class I) on various dates from 28th October, 1959 till 26th September, 1961, while the petitioner has not been promoted.

In petition No. 1089 of 1962 the name of V. P. Bansal, petitioner, in the joint seniority list of P.E.S. (Class II) before bifurcation was at No. 68, while those of respondents Nos. 2 and 3 were at Nos. 69 and 70. Respondents Nos. 2 and 3 were promoted to P.E.S (Class I) on 19th September, 1960 and 26th September, 1961, while the petitioner has not been promoted.

In petition No. 1090 of 1962 the name of Dipak Nath, petitioner, in the joint seniority list before bifurcation was at No. 66, while those of respondents Nos. 2 and 3 were at Nos. 69 and 70. Respondents Nos. 2 and 3 were promoted to P.E.S. (Class I) on 19th September, 1960 and 26th September, 1961, while the petitioner has not been promoted.

In petition No. 1091 of 1962 J. D. Verma, petitioner's name was at No. 29 in the joint seniority list before bifurcation, while those of respondents 2 and 3 were at Nos. 37 and 50. Respondents Nos. 2 and 3 were promoted to P.E.S. (Class I) on 28th October, 1959, while the petitioner was promoted to that service after respondents Nos. 2 and 3 on 3rd November, 1959.

In petition No. 1092 of 1962 the name of H. D. Bhagat, petitioner, in the joint seniority list before bifurcation was

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at No. 67, while those of respondents Nos. 2 and 3 were at Nos. 69 and 70. These two respondents were promoted to P.E.S. (Class I) on 19th September, 1960 and 26th September, 1961, while the petitioner has not been promoted.

In petition No. 1093 of 1962 the name of Rulia Ram Sharma, petitioner, was in the joint seniority list before bifurcation at No. 55, while those of respondents Nos. 2 to 5 in that list were at Nos. 63, 65, 69 and 70. These respondents were promoted to P.E.S. (Class I) on 12th September, 1960, 16th September, 1960, 19th September, 1960 and 26th September, 1961, respectively, while the petitioner was not promoted to P.E.S. (Class I) till the filing of the petition. It is, however, stated that during the pendency of this petition in 1962 he too has been promoted to P.E.S. (Class I).

In petition No. 1114 of 1962 the name of Hans Raj, petitioner, in the joint seniority list before bifurcation was at No. 60, while those of respondents Nos. 2 to 5 were at Nos. 63, 65, 69 and 70. These respondents are the same as those in petition No. 1093 of 1962 and were promoted on the dates mentioned above, while the petitioner has not been promoted.

In petition No. 1115 of 1962 the name of Nand Lal Dosajh, petitioner, in the joint seniority list before bifurcation was at No. 32, while those of respondents Nos. 2 to 4 were at Nos. 37, 50 and 63. Respondents Nos. 2 and 3 were promoted to P.E.S. (Class I) on 28th October, 1959, while respondent No. 4 was promoted to that service on 12th September, 1960. After that, the petitioner was promoted to P.E.S. (Class I) on 16th September, 1960.

According to the petitioners, respondents other than respondent No. 1, who were junior to the petitioners, were promoted to P.E.S. (Class I) in preference to the petitioners because of the bifurcation of P.E.S. (Class II) service into School and College Cadres. The only basis for these promotions, it is stated, was the bifurcation of P.E.S. (Class II) into School and College Cadres. The bifurcation is thus stated to have adversely affected the career and further chances of promotion of the petitioners as well as their emoluments and pensions. The method adopted by the State of Punjab in this respect is described to be *mala fide*, arbitrary and to have resulted in grave prejudice to

the petitioners. The order of bifurcation, in the circumstances, is stated to offend the principle about the preservation of *inter se* seniority which was embodied in rule 16 of the Punjab Services Integration Rules, 1957 (hereinafter referred to as the Rules) which reads as under:—

> "16. *Inter se* seniority of any employee in the parent State shall not be disturbed in determining his seniority in the State of Punjab under these rules."

The petitioners have, accordingly, prayed for the issuance of suitable writs for—

> "(a) quashing the bifurcated lists of School and College Cadres in P.E.S. (Class II) and quashing the order of the Punjab Government dated 29th September, 1961.
>
> (b) ordering the Punjab State to determine the seniority of the petitioners and respondents other than respondent No. 1 as also of others according to Punjab Services Integration Rules, 1957."

The petitions have been resisted on the grounds that the matters relating to seniority and promotion are not justiciable and that there has been no violation of any mandatory statutory provisions. According to the respondents the *inter se* seniority was not disturbed as a result of the bifurcation of P.E.S. (Class II) service into School and College Cadres. Regarding the promotion to P.E.S. (Class I) it is stated that the old seniority lists lost all force with effect from 1st November, 1956 and thereafter promotions were made keeping in view the nature of vacancies in P.E.S. (Class I). The respondents have denied that the method of determining seniority was arbitrary, *mala fide* or against the Integration Rules.

When the petitions came up for hearing before the Division Bench, it was conceded on behalf of the respondents that the petitioners were not considered for promotion for the posts in P.E.S. (Class I) to which the respondents were promoted not because there was anything against the petitioners but because the petitioners belonged to the College Cadre and the aforesaid respondents belonged to the School Cadre as a result of bifurcation. It was, however, urged that in making the promotion to P.E.S. (Class I) the nature of the vacancy was looked at

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and if the vacancy was of such a nature for which a person from the School Cadre was considered to be more suitable, in that event no name from College Cadre was considered.

In view of the considerable importance of the matter, which affected a large number of officers of the Education Department, the questions reproduced above were referred for decision to the Full Bench.

Mr. Sibbal, on behalf of the petitioners, has argued, as he did before the Division Bench, that though rule 16 provided that the *inter se* seniority of the employees in the parent State should not be disturbed, as a result of the integration of the States, the order about the bifurcation of P.E.S. (Class II) service of the State of Punjab into School and College Cadres has had the effect of actually disturbing that seniority. It is pointed out that but for that bifurcation the respondents other than respondent No. 1 would not have been promoted to P.E.S. (Class I) in preference to the petitioners because they were in the original list junior to the petitioners. Emphasis has been laid upon the fact that if there had prevailed some other consideration of merit in the promotion of the aforesaid respondents to P.E.S. (Class I) in preference to the petitioners, the position might have been different but, as things stand, the only basis of promotion was that the aforesaid respondents belonged to the School Cadre, while the petitioners had been put in the College Cadre. The order about the bifurcation of the P.E.S. (Class II) service into School and College Cadres and about the promotion of the respondents in preference to the petitioners is further stated to offend the mandatory provisions of clauses (1) and (2) of Article 16 of the Constitution, which read as under:—

> "(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

Mr. Punnu, on behalf of the respondents, has not denied that the petitioners were senior to the respondents concerned in the joint seniority list of P.E.S (Class II) and that the aforesaid respondents have been promoted to P.E.S. (Class I), while some of the petitioners have not been promoted and others have been promoted subsequent to the respondents. It is, however, contended that in making the promotion to P.E.S. (Class I) the Government looked to the nature of vacancy and if the vacancy was found to be of such a type for which a person from the School Cadre was deemed to be more suitable, in that case no name from the College Cadre was considered. It is further urged that the Government, which is carrying on the administration, has necessarily to have a choice in the constitution of the services to man the administration and the limitations imposed by the Constitution are not such as to preclude the creation of such services. Argument has also been advanced that the petitioners had no claim as of right to be promoted to Class I which essentially is a matter of selection. Reliance in this connection is placed by Mr. Punnu on rule 7 of the Punjab Educational Service (Class I) Rules, 1931 which reads as under:—

> "7. Appointments to the Service under clause (a) of rule 6 shall be made by strict selection and no officer shall have any claim to such appointment as of right."

I have given the matter my consideration and am of the view that the bifurcation of the P.E.S. (Class II) of the Punjab into School and College Cadres has had the effect of adversely disturbing the seniority of the petitioners, the preservation of which was guaranteed by rule 16. As would appear from the resume of facts given above, the petitioners in each petition were senior to the respondents concerned by many positions and yet as a result of the bifurcation those respondents were promoted to Class I, while the petitioners were either not promoted or were promoted much later. The claims of the petitioners in spite of their seniority were not even considered for promotion to those posts in the P.E.S. (Class I), not because there was anything adverse against the petitioners but because they happened to be in the College Cadre and the vacancy was considered to be more suitable for the School Cadre. The College and School Cadres had no existence

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in P.E.S. (Class II) before the bifurcation but came into being as a result of bifurcation and, in the circumstances, the promotion of the respondents concerned to the P.E.S. (Class I) in preference to the petitioners can be traced directly to the bifurcation which was effected by the impugned order. In para 8 of the petitions the petitioners have stated that besides direct appointment to Class I of the Provincial Educational Service, promotions used to be made from P.E.S. (Class II) on the basis of seniority. As and when such appointments were made from P.E.S. (Class II) to P.E.S. (Class I), the Government, while making the promotions, ignored the Punjab Services Integration Rules and effected promotions in such a manner that persons, who were junior to the petitioners in the joint seniority list in Punjab before merger, were considered senior because of the bifurcation of P.E.S. (Class II) into School and College Cadres. In reply to para 8 of the petitions, the respondents have stated that with effect from 1st November, 1956 the parent State Seniority Lists of P.E.S. (Class II) lost all force and from that date onwards the officers working on the School and Inspection Cadre and officers working on College Cadre enjoyed separate seniority in their respective Cadres. Promotions to P.E.S. (Class I) were made from the two cadres in P.E.S. (Class II) keeping in view the nature of vacancies in P.E.S. (Class I). In view of the unequivocal stand of the respondents that with effect from 1st November, 1956 the original seniority list of Class II, according to which the petitioners were senior to the respondents concerned, lost all force as well as the other circumstances of the case, I have no doubt in my mind that the bifurcation of the P.E.S. (Class II) into School and College Cadres which was effected by order dated 29th September, 1961 has had the result of disturbing the seniority of the petitioners *vis-a-vis* the respondent concerned and as such is violative of rule 16.

Although the material on record is silent on this point, Mr. Punnu has pointed out that the respondents concerned were initially promoted in an officiating capacity and only a few of them have so far been confirmed. This fact would, however, not make any material difference because, according to rule 10 of the Punjab Educational Service (Class I) Rules, 1931, the seniority of members of P.E.S. (Class I) service in the case of members appointed

under sub-clause (i) of clause (a) of rule 6 of those Rules, which deals *inter alia* with the selection of P.E.S. (Class II) to P.E.S. (Class I), shall, in the case of persons, who have officiated continuously in any of the posts specified in Appendix 'A', be from the date a person begins to officiate. It would, therefore, follow that even if some of the petitioners are subsequently promoted to P.E.S. (Class I) they would not regain their old seniority, but would remain junior to the respondents concerned. The position in the case of those petitioners, who are not promoted because of lack of vacancy in P.E.S. (Class I) would obviously be still worse.

It would also follow from the above that the promotion of the respondents to P.E.S (Class I) in preference to the petitioners on the sole ground of the nature of vacancy, was the direct consequence of the bifurcation, which has been found to be violative of rule 16. As such the promotion of the respondents concerned in preference to the petitioners should be deemed to impinge upon the provisions of rule 16.

Question then arises whether the promotions of the respondents concerned violate clauses (1) and (2) of Article 16 of the Constitution which have been reproduced in the earlier part of this judgment. In this respect I find that the proposition is fairly well settled that the equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State is confined not only to the initial appointments but includes also the terms and conditions of service as well as promotion to selection posts, and the reason for that is obvious. If the equality of opportunity mentioned in Article 16 were confined only to the initial appointments and not to subsequent promotions and conditions of service, the equality guaranteed by that Article would in actual practice in a large number of cases become illusory and lose all effectiveness, because after the initial appointments, as a result of differential treatment in the matter of promotions and conditions of service of various candidates selected at the same time, the object of securing fairplay in the services may be set at naught. Inroads would thus be made into the very conception of equality of opportunity in public services and thus open the way for worst kind of favouritism and nepotism. The matter came up before their

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Lordships of the Supreme Court in *General Manager, Southern Railway and another* v. *Rangachari* (1). That case arose from certain directions which had been issued by the Railway Board ordering reservation of selection posts in Class III of the railway service in favour of the members of the Scheduled Castes and Scheduled Tribes and in particular the reservation of selection posts among the Court Inspectors. One of the questions, which arose for determination in that case, was whether clauses (1) and (2) of Article 16 of the Constitution referred to the promotions, or whether they were confined to the initial appointments to any post in civil service. Both the appellants and the respondent conceded before the Supreme Court that cases of promotion also fell within the above two clauses. As neither party was interested in contending that the guarantee afforded by clauses (1) and (2) of Article 16 was confined to only initial appointment and did not extend to promotion, notice was issued to the Attorney-General. In response to the notice the Attorney-General was represented by Mr. Sen and he also took the same stand as had been taken by the appellants and the respondents that clauses (1) and (2) of Article 16 covered within their ambit promotion also. Gajendragadkar, J., as he then was, who spoke for the majority, after reproducing clause (1) of the Article observed as under:—

> "In deciding the scope and ambit of the fundamental right of equality of opportunity guaranteed by this Article it is necessary to bear in mind that in construing the relevant Article a technical or pedantic approach must be avoided. We must have regard to the nature of the fundamental right guaranteed and we must seek to ascertain the intention of the Constitution by construing the material words in a broad and general way. If the words used in the Article are wide in their import they must be liberally construed in all their amplitude. Thus construed it would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Article 16(1) to the initial employment and nothing else: but that clearly is only

(1) A.I.R. 1962 S.C. 36.

one of the matters relating to employment. The other matters relating to employment would inevitably be the provision as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. These are all matters relating to employment in Article 16(1)."

It was further observed—

"This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Article 16(1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or the appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity; but in regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service."

Laying emphasis on the necessity of avoiding narrow construction the learned Judge observed—

"If the narrow construction of the expression "matters relating to employment" is accepted, it would make the fundamental right guaranteed by Article 16(1) illusory. In that case it would be open to the State to comply with the formal requirements of Article 16(1) by affording equality of opportunity to all citizens in the matter of initial employment and then to defeat its very aim and object by introducing discriminatory provisions in respect of employees soon after their employment. Would it, for instance, be open to the State to prescribe

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different scales of salary for the same or similar posts, different terms of leave or superannuation for the same or similar posts ? On the narrow construction of Article 16(1), even if such a discriminatory course is adopted by the State in respect of its employees, that would not be violative of the equality of opportunity guaranteed by Article 16(1). Such a result could not obviously have been intended by the Constitution. In this connection it may be relevant to remember that Article 16(1) and (2) really give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). The three provisions form part of the same constitutional code of guarantees and supplement each other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment."

It was accordingly held that the words in respect of employment included all matters relating to employment including promotion. The view, that words of Article 16(1) were wide enough to include words of promotion, was again expressed in *Kishori Mohanlal Bakshi* v. *Union of India* (2), and it was observed that inequality of opportunity for promotion as between citizens holding different posts in the same grade would be an infringement of Article 16. The position would, however, be different for persons holding posts in different grades.

The petitioners, as stated earlier, as a result of bifurcation were not even considered for promotion for the post to which the respondents concerned were promoted in P.E.S. (Class I) and this course was adopted in spite of the admitted seniority of the petitioners in the original joint list. In the circumstances I am of the view that the promotion of the respondents in preference to the petitioners was violative of clauses (1) and (2) of Article 16.

(2) A.I.R. 1962 S.C. 1139.

So far as respondents' reliance upon rule 7 of the Punjab Educational Service (Class I) Rules, 1931, which provides for promotion by strict selection and rules out claim as of right to such promotion, is concerned, I am of the view that if the claims of the petitioners had been considered and then on merits they had been passed over, the petitioners would have no grievance which can be sustained in law. Where, however, the claims of the petitioners, as in the present case, were not even taken into consideration in spite of their admitted seniority, and the respondents, who were junior to the petitioners, were promoted, rule 7, in my opinion, would not stand in the way of the petitioners getting relief. The rule has to be harmonized with Article 16 of the Constitution and is not to be construed in such a way as to make it inconsistent with or violative of that Article because the inevitable effect of that would be to strike down that rule.

As regards the contention on behalf of the respondents that the Government which is carrying on the administration has necessarily to have a choice in the constitution of the services to man the administration and the limitations imposed by the Constitution are not such as to preclude the creation of such services, I may say that the proposition, as stated, is unexceptionable. It does not, however, warrant the bifurcation of an existing service in such a way as to disturb seniority of the members of that service so as to give a chance of promotion to the junior man without considering the claim of the senior man. Mr. Punnu has referred to case *The State of Punjab* v. *Joginder Singh* (3). In that case the Education Department of the Punjab Government took over by an executive order the schools run by the Municipal Boards and District Boards in the Ambala and Jullundur Divisions. The order stated that the teachers taken over by the State, who were called provincialised teachers, would be given the same grade of pay and other allowances as were given to their counterparts in Government service. On 13th February, 1961, the Punjab Government promulgated certain rules with retrospective effect from 1st October, 1957 the effect of which was that the provincialised teachers were treated as falling under a cadre separate and distinct from the teachers in the State Cadre. As a result of those rules, a member of State Cadre stood a

(3) A. I. R. 1963 S. C. 913.

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better chance of promotion than a teacher belonging to the Provincialised Cadre. The validity of those rules was challenged on the ground that it brought about a division in the united or unified service by creating the two new cadres on the basis of no intelligible differentia. This contention was repelled by the majority of Judges and it was held that there had been no integration of the two cadres with effect from October 1957. The two services were found to have started as independent services, the qualifications prescribed for entry into each were different; the method of recruitment and the machinery for the same were also different and the general qualifications possessed by and large by the members of each class were different. It was further observed that if they were two distinct services, there was no question of *inter se* seniority between the members of the two services, and as such no argument could be based upon Article 16. The respondents, in my opinion, can derive no assistance from the observations in the above case because unlike the cited case the present case relates to the bifurcation of what was originally only one service, namely, P.E.S. (Class II) in the Punjab.

Another case referred to by Mr. Punnu is *Ram Sharma* v. *The Deputy Inspector-General of Police, Ajmer and others* (Writ Petition No. 175 of 1963), decided by the Supreme Court on 16th March, 1964. This was a case of a petitioner who was head-constable in the former State of Ajmer. The petitioner was included in the approved list of head-constables to be promoted to the rank of Sub-Inspectors of Police in 1955 and was appointed as officiating Sub-Inspector in July, 1956. In November, 1956 the former State of Ajmer merged into Rajasthan, and the petitioner was absorbed in the police service of Rajasthan. The police force of that State was under the administrative control of the Inspector-General of Police, who was assisted by six Deputy Inspectors-General of Police, each Deputy Inspector-General of Police being in-charge of one of the six ranges in which the whole State had been divided for administrative convenience. The petitioner was reverted in April 1957 when a permanent Sub-Inspector returned to the range as he was the juniormost head-constable in the Ajmer range, though in other ranges there were many approved head-constables who were junior to him but they continued to officiate as Sub-Inspectors. The petitioner

claimed that there were frequent transfers of Sub-Inspectors and head-constables from one range to the other. His grievance, accordingly, was that if the whole State were treated as one unit for purposes of promotion to and reversion from the rank of Sub-Inspectors, the petitioner would not have been reverted. The State of Rajasthan denied that there were frequent transfers and averred that sometimes on account of exigencies of service transfers were made, but they were rare. Wanchoo, J., who spoke for the Court, referred to the various factors and observed that balancing the various considerations it seemed that the system in force in Rajasthan had been for the efficiency of the police as well as for administrative convenience, and it could not be said to deny equality before the law or equality in the matter of employment in police force. Warning was also administered that the system of promotion of head-constables to Sub-Inspectors within a range could be rationally supported on the basis that inter-range transfers of Sub-Inspectors would be a matter of rare occurrence. It would thus appear that the aforesaid case was decided on its own circumstances which have no parallel in the present case.

G. S. Ramaswamy and others v. *The Inspector-General of Police, Mysore State, Bangalore* (Civil Appeals Nos. 972 to 977 of 1963) decided by the Supreme Court on 21st January, 1964, has also been referred to by Mr. Punnu. The petitioners in that case were appointed Sub-Inspectors in the former Hyderabad State. According to the Hyderabad District Police Manual, posts of Circle Inspectors were to be filled in from the rank of Sub-Inspectors, and for this purpose an approved list (called eligibility list) of Sub-Inspectors fit for promotion was prepared. On coming into force of the States Reorganisation Act, certain areas of Hyderabad State were formed part of new State of Mysore. The petitioners were transferred to the State of Mysore. The petitioners, whose names were on the eligibility list, were promoted as Circle Inspectors, but were subsequently reverted when certain confirmed Circle Inspectors returned to the New State. The petitioners thereupon filed writ petitions stating that they were entitled as of right to promotion as Circle Inspectors and to continue as such. The Supreme Court, after referring to the various rules of the Hyderabad District Police Manual, held that the fact that the petitioners' names had

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been put in the eligibility lists, did not give them an indefeasible right to promotion or to continue in the post of Circle Inspectors. Reference was made on behalf of the petitioners to rule 2(c) of the Mysore Seniority Rules according to which seniority of persons appointed on permanent basis was to be determined by the dates of their continuous officiation. It was observed that the aforesaid rule provided for seniority and was not an express rule as to the manner of reversion. The Court then took into consideration the peculiar circumstances which came into existence because of integration and held that as the integration of the different services had to take time *ad hoc* promotions were made. Subsequently in 1958 a provisional list of Sub-Inspectors was prepared. It was then found that the promotions which had till then been made out of the eligibility list were not in accordance with the provisional list and it so happened in many cases that Sub-Inspectors, who were senior in the provisional list and who were in the eligibility list of the various States, were promoted after Sub-Inspectors, who were junior in the provisional list though they were also in the eligibility list. It was because of these special circumstances that reversions had to be made. This case as would appear from the narration of facts given above, was decided on its peculiar facts and as such the respondents can derive no help from it. It is, however, significant that in the above case also it was observed—

> "Further ordinarily as promotion on officiating basis is generally according to seniority, subject to fitness for promotion, the juniormost person reverted is usually the person promoted last. This state of affairs prevails ordinarily unless there are extraordinary circumstances, as in the present case."

Mr. Punnu has also argued that rule 16 is directory and not mandatory, and the claim based on that rule is not justiciable. As against the above, Mr. Sibbal has argued that rule 16 is mandatory and an infraction of that rule would be justiciable. He has referred in this connection to *Life Insurance Corporation of India and others v. Sunil Kumar Mukherjee and others* (4), wherein relief

(4) A.I.R. 1964 S.C. 847.

given to a petitioner on the ground that the order minating his service was contrary to the Blue Order and Regulations issued under the Life Insurance Corporation Act. The above matter is, however, outside the scope of reference to the Full Bench and in the circumstances it is not necessary to express any opinion. The respondents, if so advised, may agitate the matter before the Division Bench at the further hearing of the petitions.

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As a result of the above I would answer the first question in the affirmative and hold that the order of the Punjab Government dated 29th September, 1961, bifurcating the P.E.S. (Class II) into School and College Cadres is violative of the principle of preserving *inter se* seniority embodied in rule 16 of the Punjab Services Integration Rules, 1957, in so far as it has affected the seniority of the petitioners *vis-a-vis* the respondents concerned. The second question referred to the Full Bench is also answered in the affirmative. The petitions may now go back to the Division Bench for disposal.

INDER DEV DUA, J.—I agree.

Dua, J.

S. B. CAPOOR, J.—I also agree.

Capoor, J.

B.R.T.