# Chandra Prakash Tiwari And Ors vs Shakuntala Shukla And Ors on 9 May, 2002

## Equivalent citations: AIR 2002 SUPREME COURT 2322, 2002 AIR SCW 2457, 2002 LAB. I. C. 2168, 2002 ALL. L. J. 1502, 2002 (6) SRJ 531, 2002 (4) SLT 5, 2002 (3) SERVLJ 88 SC, 2002 (1) JT (SUPP) 159, 2002 (2) LRI 729, 2002 (6) SCC 127, (2002) 2 SCT 1093, (2002) 4 ALL WC 2657, (2002) 7 SERVLR 241, (2002) 3 LAB LN 873, (2002) 4 SCALE 528, (2002) 4 SUPREME 218, 2002 SCC (L&S) 830

## Author: Umesh C. Banerjee

## Bench: Umesh C. Banerjee

```
           CASE NO.:
Appeal (civil)  3441-3446 of 2002

PETITIONER:
CHANDRA PRAKASH TIWARI AND ORS.

RESPONDENT:
SHAKUNTALA SHUKLA AND ORS.

DATE OF JUDGMENT: 09/05/2002

BENCH:
G.B. PATTANAIK & UMESH C. BANERJEE

JUDGMENT:
```

JUDGMENT 2002 (3) SCR 948 The Judgment of the Court was delivered by BANERJEE, J. Leave granted.

The irksome issue as regards the criterion of selection through placed before the Court on occasions innumerable but the debate is still on. The matters presently before this Court pertain to the promotion of police officers from Sub-Inspector to Inspector in the State of U.P. in 1977 for vacancies for the period between 1992 and 1996 and said to be upon due completion of elaborate selection process - it is however this process which stands scrutiny before this Court. Whereas the learned Single Judge negated the selections and allowed the grievance of the writ petitioners upon recording of a categorical finding that the selection has caused great injustice to the senior Sub-Inspectors who had a totally unblemish service record - the appellate Bench in a very detailed judgment recorded an affirmation to the judgment of the learned Single Judge though for different set of reason to wit, that the criteria for selection seniority subject to the rejection of the unfit" as laid down in the Rules was not followed and secondly that Selection Committee failed to prepare the

list for each year, keeping in view the number of vacancies in that year after considering the Sub-Inspectors of police who were eligible and fell within the zone of consideration for selection that year.

The records depict that the select list of 1996-97 stood challenged both at Allahabad and at Lucknow under various writ petitions and as against the orders of the learned Single Judge there were pending a large number of appeals. The learned Single Judge who was in seisin of the matters at Lucknow, however, thought it fit to refer the matters to a larger Bench and scripted the following questions.

1. Whether the Departmental Selection Committee constituted for the purpose of selection of Sub-Inspectors, Civil Police for promotion to the rank of Inspectors, Civil Police, having adopted the criterion of 'merit' alone for selection, has not contravened the provisions of "The Uttar Pradesh Govt. Services Criteria for Recruitment by Promotion Rules, 1994" which lays down that posts for all services (excepting the post of Head of Department and Officer immediately below him) to be filled up by promotions, shall be made on the basis of seniority subject to rejection of the unfit?

2. Whether the provisions of the Uttar Pradesh Government Services Criteria for Recruitment by Promotion Rules 1994 do to apply to the Police personnel?

3. Whether in case the answer to question No. 1 is in the affirmative the selection/select list contained in Annexure No. 1 in some writ petitions and Annexure No. 1 and 2 in others is not bad in law and liable to be quashed?

The core question thus falling for consideration before this Court thus runs as below :

> Whether the selection as effected was to be made under the specific police related order of 5th November, 1965 or the basis of seniority under the General UP Government Service (Criteria for Recruitment by Promotion) rules, 1994 framed under Article 309 of the Constitution?
>
> Admittedly, the impugned selection of Sub-Inspectors of police for promotion to the rank of Inspectors was effected in terms of the Government Order dated 5th November, 1965. In order, however, to appreciate the contentions raised in a manner proper and effective, the Government Order spoken of earlier, ought to be noticed in extenso for its true purport. The Government Order as below :
>
> "From :
>
> Shri R.K. Dar, UP. Sachiv, Uttar Pradesh Shasan To, The Inspector General of Police, Uttar Pradesh Allahabad/Lucknow Dated Lucknow: November 5, 1965 Home (Police-A) Sub : Method of Selection of Sub-Inspectors for promotion to the rank of Inspectors.

Sir, With reference to Deputy Inspector General of Police, Headquarters letter No. V-500-51, dated August 18, 1964, on the subject noted above, I am directed to say that after careful consideration of the recommendations contained in para 246 of the U.P. Police Commissions Report, 1960, the Governor in supersession of the povisions in the Police Regulations and in modification of the present orders on the subject, has been pleased to order that the procedure for selection of Sub Inspectors for their promotion to the cadre of Inspector shall henceforth be as follows :

(A) The existing quota system by which a certain number of Sub Inspectors are at present selected from each Range should be abolished. Sub Inspectors Civil Police who have put in not less than 10 years service as such (and are below 50 years of age) on the 1st day of January of the year in which the selection is made will now be eligible for promotion to the post of Inspector. The range Deputy Inspector General of Police will send to the Police Headquarters every year the following list.

(i) Lists of Sub Inspectors, Civil Police considered suitable for officiating promotion as Inspector in order of seniority in a prescribed form, which may be laid down by the Police Headquarters.

(ii) Lists of Sub Inspectors, Civil Police, who are not considered fit for officiating promotion with brief reasons.

The Departmental Selection Committee will thereafter have a final consolidated list prepared of Sub Inspectors Civil Police, considered suitable for officiating promotion arranged in the order of their seniority. From the final consolidated list, four times the number of Inspectors required to be approved for officiating promotion will be called for interview by the Departmental Selection Committee as constituted by Government vide G.O. No. 4381-A/VIII-A-268/1961, dated August 2, 1962. The assessment made by the Committee will be done by selection on merit, and a list of approved candidates will be prepared on which the names of selected candidates will arrange in order of their seniority. Those who are borne on the approved list of an earlier year will rank above those selected and brought on an approved list of a later year.

(B) On the occurrence of substantive vacancies appointment to them shall be made from amongst the candidates on the approved list prepared under para 'A' on the basis of suitability. The claims of the candidates passed over will be considered in the subsequent selection. The selection will be made by the Departmental Selection Committee and there will be no further interview of the candidates for filling in the substantive vacancies.

(C) Candidates selected for substantive appointment will be placed on two years probation in accordance with the provisions of para 403(3) of the Police Regulations. The period of service rendered by them as Inspector of Police in a temporary or officiating capacity will be counted towards the period of probation.

2. The above orders shall come into force with immediate effect.

Yours faithfully, Sd/- R.K. Dar, Up Sachiv."

It is needless, however, to record that selection of Inspectors in Uttar Pradesh stands effected on the basis of merit arranged in order of seniority and the Government Order dated 5.11.1965 being the backgrounder thereto.

Adverting at this juncture to U.P. Government Service (Criterion for Recruitment by Promotion) Rules, 1994 made by the Governor of the State in exercise of powers conferred by the proviso to Article 309 of the Constitution and published in the U.P. Gazette (Extraordinary) Part IV Section (Ka) dated 10th October, 1994 vide Notification No. 13/34/19- Ka-1/1994 dated October 10, 1994, it may be noticed that the same visualised the criterion of the seniority 'subject to the rejection of unfit' for promotion to the posts in all services to be filled by promotion excepting the post of the Head of Department, a post one rank below the post of Head of Department and a post in any service carrying the pay scale, the maximum of which is Rs. 6,700 or above. Rule 4 of the Rules has some significance and the same reads as under:

> "4. Criterion for recruitment by promotion - Recruitment by Promotion to the post of Head of Department, to a post just one rank below the Head of Department and to a post in any service carrying the pay scale, the maximum of which is Rs. 6700 or above, shall be made on the basis of merit, and to rest of the posts in all services to be filled by promotion including a post where promotion is made from a non-gazetted post to a gazetted post or from one service to another service, shall be made on the basis of seniority subject to the rejection of the unfit."

Dr. Rajiv Dhawan with his usual erudition and eloquece in support of the appeals rested his submissions principally on two counts - the first being field being already occupied by a statutory rule or order and subsequent rule though framed under Article 309 cannot but give into the special and specific rule or order - it is under the first count, however, another incidental issue was also high-lighted by Dr. Dhawan, to writ:

> applicability of the doctrine of estoppel by conduct. Referring to the first count as above Dr. Dhawan drawing inspiration from the factual status submitted that in the light of the clarifications of 1996 (pre-litigation) and 1998 (post-litigation) by the U.P. State administration and by reason of the order of 1965 being framed under Section 2 of the Police Act, the applicability of the Rules framed under Article 309 in 1994 is a total non- issue. Before however adverting to the same, it would be apposite to refer to Section 2 of the Police Act, 1861 which postulates for establishment and constitution of Police Force. Section 2 of the Act of 1861 (Police Act) reads as below :-
>
> "(2). Constitution of the force - The entire police establishment under a State Government shall, for purposes of this Act, be deemed to be one police force, and shall be formally enrolled; and shall, consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government.

Subject to the provisions of this Act the pay and all other conditions of service of members of the subordinate ranks of any a police force shall be such as may be determined by the State Government."

Incidentally, the Police Act, 1861 being an Act for regulation of police has the following as its preamble : "Whereas it is expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime". The Police Act of 1861, however, remained and maintained its effectiveness though a pre-constitutional Act by virtue of the provisions contained in Article 372(1) of the Constitution notwithstanding the repeal of the Indian Independence Act, 1947 and the Government of India Act, 1935. It is in this context Article 372 may be of some significance as such relevant extracts thereof are set out hereinbelow :

> "372. Continuance in force of existing laws and their adaptation - (1) Notwithstanding the repeal by this constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.
>
> At this stage, it would be convenient also to note transitional provisions as engrafted in Article 313 of the Constitution. The said Article reads as below :
>
> "313. Traditional provisions - Until other provisions is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India Service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution."

In this context. Section 46 and in particular sub-sections (2) and (3) may also be noticed here being germane to the issue presently :

> "(2).....the State Government may, from time to time, by notification in the Official Gazette, make rules consistent with the Act -
>
> (a) .....
>
> (b) .....
>
> (c) generally for giving effect to the provisions of this Act.
>
> (3) All rules made under this Act may from time to time, be amended added to or cancelled by the State Government."

There are thus an administrative order said to have been issued under the Police Act of 1861 and which stands clarified by issuing amendment notes thereto and a subsequent General Rule framed under Article 309. We shall presently deal with Article 309 but before so doing one redeeming feature which comes up for consideration pertains to the issue as to whether the rules framed under Article 309 impliedly repeal the earlier administrative order framed under a statute - needless to repeat that clarification of the administrative order was effected as late as in the year 1998, depicting thereby, of course, adaptation of the same by the State Government - it is on this factual backdrop that the issue arises as to whether it would be justifiable conclusion that since the rules stand framed under Article 309 in the year 1994 governing the service conditions in general, there has been a repeal by implication of certain administrative order framed under a special legislature? It is on this context Broom's legal Maxim in reference to two Latin Maxims stated as below :

> "It is then, an elementary rule that an earlier Act must give place to a later of the two cannot be reconciled lex posterior derogat priori -non et nonum ut priores leges ad posteriores trahantur (Emphasis supplied) - and one Act may repeal another by express words or by implication ; for it is enough if there be words which by necessary implication repeal it. But a repeal by implication is never to be favoured, and must not be imputed to the legislature without necessity, or strong reason, to be shown by the party imputing it. It is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together; unless the two Acts are so plainly repugnant to each other than effect cannot be given to both at the same time a repeal cannot be implied; and special Acts are not repealed by general Acts unless there be some express reference to the previous legislation, or a necessary inconsistency in the two Acts standing together, which prevents the maxim generalia specialibus non derogant (Emphasis supplied) from being applied. For where there are general words in a later Act capable of reasonable application without being extended to subjects specially dealt with by earlier legislation, then, in the absence of an indication of a particular intention to that effect, the presumption is that the general words were not intended to repeal the earlier and special legislation, or to take-away a particular privilege of a particular class of persons."
>
> Let us, at this juncture, have a look at Article 309 of the Constitution which provides as under.
>
> "309. Recruitment and conditions of service of persons serving the Union of a State - Subject to the provisions of this Constitution, Acts of the Appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :
>
> Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the

> recruitment, and the conditions of the service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article and any rules so made shall have effect subject to the provisions of any such Act."

It is in this context as well the decision of this Court in A.B. Krishna (A.B. Krishna and Ors. v. State of Karnataka and Ors., [1998] 3 SCC 495 wherein this Court upon reference to Maxwells Interpretation of Statutes (11th Edn. p. 168) as also oft cited decision pertaining to the maxim in Vera Cruz (Seward v. Vera Cruz : (1884) 1 AC 59) States as below :

> "9. It is no doubt true that the rule-making authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to be precise, the Governor, under Article 309 and the Government under Section 39), but the two jurisdictions are different. As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, rules can be made under the law so made by the legislature and not under Article 309. It has also to be noticed that rules made in exercise of the rule-making power given under an Act constitute delegated or subordinate legislation, but the rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle "occupied field", the rules under Article 309 cannot supersede the rules made by the legislature.
>
> 10. So far as the question of implied suppression of the rules made under Section 39 of the Act by the General Recruitment Rules as amended in 1977, is concerned, it may be pointed out that the basic principle, as set out in Maxwell's Interpretation of Statutes (11th Edn. p. 168) is that :
>
> "A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant, or, in other words, 'where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so'. In such cases, it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided by the Special Act."

11. This principle was reiterated in Vera Cruz case (Seward v. Vera Cruz, (1884) 10 AC 59 as under :

> "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation that.....earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force, of such general words, without any indication of a particular intention to do so."

12. Vera Cruz case (supra) was followed in Eileen Louise Nicolle v. John Winter Nicolle (1992) 1 AC 284 as under:

> 'It is no doubt a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases of which the particular law is but one."

13. To the above effect, is also the decision of this Court in Maharaja Pratap Singh Bahadur v. Thakur Manmohan Day, AIR (1966) SC (193 1), in which it was indicated that an earlier special law cannot be held to have been abrogated by mere implication. That being so, the argument regarding implied supersession has to be rejected for both the reasons set out above."

The issue at this stage thus arises as to the true effect of the Government Order of 1965-is it a mere circular without any effect and succumb to rules under Article 309?: A further question may also arise in this context, namely, whether a post-independence Government Order having statutory back- up under Police Act which stands amended or modified upto the year 1998 stands to lose its efficacy by reason of rule under Article 309 of 1994? Whereas the Government Order though under a statute and especially empowered to frame Rules and administrative orders, was issued under the executive power of the State, the rules have been framed by the selfsame Government by reason of the power conferred under Article 309-agency is the same: author is the same-why was it necessary if the same is to give way to the rules of 1994 to have a clarification issued in 1998. It is on this score that Dr. Dhawan have been very vocal and criticised the judgment as an "inexplicable contradiction". Truly a strong criticism, but we, however, find some justification therein.

Contra is the submission of Mr. Misra appearing for the respondents herein. It has been contended that the Government Order dated 5th November, 1965 being in the nature of executive instructions stood obliterated after 10.10.1994 (date of notification of the Rules framed under Article 309) since the executive order is subordinate to that of the Legislature and as such the Government Order dated 10.10.1994 would prevail for governing the terms and conditions of services of subordinate ranks of the police force. Mr. Misra contended that admittedly the members of the subordinate ranks of the police force come under the purview of the rule making power of the Governor under Article 309 and their service conditions other than those specified in Section 7 of the Act can be regulated by the Rules made under the proviso to Article 309. It is with strong emphasis that Mr. Misra contended that order of 5th November, 1965 falls short of becoming statutory order as it is not a Rule made under Section 46(2) of the Police Act, 1861 and Section 2 recognises only the executive power of the State. Non-publication in the Official Gazette has been stated to be a redeeming feature since the same stands out to be a primary requirement of Section 46(2) of the Police Act.

It is in this context, strong reliance has been placed on the decision of Dayanandalal (K. Dayanandalal and Ors. v. State of Kerala and Ors., [1996] 9 SCC 728, wherein this Court in paragraphs 8, 9 and 10 stated as below:

"8. Shri P.S. Poti, the learned Senior Counsel appearing in support of the appeals, has, in the first place, urged that the State and Subordinate Services Rules are not applicable to the members of the police force in Kerala. The learned counsel has pointed out that initially in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1957 (hereinafter referred to as "the 1957 Rules"), Kerala Police Service was included in Schedule I and Kerala Police Subordinate Service was included in Schedule II, and the said Rules were applicable to the Kerala Police Service and the Kerala Police Subordinate Service. Subsequently, by notification dated 26.5.1958, the 1957 Rules were amended and Kerala Police Service was deleted from Schedule I and the Kerala Police Subordinate Service was deleted from Schedule II. The submission was that since the members of the Kerala Police Subordinate Service were no longer governed by the 1957 Rules, the members of the said service were also not governed by the State and Subordinate Services Rules which were made on 17.12.1958, after the aforementioned notification dated 26.5.1958. We do not find any merit in this contention. Merely because the Kerala Police Subordinate Service had been excluded from the ambit of the 1957 Rules by notification dated 26.5.1958, it cannot be said that the State and Subordinate Services Rules, which are independent rules made vide notification dated 17.12.1958, are not applicable to the members of the Kerala Police Subordinate Service. The question of applicability of the State and Subordinate Services Rules to the Kerala Police Subordinate Service has to be determined on the basis of the provisions contained in the State and Subordinate Services Rules, and not on the basis of the 1957 Rules. We find that the provision with regard to the applicability of the State and Subordinate Services Rules is contained in Rule 1 of the General Rules contained in Part II of the State and Subordinate Services Rules which reads as under:

"1. Scope of the General Rules-These rules in this part shall apply to all State and subordinate services and the holders of all posts, whether temporary of permanent in any such service, appointed thereto before, or after the date on which these rule come into force as provided in sub-rule

(b) of Rule 1 in Part I except to the extent otherwise expressly provided

(a) by or under any law for the time being in force, or (b) in respect of any member of such service by a contract or agreement subsisting between such member and the State Government."

9. The language of the said Rule is wide and comprehensive enough to include all State and Subordinate Services and all posts whether temporary of permanent except to the extent otherwise expressly provided by or under any law for the time being in force or in respect of any member of such service by contract or agreement subsisting between such member and the State Government. Shri Poti has not been able to show any law or statutory rule whereby the members of the Kerala Police Subordinate Service have been excluded from the ambit of the State and Subordinate Service Rules. We are, therefore, of the view that members of the Kerala Police subordinate Service are

governed by the State and Subordinate Services Rules.

10. Shri Poti has next submitted that even if the State and Subordinate Services Rules were held to be applicable to the members of the Kerala Police Subordinate Service, the said Rules have no application in the matter of promotion of Constables as Head Constables in view of rules issued under order dated 17.5.1963. The submission is that the said Rules are rules made under Section 69 of the Act. This contention of Shri Poti cannot be accepted for the reason that Section 69 of the Act requires that the rules should be notified in the Gazette and it has not been shown that the order dated 17.5.1963 was published in the Gazette. Shri Poti has invited our attention to certain circulars making amendments in the rules issued under order dated 17.5.1963 which were published in the Kerala Police Gazette". The submission is that the publication of these circulars in the Kerala Police Gazette indicates that the rules issued under order dated 17.5.1963 were in the nature of statutory rules made under Section 69 of the Act. We are unable to accept this contention. The Kerala Police Gazette is a publication of the Office of Inspector General of Police issued for departmental use only. It contains various circulars and standing orders issued by the State Government as well as the circulars issued by the Inspector General of Police and other useful information or the members of the police force. The said Kerala Police Gazette cannot be equated with the State Gazette published under the authority of the State Government. The requirement in Section 69 of the Act regarding the rules being notified in the Gazette postulates publication of the rules in the Kerala State Gazette, and publication in the Kerala Police Gazette (which too is not established) would not be a substitute for the requirement of Section 69 regarding publication in the State Gazette. In our opinion, therefore, the rules issued under order dated 17.5.1963 cannot be held to be rules made under Section 69 of the Act and the order dated 17.5.1963 must be treated as an executive order only. Since the provisions contained in Rule 10(ii) of the Rules contained in the said order are in conflict with the provisions mentioned in Rules 28 (b) (10) and 28(bb) of the State and Subordinate Services Rules, the said provisions in Rule 10(ii) could not be applied and promotion of Constables as head Constables could be made only in accordance with Rules 28(b) (10) and 28(bb) of the State and Subordinate Services Rules. We therefore, do not find any infirmity in the impugned judgments of the High Court and the appeals are liable to be dismissed".

Some reliance has also been placed on the decision of this Court Shish Ram and Ors. v. State of H.P. and Ors., [1996] 10 SCC 166, wherein this Court in paragraph 5 observed as under:

> "5. Having given our anxious consideration to the respective contentions, we think that the case of the appellants is founded on a sounder footing than that of the respondents. It is true that the respondents were drawing higher pay scale than that of the appellants at the initial stage. But, let, when the statutory rules came to be made, there was jump in the scale of pay of the appellants from Rs. 160-400 to 225-500 while the case of pay of the respondents remained stagnant at Rs. 160-400 (sic 450). Even in the subsequent revision in the ministerial cadre, the appellants' scale of pay was higher than that of the respondents. They were treated as two separate entities as indicated earlier. When the statutory rules came to be made increasing their scale of pay and making them eligible for promotion directly to the post of gazetted cadre Class II from Assistants. Head Accountants, Stenographers etc.

> to a pay scale of Rs. 500-900, it would be obvious that the executive instructions issued earlier had to yield place to the statutory rules made under provisio to Article 309. It is equally true that in the subsequent rules made on 13.6.1978 under proviso to Article 309 of the Constitution fusing Accountants and Head Clerks as eligible for promotion to the post of superintendent, it would be obvious that in view of the fact that higher scale of pay was given to the Assistants, Head Clerks in the scale of pay of Rs. 620-1200 while that of the respondents remained to be Rs. 570-1080, by necessary implication they cannot be treated to be of the same class for the purpose of enabling them to seek promotion to the post of Gazetted Class II. Moreover, the statutory rues do not include Accountants as a feeder post for promotion as Gazetted Class II. Considered from these perspectives, we are of the view that the Tribunal was in clear error in directing the Government to consider Respondents 3 and 4 as senior to the appellants and in giving promotion over the appellants."

The Decision in Shish Ram (supra) in our view, however, not lend any support to the contentions, more, so by reason of the fact that the statutory rules which stand engrafted later" came to be made increasing their scale of pay and making them eligible for promotion directly to the post of Gazetted cadre Class II from Assistants. Head Accountants. Stenographers etc. to a pay scale of Rs. 500-900." It is on this factual background the Court gave its opinion that earlier executive instructions containing a different pay scale had to yield place to the statutory rules made under the proviso to Article 309. Conferment of higher pay thus was the consideration for arriving at the conclusion in supersession of the executive instructions.

As regards the decision in Dayanandalal (supra), this Court dismissed the appeals on the ground that the provisions contained in Rule 10(2) of the Rules contained in the order are in conflict with the provisions mentioned in Rule 28(b) (10) and 28(bb) of the State and subordinate Service Rules and it is by reason of such conflict that this court came to the conclusion that the Kerala Civil Services (Classification, Control and Appeal) Rules. 1957 ought to prevail over Kerala Police subordinate Services Rules 1957.

It is at this juncture, some provisions of the Police Act ought also to be noticed for ascertainment of its proper scope and effect. Section 2 of the Act reads as below:-

> "2. Constitution of the Force- The entire police establishment under a State Government shall, for the purposes of this Act, be deemed to be one police force, and shall be formally enrolled; and shall, consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government.
>
> Subject to the provisions of this Act the pay and all other conditions of service of members of the subordinate rank of an police force shall be such as may be determined by the State Government."

On a scrutiny of the language, it appears that the proviso is of widest possible amplitude. Section 7 of the Police Act is of some consequence and relevance and it thus noted hereinbelow:

> "7. Appointment, dismissal etc., of inferior officer-Subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may from time to time make under this Act. the Inspectors- General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty or unfit for the same; or may award any one or more of the following punishments to any police officer of the subordinate ranks who shall discharge his duty in a careless or negligent manner, or who by any act of his own shall render himself unfit for the discharge thereof, namely:-
>
> (a) fine to any amount not exceeding one month's pay;
>
> (b) confinement to quarters for term not exceeding fifteen days, with or without punishment-drill, guard, fatigue or other duty;
>
> (c) deprivation of good conduct pay;
>
> (d) removal from any office of distinction or special emolument."

The opening words "subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may from time to time make under this Act" is not only relevant but is of utmost importance. It is true that the Section is restrictive in nature but under the same heading itself gives guidance that the same includes appointments as well and the Rules spoken of is to be under the Police Act only. Section 12 of the Act needs also mention at this juncture which reads as below:-

> "12. Power of Inspector-General to make rules:- The Inspector-General of Police may, from time to time subject to the approval of the State Government frame such orders and rules as he shall deem expedient relative to the organisation, classification and distribution of the police-force, the place at which the members of the force shall reside, and the particular services to be performed by them; their inspection the description of arms, accountrements and the other necessaries to be furnished to them; the collecting and communicating by them of intelligence and information and all such other orders and rules relative to the police- force as the Inspector-General shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties."

The aforesaid provision of Section 12 thus authorises the Inspector General of Police to make Rules obviously under the Act and in the nature of administrative instructions. As a matter of fact a perusal of the provisions of the Act, in particular that of Section 46, makes it abundantly clear that

the Statute (the Police Act) ought to be treated as a complete Code by itself-There is thus a special statute concerning the Police Force and within its fold include the appointment, dismissal, placement and all other steps required to re-organise the Police and make it more efficient instrument for the prevention and detection of crime. Administrative instruction have admittedly been in use since the beginning of the formation of separate cadre of Police in Uttar Pradesh. Let us, however, at this juncture refer to certain office orders so as to reflect the intention of the Government in the matter of implementation of the Government Order dated 5.11.1965.

It is in this context reference may be made to Memorandum dated 21st September, 1996 issued from the Special Secretary, Home, U.P. Administration and addressed to the Deputy Inspector General of Police (Personnel), U.P. Police Headquarters, Allahabad, wherein it has been specifically recorded as under:

> "In this connection I am directed to state that since the Police Department has been formed and established under Section 2 of the Police Act, 1861 and the Police Act is effective at present under Articles 313/372(1) of the constitution, hence the Seniority Rules 1991 framed under the provision to Article 309 of the Constitution shall not apply to the Police personnel."

Incidentally, be it noted that the aforesaid came as a reply as regards the inquiry for applicability of the Service Rules of 1994 to the Police personnel.

Subsequently, on 13th April, 1998, the Secretary, Home (Police) Section, UP Admn. in consultation with the Personnel Department intimated all concerned the following:-

> "2. In the matter in question this situation has become clear in consultation with the personnel department and after full consideration that since the rules of service of personnel in the police department have been framed under the Police Act, hence the rules framed by the personnel department under Article 309 of the Constitution are not applicable to them."

There is yet another communication on 26th April, 1999 from the Home Police Section of U.P. Administration to the Deputy Inspector General of Police, UP Police Headquarters, Allahabad stating therein that there is a provision in Section 2 of the Police Act, 1861 that subject to the provisions of the Act, the State Government shall stipulate the pay and all the conditions of service of members of the subordinate rank of any Police Force and if the same is read with Section 46(2), the State Government stands vested with the power to frame Rules and it has been the definite instructions/guidelines that the State Government can thus prescribe the conditions of service of its servants either by executive orders or by the rules. The communication dated 26th April, 1999 further contained as below:

> "In this case the procedure for promotion had been prescribed by the Government order dated 5.11.1965, in which amendments were also made by G.Os. The power to pass this Government Order has been provided for in Section 2. For the exercise of

> this authority it has not been mentioned at any place in Section 2 for getting the Governmental orders published in the gazette.
>
> When the State Government frames any rule under Section 46(2) then the publication thereof in the gazette is expected.
>
> When the publication of the Governmental order issued under Section 2 in the gazette has not been expected of then any justification does not exist for getting it published in the gazette with retrospective effect."

The aforesaid thus depicts the understanding of the Home Department under the Ministry of Home Affairs (a Wing of the Government) and on the wake of the understanding as above and acting thereon would mean and imply that while the State Legislature passed the Act of 1994 but by reason of the provisions of a special statute, namely, the Police Act, read with the authorisation contained therein to frame Rules by way of executive orders, the Government of Uttar Pradesh obviously did not in fact intend to apply the general law to all and sundry.

Significantly, on a brief reference to factual matrix interviews were held under 1965 Order which had participants participating without demur or protest and the judgment impugned itself records that as regards the interviews there has been no mala fides neither any bias nor any favouritism. Even the 50% marks earmarked for interview stands accepted by the impugned judgment. The principal ground of challenge thus against the judgment impugned is that the Regulation of 1994 was applied by the High Court and the other ancillary reason being that clubbing was not permissible. It is at this juncture the conduct in the matter of participation in the selection process without demur ought to be noticed, as strongly propagated by Dr. Dhawan, which in turn brings into a discussion of estoppel by conduct. This Court in Tata Iron and Steel Co. Ltd. v. Union of India and Ors., [2001] 2 SCC 41 dealt with the issue of estoppel by conduct rather exhaustively and one of us (Banerjee, J) in paragraphs 20 and 21 stated the law pertaining thereto as below:-

> "20. Estoppel by conduct in modern times stands elucidated with the decisions of the English Court in Pickard v. Sears (1837:6Ad. & E1.469) and its gradual elaboration until placement of its true principles by the Privy Council in the case of Sarat Chunder Dey v. Gopal Chunder Laha, (1891-92)19 I.A.203) whereas earlier Lord Esher in the case of Seton, Laing Co. v. Lafone, (1887: 19QBD 68 evolved three basic elements of the doctrine of Estoppel to wit:
>
> "Firstly, where a man makes a fraudulent misrepresentation and another man acts upon it to its true detriment: Secondly, another may be where a man makes a false statement negligently though without fraud and another person acts upon it: And thirdly, there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel."

Lord Shand, however, was pleased to add one further element to the effect that there may be statements made, which have induced other party to do that from which otherwise he would have

abstained and which cannot properly be characterised as misrepresentation. In this context, reference may be made to the decisions of the High Court of Australia in the case of Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920: 28 C.L.R. 305) Dixon, J. in his judgment in Grundt. v. Great Boulder Gold Mines Pvt. Ltd., (1939 :

59 C.L.R. 641) stated that:

> "In measuring the detriment, or demonstrating its existence, one does not compare the position of the representee, before and after acting upon the representation, upon the assumption that the representation is to be regarded as true, the question of estoppel does not arise. It is only when the representor wished to disavow the assumption contained in his representation that an estoppel arises, and the question of detriment is considered, accordingly, in the light of the position which the representee would be in if the representor were allowed to disavow the truth of the representation."

(In this context see Spencer Bower and Turner: Estoppel by Representation 3rd Edn.) Lord Denning also in the case of Central Newbury Car Auctions Ltd. v. Unity Finance Ltd., (1956) 3 All ER 905) appears to have subscribed to the view of Lord Dixon, J. pertaining to the test of detriment' to the effect as to whether it appears unjust or unequitable that the representator should now be allowed to resile from his representation, having regard to what the representee has done or refrained from doing in reliance on the representation, in short, the party asserting the estoppel, must have been induced to act to his detriment. So long as the assumption is adhered to, the party who altered the situation upon the faith of it cannot complain. His complaint is that when afterward the other party makes a different state of affairs, the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. [vide Grundts: High Court of Australia (1939 (59) CLR 641)]

21. Phipson on Evidence (Fourteenth Edn.) has the following to state as regards estoppels by conduct.

> "Estoppels by conduct, or, as they are still sometimes called, estoppels by matter in pais, were anciently act of notoriety not less solemn and formal than the execution of a deed, such as livery of seisin, entry, acceptance of an estate and the like; and whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. [Lyon v. Reed, (1844) 13M & W.285, 309] The doctrine has however, in modern times, been extended so as to embrance practically any act or statement by a party which it would be unconscionable to permit him to deny. The rule has been authoritatively stated as follows: "Where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the later a different state of things as existing at the same time." [Pickard v.

Sears (1837) 6Ad. & El. 469, 474] And whatever a man's real intention may be, he is deemed to act willfully "if he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it. (Freeman v. Cooke: 1848 (2) Exch. 654, 663).

Where the conduct is negligent or consists wholly of omission, there must be a duty to the person misled. Mercantile Bank v. Central Bank (1938) AC 287, 304 and National Westminster Bank v. Barelays Bank International, (1975 Q.B. 654) This principle sits oddly with the rest of the law of estoppel, but it appears to have been reaffirmed, at least by implication, by the House of Lords comparatively recently. Moorgate Mercantile Co. Ltd. v. Twitching. (1977) AC 890 (H.L.)] The explanation is no doubt that this aspect of estoppel is properly to be considered a part of the law relating to negligent representations, rather than estoppel properly so-called. If two people with the same source of information assert the same truth or agree to assert the same falsehood at the same time, neither can be estopped as against the other from asserting differently at another time. [Square v. Square (1935) P. 120]"

> In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhawan pertaining the doctrine of Estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/selection. It is a remedy which stands barred and it is in this perspective in Om Parkash Shukla (Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors., [1986] Supp. SCC 285) a Three Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a Petition challenging the said examination would not arise.
>
> Subsequently, the decision in Om Prakash stands followed by a later decision of this Court in Madan Lal and Ors. v. State of J & K and Ors., [1995] 3 SCC 486, wherein this Court stated as below:
>
> "9 Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find

themselves selected to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla, [1986] Supp SCC 285 it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such petitioner.

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee."

There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not 'palatable' to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.

In that view of the matter, while we are not in a position to record our concurrence with the applicability of the doctrine of estoppel by conduct but by reason of the decisions as cited from the Bar, we do feel it required to lend our concurrence to the submissions of Dr. Dhawan, on that score as noticed above.

On a conspectus of the whole issue, it is thus difficult to comprehend that the General Rule framed under Article 309 should or would also govern the existing special rules concerning the police rules. Admittedly, the guidelines as contained in the Government Order dated 5.11.1965 have been under and in terms of the provisions of the Police Act. There is special conferment of power for framing of Rules dealt with more fully hereinbefore, which would prevail over any other Rule. Since no other rule stands formulated and the Government Order of 1965 being taken as the existing rule

pertaining to the subject matter presently under consideration with recent guide-lines as noted above, its applicability cannot be doubted. Unless the General Rule specifically repeal the effectiveness of the special rules, question of the latter rule becoming ineffective or inoperative would not arise. In order to be effective, an express mention is required rather an imaginary repeal. It is now a well settled principle of law for which no relation is further required that law Courts rather loath repeal by implication. The General Rule framed under Article 309 has been for all State Government officials on and since 1994. List II (State List) of the 7th Schedule specially refers to the powers of the State Legislature to frame Rules specially for the Police. In this context Item 2 thereof would be significant which reads as follows:

> "List II-State List"
>
> "2 Police (including railway and village police) subject to the provisions of entry 2A of List I."

Police force admittedly has a special significance in the administration of the State and the intent of the framers of our Constitution to empower the State Government to make rules therefor has its due significance rather than being governed under a general ominbus rule framed under the provisions under Article 309. When there is a specific provision unless there is a specific repeal of the existing law, question of an implied repeal would not arise. In any event, the General Rules are only prospective in nature and as such could not have affected the selection process which commenced in the year 1993 and it is on this score the parties advanced quite a lengthy submissions but in our view question of further consideration thereof would not arise by reason of the commencement of the selection process in 1993.

Incidentally, the Legislative intent has to be assessed in its proper perspective and from the word used therein. In this context the inter- ministerial correspondence as noticed above and the understanding apropos the Government Order stands clear enough to indicate that while General Rules framed in the year 1994 are for general government servants, the Police force are to be guided by the provisions of the Police Act and no exception can be taken thereto.

Two other short issues remain for consideration; one pertaining to the clubbing and the other is in regard to non-publication in the Official Gazette. Gazette publication is required in terms of Section 46(2) and as such until the Rule specifically required to be framed under Section 46(2), the mandatory nature of the same cannot be stated to be a requirement. In any event, it is hypertechnical in nature since the parties who were well aware of the 965 Order, participated at the interview and knew the contents. As such no further detail need be had on this score and we record our concurrence with the submissions advanced by Dr. Dhawan.

As regards the issue of selections and clubbing, while in the normal circumstances the same ought to be adhered to but in the event of there being no such assessment or selection, it would not render the subsequent selection void. In Vipinchandra Hiralal Shah Union of India and Ors. v. Vipinchandra Hiralal Shah, [1996] 6 SCC 721, this Court upon reliance on to the decision in Syed Khalid Rizvi v. Union of India, [1993] Supp. 3 SCC 575 in paragraph 11 stated as below:

> "11. It must, therefore, be held that in view of the provisions contained in Regulation 5, unless there is a good reason for not doing so, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State Civil Service Officers who fulfil the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed in clause (2) of Regulation 5. The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the Select List for that year. If for any reason the Selection Committee is not able to meet during a particular year, the Committee when it meets next, should, while making the selection, prepare a separate list for each year keeping in view the number of vacancies in that year after considering the State Civil Service Officers who were eligible and fell within the zone of consideration for selection in that year."

It cannot thus be treated to be void but any irregularity which is of curable nature and can be cured. Dr. Dhawan made some comments as regards the situation in Uttar Pradesh in support of not having annual selections and thus clubbing. We are not, however, inclined to dilate thereon neither any credence can be put thereto by reason of our views expressed above. Clubbing in a later year may not be treated as fatal but as noticed earlier, curable, more so having regard to the fact that initiation of a selection process throughout the State would further take a considerable period of time and the Court's attitude presently being pragmatic and justice oriented should do away with techincalities ought not to out-weigh the course of justice.

In that view of the matter, the order impugned cannot be sustained. The judgment of the learned Single Judge as also that of the Division Bench stand set aside. The appeals thus stand allowed. No costs.