1955 (Act 13 of 1955). For one thing, there is no provision in that Act for review as it is there in the Punjab Security of Land Tenures Act, and it has been so held by this Court; and for another, the learned Financial Commissioner was swayed by the provisions of section 78 of the Tenancy Act and section 11 of the Revenue Act, which are not applicable, even remotely, to a matter like the present one.

(10) The petitioners, on merit, are not entitled to the allotment at all. They are sticking to the land only on the technical objection that the review order passed by the Circle Revenue Officer was illegal, as the requisite permission to review had been accorded by the Collector (Agrarian) who was not competent to grant the same. The learned Financial Commissioner has observed that even if the permission to review was not in accord with the privisions of laws, but if a matter like this was to come to his notice, he in his revisional jurisdiction would have set aside the original order of the Circle Revenue Officer as the same was palpably illegal and incorrect. In view of this, even if it is to be held for the sake of argument that the permission accorded by the Collector (Agrarian) was without jurisdiction, the Financial Commissioner having dealt with the matter and having expressed himself in the manner already noticed, there is absolutely no merit in the writ petition and the same deserves to be dismissed. I, therefore, dismiss the writ petition with costs.

B.S.G.

Before R. S. Narula, C. J. and M. R. Sharma, J.

THE SPEAKER, HARYANA VIDHAN SABHA AND OTHERS,—*Appellants.*

versus

SHRI SITA RAM AND OTHERS,—*Respondents.*

L.P.A. 424 of 1972.

August 16, 1974.

Constitution of India (1950)—*Articles* 14, 16, 154, 187 *and* 309—*Appointments of the Secretariat Staff of Legislative Assembly—Framing of Rules by the Governor under Article* 187(3)—*Whether*

mandatory—Such appointments—Whether can be made by the Speaker of the Assembly under the executive instructions issued by the Governor—Governor, while issuing the executive instructions—Whether has to lay down the eligibility and other conditions of service of the Assembly Secretariat staff—Such conditions whether can be left to the discretion of the Speaker—Direct recruitment to higher posts—Whether violate the rights under Articles 14 and 16 of the Constitution of those working in the lower posts expecting promotion.

Held, that although the phrasiology implied in Article 187 and 309 of the Constitution is different yet it can not be inferred from this difference that the Governor must, of necessity himself lay down the conditions of service of the members of the Secretariat staff of the Assembly instead of leaving this matter to the discretion of the Speaker. Power to frame rules under proviso to Article 309 was made exercisable by another person under the authority of the Governor for the simple reason that the nature and number of services under the executive were large. The same considerations do not prevail in the case of Secretariat staff of the Speaker. The Secretariat of the Legislative Assembly is comparatively not so large. The Speaker as the head of the department is presumed to know the number and nature of posts which his Secretariat should have for carrying out its day to day business. It is not necessary for the Governor to frame statutary rules under Article 187(3) of the Constitution before the Speaker can make appointments to his Secretariat staff. The word "may" as used in Article 187(3) cannot be read as the word "shall". The provisions of this Article are. therefore, directory in nature and it is not mandatory for the Governor to frame rules under the Article for the appointments of the Secretariat Staff of the Legislative Assembly. Such appointments can be made by the Speaker under the executive instructions issued by the Governor. In his own sphere Speaker is supreme and the Constitution has acknowledged him as the head of his own Secretariat. When power is vested in a high dignitary like the Speaker, who performs public functions. it cannot be struck down as being discriminatory merely because it vests a large discretion in the authority.

Held, that the Governor being the Head of the State enjoys a unique position under the Constitution. As a public servant number one, he takes precedence over all other public functionaries in the State. The words, "though Officers subordinate to him" as used in Article 154(1) of the Constitution do not necessarily postulate that the Governor should exercise power through an officer whom he himself appoints. These words indicate that the power may be exercised by the Governor through those public functionaries who rank lower in the order of precedence. It is not necessary for the Governor, while issuing executive instructions for appointments in the Assembly Secretariat to lay down the eligibility and other

conditions of Secretariat of the staff. He can confer the power of laying down the conditions of service to the discretion of the Speaker.

Held, that Articles 14 and 16 of the Constitution only provide that the citizen should have equality of opportunity in the matter relating to employment under the State. They have a right to be considered for appointment, but the right to select the servant vests in the appointing authority. Such an authority is empowered to lay down policy relating to the number of posts to be filled in by direct recruitment or by promotion. In some cases it may decide to fill in posts by direct recruitment alone. The public servants who are eligible for promotion to the post form a separate class by themselves and in the absence of anything else to the contrary they cannot complain that the competent authority should also reserve some posts for their class. Hence the decision of the appointing authority to fill in higher posts by direct recruitment does not violate the right under article 14 and 16 of the Constitution of those working in the lower posts of the same Department expecting promotion.

Letters Patent Appeal under Clause X of the Letters Patent against the judgment of Hon'ble Mr. Justice H. R. Sodhi, dated 13th March, 1972, passed in Civil Writ No. 617 of 1969.

J. N. Kaushal, Advocate-General (Haryana) with Mr. Ashok Bhan, Advocate, *for the appellants.*

J. L. Gupta, Advocate with Karminder Singh, Advocate, *for the respondents.*

JUDGMENT

SHARMA, J.—A question of law of considerable importance is involved in this appeal under clause X of the Letters Patent.

The respondents joined service in the Secretariat of the Punjab Vidhan Sabha as Clerks and their relevant particulars of service are given below:—

Serial No.	*Name*	*Date of joining*	*Date of confirmation*
1.	Shri Sita Ram	8-1-1959	17-2-1962.
2.	Shri Rajinder Singh	6-11-1962	15-9-1966.
3.	Shri Som Dutt	6-11-1962	15-9-1966.
4.	Shri Subhash Chander	6-11-1962	15-9-1966.

on the reorganisation of the erstwhile State of Punjab in the year 1966, they were allocated to the State of Haryana and are at

present serving in the Haryana Vidhan Sabha Secretariat. As Clerk, they are eligible for promotion to the posts of Assistants. It is alleged that according to the well established practice in the Secretariat, the posts of Assistants were being filled in by promoting Clerks on the basis of seniority-cum-merit. On one occasion, Mr. Speaker ordered that promotions to the posts of Assistants be made only of those Clerks who passed the departmental test. As a consequence of this decision, two promotions were made amongst the Clerks. Some of the Clerks filed Civil Writ No. 315 of 1967, challenging the introduction of the departmental test for purposes of promotion and the same was allowed by P. C. Pandit, J., on March 22, 1968. It was held that the instructions prescribing the passing of a test by a Clerk to qualify himself for promotion to the post of an Assistant were illegal. It may, however, be mentioned at this stage that so far as the employees of the erstwhile Pepsu State Legislature Secretariat Service were concerned, they were governed by the rules framed in the year 1952, under Article 187 of the Constitution, by the Rajpramukh in consultation with the Speaker. They continued to be governed by these rules and promotions are always made on the basis of seniority-cum-merit. In other words, the promotion of all the Clerks was being made on the same basis. The cases of the Clerks who served in the Pepsu State Legislature Secretariat were governed by the rules, while the cases of their colleagues, who served in the erstwhile State of Punjab, were being governed by a practice *simpliciter*. On February 10, 1969, Mr. Speaker inserted a citation, Annexure 'E', in the daily Tribune inviting applications for the post of Assistant in the scale of Rs. 225—15—360/20—500 plus usual allowances. The age limit was 25 years (30 years in case of Scheduled Castes/Tribes and Backward Classes). The age limit was also made relaxable in the case of Government employees and Ex-Servicemen. The qualifications for Ex-Servicemen were that a candidate should be a J.C.O. and should have 24 years service as a Clerk out of which at least 4 years should be as a Head Clerk. For others, the qualifications prescribed were that a candidate should be a Graduate with adequate knowledge of Hindi language and seven years experience as a Clerk in a Government office. The respondents filed a writ petition challenging the validity of the decision of Mr. Speaker to appoint Assistants by direct recruitment *inter alia* on the following grounds:—

(1) That Mr. Speaker was not competent to make appointments in the absence of rules framed by the Governor of Haryana under Article 187(3) of the Constitution.

(2) That the Governor was bound to make rules empowering Mr. Speaker to make recruitment to the service on the basis of the qualifications and other conditions of service incorporated in the rules. No appointment could be made by Mr. Speaker on the basis of executive instructions issued by the Governor.

(3) That according to the recognised practice, appointments to the posts of Assistants were to be made by promoting the Clerks already in service on the basis of seniority-cum-merit. The petitioners had a right to be considered for promotion which right has been denied to them.

(4) That the action of Mr. Speaker was *mala fide* inasmuch as he had laid down the qualifications so as to facilitate the induction of particular individuals to the service. Furthermore, his action was vindictive and prompted by a desire to undo the decision already given by this Court.

The learned Judge who heard this petition held that it was mandatory for the Governor to frame rules before he could authorise Mr. Speaker to make appointments. He also held that the executive instructions could not take the place of the rules. The executive power of the State does vest in the Governor, but it has to be exercised subject to other provisions of the Constitution including Article 187 which contemplates the framing of the service rules. In other words, the executive power in the instant case could not be exercised in the absence of appropriate service rules. On the question of *mala fides*, the learned Judge found against the respondents.

Mr. Speaker has come up in appeal.

The learned Advocate-General has argued that it was not necessary for the Governor to frame rules in exercise of the powers conferred upon him under Article 187(3) of the Constitution. It was open to him to issue an executive order authorising Mr. Speaker to make the appointments. According to him, where a statute contemplates the framing of rules, the competent authority can issue executive instructions which would be justiciable in a Court of law and binding on the parties. It was further submitted that the Governor had not abdicated his functions as suggested by

the respondents because as a matter of fact. he had taken action under Article 187 of the Constitution

On behalf of the respondents, Mr. Jawahar Lal Gupta has submitted that even though the word. "may" has been used in Article 187(3) of the Constitution, yet this provision having been enacted for the benefit of the employees of the Vidhan Sabha Secretariat, should be regarded as mandatory, and the word, "may" should be read as "shall". The Governor has abdicated his functions by allowing Mr. Speaker to prescribe the qualifications and conditions of service of the employees to be recruited. He could exercise his executive functions through an authority which is subordinate to him and Mr. Speaker was not subordinate to anybody. Since no guidelines have been provided, the action taken by Mr. Speaker was arbitrary and violative of Article 311 of the Constitution. The provision for direct recruitment had the effect of changing the conditions of service of the respondents in violation of section 82 of the Punjab Reorganisation Act, 1966, and a practice which was being consistently followed could not be undone without the prior approval of the Government of India.

In order to appreciate the rival contentions it becomes necessary to consider the historical development of the establishment of the Legislative Wing of the Government. Kaul and Shakdher have traced the deveopment of the Secreatriat of the Lok Sabha in the following terms in "Practice and Procedure of Parliament", first edition, page 833 .

> 'With the introduction of the Montagu-Chelmsford Reforms in 1920, the Central Legislature became bicameral and consisted of the Legislative Assembly and the Council of State.
>
> The administrative and clerical work of both the Houses of the Indian Legislature was carried on by the Legislative Department. The Secretary of the Government of India in the Legislative Department was Secretary of both the Houses; Joint and Deputy Secretaries in the Legislative Department were Assistants to the Secretary of the Assembly and of the Council of State and the Clerks at the Table for both the Houses were supplied from among their number; while the whole of the clerical establishment was provided from the ministerial staff of the Legislative Department.

In 1921, the question of having a separate establishment for the Assembly was raised in the House by some members and the matter featured in debates during 1922 and 1923. In 1924, the Government stated in reply to a question that "it has been decided for the present that in the interest both of economy and efficiency it is desirable that the business of the Legislative Assembly should continue to be conducted by the Legislative Department of the Government of India."

However, in August, 1925, when Shri Vithalbhai Patel was elected Speaker, he along with several other members of the House felt that the independence of the elected Speaker was prejudicially affected because the Secretary of the Assembly was the Secretary of the Legislative Department under the Government of India. Many questions were also asked in the Assembly by members stressing the need for having a separate office for the Assembly Department.

Soon after he assumed charge of his office, Speaker Patel convened the Presiding Officers' Conference in January, 1926, which passed a resolution advocating the creation of a separate office for the Legislative Assembly, independent of and unconnected with the Government. The matter was immediately referred to the Government for consideration and action. As the Government did not take any action in the matter for more than a year. Shri Patel, on his re-election as Speaker, presented to the Government a scheme on August 17, 1927, embodying concrete proposals for setting up a separate department or office for the Legislative Assembly. The Government of India forwarded this scheme to the Secretary of State for India, but he did not accept the views of Speaker Patel in certain matters which the latter considered vital. The Speaker, therefore, submitted his proposal for consideration direct to the House and made the emphatic declaration that "As an elected President (Speaker), I am responsible to the Assembly and to no other authority".

On September 22, 1928, Pandit Moti Lal Nehru moved a resolution in the House that a separate Assembly Department be constituted and it was adopted unanimously.

The Secretary of State for India having accorded his approval, with certain modifications, to the scheme as embodied in the resolution, a separate self-contained department known as the "Legislative Assembly Department" was created on January 10, 1929, in the portfolio of the Governor-General with the Speaker of the Legislative Assembly as the *de facto* head. In accordance with the Legislative Assembly Department (Conditions of Service) Rules, 1929, the members of the staff began to be appointed with the approval of the Speaker."

After independence, due recognition was given to this position in the shape of Article 187 of the Constitution, which reads as under :

"(1) The House or each House of the Legislature of a State shall have a separate secretariat staff:

Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such legislature.

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under cluase (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative council as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed to the secretarial staff of Assembly or the Council and any rules so made shall have effect subject to the provisions of any law made under the said clause".

This provision is *pari materia* with Article 309 of the Constitution which contains a proviso under which the Governor can make rules regulating the recruitment and conditions of service of posts in connection with the affairs of the State. However, there is one difference in the phraseology employed in the two Articles. Where as Article 187(3) lays down that the rules may be made by the Governor, the proviso to Article 309 of the Constitution lays down

that the rules may be made either by the Governor or by such person as he may direct. In order to appreciate why these two Articles were worded differently, a brief reference to the nature of the high offices held by the Governor and the Speaker under our Constitution has to be made.

Our Constitution is based upon the British model of Parliamentary democracy. The Governor is the constitutional head of the State and the entire business of the State is conducted in his name. Under Article 164, he appoints the Chief Minister and the other Ministers on receipt of the advice of the Chief Minitser. The Council of Ministers is collectively responsible to the Legislative Assembly of the State. The real and effective executive power vests in the Council of Ministers, who aid and advise the Governor in the exercise of his functions other than those which he is under the Constitution required to exercise in his discretion. Under Article 175, he has a right to address and send messages to the Legislative Assembly. Under Article 176, he is empowered to make a special address to the Legislative Assembly at the commencement of its first session after general election. In other words, the Governor *vis-a-vis* the State has been invested with almost the same powers which the King in England enjoys. He is beyond criticism because responsibility for his actions lies on the shoulders of his Council of Ministers. In order of precedence, he ranks as number one public servant of the State. Every other public functionary holds a position inferior to him. The framers of the Constitution have aptly invested him with the legislative functions including the power to issue ordinances when the Legislature is not in session. He is empowered to frame rules under Article 187(3) of the Constitution for the Legislative Wing, under Article 234 for the Judicial Wing and under Article 309 for the Executive Wing of the State Government.

The exalted office of the Speaker is of no less importance. He presides over the Legislative Assembly which consists of chosen representatives of the people and which is charged with the duty of framing laws for the governance of the State. In his own sphere Mr. Speaker is supreme and the Constitution has rightly acknowledged him as the Head of his own Secretariat. The incumbents of the office of the Speaker have set up a very healthy convention of disaffiliating themselves from the political parties to which they belonged prior to their election as Speakers. Naturally,

it was desirable that the Governor and the Speaker alone should associate for framing rules for the members of the establishment of Mr. Speaker or, otherwise, the action of Mr. Speaker would be bound by the rules framed by an authority which according to the Warrant of Precedence and the high traditions of the office of the Speaker may be inferior to him. Such a situation would not have been compatible with the dignity of the high office which Mr. Speaker holds. It is precisely for this reason that under Article 187(3) of the Constitution it has been provided that the Governor may, after consultation with the Speaker, make rules regulating the recruitment and conditions of service of persons appointed to the Secretariat staff of the Assembly. The words, "such person as he may direct", which appear in Article 309, in relation to the legislative power of the Governor have been purposely omitted from Article 187(3) of the Constitution. From the difference in the phraseology employed in Article 187 and Article 309 of the Constitution, it cannot be inferred that the Governor must, of necessity, himself lay down the conditions of service of the members of the Secretariat staff of the Assembly instead of leaving this matter to the discretion of Mr. Speaker. Power to frame rules under proviso to Article 309 was made exercisable by another person under the authority of the Governor for the simple reason that the nature and number of services under the executive were large. The same considerations do not prevail in the case of Secretariat staff of Mr. Speaker.

Nor is it necessary for the Governor to frame statutory rules under Article 187(3) of the Constitution before Mr. Speaker can make appointments to his Secretariat staff. In the language employed in this Article; "..... the Governor may, after consultation with the Speaker ..... make rules", the use of word, "may" *prima facie* shows that it is discretionary for the Governor either to make the rules or to refrain from making the service rules. The word, "may" as used in this Article cannot be read as the word "shall". The law on the subject has been summarised by Maxwell in his celebrated book on "The Interpretation of Statutes", 10th Edition, at page 381, as follows:—

> "On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with

> the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and Government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them.".

While accepting this pasage with approval in *State of U.P.* v. *Babu Ram,* (1), the Court observed as under:

> "The relevant rules of interpretation may be briefly stated thus: When a statue uses the word "shall", *Prima facie,* it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, *inter alia,* the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

While framing the rules under Article 187(3), the Governor of a State, undoubtedly, performs public functions. The Constitution nowhere provides that omisison to perform these functions shall be visited with some penalty. Under these circumstances, it must be held that the provision of Article 187(3) of the Constitution is directory in nature.

This matter is not *res integra.* Proviso to Article 309 which is in *pari materia* with Article 187(3) of the Constitution, came up for consideration on more than one occasion before the highest Court

(1) A.I.R. 1961 S.C. 751.

of the land. In *B. N. Nagarajan and others* v. *State of Mysore and others*, (2), it was observed as under:

> "Mr. Nambiar contends that the words, "shall be as set forth in the rules of recruitment of such service specially made in that behalf" clearly slow that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First, it is not obligatory under proviso to Article 309 to make rules of recruitment, etc., before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in *Ram Jawaya Kapur* v. *State of Punjab* (3), that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. *We see nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law.* It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or act." (emphasis supplied).

Again, in *Sant Ram Sharma* v. *State of Rajasthan and others* (4), it was held:—

> "We pass on to consider the next contention of Mr. N. C. Chatterjee, that if the executive Government is held to have power to make appointments and lay down conditions of service without making rules in that behalf under

(2) A.I.R. 1966 S.C. 1942.
(3) 1955—2 S.C.R. 225: (A.I.R. 1955 S.C. 549).
(4) A.I.R. 1967 S.C. 1910.

> the proviso to Article 309, there will be a violation of Articles 14 and 16, because the appointments would be arbitrary and capricious. In our view, there is no substance in this contention of the petitioner. If the State of Rajasthan had considered the case of the petitioner along with the other eligible candidates before appointments to the selection posts there would be no breach of the provsiions of Articles 14 and 16 of the Constitution because everyone who was eligible in view of the conditions of service and was entitled to consideration was actually considered before promotion to those selection posts were actually made."

In *Tejinder Singh Sandhu* v. *State of Punjab and others* (5), while speaking for the Bench, I held as under:

> "I am of the considered view that the Government is competent to determine the *inter se* seniority of the officiating and temporary public servants in the absence of any statutory rules on the subject."

In my considered opinion, the same considerations would apply to the legislative power of the Governor under Article 187(3) of the Constitution. If the rules are framed under that provision, the same would have to be followed without any exception, but if there are no rules on the subject, it would be open to the Governor to issue executive instructions entitling Mr. Speaker to make appointments to the staff of his Secretariat.

Mr. Speaker, while making the appointments of the Assistants by direct recruitment acted on the executive instructions issued by the then Governor of the composite State of Punjab on April 11, 1953. These instructions read as under:

> "In continuation of his order, dated the 30th March, 1953, by which the Punjab Legislative Council Secretariat and the Punjab Legislative Assembly Secretariat were created, the Governor of the Punjab is pleased to order that the power to appoint a Secretary to either house of the State Legislature will vest in Government, in consultation with the Chairman or the Speaker, as the case may be and all

(5) (C.W. 2675 of 1973 decided on May 31, 1974).

other appointments and all matters relating to promotions etc., will vest in the Chairman or the Speaker as the case may be. Appointments will, of course, be made subject to Government orders regarding references to the Public Service Commission or an Appointment Board.

The Governor of the Punjab is further pleased to order that the Chairman or the Speaker will be competent to create fresh posts in their respective Secretariats, in consultation with the Finance Department."

It is not disputed that the respondents themselves were recruited to the service pursuant to the power vesed in Mr. Speaker under these instructions. If the argument addressed on their behalf is accepted, the necessary result would be that their own appointments as Clerk would have to be declared to be illegal. In this situation, the very foundation of their right to challenge the action of Mr. Speaker would vanish. Apart from the legal considerations mentioned above, a Court of law would be highly chary of unsetting the settled state of affairs and on this ground alone would justify me to uphold the action of Mr. Speaker.

The argument addressed on behalf of the respondents that the executive instructions give unguided and arbitrary power to Mr. Speaker in making appointments to his Secretariat is also without foundaton. In the first place, the power has been vested in the Head of the Legislative Wing of the State Government. The Secretariat of the Legislative Assembly is comparatively not so large. The Head of the Department is presumed to know the number and nature of the posts which his Secretariat should have for carrying out its day to day business. When power is vested in a high dignitary who performs public functions, it cannot be struck down as being discriminatory merely because it vests a large discretion in the authority. In *Pannalal Binjraj* v. *Union of India* (6), it was held as under:

"It may also be remembered that this power is vested not in minor officials but in top-ranking authorities like the Commissioner of Income-Tax and the Central Board of Revenue who act on the information supplied to them by the Income-tax officers concerned. This power is discretionary and not necessarily discriminatory and abuse of

(6) 1957 S.C.R. 233.

> power cannot be easily assumed where the discretion is vested in such high officials,—*vide Matajog Dobey* v. *H. C. Bhari* (7). There is moreover a presumption that public officials will discharge their duties honestly and in accordance with the rules of law,—*vide People* of the *State of New York* v. *John E. Van De Carr, etc.*, (8). It It has also been observed by this Court in *A. Thangal Kunju Musaliar* v. *M. Venkitachalam Potti*, (9), with reference to the possibility of discrimination between assessees in the matter of the reference of their cases to the Income-tax Investigation Commission that, "it is to be presumed unless the contrary were shown, that the administration of a particular law would be done 'not with an evil eye or unequal hand and the selection made by the Government of the cases of persons to be referred for investigation by the Commission would not be discriminatory."

Besides, a careful reading of the executive instructions shows that the exercise of power by Mr. Speaker is hedged in by certain important relevant considerations. The matters relating to appointments and further promotions are subject to the approval of Public Service Commission or an Appointment Board, as the case may be. Similarly, when fresh posts are to be created, the Finance Department has to be consulted. It is a matter of common knowledge that so far as the question of spending money out of the consolidated fund of the State is concerned, the Finance Department, makes a meticulous scrutiny of the matter in each case. The Public Service Commission besides assisting in the selection of the public servants, makes useful suggestions to the authority at whose behest the appointments are to be made. When the instructions are read as a whole, the charge of arbitrariness falls to the ground.

The argument relating to the exercise of the executive power of the State by the Governor in accordance with the provisions of

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(7) (1955) 2. S.C.R. 925 page 932. (S) A.I.R: 1956 S:C. 44 page 48:

(8) (1905) 199 U.S. 522; 50 Law Ed. 305.

(9) (1955) 2 S.C.R. 1196. (S) A.I.R. 1956 S.C. 246:

Article 154 of the Constitution, may now be examined. This Article reads as under:

> "(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
>
> (2) Nothing in this Article shall—
>
> (a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or
>
> (b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor."

The precise argument raised on behalf of the respondents is that while framing rules under proviso to Article 187 of the Constitution the Governor exercises the executive power of the State. The eligibility and other conditions of the posts have to be mentioned in these rules. Assuming that the Governor may act under this provision of law by framing necessary executive instructions, the eligibility and other conditions of service of the posts have to be incorporated in these instructions by the Governor himself. He cannot confer this power of laying down the conditions of service upon Mr. Speaker because the latter is not subordinate to him within the meaning of Article 154(1) of the Constitution, mentioned above.

The argument does look attractive on the face of it, but on a closer scrutiny loses all semblance of plausibility. It has already been noticed that the Governor being the Head of the State enjoys a unique position under our Constitution. As a public servant number one, he takes precedence over all other public functionaries in the State. The words, "through officers subordinate to him" as used in Article 154(1) of the Constitution do not necessarily postulate that the Governor should exercise power through an officer whom he himself appoints. These words indicate that the power may be exercised by the Governor through those public functionaries who rank lower in the order of precedence.

In the instant case, the argument that the Governor has exercised legislative functions through another authority does not arise inasmuch as he has himself issued the executive instructions, dated April 11, 1953.

Again, there is no merit in the submission made by Mr. Gupta that the provision for direct recruitment of Assistants violates any of the rights conferred on the respondents under Articles 14 and 16 of the Constitution. An authority which is competent to make recruitment to a service is empowered to lay down policy relating to the number of posts to be filled in by direct recruitment or by promotion. In some cases it may decide to fill in posts by direct recruitment alone. The public servants who are eligible for promotion to the post form a separate class by themselves and in the absence of anything else to the contrary they cannot complain that the competent authority should also reserve some posts for their class. The argument based on illegal discrimination can only be raised when two persons belonging to the same class are treated in a different manner. Nor can it be argued in the instant case that the respondents were not allowed to compete with others for direct recruitment. The advertisement, dated February 10, 1969, does not debar the Clerks from applying for the post of Assistant. On the other hand, there is a provision for relaxation of age limit in case of Government employees like the respondents. If persons in line for promotion to a post are allowed an opportunity to seek direct recruitment, it cannot be argued on their behalf that their claim for consideration for the higher post is being denied to them. Articles 14 and 16 of the Constitution only provide that the citizens should have equality of opportunity in the matters relating to employment under the State. They have a right to be considered for appointment, but the right to select a servant vests in the appointing authority It is not the case of the respondents that they applied for these posts and their applications were not considered in terms of the advertisement, dated February 10, 1969. In these circumstances, it does not lie in their mouth to complain of illegal discrimination.

Last of all, Mr. Gupta argued that from the time immemorial these posts were filled in by promotion alone. This settled practice had conferred upon the respondents a right to be promoted to the higher rank and Mr. Speaker could not depart from the practice without the approval of the Central Government under section 115 of the States Reorganisation Act 1956. In order to appreciate this contention it becomes necessary to notice the relevant provisions of section 115 of the State Reorganisation Act, 1956. They are:

> "(1) Every person, who immediately before the appointed day is serving in connection with the affairs of the Union

under the administrative control of the Lieutenant-Governor or Chief Commissioner in any of the existing States of Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh, or is serving in conection with the affairs of any of the existing States of Mysore, Punjab, Patiala and East Punjab States Union and Saurashtra shall, as from that day, be deemed to have been allotted to serve in connection with the affairs of the successor State to that existing State.

"(2) Every person, who immediately before the appointed day is serving in connection with the affairs of an existing State part of whose territories is transferred to another State by the provisions of Part II, shall, as from that day, provisionally continue to serve in connection with the affairs of the principal successor State to that existing State, unless he is required by general or special order of the Central Government to serve, provisionally in connection with affairs of any other successor State.

(3) * * * * * *

to

(6) * * * * * *

(7) Nothing in this section shall be deemed to affect after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to the determination of the conditions of service of persons serving in connection with the affairs of the Union or any State:

Provided that the conditions of service applicable immediately before the appointed day to the case of any person referred to in sub-section (1) or sub-section (2) shall not be varied to his disadvantage except with the previous approval of the Central Government."

When this provision of law is carefully examined, it becomes obvious that the conditions of service of the employees of the erstwhile States of Punjab and Pepsu have been given statutory protection and the same cannot be varied to their disadvantage unless the prior approval of the Central Government has been obtained in terms of proviso to sub-section (7), quoted above. This provision appears to have been enacted in order to allay the fears of the merging units regarding disadvantageous treatment in matters

relating to service in the new States. It has already been noticed in the preamble of this judgment that all the respondents entered service in the erstwhile State of Punjab. They were governed by the executive instructions issued by the Governor of the composite State of Punjab on April 11, 1953. It has nowhere been provided in these instructions that Mr. Speaker will be bound to appoint Assistants by promoting the Clerks. For the employees hailing from Pepsu, rules framed by the Rajpramukh were in existence. The authority relied upon by Mr. Gupta, that is, *Sat Parkash* v. *Rup Chand and others* (10), is not applicable. In that case, an employee of the erstwhile State of Pepsu had complained that whereas in Pepsu he was entitled to be promoted under the practice prevailing in that State, he was being denied promotion in the composite State of Punjab by a service rule which had not been promulgated with the prior approval of the Central Government. Consequently, this contention raised on behalf of the respondents also does not carry their case any further.

The result of the foregoing discussion is that the judgment rendered by the learned Judge is not sustainable on any ground and the action of Mr. Speaker to make direct recruitment to the posts of Assistants cannot be subjected to any legal challenge.

Before parting with this case, I may observe that it would be highly desirable to have statutory rules regarding eligibility and other conditions of service of the incumbents of the posts borne on the cadre of the Assembly Secretariat. Service rules would ensure uniformity of treatment to the employees and would prevent them from making irresponsible allegations against the conduct of Mr. Speaker.

For the reasons mentioned above, this appeal is allowed and the writ petition filed by the respondents is dismissed. However, in the circumstances of the case, the parties are left to bear their own costs.

NARULA, C.J.—I agree.

K. S. K.

(10) 1974 S. Law Weekly Reporter 291 (D.B.).