

Aruvendra Kumar Garg and ors. Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : Mar-22-2002

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Judge : S.R. Singh and ;D.R. Chaudhary, JJ.

Acts : Uttar Pradesh Service of Engineers (Buildings) and Roads Branch) (Class II) Service Rules, 1936 - Rules 3, 5, 6 and 12; Uttar Pradesh Service of Engineers (Buildings) and Roads Branch) (Class II) Service (Amendment) Rules, 1987; [Constitution of India](#) - Articles 13(2), 14 and 16; Uttar Pradesh Service of Engineers (Buildings) and Roads Branch) (Class II) Service (Amendment) Rules, 1997; Uttar Pradesh Service of Engineers (Buildings) and Roads Branch) (Class II) Service (Amendment) Rules, 1969; Uttar Pradesh Service of Engineers (Buildings) and Roads Branch) (Class II) Service (Amendment) Rules, 1992; [Public Service Commission \(Procedure Rules\), 1970](#)

Appeal No. : C.M.W.P. Nos. 8946 and 17949 of 1998 and 19844 and 42762 of 2000

Appellant : Aruvendra Kumar Garg and ors.

Respondent : State of U.P. and anr.

Advocate for Def. : Piyush Shukla, ;L.P. Naithani, ;S.C. Budhwar, ;Aditya Kumar Singh, ;Ashok Khare and ;C.B. Yadav, Advs. and ;V.B. Singh, S.C.

Advocate for Pet/Ap. : Ashok Bhushan, ;Deepak Verma, ;Anil Bhushan and ;Seema Agarwal, Advs.

Judgement :

S.R. Singh, J.

1. This judgment will dispose of all the four writ petitions above mentioned which have been heard together and in which same question as to constitutional validity of the relevant service rules is involved.

2. Writ Petition No. 17949 of 1998, Atibal Singh v. Chief Secretary, U. P. and Ors. and Writ Petition No. 19844 of 2000. Sansvir Singh and three Ors. v. State of U. P. and Ors., have been instituted for quashing and declaring notifications dated 4.8.1997 and 25.9.1997 as ultra vires of Articles 14 and 16 of the Constitution. Issuance of a writ in the nature of certiorari quashing the order dated 18.11.1999 issued by the respondent No. 2 thereby declaring vacancies in the posts of Assistant Engineer (Civil) to be filled by promotion of diploma holder Junior Engineers and degree holder Junior Engineers in given numbers has been prayed for in Writ Petition No. 19844 of 2000 filed by Sansvir Singh and three others who are all degree holder Junior Engineers and so is Atlbai Singh, the sole petitioner of Writ Petition No. 17949 of 1998. Writ Petition No. 8946 of 1998 has been instituted for issuing a writ in the nature of certiorari quashing the notification dated 25.9.1997 and a writ of mandamus commanding the respondents to revert the proposed increase of quota in promotion of diploma holders vide impugned Government Notification dated 24.12.1997. The sole petitioner Jang Bahadur Singh, a Junior Engineer, according to the averments made in para 17 of the writ petition appeared in degree examination and has perhaps obtained the degree during the pendency of the writ petition.

3. In Civil Misc. Writ Petition No. 42762 of 2000, Aruvendra Kumar Garg and Ors. v. State of U. P. and Ors., has been instituted by diploma holders praying for issuance of writ of mandamus directing the respondents to consider the diploma holders/petitioners for promotion to the post of Assistant Engineer in accordance with the Uttar Pradesh Service of Engineers (Buildings and Roads Branch) (Class

II) Rules. 1936, as amended up to date within a specified period.

4. Recruitment to the service known as the 'United Provinces' Service of Engineers Class II (Buildings and Roads Branch) and conditions of service are regulated by the provisions contained in the 'United Provinces' Service of Engineers (Buildings and Roads Branch) (Class II) Rules, 1936. The words 'United Provinces' have since been substituted by words 'Uttar Pradesh'. Validity of the U. P. Service 'of Engineers (Building and Road Branch) Class II (Amendment) Rules, 1987, made vide notification dated 4.8.1987 and that of the U. P. Service of Engineers (Building and Road Branch) Class II (IVth Amendment) Rules, 1997, made vide notification dated September 25, 1997, are under challenge at the behest of degree holder Junior Engineers in three out of four writ petitions aforesaid. Rule 3 (b) of the rules defines 'Member of the Service' as a Government servant appointment in substantive capacity under the provisions of these rules or of rules in force prior to introduction of the rules to a post in the cadre of the service. Appointment to the service is made both by direct recruitment and promotion in a given ratio. Class (c) of Rule 3 as it stood originally defined 'direct recruitment' or 'direct appointment' as 'recruitment' or 'appointment' in the manner prescribed in Sub-rules (i), (ii) and (iii) of Rule 5 of the Rules. Number to be recruited from each source was to be decided under Rule 6 of the rules. Promotion under the rules is contemplated from amongst the members of the feeder cadre which consists of Junior Engineers. The qualifications for appointment to the cadre are laid in Rule 9 of the rules.

5. Rules 5, 6 and 9 of the rules as they stood prior to 1969 read as under :

'5. Sources of Recruitment. --Recruitment to the service shall be made by the Government :

(i) By direct appointment from amongst engineer students who have passed out of the Thomson Civil Engineering College, Roorkee and who have completed a course of training in the buildings and roads branch as engineer students after consulting the Public Service Commission.

(ii) By direct appointment after advertisement and after consulting Public Service Commission.

(iii) By the appointment of officers in the temporary service of the United Provinces Public Works Department (B and R) Branch after consulting the Public Service Commission, U. P. :

Provided that it will not be necessary to consult the Commission in the case of appointment of temporary officer to a permanent vacancy if he has already been appointed to a temporary post in the cadre of service after consultation with the Commission. (iv) By promotion of members of the United Provinces Subordinate Engineering Service or of Upper Subordinate in the Public Works Department (Buildings and Roads) Branch, who have shown exceptional merit.

(v) By promotion of members of the P.W.D.. B and R branch, who have shown exceptional merit and who are technically qualified.

6. Number to be recruited from each source.--The Government shall decide in each case the source from which a vacancy shall be filled provided that :

(a) not less than 20 per cent of vacancies shall be reserved for selected qualified members of the Subordinate Engineering Service and the Upper Subordinate Engineering Service.

(b) members of the United Provinces Subordinate Engineering Service and Upper Subordinate, who are eligible for promotion under Clause (iv) of Rule 5 are debarred from applying for direct appointment under Clause (ii) of that rule.

(c) In making appointments to the service care shall be taken to secure reasonable representation of the different communities and to prevent the preponderance of any one class or community.

(d) In the case of direct appointments, other thing being equal, weight shall be given to a candidate's family status.

9. Technical Qualifications :

(i) No person shall be recruited to the service under provision of Rule 5 (i) 5 (ii) or 5 (iii) unless :

(a) he holds the engineering certificate of the Thomson College, or

(b) he is a qualified Associate Member of the Institution of Engineers India, or

(c) he has obtained an Engineering degree of the Universities mentioned in the Appendix-A under the conditions prescribed therein, or

(d) he has passed Sections A and B of the Associate Membership Examination of the Institution of Civil Engineers, or

(e) He has passed the Associateship Examination of the City and Guilds Institute (Imperial College of Science and Technology, South Kensington) in Civil Engineering, or

(ii) No officer shall be promoted to the service under Rule 5 (iv) unless he has passed such qualifying examination which the Government may prescribe.'

6. Rules 5, 6 and 9 of the Rules as they stood amended in 1969 vide Notification No. 492 EBR dated 28.7.1969 are quoted below :

'5. Source of recruitment : Recruitment to the post of Assistant Engineer shall be made from the following sources :

(a) in permanent vacancies :

(i) by direct recruitment on the result of a competitive examination conducted by the Commission.

(ii) by selection from amongst officers appointed as Assistant Engineer by direct recruitment through the Commission and working in temporary or officiating vacancies in the Department.

(iii) by promotion of members of the Public Works Department Subordinate Engineering Service and the Public Works Department Computers Service.

(b) in officiating or temporary vacancies :

(i) by direct recruitment on the result of a competitive examination conducted by the Commission.

(ii) by promotion of members of the Public Works Department, Subordinate Engineering Service and Public Works Department Computers Service.

6. Number to be recruited from each source.--The Governor shall decide the number of appointments to be made at each selection in each kind of post from the sources specified in Rule 5 :

Provided that recruitment in substantive vacancies, occurring during any period of recruitment in the post of Assistant Engineer shall, so far as may be possible be made from the source mentioned in Rule 5 (a) in the following proportion :

(a) Fifty per cent of the vacancies shall be filled by direct recruitment on the result of a competitive examination under Rule 5 (a) (i).

(b) Twenty-five per cent of the vacancies shall be filled from the source specified in Rule 5 (a) (ii),

(c) Twenty-five per cent of the vacancies shall be filled from the source specified in Rule 5 (a) (iii) which shall be shared by members of the Public Works Department Subordinate Engineering Service and the Public Works Department Computers' Service in approximate proportion of permanent strength of their respective cadres at the time of selection :

Provided further that with a view to giving facility to temporary Assistant Engineers recruited in the department in consultation with the Commission up to the date of commencement of the first competitive examination in accordance with these rules, the proportionate vacancies to be filled from the three sources mentioned in the first proviso shall be 25%, 50% and 25% respectively subject to review at the discretion of the Governor in consultation with the Commission.

Explanation.--The vacancies for the source mentioned in Rule 5 (a) (ii) will until further orders, be filled from amongst those temporary Assistant Engineers only

who were recruited in the Department in consultation with the Commission and were working in this capacity on the date of commencement of first competitive examination.

Provided also that recruitment in temporary or officiating vacancies in posts of Assistant Engineer by promotion from the source mentioned in Rule 5 (b) (ii) shall be made up to 25 per cent of the vacancies accruing during any one period of recruitment in the same proportion as in Clause (c) of the first proviso and the remaining vacancies shall be filled by direct recruitment under Rule 5 (b) (i).

Note.--The distribution of vacancies in the permanent cadre in the above manner will be subject to the condition that the Governor, in consultation with the Commission, may for special reasons, increase or decrease the percentage fixed for recruitment by selection and competitive examination in any particular period of recruitment.

9. Technical qualifications :

(i) No person shall be recruited to the service under the provisions of Rule 5 (a) (i) or 5 (b) (i) unless :

(a) he holds that engineering certificate of the Thomson Civil Engineering College, Roorkee or has obtained a Civil Engineering degree of any institution recognised by Government from time to time, or

(b) he has passed Sections A and B of the Associated Membership Examination of the Institution of Civil Engineers (London), or

(c) he has passed the Associateship Examination of the City and Guilds Institute (Imperial College of Science and Technology South Kensington) in Civil Engineering, or

(d) he is a fully qualified Associate Member of the institution of Engineers (India) :

Provided that from August 6, 1986, passing of Sections A and B of the institution of Engineers (India) would be required : Or

(e) he has obtained a degree in Civil Engineering from any university in India incorporated by an Act of the Central or State Legislatures.

(ii) No officer shall be promoted to the service under Rule 5 (a) (iii) and 5 (b) (ii) unless he has passed such qualifying examination as the Governor may prescribe or unless he possesses any of the technical qualifications prescribed in Clause (i) of this rule.'

7. The term 'direct recruitment' or 'direct appointment' according to Clause (c) of Rule 3 as stood amended by notification dated 28.7.1969 came to be defined as 'recruitment or appointment in the manner prescribed in Rule 5 (a) (i) and 5 (b) (i)'. Another significant change in the 1969 Rules was that detailed procedure for recruitment by promotion under Rule 5 (a) (iii) and 5(b) (ii) came to be laid down under Rule 12 of the rules which visualized that recruitment by promotion would be selection on 'merit.' In P.D. Agarwal and Ors. v. State of U. P. and Ors. AIR 1987 SC 1676. Rules 3(c). 5, 6 as amended in 1969 and Rule 23 as amended in 1971 were struck down being violative of Articles 14 and 16 of the Constitution. As a result of these amendments, seniority in the service was required to be determined by the date of order of appointment in substantive vacancy. The said rule deprived the Assistant Engineers, who had been appointed substantively in temporary posts of the cadre and who had become members of the service under the unamended Rules of 1936 were deprived of their right to reckon their service from their substantive appointment to the temporary posts for the purpose of determination of seniority and it was due to this reason that the rules aforesaid came to be struck down as arbitrary and violative of Articles 14 and 16 of the Constitution. While Rule 6 of the rules came to be omitted vide impugned Notification No. 3428 EBR/23-(3)-60 E.B.R.-86 dated Lucknow August 4. 1987, i.e., the U. P. Service of Engineers (Buildings and Roads Branch) Class-II (Amendment) Rules, 1987, Rules 5, 9 and 12 were substituted as under :

'5. Recruitment to the posts of Assistant Engineer shall be made from the following sources :

(i) 66-2/3 per cent vacancies by direct recruitment on the basis of the competitive examination conducted by the Commission :

Provided that the officers appointed as Assistant Engineers by direct recruitment through the Commission and working in temporary or officiating vacancies in the department, or the officers after regularisation under the Uttar Pradesh Regulation of Ad-hoc Appointments (On Posts within the Purview of the Public Service Commission) Rules, 1979 shall be deemed to have been appointed against the quota of direct recruitment before any fresh appointments are made by direct recruitment. (ii) 25 per cent vacancies by promotion through the Commission from amongst such permanent incumbents of the posts in the Public Works Department, Subordinate Engineering Service and Public Works Department Computer's Service as have put in at least seven years continuous service on such posts, in the proportion of respective permanent cadre strength.

(iii) 8-1/3 per cent vacancies by promotion through the Commission from against such permanent incumbents of the posts in the Public Works Department Subordinate Engineering Service and Public Works Department Computer's Service as possess bachelors degree in engineering from a recognised Institution or are Associate Members of the Institute of Engineers in the proportion of respective permanent cadre strength :

Provided that if persons possessing the qualifications mentioned in Clause (iii) are not available these vacancies shall also be filled from the source mentioned in Clause (ii). 9. No person shall be directly recruited to the service unless he :

(a) possesses a degree of Bachelor of Engineering (Civil) from any institution recognised by the Government from time to time ; or

(b) has passed Sections A and B of the Associate Membership Examination of the Institution of Civil Engineering (London) : or

(c) has passed the Associateship Examination of the City and Guilds Institute (Imperial College of Science and Technology South Kensington) in Civil Engineering : or

(d) is fully qualified Associate Member of the Institution of Engineers (India) :

Provided that from August 6, 1966, passing of Sections A and B of the Institute of Engineers (India) would be required ; or (e) has obtained a degree in Civil Engineering from any University in India incorporated by an Act of the Central or State Legislature.

12. Recruitment by promotion to the post of Assistant Engineers shall be made on the basis of merit in accordance with U. P. Promotion by selection in consultation with Public Service Commission (Procedure) Rules, 1970, as amended from time to time.'

8. The significant change that came to be made in rules vide 1987 amendment rules was that the eligibility qualification for promotion earlier laid down in Rule 9 (ii) of the Rules was done away with though 'merit' criterion for promotion was maintained in Rule 12 extracted above. Subsequently, however, by means of IInd Amendment Rules, 1992 (Annexure-3 to Writ Petition No. 19844 of 2000) the criterion of 'merit' for promotion as contained in Rule 12 was changed to 'seniority subject to rejection of unfit'. It would also be evident from the above rules that a specific quota came to be fixed both for direct recruitment and promotion. 8.33% has been reserved in promotion for degree holder permanent incumbents of P.W.D. Subordinate Engineering Service and P.W.D. Computer Service while 25% vacancies were required to be filled up by promotion through Commission amongst such permanent incumbents in the P.W.D. Subordinate Engineering Service and P.W.D. Computer Service as have put in at least seven years continuous service on such posts in the proportion of respective permanent cadre strength. Under Rule 5 of the Rules, as it stands substituted by the other impugned 'notification dated 25th September, 1997, i.e., The Uttar Pradesh Service of Engineers (Building and Road Branch) Class-II (Fourth Amendment) Rules, 1997, the quota of direct recruit has been reduced from 66-2/3% to 58.34% and that of promotees under Clause (ii) proportionately increased from 25% to 33.33%. The amended Rule 5 is quoted below :

'5. Recruitment to the posts of Assistant Engineer shall be made from the following sources :

(i) 58.34 per cent of posts by direct recruitment on the basis of the competitive examination conducted by the Commission :

Provided that the officers appointed as Assistant Engineers by direct recruitment through the Commission and working in the 'temporary or officiating vacancies in the Department, or the officers after regularisation under the Uttar Pradesh Regularisation of Ad-hoc Appointments (On Posts within the Purview of the Public Service Commission) Rules, 1979 shall be deemed to have been appointed against the quota of direct recruitment before any fresh appointments are made by direct recruitment. (ii) 33.33 per cent of the posts by promotion through the Commission from amongst such permanent incumbents of the posts in the Public Works Department Subordinate Engineering Service and Public Works Department Computer's Service as have put in at least seven years continuous service on such posts, in the proportion of respective permanent cadre strength.

(iii) 8.33 per cent of posts by promotion through the Commission from amongst such permanent incumbents of the posts in the Public Works Department Subordinate Engineering Service and Public Works Department Computer's Service as possess bachelors degree in Engineering from a recognised institution or are Associate Members of the Institute of Engineers in the proportion of respective permanent cadre strength : Provided that, if persons possessing the qualifications mentioned in Clause (iii) are not available these posts shall be filled from the source mentioned in Clause (ii) ; Provided further that where number of vacancies to be filled in by any of the said source in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one.'

9. Although the proviso to 5 (i) of the Rules as amended by the impugned notification dated 4.8.1987 has taken care of the constitutional infirmities in the 1969 Rules due to which it was invalidated, the impugned amendment rules are sought to be Invalidated, inter alia, on the ground that the rules declared void in P.D. Agarwal (supra) being non-est were incapable of being substituted by way of amendment. S/Sri S.C. Budhwar, V.B. Singh and Ashok Khare, learned senior

advocates appearing for the degree holder Junior Engineers have vehemently urged that a post-Constitution legislation which is violative of fundamental right is void and non-est from the very inception under Article 13(2) of the Constitution and, therefore, the amending rules seeking substitution of non-est rules could not come into force. Thrust of the submissions made by Sri S. C. Budhwar is that a legislation made in contravention of Article 13(2) of the Constitution is as much a 'still-born' piece of legislation as a law made by a Legislature not competent to enact such law. A legislation, substantive or subordinate, is admittedly a still-born piece of legislation if it has been enacted on a subject-matter not falling within the specified field of legislation as visualized under Articles 245 and 246 read with the VIIth Schedule of the Constitution. Submission of the learned advocates appearing for graduate Junior engineers is that the Legislature is equally incompetent to make a law in violation of fundamental rights or in breach of any other constitutional inhibition. They challenged the validity of the impugned rules also on the ground that classification for the purpose of promotion of junior engineers based on degree and diploma is arbitrary and violative of Articles 14 and 16 in as much the feeder cadre for promotion to the post of Assistant Engineer is one and the same, i.e., the cadre of junior engineers carrying same pay scale and responsibilities with no distinction in the nature of duties being performed by them. Sri Anil Bhushan, learned counsel representing the diploma holders has, on the other hand, submitted that while a law on a matter not within the competence of the Legislature is a nullity, the law on a topic within its competence but repugnant to any constitutional inhibition is only unenforceable. As regards the prescription of quota, the learned counsel submitted that prescription of a higher quota in promotion for diploma holder junior engineers was within the domain of the executive and that higher quota for diploma holder junior engineers was justified keeping in view that their member in the feeder cadre was proportionately much more (4300 out of the sanctioned strength of 5,400) than that of the degree holder junior engineers and who are also eligible for direct recruitment.

10. We have given our anxious consideration to the submissions made by the learned counsel for the parties. Three questions emerge from the submissions made across the Bar for consideration by the Court. Firstly, whether the related provisions of the rules held to be void in view of Article 13(2) of the Constitution in

P.D. Agarwal were non-est for all purposes including the purpose of substitution by amendment? : secondly if the related rules brought about by 1969 Rules are held to be 'still-born' even for the purpose of their substitution by new rules, whether the old rules would stand revived or whether did they continue on the statute book? ; and thirdly, whether classification of the members of the feeder cadre based on qualification (degree and diploma) is violative of Articles 14 and 16 of the Constitution.

In re Ist Question :

11. Article 13 of the Constitution provides the consequences of a law which is inconsistent with or in derogation of the fundamental rights. While Clause (1) of Article 13 provides that all laws in force in the territory of India immediately before commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III of the Constitution, shall, 'to the extent of such inconsistency' be void. Clause (2) not only prohibits the State to make any law which takes away or abridges the rights conferred by Part III but provides the consequence of the breach of the aforesaid injunction as well in that it declares that any law made in contravention of this clause shall, 'to the extent of the contravention', be void. Concededly Rules 5 and 6 of the rules as they stood amended by means of 1969 Amendment Rules were held violative of Articles 14 and 16 of the Constitution and hence void under Article 13(2) of the Constitution. The question is what is the effect of declaration of unconstitutionality of the Rules in P.D. Agarwal's case. The effect of declaration of a statute as unconstitutional, has been the subject-matter of debates by Courts and other authorities. According to one view, the effect of declaring a statute as unconstitutional is 'as if it had never been' and consequently, it has to be regarded as having never at any time been possessed of any legal force. Willoughby on Constitution of the United States, (Second edition. Vol. I page '10) holds the view that-

'The Court does not annul or repeal the statute if it finds it in conflict with the Constitution ; it simply refuses to recognise it and determines the rights of the parties just as if such statute had no application. The Court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only,

and there is no judgment against statute. The opinion or reasons of the Court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book ; it does not repeal the statute.

12. In *State of Bombay v. F.N. Balsara*, AIR 1951 SC 318. Clause (b) of Section 13 of the Bombay Prohibition Act, 1949, was held to be invalid under Article 13 of the Constitution in so far as it affected the consumption or use of liquid medicinal and toilet preparations containing alcohol. The effect of that declaration was to lift the consumption or use of liquid medicinal and toilet preparations containing alcohol from the prohibition enacted in Section 13(b) of the Bombay Prohibition Act, 1949. In *Behram Khurshid v. State of Bombay*, AIR 1955 SC 123, a question as to the effect of declaration of unconstitutionality of the provisions of Section 13(b) of Bombay Prohibition Act, 1949, came up for consideration before the Supreme Court initially, the case was decided by a three Judge Bench but the Judgment rendered by the original Bench was reviewed and the case reopened with a view to obtaining the opinion of a larger Bench on the question as to the effect of declaration in *Balsara's* case that Clause (b) of Section 13 of the Bombay Prohibition Act, 1949, was void in so far it affected the consumption or use of liquid medicinal and toilet preparations containing alcohol on the ground that it infringed Article 19(1)(f) of the Constitution : According to the majority opinion delivered by Mahajan, C.J., a declaration of unconstitutionality brought about by the lack of legislative power does not stand on a different footing from a declaration of unconstitutionality by reason of abridgement of fundamental rights in that when the law making power of State is restricted by a written fundamental law then any law enacted and opposed by fundamental law is in excess of the legislative authority and is thus nullity. Declarations of unconstitutionality, it has been held, go to the root of the power itself irrespective of whether declarations have been made on the ground of legislative incompetence or on the ground of any constitutional prohibition contained in Part III of the Constitution. In other words, the law as enunciated therein is that the legislative power of the Parliament and the State Legislatures as conferred by Articles 245 and 246 of the Constitution stands curtailed by the fundamental rights contained in Chapter III of the Constitution.

13. In *Bhikaji Narain Dhakras and Ors. v. State of Madhya Pradesh and Anr.* AIR 1955 SC 781, it was urged for the petitioners therein that the 'law having become void for unconstitutionality was dead and could not be vitalised by a subsequent amendment of the Constitution removing the constitutional objection, unless it was re-enacted.' The question that arose for consideration before the Apex Court in view of amendment in Clause (6) of Article 19(1)(g) of the Constitution was as to what would be the effect of the amended Clause (6) of Article 19(1)(g) on the Act impugned therein, namely, C. P. and Berar Act. Reference was made to certain American authorities and the Judgment of the Supreme Court in *Sagir Ahmad v. State of U. P.*, AIR 1954 SC 728. The Supreme Court was of the view that the question was not considered by the Court in *Sagir Ahmad's* case nor was it raised before or considered by the Court in *Behram Khurshid's* case and held that the meaning to be given to the word 'void' in Article 13 of the Constitution was no longer *res integra* in view of the Court's decision in *Keshavan Madhava Menon v. State of Bombay*, AIR 1951 SC 128. An existing law, it was held, which impinged on the exercise of a right guaranteed to the citizens of India by Article 19(1)(g) restrictions which could not be justified as reasonable under Clause (6), as it then stood being existing law within the meaning Article 13(1) of the Constitution, became void 'to the extent of such inconsistency'. Article 13(1), held the Apex Court, 'by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book.' Such law, according to the Supreme Court, exists for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution. Article 13(1), it has been held therein, has the effect of nullifying or rendering the existing law inconsistent with Part III of the Constitution, as ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. In view of the provisions contained in Article 13 of the Constitution., the Supreme Court held, the American authorities 'can have no application to our Constitution' and all laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are by the express provisions of Article 13, rendered void 'to the extent of such inconsistency'. Such laws, held the Supreme Court, would, however, not be dead for all purposes and

would rather exist for the purposes of pre-Constitution rights and liabilities and remain operative, even after the Constitution, as against non-citizens. These observations made by the Apex Court to our mind, were obviously made in relation to pre-Constitution laws dealing with citizens and non-citizens which become inconsistent with the Constitution and have no application in relation to a post-Constitution law which is void under Article 13(2) of the Constitution. A distinction has been clearly drawn between post-Constitution laws inconsistent with the provisions of the Constitution and pre-Constitution laws which were perfectly valid before the Constitution. The former, according to the Supreme Court would be treated as 'still-born' in that such laws would be deemed to have never come to light being inconsistent with the provisions of the Constitution.

14. In *Deep Chand v. State of U. P. and Ors.*, AIR 1959 SC 648, it was held that the doctrine of eclipse has no application to post-Constitution laws infringing the fundamental rights as they would be ab initio void in toto or to the extent of their contravention of the fundamental rights. Prohibition contained in Article 13(2) of the Constitution, held the Apex Court, 'goes to the root of the matter and limits the State's power to make law ; the law made inspite of the prohibition is a 'still-born' law.' In other words Legislature has no power to make any law in derogation of the provisions contained in Article 13(2) of the Constitution. A distinction between Clauses (1) and (2) of Article 13 has been clearly drawn by the Apex Court in *Deep Chand's* case according to which a pre-Constitution law subsists except to the extent of inconsistency with the provisions of Part III, whereas no post-Constitution law can be made contravening the provisions and, therefore, the law to that extent if made, would be nullity from its inception. In *Mahendra Lal Jaini v. State of U. P. and Ors.*, AIR 1963 SC 3019, the Supreme Court noticed the difference between language and scope of Clauses (1) and (2) of Article 13 and held that the doctrine of eclipse would apply to pre-Constitution laws which are governed by Article 13(1) and would not apply to post-Constitution laws which are governed by Article 13(2). Though meaning of the word 'void' in Clauses (1) and (2) of Article 13 is for all practical purposes the same but the vital difference between pre-Constitution and post-Constitution laws is that the voidness of the pre-Constitution law is not from the very inception whereas voidness of the post-Constitution laws, on the other hand, is from their very inception and they cannot,

therefore, continue to exist for any purpose. To put it differently, in the case of a post-Constitution law inconsistent with the Constitution, the doctrine of eclipse will not apply and, therefore, can be brought to life only by re-enactment and not by amendment and substitution, while in the case of law which becomes void under Article 13(1) of the Constitution, the doctrine of eclipse will apply for such law is not a 'still born' piece of legislation and, therefore, can be brought to life by way of appropriate amendment.

15. In *M.P. Sundararamier and Co. v. State of Andhra Pradesh*, AIR 1958 SC 468, the Supreme Court was confronted, inter alia, with the question as to whether Section 22 of the Madras General Sales Tax Act, 1939 - a pre-Constitution law - was void on the ground that it was in contravention of Article 286(2) of the Constitution. Their lordships of the Supreme Court after referring to certain decisions including some decision of American Courts although held that, 'preponderance of authority is in favour of the view that while a law on a matter not within the competence of the Legislature is a nullity, a law on a topic within its competence but repugnant to the constitutional prohibitions is only unenforceable' but at the same time their lordships did notice the difference in the language of Article 13 and that of Article 286(2) and observed that *Behram Khursheed Peshikaka* and *Bhikaji Narayan Dhakras* both turned on the construction of Article 13 'which enacts that laws shall be void to the extent they are repugnant to the provisions of Part III' whereas 'Article 286(2) does not provide that a law which contravenes it is void.' The distinction between the law on a matter not within the competence of a Legislature and the law on a topic within its competence but redundant to the constitutional prohibitions as made by the Constitution Bench in *Sundararamier* (supra) was not maintained in *Deep Chand v. State of U. P. and Ors.* (supra) and in *Mahendra Lal Jaini v. State of U. P. and Ors.* (supra) though in none of these cases the decision in *M.P. Sundararamier* was taken note of by the Supreme Court. In *State of Gujarat v. Shri Ambica Mills Ltd.*, AIR 1974 SC 1300, another Constitution Bench of the Supreme Court reviewed its earlier decisions on the point and held that the law which is void in view of Article 13(2) of the Constitution being violative of any fundamental right of citizens might be 'still-born' so far as the persons, entities or denominations whose fundamental rights are taken away or abridged but there is no reason why the law should be void or 'still-

born' as against those, who have no fundamental rights. The rules on hand, it may be observed, concern persons, who have fundamental rights and do not intend to regulate persons, entities or denominations, who have no fundamental rights.

16. In *U.P.S.R.T. Corporation v. State Transport Appellate Tribunal*, AIR 1975 All 154, K.N. Singh. J. (as he then was) after noticing *Bhikaji Narain Dharkras* (supra) and *M.P. Sundararamier* (supra) has held :

'.....The above observations show that a law enacted by a Legislature without having legislative competence would be void ab initio and the same cannot be revived or revitalised even if the legislative competence is conferred on that Legislature subsequently. But in a case where the Legislature has legislative competence to enact a law, and some of its provisions violate any of the fundamental rights contained in Part III of the Constitution, the same would be rendered void under Article 13(2) of the Constitution and would remain unenforceable. The law so enacted is not wiped off the Statute Book nor it stands repealed. Further if the offending provisions of the Statute which violate fundamental rights are removed the law would become effective and enforceable even without re-enactment. Such a law, whether pre-Constitution or post-Constitution, is not wholly dead if it violates fundamental right and remains as it were in a moribund condition as long as the shadow of fundamental rights falls upon it. When that shadow is removed the law begins to operate proprio vigore from the date of such removal unless it is retrospective, A law declared void by a Court is not effaced from the Statute Book ; it is revived and revitalised if Constitutional limitations are removed by Constitutional amendment or by re-enactment by Legislature.'

17. We respectfully do not agree with the above exposition that a law which is void under Article 13(2) is not 'wiped off or 'effaced' from the Statute Book. The correct legal position to our mind is that if a provision of law concerning citizens is void under Article 13(2) of the Constitution, then the entire enactment would be treated as 'stillborn' or non-est. But if such law concerns both citizens and persons who do not have fundamental rights, then it would remain on the Statute Book being a law which is not 'stillborn' as against persons who do not have fundamental rights. The

former can be revived or revitalised only by re-enactment while the latter can be brought to life by suitable legislative amendment.

18. In *A.P. Krishnaswamy Naidu v. State of Madras*, AIR 1964 SC 1515. provisions of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, were challenged on the ground of being violative of Articles 14, 19 and 31(2) of the Constitution. The Supreme Court held therein that the definition of 'family' in Section 3(14) was artificial and resulted in discrimination between persons equally circumstanced and thus violating Article 14. The provisions contained in Section 50 read with Schedule III with respect to compensation were also held to be discriminatory and these two sections being the pivotal provisions of the Act. the entire Act had to be struck down as unconstitutional. Subsequently, the Parliament passed 17th Constitution Amendment Act on 20th June, 1964, thereby effecting changes in Article 31A by not only adding a proviso after the existing proviso in Clause (1) but also substituting a new sub-clause (a) in Clause (2) and including the Land Reforms Act in the Ninth Schedule, in *L. Jagannath etc. v. Authorised Officer Land Reforms and Anr.*, AIR 1972 SC 425, validity of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961. was under challenge. The main attack in *L. Jagannath's* case was two fold : first, that the act having been struck down as invalid by the Supreme Court in *Krishnaswamy Naidu's* case being void ab initio under Article 13(2). Article 31B of the Constitution could not validate it without a separate validating Act being passed by the Madras Legislature and, secondly, the Act was incompetent for want of legislative power of the State. It was urged therein that the Ceiling Act of 1961 having been declared void under Article 13(2) of the Constitution must be held to be void ab initio inasmuch as it did not lie within the power of the State to make any law which abridged the rights conferred by Part III of the Constitution. In other words, it was urged that the measure being non-est or 'still-born', any validating measure could not instil life therein. The argument was that the Act having been struck down by the Apex Court could be deemed to have been effected from the statute book and to make any such Act operative, it was necessary not only to give protection of fundamental right as was sought to be done by Article 31B but to get the Act re-enacted. The Apex Court noticed its earlier decisions in *Behram Khurshid's* case ; *Sagir Ahmad* ; *Deep Chand* ; *Bhikaji Narain Dhakaras* including *M.P.V. Sundaramier and Co.* and

several other decisions and authorities on the point but did not consider it necessary 'to scrutinise too closely the decisions wherein views appear to have been expressed that a law which is void under Article 13(2) is to be treated as still-born' as in the opinion of the Supreme Court :

'Apart from the question as to whether fundamental rights originally enshrined in the Constitution were subject to the amendatory process of Article 368 it must now be held that Article 31B and the Ninth Schedule have cured the defect, If any in the various Acts mentioned in the said Schedule as regards any unconstitutionality alleged on the ground of infringement of fundamental rights, and by the express words of Article 31B such curing of the defect took place with retrospective operation from the dates on which the Acts were put on the statutes book. These Acts even if void or inoperative at the time when they were enacted by reason of infringement of Article 13(2) of the Constitution, assumed full force and vigour from the respective dates of their enactment after their inclusion in the Ninth Schedule read with Article 31B of the Constitution. The States could not, at any time, cure any defect arising from the violation of the provisions of Part III of the Constitution and therefor the objection that the Madras Ceilings Act should have been re-enacted by the Madras Legislature after the Seventeenth Constitutional Amendment came into force cannot be accepted,'

19. The above decision is not very helpful for the legislations impugned therein though void under Article 13(2) of the Constitution were held to have 'assumed full force and vigour from the respective dates of their enactment after their inclusion in the Ninth Schedule read with Article 31B of the Constitution.' Their lordships did not consider it necessary to go into the doctrine of eclipse. In the instant case the 1969 amendment Rules being violative of Articles 14 and 16 of the Constitution were void under Article 13(2) of the Constitution and hence 'still-born'. Preponderance of Judicial decisions leans to the view that if a post-Constitution statutory provision violates the fundamental rights enshrined in Part III of the Constitution, the same would be void under Article 13(2) of the Constitution from the very inception and being a 'still-born' piece of legislations could not remain on the statute book and, therefore, substitution of the offending provisions by means of the U. P. Service of Engineers (Building and Road Branch) Class II

(Amendment) Rule, 1987, without 're-enactment' was impermissible. The offending rules being of pivotal significance, the effect of declaration of their unconstitutionality was to render the entire rules as ineffective. The defect could not be removed except by re-enactment of the rules consistent with Articles 14 and 16 of the Constitution for we are of the considered view that if a pivotal provision of a statutory service rule but for which the other provisions thereof become ineffective and inoperative, is void under Article 13(2) of the Constitution, then the entire enactment would be non-est and the constitutional infirmity cannot be removed except by way of re-enactment consistent with Articles 14 and 16 of the Constitution or by placing it in the IXth Schedule with retrospective effect in the instant case, Rules 5 and 6 of the Rules are pivotal in the sense that but for these provisions, others would be ineffective and since these two rules as substituted by 1969 amendment rules were declared void being violative of Articles 14 and 16, the rule-making authority ought to have re-enacted the rules consistent with Articles 14 and 16 of the Constitution.

In re 2nd Question :

20. The next question is whether as a consequence of the declaration of unconstitutionality of Rules 3 (c), 5 and 6 of the 1969 Amendment Rules, the old rules stood revived or did they continue unabridged and unbroken? In *Firm A.T.B. Mehtab Majid and Company v. State of Madras and Anr.*, AIR 1963 SC 928, the provisions of Rules 16 (2) of Madras General Sales Tax (Turnover and Assessment) Rules 1939, were held to be discriminatory and, therefore, violative of Article 304(a) of the Constitution. It was, however, urged before the Supreme Court that old Rule 16 got revived and, therefore, the tax assessment on the petitioner therein would be good. The Apex Court repelled the argument and held : that 'once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid.' In *Deodosan v. Union of India*. AIR 1964 SC 179, the carry forward Rule of 1952 as modified in 1955 was declared invalid. In the case of *B.N. Tewari v. Union of India*, AIR 1965 SC 1430, a case decided by five-Judge Bench of the Apex Court, a question arose as to whether the carry forward Rule of 1952 could still be said to exist. The Supreme Court held that on its substitution, the carry forward rule of

1952 clearly ceased to exist because its place was taken by the carry forward Rules of 1955 in that by promulgating the new rule in 1955, the Government of India would be deemed to have cancelled the carry forward rule of 1952 and, therefore, when the carry forward rule as modified in 1955 came to be struck down, the carry forward Rule of 1952 which had already ceased to exist could not revive. The Supreme Court was, therefore, of the opinion that after the Judgment in Devadasan's case there was no carry forward rule at all. In *Indian Express Newspaper (Bombay) Pvt. Ltd., and Ors. etc, v. Union of India and Ors.*, 1985 (1) SCC 641, the Government of India issued a notification dated July 15, 1977, under which total exemption had been granted. Subsequently, the said notification was substituted by another notification dated March 1, 1981. The notification came to be struck down. A question arose as to whether the old notification dated July 15, 1977, would revive on quashing of the notification dated March 1, 1981. The Supreme Court held that on striking down of subsequent notification, the repealed notification did not revive. *Firm A.T.B. Mehtab Majid*. *Indian Express Newspaper* and *B.N. Tiwari* cases (supra) were referred to and relied on by a three-Judge Bench of the Supreme Court in a recent case of *West U. P. Sugar Mills Association and Ors. v. State of U. P. and Ors.*, JT 2002 (1) SC 619.

21. In *Bhagat Ram Sharma v. Union of India and Ors.*, AIR 1988 SC 740, it has been held : 'in case of execution instruction the bare issue of afresh instrument on the same subject would replace a previous instrument. But in the case of a legislative enactment there would be no repeal of an existing law unless the substituting act or provision has been validly enacted with all the required formalities.' This holding appears to be in conflict with the view expressed in *Firm A.T.B. Mehtab Majid*. *Bhagat Ram* was decided by a two-Judge Bench while *Firm A.T.B. Mehtab Majid* was decided by a five Judge Bench of the Apex Court. However, distinguishing the earlier decisions *Firm A.T.B. Mehtab Majid* and *Company u, State of Madras*, 1963 Supp (2) SCR 435 : AIR 1963 SC 928 and *Koteshwar Vittal Kamath v. K. Rangappa Balika and Company*. (1969) 3 SCR 40 : AIR 1969 SC 504, the Court observed that mere use of the word 'substituted' does not ipso facto or automatically permissible and legally effective. *Bhagat Ram Sharma*, it appears was not noticed by the Supreme Court in its recent decision in the case of *West U. P. Sugar Mills Association*. We are persuaded to the view that

even if it is held that the old rules did not stand obliterated by 1969 rules which were declared void obviously under Article 13(2) of the Constitution and that a provision which is a 'still-born' is incapable of repealing or substituting an existing provision, the 1987 and 1997 Amendment Rules would not be deemed to have come into operation inasmuch as the existing rules, namely the rules as they stood prior to 1969 amendment rules were not substituted by the impugned rules and instead rules which were nonexistent were sought to be substituted by the impugned Amendment Rules of 1987 and 1997.

In re 3rd Question :

22. Coming to the third question, it has been submitted for the degree holder junior engineers that both diploma holder junior engineer and degree holder junior engineer constitute one and the same homogeneous cadre which being the feeder cadre for the purpose of promotion to the post of Assistant Engineer, prescription of higher quota for diploma holder junior engineer was violative of Articles 14 and 16 of the Constitution. In *Govind Dattatray Kelkar and Ors. v. Chief Controller of Imports and Exports and Ors.*, AIR 1967 SC 639, the constitutional validity of provision in the recruitment rules visualising appointment by direct recruitment and departmental promotion in the ratio of 3 : 1 was under challenge. The Supreme Court held as under :

'When the recruitment to certain posts is from different sources, what ratio would be adequate and equitable would depend upon the circumstances of each case and the requirements and needs of a particular post. Unless the ratio is unreasonable as to amount to discrimination, it is not possible for this Court to strike it down or suggest a different ratio.'

But at the same time, the Supreme Court observed :

'The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification.'

There can be cases where the differences between the two groups of recruits may not be sufficient to give any preferential treatment to one against the other in the matter of promotions, and, in that event a Court may hold that there is no reasonable nexus between the differences and the recruitment.'

23. The above-mentioned decision, reliance on which was placed by the learned counsel representing the diploma holder junior engineers, is not of much avail for in that case, what was sustained was the classification between two sources of recruitment. The validity of classification between members of one and the same source of recruitment for higher promotion was not in question in that case. Rather the observation made therein that, 'the concept of equality in the matter of promotion can be predicated, only when the promotees are drawn from the same source' goes a long way to suggest that such classification would be invalid in the instant case, the promotees are drawn from one and the same feeder cadre of junior engineer and the question involved herein is as to whether classification for the purpose of promotion to the post of Assistant Engineer between graduate and non-graduate members of the same cadre is constitutionally Justified. A similar question came up for consideration on Mohd. Shujat Ali v. Union of India, AIR 1974 SC 1631, wherein the validity of a prescription in the rules of the State of Andhra Pradesh treating graduate engineer on the one hand, and engineers with diploma or equivalent qualification on the other, differently for the purposes of promotion arose for consideration. The Supreme Court recognised permissibility and validity of such classification only if the nature of the functions and duties attached to the promotional posts are such as to justify the classification in the interest of efficiency in public service and held that such classification would be violative of equality clause of the Constitution where both graduates and non-graduates are regarded as equally fit and eligible for promotion. The Supreme Court observed :

'But where graduates and non-graduates are both regarded as fit and therefore, eligible for promotion, it is difficult to see how, consistently, with the claim for equal opportunity, any differentiation can be made between them by laying down a quota of promotion for each and giving preferential treatment to graduates over non-graduates in the matter of fixation of such quota. The result of fixation of quota of

promotion for each of the two categories of supervisors would be that when a vacancy arises in the post of Assistant Engineer, which, according to the quota is reserved for graduate supervisors, a non-graduate supervisor cannot be promoted to that vacancy, even if he is senior to all other graduate supervisors and more suitable than they. His opportunity for promotion would be limited only to vacancies available for non-graduate supervisors. That would clearly amount to denial of equal opportunity to him.....'

24. Reliance was then placed by the learned counsel representing the diploma holders on another decision of the Supreme Court in *Roop Chand Adlakha and Ors. v. Delhi Development Authority and Ors.*, AIR 1989 SC 307, In that case, the Supreme Court was considering the prayer of graduate engineers to declare them as a separate category amongst junior engineers and give them equal quota like the diploma holder out of 50% as Assistant Engineers. The graduates diploma holders were not treated equal in the matter of eligibility for promotion and what was assailed therein was not the mere fixation of a quota as between diploma holders and the graduates in the promotional posts but the very prescription of different standards of condition of eligibility. In the instant case, graduates and non-graduates are not treated differently in the matter of eligibility for promotion and, therefore, prescription of separate quota for graduate and diploma holders is bound to violate Articles 14 and 16 of the Constitution. The case on hand is similar to *Shujat Ali's* case discussed here in above. In *H.C. Sharma and Ors. v. Municipal Corporation of Delhi and Ors.*, AIR 1983 SC 881, the question of validity of recruitment prescribing separate quota for graduate junior engineers for promotion to the post of Assistant Engineers on the basis of qualification was under challenge. The Supreme Court declined to grant the prayer holding that :

'This cannot be done except by carrying out two classes in the same category of Junior Engineers on the basis merely of their qualification which is not permissible in law though the creation of selection grade in the same category on the basis of merit and/or seniority is well known and permissible. The Junior Engineers do the same kind of work and bear the same responsibilities whatever their qualification, whether they are degree holders or diploma holders.'

25. The decision in Shujat Ali's case was followed by the Supreme Court in Punjab State Electricity Board, Patiala v. Ravinder Kumar Sharma and Ors., AIR 1987 SC 367. In that case, fixation of quota in the matter of promotion for diploma holder and non-diploma holder linemen was in question. The Supreme Court held :

'.....There is no gainsaying that all the linemen either diploma holders or non-diploma holders are performing the same kind of work and duties and they belong to the same cadre having a common/joint seniority list for promotion to the post of Line Superintendent. The order dated 12.7.1977 being order No. 73 promoting defendants 3, 4 and 5 as well as office order No. 898 dated 17.8.1977 promoting defendants 6 and 7 on the basis of quota from diploma holders as fixed by the order of the State Electricity Board dated 9.5.1974 is wholly arbitrary, illegal, discriminatory and violative of the equality clause contained in Articles 14 and 16 of the Constitution inasmuch as it purports to promote defendants 3 to 7, who are admittedly junior to respondent No. 1 in service as Lineman in the State Electricity Board.'

26. The diploma holder Junior Engineers and the degree holder Junior Engineers are both eligible for promotion to the post of Assistant Engineer in the instant case and the promotion according to Rule 12 as it stands amended by 2nd Amendment Rules, 1992, provides for selection in consultation with the Public Service Commission in accordance with the provisions of [Public Service Commission \(Procedure Rules\), 1970](#), on the basis of 'seniority subject to rejection of unfit.' The result of fixation of separate quota in favour of diploma holder junior engineers and degree holder may lead to denial of promotion on the basis of seniority and this would lead to denial of equality clause of the Constitution in the matter of promotion. Fixation of separate quota for degree holder Junior Engineers and diploma holder Junior Engineers to our mind is discriminatory and violative of Articles 14 and 16 of the Constitution.

27. In the result while Civil Misc. Writ Petition No. 17949 of 1998. Atibal Singh v. Chief Secretary U. P. and Ors., Civil Misc. Writ Petition No. 19844 of 2000 ; Sansvir Singh and Ors. v. State of U. P. and Ors., ; Civil Misc. Writ Petition No. 8946 of 1998, Jang Bahadur Singh v. State of U. P. and Ors., succeed and are

allowed and impugned notifications are quashed with the liberty reserved to the rule making authority to re-enact the rules in consonance with the provisions of Articles 14 and 16 of the Constitution, Civil Misc. Writ Petition No. 42762 of 2000, Aruvendra Kumar Garg and Ors. v. State of U.P. and Ors., filed by the diploma holders fails and is dismissed. Parties are directed to bear their own costs.

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