Bombay High Court
Chandrakant Sakharam Karkhanis ... vs State Of Maharashtra And Ors. on 14 April, 1976
Equivalent citations: AIR 1977 Bom 193, (1980) 82 BOMLR 212, 1977 LablC 654
Author: Tulzapurkar
Bench: Kantawala, Tulzapurkar, Kania
JUDGMENT Tulzapurkar, J.

1. The three questions referred to our Full Bench by the Division Bench are these;

(1) Whether the Circulars, Orders or Resolutions or parts thereof laying down rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra" and intended to be applicable straightway are or amount to the rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India, although the said Circulars, Orders or Resolutions do not expressly state that the same are made or issued in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India and are not published in the Government Gazette?

(2) Whether the said Circulars, Orders or Resolutions or parts of them as set out in Question No. 1 above must be deemed to be rules made in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India?

(3) Whether the said Circulars, Orders or Resolutions or parts thereof as set out in Question No. 1 above have the same force or effect in law as a rule or rules made in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India?

2. Though three questions as set out above have been referred to this Bench, in our view, the substantial question that needs an answer is the first one, the other two being of ancillary character.

3. At the outset it may be observed that these questions arise out of more or less a perpetual dispute going on between direct recruits end promotees in the Secretariat departments of the Government of Maharashtra. The dispute to some extent is aggravated by apparently inconsistent or conflicting circulars, orders or resolutions issued from time to time. In order to appreciate how these questions have arisen for determination it would be sufficient if the facts pertaining to Spl. Civil Appln. No. 201 of 1971 are briefly stated: The petitioners in this Special Civil Application are Lower Division Clerks in the Education and Social Welfare Department of the State of Maharashtra (respondent No. 1) and who have been promoted as Junior Assistants. Petitioner No. 2 amongst them was the first to be so promoted on 3rd November 1961 while petitioners Nos. 1 and 5 were the last to be so promoted on 6th January 1964. It also appears that petitioners Nos. 2, 3 and 6 have been provisionally confirmed as Junior Assistants from 2nd August 1968. Respondent Nos. 2 to 5 are the direct recruits having been directly recruited in employment as Junior Assistants on selection by the Maharashtra Public Service Commission. Of these the first to be appointed was respondent No. 3 who was appointed on 19-3-1962 and the last to be appointed was respondent No. 2 who was

appointed on 19-4-1966. The petition deals with the question of seniority in the posts of Junior Assistants between the petitioners on the one hand and the respondents on the other i.e. between promotees and direct recruits. According to the petitioners, as a result of the policy and the circulars, orders and resolutions issued by the 1st respondent from time to time, some of them, like petitioners Nos. 2, 3 and 6 for example, who have already been confirmed in the posts as Junior Assistants, are liable to be deconfirmed after long and meritorious service in the said posts on account of allegedly arbitrary and invalid rules and resolutions passed by the 1st respondent and some of the petitioners are even in the danger of being reverted on account of such arbitrary and unjust rules and resolutions, which are the subject-matter of the petition and such result is likely to arise in the following facts and circumstances:

4. It is common ground that prior to 23rd April 1921 the Lower Division Clerks were not promoted to the posts of Junior Assistant, which belonged to the Upper Division. By an order dated 23rd April 1921 issued by the Finance Department it was, inter alia, stated thus:

"4. The Government desires that clerks in the Lower Division should, if they prove their fitness, have an opportunity of promotion to the Upper Division.

They are accordingly pleased to direct that in all Departments of the Secretariat (except the Separate Department) every fourth appointment of the Upper Division should be filled by promotion of a clerk from the Lower Division, provided there is a clerk really fit for such promotion. This provision should be strictly observed and no clerk should be selected about whose complete fitness for the Upper Division there is any doubt."

It is not necessary to refer to the rest of the order as it is not material for our purpose. It may however be stated that this order dated 23-4-1921 has been authenticated under the signature of the Under-Secretary to Government, Finance Department, who has put his signature under the endorsement "By order of the Governor of Bombay."

5. On 5th August 1939 the then Government of Bombay published in the Official Gazette certain rules called the Bombay Civil Service Classification and Recruitment Rules, 1939. These Rules were framed in exercise of the powers conferred by clause (b) of Sub-section (1) and clause (b) of Sub-section (2) of Section 241 and Section 265 of the Government of India Act, 1935 and in supersession of the Bombay Civil Services Classification and Recruitment Rules issued in 1929. These Rules came into force with effect from 1st September 1939. Rule 138 of these Rules provided that the Secretariat Ministerial Staff could be divided into two divisions -- Upper and Lower -- and further provided that as far as Upper Division was concerned, recruitment was to be made by promotion from persons in the Lower Division or by nomination from candidates selected by the Commission. It also stated that the candidates must be University Graduates in Arts, Law, Science or Commerce.

6. On 21st November 1941 a resolution was issued by the Political and Services Department of the then Government of Bombay directing that the principles stated therein should be observed in determining the seniority of direct recruits and promoted officers in the Provincial Services except

the Bom-bay Service of Engineers. The said principles were as follows:

"(1) In the case of direct recruits appointed substantively on probation, the seniority should be determined with reference to the date of their appointment on probation.

(2) In the case of officers promoted to substantive vacancies, the seniority should be determined with reference to the date of their promotion to the substantive vacancies provided there has been no break in service prior to their confirmation in those vacancies." It may be stated that this resolution has been signed by the then Chief Secretary to the Government of Bombay under the endorsement "By order of the Governor of Bombay."

7. It appears that on 22nd May 1957 the then Government of Bombay in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India amended the Rules of 1939 and by this amendment the new Rule 13S came to be framed in place of old original Rule 138. The material portion of the said amended Rule 138 provides as follows:

The Ministerial staff in the Secretariat and attached offices is divided into two Divisions--

(A) Upper and (B) Lower.

(A) (1) Upper Division--

(i) Superintendent -- Appointments shall be made by promotion from among Senior Assistants.

(ii) Senior Assistants--Appointments shall be made by promotion from among Junior Assistants.

(iii) Junior Assistants--Appointments shall be made either:--

(a) by nomination on the results of a competitive examination held by the Bombay Public Service Commission, or

(b) by promotion from among members of the Lower Division:

Provided that not more than one out of every four vacancies in the posts of Junior Assistants shall ordinarily be filled by promotion.

We are not concerned with the rest of the contents of the said substituted Rule 138. This notification by which 1939 Rules were amended has been duly authenticated by the then Chief Secretary to the Government under the endorsement "by order and in the name of the Governor of Bombay."

8. According to the petitioners, the 1921 order was substantially incorporated in the aforesaid notification dated 21-5-1957 issued under Article 309 of the Constitution end even after the issuance of this notification dated 21-5-1957 the self-same principle determining the seniority of direct recruits vis-a-vis the promoted officers enunciated in the Government Resolution dated 21-11-1941

was followed by the 1st respondent, namely that seniority was fixed on the principle of length of service from the date of appointment in the case of direct recruits and from the date of continued officiation in the case of promotees and even the ratio of 3:1 was ordinarily followed while making appointments in the cadre of junior Assistants, though the ratio was not intended to be rigidly or mandatorily followed.

9. It appears that on 11-3-1958 a Circular was issued by the then Government of Bombay, Political and Services Department, which stated that in order to facilitate the absorption in Upper Division of Upper Division Clerks/Assistants allocated from the former States of Madhya Pradesh, Hyderabad, Saurashtra and Kutch, Government was pleased to direct that till the end of August 1958 no direct recruit should be appointed to the cadre of Junior Assistants in the Departments of the Secretariat and allied Offices and that all vacancies occurring in that cadre should be filled by promotion from among Lower Division Clerks in each Department or office on the basis of seniority fixed under the Allocated Government Servants' (Absorption, Seniority, Pay and Allowances) Rules, 1957 and such other factors as were normally taken into consideration in making these appointments. Para 2 of this Circular sets out that for want of candidates selected by the Public Service Commission for a long time past, a number of non-Public Service Commission candidates might have been appointed in the various Departments and Offices in the Upper Division direct and the Government was pleased to direct that all these persons should be discharged forthwith and that the vacancies released by them should be filled in the manner set out earlier. This Circular was also authenticated by the signature of the then Chief Secretary to the Government of Bombay under the endorsement "By Order and in the name of the Governor of Bombay". By another Circular issued by the Political and Services Department of the then Government of Bombay on 13-5-1958 it was stated that candidates recommended by the Bombay Public Service Commission on the basis of the Competitive Examination held in December 1957 for the posts of Junior Assistants in the Upper Division of the Subordinate Secretariat Service were available for allotment. Paragraph 2 of this Circular recorded that prior to the reorganisation of the States the Departments of the Secretariat had to promote Lower Division Clerks to the posts of Junior Assistants in excess of the ratio of 3:1 prescribed for their promotion to the Upper Division of the Subordinate Secretariat Service, because of the urgency of the work and the non-availability of selected candidates and that such persons had still been continued in their posts. The said Circular further recorded in the same paragraph that it had been decided that the position regarding the out-of-turn promotions given to the Lower Division Clerks in the old Bombay State since 1st January 1956 should be revised so as to restore the ratio of 3:1 prescribed for promotion of Lower Division Clerks to the Upper Division of the Subordinate Secretariat Service. This Circular was authenticated by the signature of the Assistant Secretary to the Government under the endorsement "By order and in the name of the Governor of Bombay."

10. It may be stated that on 14th August 1959 by a Resolution passed in the Political and Services Department of the then Government of Bombay, the ratio of 3:1 was altered. The said Resolution, inter alia, provided as follows:

"..... According to the existing rules, recruitment to the posts of Junior Assistants in the Secretariat Department is made either by nomination on the basis of the results of the "Competitive Examination held by the Public Service Commission or by promotion from among mebers of the

Lower Division, the ratio of direct recruits to promotees being 3:1. It is observed by Government that according to the present ratio of promotion, the members of the Lower Division have not been able to secure promotions to the Upper Division to an appreciable extent although they have put in a fairly long service, resulting in stagnation in the Lower Division to some extent." Paragraph 2 of the said Resolution runs as follows:

"The question has been very carefully examined by Government and with a view to reducing the stagnation in the Lower Division, it has been decided to hold a special Competitive Examination on departmental basis for the members in the Lower Division for their promotion to the posts of Junior Assistants in Secretariat Departments. After the results of this departmental examination are known, recruitment to Upper Division will be made for a period of one year by the direct method (through the Public Service Commission), promotion according to the present rule of seniority-cum-merit and the departmental competitive examination, in the ratio of 2:1:1. In following this ratio, the intention is that vacancies of Junior Assistants in Secretariat Departments should be filled for one year on the basis of one by direct recruit, one by promotion according to seniority-cum-merit, one again by direct recruit and one through the departmental competitive examination. The present 3:1 ratio will not operate during this period."

It may be stated that this Resolution dated 14-8-1959 bears the signature of the Assistant Secretary to Government under the endorsement "By Order and in the name of the Governor of Bombay."

11. The petitioners have then referred to yet another Circular dated 25th September 1961 that was issued by the General Administration Department, whereby it was stated that "Recruitment to the posts of Junior Assistants in Secretariat Departments must be made either by nomination through Public Service Commission or by promotion from among members of the Lower Division, the ratio of direct recruits to promotees being 3:1 i.e. 2,5% of the vacancies (both permanent and temporary) occurring in the Upper Division being available for promotion to the members of the Lower Division". But since it was noticed that no uniform method was followed by the various Secretariat Department in regard to the fixation of inter se seniority in the cadre of Junior Assistants between direct recruits and such .promotees, a clarification was sought to be given. It was clarified that the ratio of promotion prescribed by Government was only for regulating promotion of members of the lower division to the upper division and it was not intended that the ratio should be used for fixing the seniority of promo-tees vis-a-vis direct recruits in the upper division. Seniority of persons promoted to the upper division had to be fixed with reference to the date of continuous officiation and in the case of those appointed by direct recruitment from the date of appointment, if any members of the lower division were promoted in excess of the prescribed ratio on account of non-availability of direct recruits they were liable to be replaced by the Public Service Commission selectees, and when direct recruitment through the Public Service Commission was made next and candidates became available, the department should maintain the proportion by replacing all those who had been promoted in excess of the prescribed proportion by direct recruits. However, it was pointed out that the promotees who remained in the upper division would count for seniority purposes their continuous service from the date of promotion to the upper division. It was directed that the above procedure should be followed by all departments in fixing the seniority inter se of direct recruits and promotees. It may be stated that this Circular bears the signature of the Assistant

Secretary to the Government of Meharashtra, General Administration Department, under the endorsement "by order and in the name of the Governor of Maharashtra". According to the petitioners, the practice that was indicated in this circular was not supported either by the language of the 1921 Rules or the 1957 Rules nor was it based on any principle and according to them, directions in the said circular to the effect that if any members of the lower division were promoted in excess of the prescribed ratio on account of non-availability of direct recruits they were liable to be replaced by the Public Service Commission selectees and accordingly if a Public Service Commission candidate became available he should replace a person promoted are erroneous, illegal and void. The petitioners have however asserted that they have no dispute with the said resolution in so far as it relates to the fixation of inter se seniority between direct recruits end promotees. So far as directions contained therein with respect to the reversion of promotees whenever direct recruits became available in order to maintain the said ratio of 3:1 are concerned these are not only contrary to the language of the Resolutions of 1921 or 1957 but also to the actual practice that was being followed by the Government. In other words, according to the petitioners, this Resolution or Circular of 1961 goes beyond the scope of 1921 and 1957 Resolution and makes mandatory what was contemplated only to be directory and thus introduced arbitrariness and unreasonableness involving consequences of great injustice to the petitioners.

12. According to the petitioners, there is yet one more Circular bearing No. SSS.1267-J dated 27th March 1969 which has been issued by Government in General Administration Department, dealing with the topic of fixation of seniority of direct recruits and promotees inter se, which prejudicially affects them, According to the petitioners, by this Circular the General Administration Department purported to remove the alleged considerable misunderstanding of principal object of the orders issued in the earlier Government Circular dated, 25th September 1961. By this circular dated 27-3-1969 the Government was pleased to clarify that the basic intention underlying the circular was to emphasise that the length of continuous officiating service shall be the criterion for determining the inter se seniority in respect of only those promotees who fall within, the accepted ratio of 3:1 vis-a-vis direct recruits (one promotee as against three direct recruits in total vacancies of 4 at a time). It further stated that the procedure laid down in that circular had already envisaged that all promotees, in excess of the accepted ratio, shall be liable to be replaced by the next batch of direct recruits selected by the Public Service Commission, so that the fortuitous promotions given to the excess promotees shall be corrected and these excess promotees shall not get a further fortuitous advantage of inter se seniority vis-a-vis direct recruits by virtue of the length of their officiating service as Assistant, on an ad hoc basic, due to nonavailability of the necessary number of direct recruits to fill up the available vacancies in accordance with the accepted ratio of 3:1, Para 2 of this Circular stated thus:

"Government is accordingly pleased to direct that all Departments of the Secretariat should review the current seniority lists and revise them, with effect from the date of the Circular, viz. 25th September, 1961, in accordance with the accepted ratio and the principle of the replacement of excess promotees by Public Service Commission recruits as and when available. This will require (a) an assessment of the vacancies which were available and were filled (i) on and after September 25, 1961 to December 31. 1961 and (ii) each Calendar year thereafter from 1962 to 1968 and (b) the re-fixation of seniority on the principle that against available vacancies in each of the periods, one

promotee and three direct recruits shall be assigned their due seniority according to their respective entitlement in the accepted ratio of 3:1 and the excess promotees who were appointed, on an ad hoc basis to fill up the vacancies, will be given a seniority of the year when their turn comes in their entitlement of 1 out of 4 vacancies All Departments of the Secretariat are, therefore, requested to review and revise the current seniority lists in accordance with the principle and the procedure, in pursuance of this clarification of the Circular No. SSS-1061-J of 25th September, 1961, and finalise the revised seniority lists by April 31, 1969, at the latest."

Pursuant to this Circular the consequential seniority list dated 30th March 1970 came to be issued. The petitioners having felt aggrieved by Circular dated 27th March 1969 and the consequential seniority list dated 30th March 1970 as well as by Circular dated 25th September 1961 approached this Court for getting the said impugned Circulars and the Seniority List quashed after examining the legality, validity and/or propriety thereof and out of the several grounds on which these circulars or Resolutions or Orders that were challenged the principal ground was these impugned Circulars, Resolutions or Orders were in the nature of executive instructions or administrative instructions and as such could not override the statutory 1957 Rules which had been framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution; in other words, several Circulars, Resolutions and Orders issued by the Government from time to time which operated to the prejudice of the rights of the petitioners either in the matter of their promotional chances to the Junior Assistant cadre or in the matter of their seniority have been challenged by the petitioners on the ground that these did not have any force of law and at any rate being inconsistent with the statutory rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution cannot affect their rights.

13. It may be stated that in the other Special Civil Application No. 687 of 1971 filed by the employees, who are all Junior Assistants having been recruited directly pursuant to their selection by the Public Service Commission, they have referred to a number of Circulars, Orders and Resolutions and have, on the other hand, challenged such of the Circulars, Orders and Resolutions which have been operating to the prejudice of their rights as direct recruits vis-a-vis promotees and the challenge inter alia is on the same ground that such Circulars, Orders and Resolutions are in the nature of executive instructions or administrative instructions and these could not have the effect of overriding statutory rules framed under the proviso to Article 309 of the Constitution.

14. Since on this principal ground of challenge which was put forward by the petitioners in both the petitions conflicting views have been expressed by sets of Division Benches of this Court, this reference to Full Bench has become necessary. As has been pointed out in the referring judgment, at least in regard to rules framed under Government Resolution dated 29-7-1963, conveniently called 'the 1963 Rules', one Division Bench (Kantawala and Kania, JJ.) in Misc. Petn. No. 549 of 1969 (Bom) has held these Rules to be Rules framed under the proviso to Article 309 of the Constitution while another Division Bench (Deshpande and Joshi, JJ.) in Spl. C. A. No. 815 of 1972 (Bom) has taken the view that these very Rules are in the nature of executive instructions and that is how the three questions reproduced at the commencement of this judgment have come to be referred to this Bench. It may be stated that on a perusal of the principal question that has been referred to us certain aspects have been accepted or admitted about which presumably there was no dispute

between the parties when the matter was argued before the Division Bench, in the first place, there was no dispute between the parties that all these impugned Circulars, Orders or Resolutions or parts thereof deal with the subject of 'Recruitment Rules and Conditions of Service' of persons appointed to public services and posts in connection with the affairs of the State and it was also not disputed that these contain or lay down rules or principles of general applicability. It was also not disputed that these Circulars, Orders or Resolutions have been duly authenticated by signature of an authorised officer under the endorsement "By order and in the name of the Governor of Maharashtra" and that these were intended to be applicable straightway. The rival contentions, however, that were urged before the Division Bench pertained only two aspects of these Circulars, Orders and Resolutions, the aspects being that these Circulars, Orders or Resolutions did not expressly state that these had been issued in exercise of the powers conferred under the proviso to Article 309 of the Constitution and that these had not been published in the Government Gazette. It may be stated that on behalf of the petitioners in both the matters a two-fold contention was urged: (a) that in order that these Circulars, Orders or Resolutions should have the force of rules made under the proviso to Article 309 a statement ought to have been expressly made therein to the effect that these had been so made under the said provision and (b) that these (Circulars, Orders or Resolutions) ought to have been published in the Government Gazette and that since no such express statement was found in these Circulars, Orders or Resolutions and since these had not been published in the Government Gazette, all these Circulars, Resolutions or Orders were really by way of executive instructions or administrative instructions issued by the Government on the topic of 'Recruitment Rules and Conditions of Service' and did not amount to any rules framed in exercise of the powers conferred under the proviso to Article 309. In support of this contention certain observations made by the Division Bench of this Court consisting of Deshpande and Joshi JJ. in their judgment delivered in Spl. Civil Appln. No. 815 of 1972 (Bom) were relied upon. Apart from the aforesaid Division Bench judgment, reliance was also placed upon certain decisions the Supreme Court as well as a decision of Andhra Pradesh High Court. On the other hand on behalf of the State of Maharashtra, it was urged that these several Circulars, Orders and Resolutions or parts thereof, since these contained rules or principles of general applicability and contents thereof touched the subject-matter of recruitment and service conditions of Government servants in employment of State of Maharashtra generally or particular class thereof, and since these had been duly authenticated by a duly authorised officer by order and in the name of the Governor of Maharashtra, will have to be regarded as rules framed under the proviso to Article 309 of the Constitution and it was urged that it was immaterial whether any express statement was or was not made in these very circulars, orders or resolutions stating that these had been made or issued in exercise of the powers conferred by the proviso to Article 309 of the Constitution and it was pointed out that making of such a statement could never be regarded as sine qua non before these could be regarded as rules framed under the proviso to Article 309 of the Constitution. As regards the non-publication in the gazette, it was conceded that due publication of these instruments containing rules was necessary but it was not essential that these ought to be published in the Government Gazette which was merely one of the modes of publication. In support of this rival view, reliance was placed upon three Division Bench judgments and two single Judges' judgments of this Court, and few decisions of the Supreme Court.

15. In order to decide the principal question which has been referred to us, certain relevant provisions of the Constitution will have to be noted. The most important provision touching the issue is the provision contained in Article 309 and the proviso thereto, which run thus:

"309; Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, end 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 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 will appear clear that Article 309 in terms deals with the topic of 'Recruitment and conditions of service of persons serving the Union or a State' and the main provision confers power upon the appropriate Legislature, subject to the provisions of the Constitution, to enact legislative measures for the purpose of regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or the State. Secondly it is the proviso to Article 309 which confers power either on the President or on the Governor to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts in connection with the affairs of the Union or in connection with the affairs of the State respectively until the appropriate Legislature has enacted a legislation covering the subject. Thirdly the proviso indicates that the rules that may be framed either by the President or the Governor, as the case may be, have been given full effect but that would be subject to the provisions of any such legislative enactment that may be passed by the appropriate Legislature. On the aspect as to what is the nature and scope of the power conferred either upon the President or the Governor under the proviso to Article 309 there are two decisions of the Supreme Court to which it would be profitable to make a reference immediately. In the case of B.S. Vadera v. Union of India, , the Supreme Court in para 24 of its judgment has clarified the nature, extent and scope of rule-making power to be exercised under the proviso to Article 309 In the following words:

"It is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning unless hedged-in by any limitations. The rules, which have to be 'subject to the provisions of the Constitution', shall have effect, 'subject to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other

words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other constitutional provision, must be enforced, if made by the appropriate authority." Legislative character of rules which either the President or the Governor has been empowered to make under the proviso to Article 309 has been reiterated by the Supreme Court in one of its latest decisions in the case of Raj Kumar v. Union of India . In that case the appellant who was appointed as Airport Ticket Clerk in the Civil Aviation Department, Government of India, on 14-8-1967, was served with a notice terminating his services 'forthwith' on 15-6-1971 and it was directed that he shall be paid a sum equivalent to the amount of pay and allowances for a period of one month (in lieu of the period of notice) calculated at the same rate at which he was drawing them immediately before the date on which the order was served on or, as the case may be, tendered to him. But the pay and allowances were not paid to him at the same time as the service of the order of termination of his services. His appeal against the termination as well as representations having failed he filed a writ petition which was dismissed by the High Court in limine and in the appeal before the Supreme Court the question that arose for determination was whether the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary service) Rules 1965, which had been amended with retrospective effect from 1st May 1965 was a valid one or not. The effect of amendment was that on 1st May 1965 as also on 15th June 1971 the date on which the appellant's services were terminated forthwith it was not obligatory to pay to him a sum equivalent to the amount of his pay and allowances for the period of the notice at the rate of which he was drawing them immediately before the termination of the services or as the case may be for the period by which such notice falls short 'and on the question of validity of amended rule which was given retrospective effect this is what the Supreme Court has observed:

"There is no doubt that this rule is a valid rule because it is now well established that rules made under the proviso to Article 309 of the Constitution are legislative in character and therefore can be given effect to retrospectively." These two decisions clearly bring out the legislative character of rules which either the President or the Governor as the case may be has been empowered to frame under the proviso to Article 309 and the latter case also makes it clear that even such a rule so framed under the proviso to Article 309 could be given retrospective effect; in other words, the rule-making power conferred upon the President or the Governor as the case may be under Article 309 partakes of the nature of plenary legislative power conferred upon the authority concerned.

16. Having broadly indicated the nature and scope of the power conferred upon the President or the Governor as the case may be under the proviso to Article 309 of the Constitution in the matter of framing rules regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State, it will be proper to refer to certain other relevant articles of the Constitution which pertain to the scope and extent of the executive power of a State and these provisions would become materiel, inasmuch as, the rival contention on behalf of the petitioners in the two petitions has been that several Circulars, Orders and Resolutions are executive instructions issued in exercise of the executive powers of the State. The relevant Articles are Articles 162 and 166 of the Constitution. Article 162 which deals with the extent of executive power of State runs thus;

"162. Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Under the aforesaid article it has been declared in unequivocal terms that the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws end it cannot be disputed that having regard to item 41 (State Public Services, State Public Service Commission) occurring in List II of Seventh Schedule the State Legislature has power to make laws touching the subject of State public services and consequently under Article 162 the executive power of a State does extend to topic of State public services in respect of which the State Executive can issue executive instructions or directions. The manner in which such executive instructions or directions could be issued pertaining to a matter covered by item like 41 occurring in List II of Seventh Schedule has been clearly indicated under Article 166 of the Constitution. Article 166 deals with the conduct of business of the Government of State end it runs thus:

"166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor, (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor, (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

Relying on Sub-clause (2) of Article 166 of the Constitution it was pointed out by counsel for the petitioners that several Circulars, Orders or Resolutions in the instant case would fall within the expression 'orders and other instruments' occurring in Sub-clause (2) of Article 166 and there was no dispute before us that all these Circulars, Orders and Resolutions in the instant case have been made end executed in the name of the Governor and have also been authenticated in the prescribed manner by a duly authorised officer in that behalf.

17. In order to bring out the distinction between legislative character of rules that could be framed by the President or the Governor as the case may be under the proviso to Article 309 and executive instructions or directions which could be issued in the name of the Governor by a properly authenticated instrument under Art 166, counsel referred us to Business Rules of the State of Maharashtra framed in exercise of powers conferred by clauses (2) and (3) of Article 166 of the Constitution and the latest set of business rules of the Government of Maharashtra which have been framed on 26th June 1975 were produced before us for the purpose of bringing out this distinction. These Maharashtra Government Rules of Business framed on 26-6-1975 are expressly stated to have been made in exercise of power conferred by clauses (2) and (3) of Article 166 of the Constitution. In

particular, reliance was placed upon Rule 9 read with the Second Schedule to the Rules and Rule 14. Rule 9 of these Business Rules runs thus:

"9. All cases referred to in the Second Schedule shall be brought before the Council--

(i) by the direction of the Governor under clause (c) of Article 167

(ii) by the direction of--

(a) the Chief Minister; or

(b) the Minister-in-charge of the case with the consent of the Chief Minister:

Provided that, no case in regard to which the Finance Department is required to be consulted under Rule 11 shall, save in exceptional circumstances under the directions of the Chief Minister, be discussed by the Council unless the Finance Minister has had opportunity for its consideration."

Item 3 in the Second Schedule being material was referred to and that item runs as follows:

"Proposals for the making or amending the rules regulating the recruitment and the conditions of service of--

(a) persons appointed to the Secretariat Staff of the Assembly or the Council (Article 187(3));

(b) officers and servants of the High Court under Article 229, provisos to clauses (1) and (2);

(c) persons appointed to the Public Service and posts in connection with the State (proviso to Article 309)." Item 12 in the Second Schedule may also be referred to and it runs thus:

"Proposals for Legislation including the issue of an Ordinance under Article 213 of the Constitution." Rule 14 of the Rules of Business rung thus:

"The Secretary of the Department concerned is in each case responsible for the careful observance of these rules and when he considers that there has been any material departure from them, he shall personally bring the matter to the notice of the Minister-in-charge and the Chief Secretary."

Relying on Rule 9 read with Item 3 of the second Schedule quoted above, Counsel for the petitioners pointed out that certain formality has been prescribed by these Rules for the purpose of initiating the proposals for making or amending the rules regulating the recruitment and the conditions of service of persons appointed to public services and posts in connection with the State (Rules under the proviso to Article 309) and according to Rule 9 such proposals have to be brought before Council of Ministers, Having regard to the aforesaid material provisions of the Constitution, namely provisions contained in Article 309 together with the proviso thereunder as well as the provisions contained in Article 166 and the relevant provisions contained in the Maharashtra Government

Rules of Business, it will appear clear that the rule-making power conferred upon the Governor under the proviso to Article 309 which is legislative in character and the power to issue Circulars, Resolutions or Orders containing executive instructions in exercise of the executive power conferred upon the State under Article 166 do overlap so far as the subject-matter of Rules of recruitment and conditions of public services of State Government employees are concerned, but at the same time it cannot be disputed that all executive instructions or directions issued by the State Government in exercise of its executive power conferred under Article 166 touching this subject-matter or topic must yield to rules that may be framed by the Governor under the proviso to Article 309 of the Constitution. In their turn, the rules framed by the Governor under the proviso to Article 309 would be subject to any enactment made by appropriate legislature under substantive provision contained in Article 309 of the Constitution itself. In other words, to the extent to which and in so far as executive instructions or directions issued by the State Government in exercise of its power under Article 166 would be inconsistent with Rules that may be framed by the Governor under the proviso to Article 309 of the Constitution, such instructions will have to be disregarded and similarly to the extent to which and in so far as the Rules framed under the proviso to Article 309 would be inconsistent with the provisions of enactment of appropriate legislature the Rules will have to be disregarded and it is because of this position which emerges clearly on record that the petitioners sought to urge before the Division Bench that several of the Circulars, Orders and Resolutions issued by the State Government that operated to their prejudice being executive instructions or directions could not prevail over the statutory rules that have been framed by the Governor in exercise of the rule-making power conferred under the proviso to Article 309 and that is why the question has assumed considerable importance as to whether the several Circulars, Resolutions and Orders in question are really in the nature of executive instructions or directions issued by the State Government in exercise of executive power or amount to statutory rules framed by the Governor under the proviso to Article 309 of the Constitution and this basic question, in our view, will have to be resolved by taking into account three or four aspects, namely (a) subject-matter, (b) general applicability, (c) form and formalities, if any and (d) publication. The question is which of these aspects will have to be regarded as essential or decisive and which are relevant but not decisive.

18. We shall consider the first two aspects together. The first question will be whether the Circulars, Orders or Resolutions in question deal with the topic or subject-matter of recruitment rules and service conditions of Government employees, for, unless any such instrument mainly or substantially deals with such topic it can never be regarded as any rule framed under the proviso to Article 309 of the Constitution. In our view, even if any such instrument were to state expressly that it has been issued in exercise of the powers conferred under the proviso to Article 309, the same would not amount to framing of rules under the said provision if the same did not deal with the subject of recruitment and service conditions of Government employees. A reference in this behalf could be made to a decision of the Supreme Court, in the case of R.N. Nanjundappa v. T. Thimmaiah , where the question that arose for consideration was whether the purported rule that dealt with regularization of a particular appointment by stating that 'notwithstanding any rules the appointment was regularised' could be regarded as a rule framed under the proviso to Article 309 or not. The Rules in question were framed by the Governor of Mysore expressly stating that these had been framed 'in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and all other powers enabling him in this behalf. The title of the Rules read "These rules may

be called The Mysore Education Department Services (Technical Education Department) (Special Recruitment) Rules, 1967" and the material Rule, being Rule 2, ran thus:

"2. Provisions relating to regularisation of appointment of Principal, School of Mines, Oorgaum Kolar Gold Fields.

Notwithstanding any rule made under the proviso to Article 309 of the Constitution of India, or any other rules or Order in force at any time, Dr. T. Thimmiah, B. Sc. (Hons.) Ph. D. (Lend) F.G.S. shall be deemed to have been regularly appointed as Principal, School of Mines, Oorgaum, Kolar Gold Fields, with effect from 15-2-1958.

By order and in the name of the Governor of Mysore. Sd. S. N. Sreenath, Under Secretary to Government, Education Department."

19. An attempt was made on behalf of the State to sustain the validity of the aforesaid Rules, both under the proviso to Article 309 of the Constitution as also under the executive power conferred upon the State under Article 162 read with Article 166 of the Constitution, but the Supreme Court negatived the State's contention on both the aspects of the matter. In para 23 of the judgment this is what the Supreme Court has stated:

"It was contended on behalf of the State that under Article 309 of the Constitution the State has power to make a rule regularising the appointment. Shelter was taken behind Article 162 of the Constitution end the power of the Government to appoint. No one can deny the power of the Government to appoint. If it were a case of appointment of a candidate by competitive examination or if it were a case of appointment by selection recourse to rule under Article 309 for regularisation would not be necessary. Assume that Rules under Article 309 could be made in respect of appointment of one man but there are two limitations. Article 309 speaks of rules for appointment and general conditions of service. Regularisation of appointment by stating that notwithstanding any rules the appointment is regularised strikes at the foot of the rules and if the effect of the regularisation is to nullify the operation and effectiveness of the rules, the rule itself is open to criticism on the ground that it is in violation of current rules. Therefore, the relevant rules at the material tune as to promotion and appointment are infringed and the impeached rule cannot be permitted to stand to operate as a regularisation of appointment of one person in utter defiance of rules requiring consideration of seniority and merit in the case of promotion and consideration of appointment by selection or by competitive examination."

Again in para 26 the Court observed thus:

"The contention on behalf of the State that a rule under Article 309 for regularisation of the appointment of a person would be a form of recruitment read with reference to power under Article 162 is unsound and unacceptable. The executive has the power to appoint. That power may have its source in Article 162. In the present case the rule which regularised the appointment of the respondent with effect from 15th February, 1958 notwithstanding any rules cannot be said to be in exercise of power under Article 162. First, Article 162 does not speak of rules whereas Article 309

speaks of rules. Therefore, the present case touches the power of the State to make rules under Article 309 of the nature impeached here. Secondly, when the Government acted under Article 309 the Government cannot be said to have acted also under Article 162 in the same breath. The two Articles operate in different areas. Regularisation cannot be said to be a form of appointment. Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309, Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

It would thus appear clear from the aforesaid decision that the Supreme Court has clearly taken the view that regularisation of an appointment by stating 'notwithstanding any rules the appointment is regularised' cannot be regarded as any item covered by the topic of recruitment rules or conditions of service, a subject-matter spoken of by Article 309. in other words, unless the subject-matter or topic dealt with in any Circular, Order or Resolution is in essence the recruitment rules or service conditions of Government employees, no Circular, Order or Resolution can ever be regarded as any rule framed under the proviso to Article 309 of the Constitution. Reference may be made to another earlier decision of the Supreme Court in the case of E.N. Nagarajan v. State of Mysore, , where the question whether Mysore Public Service Commission (Functions) Rules, 1957, particularly Rule 4 (1) thereof, were rules made under the proviso to Article 309 of the Constitution or not was answered in the negative and one of the grounds on which the Court came to the conclusion that they were not rules made under Article 309 was that those rules really dealt with the functions of the Commission rather than laying down any rules regarding recruitment to services or posts. The High Court had taken the view that to the extent to which the rules dealt with the topic of regulating recruitment to Civil Services under the State, the source of the power could only be the proviso to Article 309 of the Constitution, but this view of the High Court was overruled by the Supreme Court and the Supreme Court on a proper construction of the relevant rules Came to the conclusion that substantially the rules dealt with the functions of the Commission rather than laying down the rules regarding recruitment to services or posts and therefore the said rules were not rules made under Article 309 of the Constitution. From these two decisions it would appear clear that before any Circular, Order or Resolution could be said to contain rules framed under the proviso to Article 309, it would be absolutely essential to find out whether the contents of such Circular, Order or Resolution mainly or substantially deal with the topic of recruitment rules and/ or service conditions of Government employees. Secondly, it will have to be considered whether such Circular, Order or Resolution contains rules or principles of general applicability or not, for, ordinarily unless the rules or principles comprised in such Circular, Order or Resolution partake of the character of general applicability such instrument would not be regarded as containing rules framed under the proviso to Article 309. The first mentioned decision undoubtedly suggests that rules under Article 309 could be made in respect of recruitment of one men or prescribe service conditions for one man but even

so the rules must be general in operation, though they might apply to a class comprising a single Government servant and that is why we are of the view that the instrument must contain rules which have general applicability. The character of general applicability would, therefore, be an essential feature to be considered while deciding whether the contents of the instrument amount to rules framed under Article 309 or not.

20. The next aspect deals with form and formalities, if any, that are required to be followed or gone through while framing rules under the proviso to Article 309. Several things will have to be considered under this topic. The first thing that need be considered is whether the instrument must be issued 'By Order and in the name of the Governor' or not While considering this aspect it must be stated at once that the position in law is well established that there is no particular charm in the expression 'By order, and in the name of the Governor' and its absence in any particular Circular, Order' or Resolution would not be conclusive one way or the other, for, even if such expression is absent it is well settled that the fact that the instrument has been issued under the authority of the Governor can be proved by other evidence if necessary and if it is so proved, there would be no question of the relevant Circular, Order or Resolution getting vitiated by reason of its absence. But the more important question which we have to consider is whether the presence of such endorsement at the foot of the instrument will necessarily mean that the instrument contains rules framed under the proviso to Article 309 of the Constitution. In this behalf our attention was invited by counsel for the petitioners to the fact that the 1939 Rules that were issued by means of a notification as well as the amendments that were effected to the said Rules by another notification dated 27-5-1937, were expressly stated to have been framed and issued under the proviso to Article 309 of the Constitution end both the notifications contained the requisite endorsement at the foot of the said notification and it was pointed out that the contents of these amounted to Rules because these had been issued In exercise of the power under Article 309 and dealt with the topic of recruitment and conditions of service of Government employees and not because those contained the endorsement 'By order and in the name of the Governor, and the signature of the duly authorised officer, for, according to counsel for the petitioners, even Circulars, Orders or Resolutions containing executive instructions issued in exercise of the executive power under Article 166(2) of the Constitution are also required to be issued in the name of the Governor and are further required to be authenticated in the prescribed manner by a duly authorised officer in that behalf. It was, therefore, urged by counsel on behalf of the promotees that some of the Circulars, Orders and Resolutions which varied the ratio or altered the seniority to their prejudice, though issued in the name of the Governor and authenticated by a duly authorised officer in that behalf, should be regarded as containing merely executive instructions not amounting to any rules framed under Article 309; similar argument was advanced by counsel for the direct recruits qua some other Circulars, Orders or Resolutions that are operating to their prejudice which contain the requisite endorsement and authentication. On behalf of the State it was fairly conceded that the presence of the endorsement 'By order and in the name of the Governor' and authentication by a duly authorised officer at the foot of the instrument would be equivocal and not decisive of the question whether the instrument contains Rules under Article 309 or mere executive instructions issued in exercise of the executive power under Article 162. Since the manner of authenticating any rule framed by the Governor under the proviso to Article 309 happens to be the same as the manner of authenticating the issuance of executive instructions in exercise of executive power of the State, in

our view, the presence of the aforesaid type of endorsement and authentication at the foot of any instrument cannot be regarded as decisive on the point as to whether the contents of the instrument should be regarded as amounting to Rules under Art 309 or as containing executive instructions and the same will have to be regarded as of no consequence,

21. Another important thing required to be considered by us under this topic is whether any particular form or any particular formality has been prescribed as being required to be used of gone through for framing rules or laying down general principles touching the subject-matter of recruitment and service conditions of Government employees under the proviso to Article 309 of the Constitution. On this aspect of the matter it will have to be observed that the proviso to Article 309 nowhere prescribes nor indicates any particular form in which such a rule should be framed nor does it prescribe any particular procedure or formality which is required to be gone through before rule thereunder could be framed. However, a two-fold contention was sought to be urged by counsel for the petitioners before us in this behalf. In the first place, it was urged that almost all the decisions of the Supreme Court on the subject have dealt with the cases where letters, memoranda or resolutions had been issued by the State Government dealing with the topic of recruitment rules and conditions of service and all these instruments have invariably been regarded as containing executive instructions or directions and not amounting to any rules framed under the proviso to Article 309 of the Constitution. Secondly it was urged that even if the proviso to Article 309 does not indicate any procedure or formality as being required to be gone through, the Maharashtra Government Rules of Business, particularly Rule 9 read with Second Schedule thereto, clearly prescribes some sort of formality which is required to foe gone through before rules could be properly framed under the proviso to Article 309 of the Constitution and relying on these two aspects it was urged by counsel for the petitioners before us that if rules or general principles governing recruitment and service conditions of Government employees took the form of letters, memoranda, Circulars or Resolutions, it would be proper to regard these instruments as containing executive instructions issued by the State Government under Article 162 and it was further urged that having regard to Rule 9 read with Second Schedule to the Maharashtra Government Rules of Business it should be held that unless the procedure or formality Indicated therein was gone through, such rules or general principles so enunciated or issued should not be regarded as rules framed under the proviso to Article 309. In our view, it is not possible to accept either of these submissions. In the first place, though by and large it has so happened that the majority of the cases which were decided by the Supreme Court were those which were concerned with letters, memoranda. Circulars or Resolutions and in many of those cases the instruments were held to contain executive instructions in the matter of service conditions but in our view, that is neither here nor there and the particular form cannot be regarded as decisive of the matter. In fact it would be apposite to refer to one decision of the Supreme Court which was concerned with & memorandum which has been held to incorporate a rule having been framed under the proviso to Article 309. In the case of E. Venkateswararao Naidu v. Union of India the question that arose for consideration was whether a certain office memorandum issued by the Ministry of Home Affairs, Government of India, raising age of compulsory retirement of Central Government servants from 55 to 58 with certain restrictions or limitations and subject to certain conditions could be regarded as a rule having the force of a rule made under the proviso to Article 309 of the Constitution or not. Originally under Rule 56 of the Fundamental Rules it was provided that except as otherwise

provided in the other clauses of that Rule that date of compulsory retirement of a Government servant, other than a ministerial servant, was the date on which he attained the age of 55 years. On November 30, 1962 the Government of India, Ministry of Home Affairs, issued an office Memorandum under which the age of compulsory retirement of Central Government servants was raised from 55 to 58 years, subject to the three exceptions mentioned in paragraph 2 thereof. Paragraph 6 of the Memorandum provided:

"Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason. This will be in addition to the provisions already contained in Rule 2 (2) of the Liberalized Pension Rules 1950 to retire an officer who has completed 30 years' qualifying service and will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. The Government servant also may, after attaining the age of 55 years, voluntarily retire after giving three months' notice to the appointing authority."

It was further specifically provided in the memorandum that the same would take effect from December 1, 1962. On July 21, 1965 Fundamental Rule 56 was amended by the Sixth Amendment so as to incorporate, with modifications, the provisions of the aforesaid Office Memorandum. The appellant who was born on 15th July 1910 attained the age of 55 on the corresponding date in 1965 and he hoped to continue in the service of the respondent until attaining the age of 58, but on 22nd July 1965 while he was holding the post of Assistant Inspecting Commissioner, Income-tax he received a notice dated 15th July 1965 compulsorily retiring him from service with effect from 2lst October 1965. He challenged the notice by filing a writ petition in Orissa High Court where he failed. In the appeal which was carried to the Supreme Court one of the contentions urged was that the notice retiring him compulsorily was invalid as the office memorandum on the strength of which it was issued did not have the force of a rule made under Article 309 of the Constitution. This contention was based on para 8 of the memorandum which provided that "The amendment of the relevant rules covering the All India Services so as to make these orders applicable to the members of those services is being undertaken in consultation with the State Governments". This contention though expressly raised was negatived by the Supreme Court. After referring to the provisions contained in the main part of Article 309 as well as the proviso thereto the Supreme Court observed thus:

"The rules so made by the President are effective subject to the provisions of any such Act. Paragraph 2 of the Office Memorandum in terms recites that "the President is pleased to direct that the age of compulsory retirement of Central servants should be 58 years," subject to certain exceptions. Paragraph 8 of the Memorandum merely re-states with particularity the true legal position which obtains under the proviso to Article 309. Nothing stated in that paragraph is capable of the construction that the Office Memorandum was not to be effective until Fundamental Rules were consequently amended. In fact, by Paragraph 7 the provisions of the Memorandum were given express effect from December 1, 1962."

It will thus appear clear from this decision of the Supreme Court that the age for compulsory retirement had been raised to 58 years subject to certain exceptions by means of office

memorandum, which merely contained the President's directions that the age of compulsory retirement of Central Government servants should be 58 years subject to certain exceptions. It will also become clear that notwithstanding the fact that paragraph 8 of the Memorandum contemplated the necessary amendment of the relevant rules covering the All India Services so as to make these orders applicable to the members of those services being separately undertaken in consultation with the State Government, the operative part of the memorandum which was to be found in para 2 was regarded by the Supreme Court as having the force of rule made under Article 309 of the Constitution, principally on the basis that para 2 which was operative contained specific direction of the President about raising of the retirement age and para 7 gave effect to that provision from 1st December, 1962. It would thus appear clear that the rule in this particular case which was regarded as a rule under the proviso to Article 309 of the Constitution had taken the form of office memorandum. Apart from this decision of the Supreme Court there are three Division Bench decisions of this Court in which though the rules or general principles governing the recruitment and service conditions of Government employees had taken the form of either a circular or o resolution, the instruments have been held as incorporating rules framed under the proviso to Article 309 of the Constitution. Appeal No. 23 of 1960 (arising out of Suit No. 387 of 1953) which was decided on 10-8-1961 (Bom) by a Division Bench of this Court consisting of Chainani, C.J. and Mody, J., dealt with a case of circular which was issued under the signature of the Chief Secretary to the Government of Bombay, on 9th December 1938 which contained provisions for transferring or suspending a Government servant during the pendency of a departmental enquiry of a serious charge against him. Similarly Spl. C. A. No. 845 of 1967 (Bom) Guru Prasad Kapoor v. Commr. (Revenue), Aurangabad which was decided on 23-3-1968 by a Division Bench consisting of Tarkunde and Nathwani, JJ. dealt with a case of resolution dated 30th July 1959 to which recruitment rules for the posts of Deputy Collectors were appended, while Misc. Petn. No. 549 of 1969 decided on 31-7-1972 (Bom) by Kantawala, J. (as he then was) and Kania, J. dealt with a case concerning recruitment rules and seniority, principles which had been issued in the form of two resolutions dated 28-7-1954 and 29-7-1963 respectively. In all these three cases though the rules or general principles touching recruitment or service conditions of Government employees had taken the form of a Circular or Resolution, these have been regarded and have been held to amount to rules framed under the proviso to Article 309. In our view, therefore, the aforesaid decisions make the position quite clear that no particular form is necessary in which a rule under the proviso to Article 309 should be framed and the rules governing recruitment end service conditions framed under the proviso to Article 309 can take any form of either a letter or a Memorandum or a Circular or an Order or a Resolution and it is not necessary that these should be styled as Rules framed under the proviso to Article 309 of the Constitution,

22. As regards formality or procedure indicated in Rule 9 of the Maharashtra Government Rules of Business read with second schedule thereto, compliance whereof was urged as a necessity the question will have to be considered whether the Business Rules framed by the Government of Maharashtra under clauses 2 and 3 of Article 166 of the Constitution are mandatory or directory and how far compliance of the relevant rule on which reliance has been placed by counsel for the petitioners could be regarded as mandatory having regard to the fact that no particular procedure as such has been prescribed by the proviso to Article 309 of the Constitution itself. We have already indicated above that so far as Article 309 is concerned, the proviso thereunder does not prescribe or

indicate any particular procedure that is required to be gone through before any rule could be framed thereunder. It is true that under Rule 9 of the Maharashtra Government Rules of Business it has been provided that all cases referred to in the Second Schedule shall be brought before the Council of Ministers in one or the other manner indicated in that rule and item (3) of the Second Schedule in terms refers to proposal for making or amending the rules regulating the recruitment and the conditions of service of persons appointed to the Public Service and posts in connection with the State (Proviso to Article 309). In other words, ordinarily having regard to this provision, any proposal for making or amending the rules regulating the recruitment and service conditions of persons appointed to the public service and posts in connection with the State is required to be made and brought before the Council of Ministers. If regard be had to item No. 12 in the Second Schedule also it will appear clear that ordinarily even the proposals for legislation including the issuance of an Ordinance under Article 213 of the Constitution--which item pertains to the domain of legislative field of the Governor--the same is required to be brought before the Council of Ministers under Rule 9. The question is what is the true legal effect of these Business Rules which have been framed by the State Government in exercise of the powers conferred by clauses 2 and 3 of Article 166 of the Constitution? In our view, these Business Rules will have to be regarded as directory. At the outset it could be stated that clause 3 of Article 166 of the Constitution in terms provides that the Business Rules which ere to be made by the Governor for regulating the conduct of business of the Government of a State are intended for "the more convenient transaction of the business of the Government of the State" and these Rules also provide for the "allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion". It will thus appear clear that these Business Rules are intended for the more convenient transaction of the business of the Government and therefore ordinarily it will be difficult to take the view that these Business Rules framed under clauses (2) and (3) of Article 166 of the Constitution are of a mandatory nature. The question as to whether the provisions of Article 166 itself are mandatory or directory in character and the further question as to whether the rules framed thereunder can be regarded as mandatory or directory have come up for consideration before the Courts on more than one occasion and the tenor of the judicial decisions appears to be that the provisions of Article 166 of the Constitution are themselves directory in nature and so are the rules framed thereunder. Three or four decisions may be referred to in this connection; one of the Federal Court, two of the Supreme Court and the fourth one of the Calcutta High Court. In the case of J.K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor reported in AIR 1947 FC 38 the Federal Court was concerned with similar Rules of Business that were made under Section 40(2) of the Government of India Act, 1935 read with Schedule 9 thereto. Head-note (b), which deals with Schedule 9 and Section 40(1) of the Government of India Act, of the report runs as follows:

"Schedule 9, Section 40(1) is not mandatory. It does not prescribe the manner and form in which orders of the Governor-General must be made in order to be valid. Hence an order of the Governor-General cannot be invalid merely because it is not expressed to be made by the Governor-General." One of the questions that was raised before the Federal Court was whether the Distribution Order that was made and approved by one member of the Council only and not by the Governor-General in Council at all will have to be regarded as invalid for non-compliance with the relevant Business Rules and this is what the Federal Court has observed in regard to this question:

"Some attempt was then made on behalf of the appellants to suggest that on some evidence tendered to the Tribunal by the Crown before the charges were framed, it might be deduced that the Distribution Order was made and approved by one Member of the Council only and not by the Governor-General in Council at all and might therefore be invalid. In this connection reference was made to the Rules of Business made under the powers conferred on the Governor-General by sub-section (2) of Section 40 which purported to authorise such action by one Member of the Council, and, it was suggested that any such delegation of authority to one Member only was ultra vires. It was submitted that the only Rules of Business which .were authorised by the Sub-section were rules in respect of business actually transacted by Members of the Council when in Council assembled, emphasis being laid on the expression "business in his Executive Council", and it was contended that no order could be made except at a meeting of the Council. In our judgment there is no substance in this point. We are of opinion that in Sub-section (2) the phrase "business in his Executive Council" really means business of the Governor-General in Council, and that the sub-section gives authority for rules of business to be made for the more convenient transaction of such business. In the circumstances it is unnecessary for the Court to consider the alleged evidence on the point."

In the case of State of U. P. v. Om Prakash Gupta the Supreme Court has observed that that Court had repeatedly held that the provisions of Article 166(1)(2) (similar to sub-sections (1) and (2) of Section 59 of the Government of India Act, 1935), are directory and substantial compliance with these provisions was sufficient. So far as Sub-clause (3) of Article 166 of the Constitution is concerned, in the case of A. Sanjeevi Naidu v. State of Madras the Court has made the following observations:

"Under the Constitution, the Governor is essentially a constitutional head end the administration of State is run by the Council of Ministers. The Constitution has authorised the Governor under Article 166(3) to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst Its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function."

The Court has also expressed the view that the cabinet is responsible to the Legislature for every action taken in any of the ministries and that is the essence of joint responsibility; that does not mean that each and every decision must be taken by the cabinet. Neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. Those matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated. In the case of Arun Kumar Bhattacharjee v. State of West Bengal the statement of law with regard to Rules of Business has been enunciated by the Calcutta High Court thus:

"Tile rules of business have been made for the convenience of public business. The opening words of clause (3) of Article 166 make it clear that the rules of business are framed by the Governor for more convenient transaction of business of the Government of the State. These rules have not been framed, and indeed were not intended, to create or confer a right upon a public servant to come and apply for a writ under Article 226 of the Constitution for violation of these rules,"

The aforesaid decisions make the position quite clear that the provisions of Article 166 of the Constitution themselves are directory in nature and further that the rules framed by the Governor under clause (3) of Article 166 must be regarded as rules having been framed for more convenient transaction of business of the Government and are directory in character and not mandatory and any non-compliance thereof would be a mere procedural defect but would not confer any right upon any citizen to, approach the Court under Article 226 of the Constitution. We are not really concerned in this case with the question as to whether for any breach of the Business Rules any citizen can approach this Court by means of a writ or not, but we are merely concerned with the true nature or character of the Business Rules framed by the Governor under clauses (2) and (3) of Article 166 and the aforesaid decisions clearly show that they are directory in nature or character. Since these Business Rules cannot be regarded as mandatory, it would not be possible to take the view that if any rules were framed by the Governor under the proviso to Article 309 without strictly following the procedure prescribed by such Business Rules, the same will not be effective or not have the force of law or that any rule framed in violation of strict compliance with the formality prescribed by such Business Rules will not amount to a rule framed under the proviso to Article 309 of the Constitution; A substantial compliance therewith would be enough. It may be stated that the Division Bench of this Court consisting of Chainani, C. J. and Mody, J. in Appeal No. 23 of 1960 decided on 10-8-1961 (Bom) has in terms taken the view that no particular form nor any particular formality has been prescribed which is required to be gone through for the purpose of making a rule under the proviso to Article 309 of the Constitution and the same view has been reiterated by a single Judge while disposing of Misc. Petn. No. 308 of 1967 decided on 19-9-1967 (Bom). In this last mentioned case (Misc. Petn. No. 308 of 1967 (Bom)) a specific contention was raised by the learned Advocate-General who appeared for the State of Maharashtra in that matter that no particular form for framing rules under Article 309 of the Constitution had been prescribed by the Constitution or by any other law nor any formalities have been prescribed as being required to be gone through before any Rule framed by the Governor acting under that power becomes effective, which contention was accepted by the Court. Having regard to the aforesaid discussion, therefore, it IS not possible to accept the contention urged by counsel for the petitioners before us that Rules or general principles embodying the recruitment rules or rules pertaining to service conditions of Government employees if they are to be regarded as rules under the proviso to Article 309 they should always be in the form of Rules or be styled as 'Rules under Art 309' or that any particular formality or procedure must be gone through before these could have the force of rules under the proviso to Article 309 of the Constitution. We would, however, like to clarify here that neither before the Division Bench nor before us was any contention raised that any of the Circulars, Orders or Resolutions concerned in the case had been issued without following the procedure laid down by the Business Rules framed by the Governor under Article 166(3) of the Constitution and no one has gone into the question whether while issuing such Circulars, Orders or Resolutions there was or has been a substantial compliance with such procedure or not.

23. The last two aspects which have to be considered in the context of the principal question referred to us by the Division Bench are whether there should be express reference or statement in the Circular or Order or Resolution issued by the duly authorised officer that the instrument has been issued under the proviso to Article 309 or that the rules or general principles contained therein have been framed in exercise of the powers conferred under the proviso to Article 309 and whether publication of such Circular, Order or Resolution in the Government Gazette is absolutely essential before the rules or general principles contained therein could have the force of rules framed under Art, 309 of the Constitution. Since some of the decided cases on which reliance was placed during the course of argument before us deal with both these aspects together we might also deal with and dispose of these aspects together.

24. On behalf of the petitioners it was specifically contended that one of the essential characteristics of a valid rule under the proviso to Article 309 would be that not merely the rule must be made under or in exercise of the proviso to Article 309 of the Constitution but the rule or the instrument containing the rule must expressly state that the same has been issued under or in exercise of the power conferred by the proviso to Art 309. It was also contended by counsel for the petitioners that any such rule or the instrument containing rules must be published in the official gazette and unless both these requirements were satisfied the rule or instrument containing the rules could not be regarded as a valid rule or rules framed under the proviso to Article 309. As a corollary to this contention it was further urged that any amendment to the rules which have been expressly made under the proviso to Article 309 and have been published in the Gazette must also be made by another instrument which must follow the same procedure viz. that it must be expressly made under the proviso to Article 309 and should be so published in the gazette. On the other hand, Mr. Gurusahani appearing for the State contended that so long as the letter, memorandum, Circular, Order or Government Resolution, whatever be the nature of the instrument, substantially deals with the subject-matter of recruitment and service conditions concerning Government employees and so long as such instrument is duly authenticated and signed by an authorised officer in the name of the Governor it would amount to making valid rules under the proviso to Article 309 of the Constitution and that it is not necessary to mention or specify the source of the power therein, that is to say, it is not necessary to mention in the instrument itself that the same has been issued under the proviso to Article 309 of the Constitution. On the question of publication it was fairly conceded by Mr. Gurusahani that unquestionably the rules or the instrument containing the rules must of necessity be published but it was not necessary that publication must be in the Official Gazette.

25. On behalf of the petitioners on the aspect of mentioning the source of power counsel placed strong reliance upon two decisions of the Supreme Court end on the aspect of publication reliance was placed upon one decision of Supreme Court, one of Andhra Pradeah High Court and the decision of the Division Bench of this Court consisting of Deshpande and Joshi, JJ. rendered in Spl. C. A. No. 815 of 1972 (Bom). In the case of B. N. Nagarajan v. State of Mysore the Supreme Court was dealing with Mysore Public Service Commission (Functions) Rules, 1967, particularly Rule 4 (1) thereof and the question was whether these particular rules were rules regarding recruitment to services under the proviso to Article 309 of the Constitution. We have already referred to this case in another context and have pointed out that having regard to the subject-matter dealt with by those rules in question, the Supreme Court came to the conclusion that those rules really dealt with the

functions of the Commission rather than laying down the rules regarding recruitment of service or posts end as such could not be regarded as rules having been framed under the proviso to Article 309 of the Constitution. But counsel for the petitioners pointed out that there was yet another ground on which those rules were held as not being rules framed under the proviso to Article 309 of the Constitution and that ground was that those rules did not expressly say so. Dealing with that aspect raised before it this is what the Supreme Court has observed:

"The High Court held that there can be little doubt that to the extent the Rules deal with the topic of regulating recruitment to Civil Services under the State, the source of the power could only be the proviso to Article 309 of the Constitution. In our opinion, these rules are not rules made under Article 309. First, the rules do not expressly say so, and secondly, the rules are dealing with the functions of the Commission rather than with laying down the rules regarding recruitment to services or posts." Reference was also made to the decision of the Supreme Court in Prabhakar Veshwant Joshi v. The State of Maharashtra, where in connection with a Government Resolution dated 29-4-1960 which set down the principles for recruitment to the Bombay Service of Engineers Class I and Class II the Court has made certain observations in para 12 of its judgment on which considerable emphasis was laid. Relying on these decisions counsel for the petitioners urged that a specific reference in the body of the instrument to the effect that the contents thereof have been issued under the proviso to Article 309 would seem necessary before the rules or general principles contained in such instrument can amount to a rule under the proviso to Article 309 of the Constitution. It is not possible to accept this submission for the simple reason that there is nothing indicated in the proviso to Article 309 that while framing the rules thereunder any express reference must be made that these rules have been so framed under the said power. In our view, the fact that a specific or express reference has been made to the source of the power or absence thereof in the instrument containing the rules would undoubtedly be a relevant factor but that same cannot be regarded as decisive of the matter; the question would turn really upon whether the instrument substantially deals with the recruitment and other service conditions of Government employee and has been duly authenticated and promulgated and if that is so then the instrument will have to be regarded as containing rules framed under the proviso to Article 309 of the Constitution even in the absence of any express reference to the source of the power under which these have been framed and conversely even if there be an express reference to the source of power, such as the proviso to Article 309, if the instrument in fact does not deal with the topic of recruitment and service conditions of Government employee, the instrument would not be regarded as containing rules under the proviso to Article 309. In this context we may point out that in the case of State of Mysore v. Padmanabhacharya though the particular notification dated 25-3-1959 with which the Court was concerned in that case expressly made a reference to the source of power under which the same had been issued, namely "In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India.....," even then, the Supreme Court took the view that the contents of that notification did not amount to any rule framed under the proviso to Article 309 of the Constitution. What was purported to be done by the notification dated 25-3-1959 in that case was that certain persons who had been wrongly retired were treated to have been rightly retired and the Supreme Court took the view that this power of validating an order which was invalid when it was made did not flow from the power conferred on the Governor to make rules regulating recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the

State. The Court went on to observe thus:

"It is certainly not a rule regulating recruitment of such persons; nor can it be said to be a rule regulating conditions of services of such persons. The rules relating to recruitment and conditions of service contemplated by the proviso to Article 309 are general in operation, though they may be applied to a particular class of Government servants. But what this notification or rule does is to select certain Government servants who had been illegally required to retire and to say that even if the retirement had been illegal, that retirement should be deemed to have been properly and lawfully made. We are of opinion that such a declaration made by the Governor-- and that is all that the notification or the rule does--cannot in any sense be regarded as a rule made under the proviso to Article 309 governing the conditions of service of persons appointed to services and posts in connection with the affairs of the State, in this view of the matter it is not necessary to decide whether a rule of this kind which is purely retrospective could be made as a rule governing conditions of service of persons appointed in connection with the affairs of the State."

It will thus appear clear that in this decision though expressly and in terms the notification in question was said to have been issued "In exercise of the powers conferred by the proviso to Article 309 of the Constitution", having regard to the contents of the notification the Court took the view that it was not a rule framed under the proviso to Article 309. To the same effect is the decision of the Supreme Court in Dr. Thimmiah'e case in . The converse case is the one to which we have already made a reference earlier being E. Venkateswararao Naidu v. Union of India , where, as we have already pointed out, the office memorandum which had been issued by the President was regarded as having the force of a rule framed under the proviso to Article 309, notwithstanding the fact that there was no reference to the source of power, namely that the same has been issued under the proviso to Article 309 of the Constitution. It seems to us clear, therefore, that the aspect whether the source of power viz. proviso to Art 309 has been specifically referred to in the instrument in question though a relevant factor would not be a decisive factor to decide the question whether the contents of the instrument could be regarded as rules framed under the proviso to Article 309.

26. Dealing next with the aspect of publication, counsel for the petitioners invited our attention to a decision of the Supreme Court in I.N. Saksena v. State of Madhya Pradesh and a decision of Andhra Pradesh High Court P. Radhakrishna v. State of Andhra Pradesh. In the former case the Court was concerned with a memorandum which had been issued by the Government of Madhya Pradesh addressed to all the Collectors and different departments which contained a decision of the Government raising the age of compulsory retirement to 58 years and on the question as to whether the memorandum itself amounted to a rule under the proviso to Article 309 of the Constitution, one of the grounds on which the Supreme Court took the view that the said memorandum could not amount to a rule under Article 309 of the Constitution was that this memorandum had never been published in the gazette. It must however be mentioned that that was not the principal reason why the memorandum was not regarded as amounting to a rule framed under the proviso to Article 309. From the phraseology employed in the memorandum and the contents thereof the Court came to the conclusion that the phraseology and the contents thereof clearly indicated that the memorandum contained a decision of the Government, intimation of which was given to all the Collectors and different departments and what is more, it was stated in the memorandum that

necessary amendments to the State Civil Service Regulations will be issued in due course. It was relying upon these factors taken cumulatively that the Court took the view that the memorandum did not amount to a rule framed under the proviso to Article 309. The other decision on which reliance was placed by counsel for the petitioners is a decision of Andhra Pradesh High Court in P. Radhakrishna v. State of Andhra Pradesh , where the Court has observed thus:

"In order to have a validly made rule under Article 309, the Governor and not the Government must first of all exercise the powers vested in him under Article 309 and make a rule regulating the recruitment etc. to the services and then publish the same in the official gazette or in any other prescribed manner for the purpose of informing the public."

There can be no doubt that since rules framed under the proviso to Article 309 touch the recruitment and service conditions of Government employees generally and since the power exercised by the President or the Governor as the case may be under the said provision is legislative in character, it is essential that there must be publication of the rules so framed under that power. But the question is whether it is absolutely essential that such rules must be published in the official gazette. Even the aforesaid decision of Andhra Pradesh High Court, on which reliance was placed by counsel for the petitioners, makes it clear that in order to have a validly made rule under Article 309, the Governor must first of all exercise the powers vested in him under Article 309 and made a rule regulating the recruitment, etc. to the services and then published the same in the official gazette or in other manner that may be prescribed for the purpose of informing the public. It is thus clear that publication could either be in the official gazette or in any other manner that may be prescribed. As we have stated above, the power which is conferred upon the President or the Governor under Article 309 of the Constitution being legislative in character end the rules that are to be framed thereunder being tantamount to laws regulating recruitment and other service conditions of the Government employees in public services or posts which will have general applicability, the publication of such rules is absolutely essential, but, in our view, it will be too narrow a view to take that such publication must necessarily be in the official gazette. We may point out that there is nothing in the proviso to Article 309 of the Constitution which prescribes this particular mode of publication in the official gazette nor has the counsel been able to draw our attention to any other provision of law which prescribes this particular mode of publication before the rules framed in exercise of that power become effective. That there should be publication of every act which is of legislative character cannot be gainsaid and this position in law has been clearly laid down by the Supreme Court in the case of Harla v. The State of Rajasthan . In that case the Court was concerned with a Resolution that was passed by Council of Ministers on 11-12-1923, whereby the Council purported to enact the Jaipur Opium Act end the question was whether the mere passing of the Resolution without due promulgation or publication of the measure was sufficient to make it law. In the context of that question the Supreme Court has made the following observations in para 8 of its judgment:

"We do not know what laws were operative in Jaipur regarding the coming into force of an enactment in that State. We were not shown any, nor was our attention drawn to any custom which could be said to govern the matter. In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be

punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way Promulgation or publication of some reasonable sort is essential,"

In view of the above observation there could be no doubt that even for the rules that are framed by the President or the Governor as the case may be under the proviso to Article 309 of the Constitution since the power is of legislative character and since the rules that are so framed are to affect Government employees in public services, it is absolutely essential that promulgation or publication of some reasonable sort of these rules would be essential, But as we have said above, there is no particular mode of publication prescribed either by the proviso to Article 309 of the Constitution or by any other law on the subject. It is unquestionably necessary that there should be some publication in the sense that the rules so framed whatever form they take, say a letter memorandum, Circular, Order or Resolution, must be made known to all the persons who are likely to be affected thereby and such persons must have access to these rules or to these instruments; in that sense promulgation or publication of rules is undoubtedly essential. But there is no requirement that publication should be in a particular manner viz. by publication in the official gazette.

27. A brief reference may now be made to the three Division Bench decisions of this Court, where both these aspects were canvassed and the Division Benches have taken the view that specific reference to the source of power was not essential and that publication in the official gazette was also not regarded as an essential aspect. The first of the decisions in which the question arose was Appeal No. 23 of 1860 which was decided by Chief Justice Chainani and Mody, J. on 10-8-1961 (Bom). As stated earlier, that was a case which dealt with the question as to whether Circular dated 9-12-1938 which provided for transfer of a Government servant and his suspension during departmental enquiry on a serious charge could be regarded as a rule framed under the relevant provisions of the Government of India Act, 1935 and continued under Article 313 of the Constitution or not. A specific contention was raised on behalf of the plaintiff that this particular Circular contained executive instructions issued by the Government, that it did not have the force of a rule and that consequently it did not continue in force after the coming into force of the Constitution under Article 313 of the Constitution. Repelling that contention the Division Bench observed thus:

"The circular affects conditions of service. It contains general directions which all Government servants under the control of the Government of Bombay had to follow. It was also issued by order of the Governor of Bombay, who was the authority competent to make, rules in this behalf. No other

formality was required for making a rule on this subject. Although, therefore, the circular is not issued in the form of a rule, as it affects conditions of service of all persons serving in connection with the affairs of the Bombay Province and as it was issued by the authority competent to make rules in this behalf, it can, in our opinion, be regarded as rule. If it is so regarded, as we think it should be. it continued to remain in force under Article 313 of the Constitution."

28. In Spl. C. A. No. 845 of 1967 which was decided on 23-3-1968 (Bom) by Tarkunde and Nathwani, JJ. the Court was concerned with a Resolution dated 30th July 1959 to which recruitment rules to the posts of Deputy Collectors were appended and the said Resolution was issued by order and in the name of the Governor of Bombay and the same could have been issued only under the proviso to Article 309 of the Constitution which was the only provision under which the Governor of Bombay could have issued the rules appended to the Resolution. A specific contention was raised before the Division Bench that there was no reference to Article 309 of the Constitution either in the Resolution or the rules and that neither the Resolution nor the rules were published in the Government gazette, and, therefore, the Resolution together with its annexure did not amount to any rules framed under the proviso to Article 309. Reliance was placed in support of the contention upon the decision of the Supreme Court in Saksena's case , The Division Bench distinguished the Supreme Court decision in Saksena's case on two or three grounds. It was pointed out that in Saksena's case the Court was concerned with the Memorandum which was issued by the Government of Madhya Pradesh to all the Collectors in the State and which raised the age of compulsory retirement of Government servants to 58 years, that is to say, the memorandum had been issued in the form of a letter and not in the form of rules, whereas in the case before the Division Bench they were concerned with a Resolution to which were appended the regular rules which were designed to regulate recruitment to the posts of Deputy Collectors. Secondly it was pointed out that before the Supreme Court Memorandum itself announced that necessary amendments to the State Civil Services Regulations would be 'issued in due course' and the memorandum was subsequently followed by a Notification issued expressly in exercise of the power conferred by the proviso to Article 309 of the Constitution, which notification did not contain one of the clauses included in the Memorandum while in the case before it there was no subsequent Notification under Article 309 of the Constitution but the Resolution dated 30-7-1959 itself directed that the Political and Services Department should 'issue necessary correction slips to the Bombay Civil Services Classification and Recruitment Rules'. After pointing put these features of distinction the Division Bench proceeded to observe thus:

"Since the Political and Services Department was competent to make any rule under Article 309 of the Constitution, this provision in the Resolution clearly meant that the Resolution by itself had brought about the necessary amendments in the Bombay Civil Services Classification and Recruitment Rules."

Jn another part of the judgment after referring to the Division Bench judgment in Appeal No. 23 of 1960 (Bom) the Court observed as under:

"For similar reasons we are of the view that the Resolution and Recruitment Rules of 30th July 1959 were statutory rules under the proviso to Article 309 of the Constitution, although no express

reference to Article 309 has been made therein."

The Court went on to observe further thus:

"Although, in our view, the said Resolution and recruitment rules do not cease to have statutory force on the grounds urged by Mr. Singhavi, it appears to us desirable to emphasise that such rules should normally be issued expressly under the proviso to Article 309 and should also be published in the Government Gazette. Mention of the proviso to Article 309 would make it easy to distinguish such rules from administrative instructions. Moreover, these rules have the force of law, and it is obviously necessary that those who are governed by the law should have the means of knowing what the law is. In the present case the petitioner and his legal advisers, for no fault of theirs, were unaware of many of the Government Resolutions which regulated the petitioner's conditions of service, including his right to promotion to the post of Deputy Collector. The first affidavit filed on behalf of the State Government did not also refer to some of the Resolutions which had a direct bearing on the issues arising in this case. We shall have to take these facts into consideration in deciding what order should be made as to the costs of this petition." It would thus appear from what has been quoted above, that the Division Bench was clearly of the view that neither a specific reference to source of power was regarded as absolutely essential nor was a publication thereof in the official gazette absolutely essential but it was highly desirable that normally such rules should be issued expressly under the proviso to Article 309 and should also be published in the Government Gazette. In other words, these aspects were regarded by the Division Bench as highly desirable but they did not affect the question of validity of the rules or the fact that the rules had been framed under the proviso to Article 309 of the Constitution. The third decision of the Division Bench in Misc. Petn. No. 549 of 1969 rendered by Kantawala, J. (as he then was) and Kania, J. on 31-7-1972 (Bom) dealt with a case of recruitment rules and seniority principles which were contained in two Resolutions, one dated 28-7-1954 and the other dated 29-7-1963 respectively and a specific contention was raised that these recruitment rules and seniority principles which had been issued in the form of two Government Resolutions were not statutory rules at all but were mere administrative instructions and the same could not be treated as binding as the same were in conflict with Bombay Civil Services Rules framed under the proviso to Article 309 of the Constitution. A two-fold contention was specifically urged that both in the case of recruitment rules and seniority principles there was no statement made in the Resolutions dated 28-7-1954 and 29-7-1963 respectively to the effect that these rules or principles had been framed in exercise of the power conferred on the Governor under Art 309 of the Constitution and further thase rules and principles had not been published in the official gazette. Relying upon the relevant portions of the judgments in the two oases (Appeal No. 23 of 1960 (Bom) and Spl, C. A. No. 845 of 1967 (Bom)) the Division Bench negatived the contention and concluded thus:

"In view of these decisions and the reasons given by us above, we are of the view that both the Recruitment Rules and the Seniority Principles in paragraph A referred to above are statutory rules framed in exercise of the power conferred under the proviso to Article 309 of the Constitution, notwithstanding the fact that there is no express statement in the respective resolutions that these were framed in exercise of the powers conferred under Article 309 or the proviso thereto and notwithstanding the fact the same have not been published in the official gazette."

To the similar effect are the two judgments of single Judges, one in Misc. Petn. No. 308 of 1967 decided on 19-9-1967 (Bom) and the other in Misc. Petn. No. 672 of 1968 which was decided on 13-11-1973 (Bom). It is not necessary for us to refer to these two decisions of the single Judges in great detail as it would suffice to say that in both these matters each learned single Judge has followed the view taken in the judgment delivered by the Division Bench in Appeal No, 23 of 1960 (Bom).

29. Reference may now be made to the decision of the Division Bench, which, as said above, has taken a contrary view, namely that delivered by Deshpande and Joshi JJ in Spl. C. A. No. 815 of 1972 decided on 15-1-1974 (Bom). The Court in that case was concerned with rules that were framed under Government Resolution dated 21-11-1941 which were referred to in the judgment as the 1941 Rules, under Government Resolution dated 29-4-1960 which were referred to in the judgment as the 1960 Rules and under Government Re-solution dated 29-7-1963 which were referred to in the judgment as the 1963 Rules and the contention was that these Rules -- the 1941 Rules, the 1960 Rules and the 1963 Rules--were in the nature of executive instructions and not statutory rules framed by the Governor in exercise of the power conferred under Article 309 of the Constitution. It does appear that that contention was accepted and since even the 1963 Rules were held to be executive instructions, the decision comes in apparent conflict with the view taken by the Division Bench consisting of Kantawala, J, (as he then was) and Kania, J. in Misc. Petn. No. 549 of 1969 (Bom), where the very 1963 Rules had been held to be statutory rules framed under the proviso to Article 309 of the Constitution. The finding that the 1963 Rules which were issued in the form of Government Resolution dated 29-7-1963 amount to pure executive instructions is to be found in the following observations made by Deshpande and Joshi, JJ.:

"..... Unlike the temporary incumbents of the posts in the cadre of Deputy Engineers, direct recruits get vested right not only to the posts with reference to which the appointments were made but also to the place in seniority list prepared in terms of Rule 8 (iii) (of 1960 Rules). This process thus involves even affecting the vested rights of the direct recruits appointed before 29-7-1963. Such divesting could not be done by such executive Fiat (viz. Resolution of 29th July 1963). This obviously leads to an inference that 1963 Rules were never intended to be applied to the Engineering Services and provision in clause (B) was made in the opening paragraph of the said 1963 Rules to make this clear."

It does appear that by adopting the aforesaid process of reasoning the Division Bench consisting of Deshpande and Joshi, JJ. could be said to have taken the view that so far as the 1963 Rules which were issued under the Government Reso-lution of 29th July 1963 amounted to mere executive instructions and the very Rules have been held to amount to Rules framed under the proviso to Article 309 of the Constitution by the Division Bench consisting of Kantawala and Kania, JJ. in Misc. Petn. No. 549 of 1969 (Bom) and it was precisely because of this conflict that the matter was referred to the Full Bench by the Division Bench. However, if regard is had to certain other passages which occur in that judgment it would appear clear that the particular view was taken on the basis of certain concession made by counsel appearing for both the parties before that Bench and the point also does not seem to have been argued seriously by counsel for respondents Nos. 2 and 3. These aspects would become clear if paragraph 5 of the judgment is carefully analysed. The material

portion of paragraph 5 of the judgment runs as follows "Before we proceed to examine the contentions of the learned advocates advanced before us, it will be convenient to mention that it was_not disputed by the learned advocates before us that 1941 Rules. 1960 Rules, 1963 Rules or for that matter 1970 Rules are in the nature of executive instructions and not the statutory rules or rules framed by the Governor in exercise of the powers under Article 309 of the Constitution. A faint attempt was made by Mr. Paranjpe, learned advocate for respondents Nos. 2 and 3 to suggest that 19.60 Rules and 1970 Rules can be said to have been framed by the Governor under Article 309 of the Constitution. He relied on the recitals in both the rules at the fag-end of the text, indicating that the seme have been issued by the order and in the name of the Governor of Maharashtra. The contention on the face of it is devoid of any substance inasmuch as all executive orders are required to be issued in that form in compliance with the Article 166 of the Constitution. We shall, therefore, have to proceed on the basis that all these rules are in the nature of mere executive instructions, it was also not disputed that while the conditions of service of the Government employees can be altered unilaterally retrospectively by competent legislative measures, the a.bove Government Resolutions under consideration being merely executive instructions cannot have any retrospective effect whatsoever."

The aforesaid passage which occurs in para 5 of the judgment really brings out two or three aspects very clearly. In the first place, it will appear clear that before the Division Bench no serious dispute was raised by learned advocates who appeared before them that the 1941 Rules, the 1960 Rules, the 1963 Rules and for that matter the 1970 Rules should not be regarded as executive instructions but statutory rules framed by the Governor in exercise of the power conferred by Art 309 of the Constitution and the Division Bench proceeded to consider the matter before it on the assumption that all these Rules were in the nature of mere executive instructions. Secondly there was a faint attempt made by Mr. Paranjpe, learned advocate who appeared for respondents Nos. 2 and 3 to suggest that 1960 Rules and 1970 Rules could be said to have been framed by the Governor under Article 309 of the Constitution, but the point does not seem to have been pressed before the Bench. Thirdly even this faint argument was sought to be canvassed on the mere aspect that these Resolutions contained statutory rules under Article 309 because of the endorsements found at the foot of each of the Government Resolutions to the effect that each had been issued 'by order and in the name of the Governor of Maharashtra'. In our view, the argument was rightly rejected by the Division Bench, inasmuch as, the mere presence of such endorsement, es pointed out by us earlier, would be equivocal and of no consequence. It will thus appear clear that no other aspect was pressed into service and the question whether the several Rules viz. the 1940 Rules, the 1960 Rules, the 1963 Rules or the 1970 Rules had been really framed by the Governor under the proviso to Article 309 of the Constitution or not was concluded by concession made by counsel for the parties and the entire matter was dealt with on the assumption that these were in the nature of executive instructions. Moreover, it is also clear from the entire judgment that none of the earlier Division Bench judgments was cited before that Bench. In any case so far as the 1963 Rules are concerned, which were issued under the Government Resolution dated 29-7-1963, we agree with the finding recorded by the Division Bench which disposed of Misc. Petn. No 549 of 1969 (Bom) that these are the Rules framed under the proviso to Article 309.

30. The only thing that remains is to deal with the observations of the Supreme Court in P. Y. Joshi's case. Strong reliance was placed by counsel for the petitioners on the observations made by the Court in para 12 of the judgment at page 144 of the report which run as follows:

"We cannot, therefore, accept the contention of Shri Gupte that a promo-tee officiating Deputy Engineer Class II is not entitled to be considered for promotion under Rule 7 to the post of an officiating Executive Engineer unless he has put in 7 years of service from the date of confirmation. On the other hand, the subsequent resolution of the Government of 1963 makes it abundantly clear that the seniority of promotees should be considered as from the date of promotion to officiate continuously irrespective of whether the appointments are made in temporary or permanent vacancies. It is no doubt submitted that this does not have the force of rules and cannot therefore have the effect of amending the Rules of 1960. As we have already held on an interpretation of the Rules of 1960 that they do not support the contention of the petitioners, the question whether the resolution has the force of rules may not be relevant in this context, but nonetheless in our view, there is force in the contention of Shri Kumaramangalam, learned Advocate for the respondents, that even the 1960 Rules have no statutory force and are no better than the executive instructions issued from time to time by means of resolutions. It may be observed that the rules referred to are part of the resolution of 1960. The resolution itself leys down the principles and in the end formulates those principles in terms of rules, which however are not purported to be made under any provision of law or even under Article 309. There also ie nothing to indicate that the procedure and formalities required for making rules have been gone through."

We may point out that the aforesaid decision has been referred to by the Division Bench of this Court while disposing of Misc. Petn, No. 649 of 1969 (Bom) and with regard to those observations it has been pointed out by that Bench that "All that has been observed by their Lordships of the Supreme Court is that there is force in the contention that even the 1960 Rules have no statutory force and are no better than the executive instructions. This cannot be looked upon as a decision of the Supreme Court or even as obiter dicta of the Supreme Court" and that the same was regarded as merely a passing observation made in the context of contention that was urged by Shri Kumaramangalam, learned advocate for the respondents before the Supreme Court. The observations themselves clearly indicate that the Court had already held on an interpretation of the rules of 1960 that they did not support the contention of the petitioners and therefore the question whether the resolution had the force of rules was not relevant in that context. In that situation the observations will have to be regarded as casual or passing observations made by the Supreme Court 31-32. Having regard to the above discussion, our answer to the first question referred to us would be as follows:

Circulars, Orders or Resolutions or parts thereof laying down the rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra" and intended to be applicable straightway can amount to rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution, although the said Circulars, Orders or Resolutions do not expressly state that the same are made or issued in exercise of the powers

conferred under the proviso to Article 309 of the Constitution of India and are not published in the Government Gazette.

33. In view of the aforesaid answer to Question No. 1, in our view, questions Nos. 2 and 3 do not arise and accordingly they are not answered.

34. Costs to be costs in the petitions and would be dealt with by the Division Bench,

35. Order accordingly.