

BEFORE

HON'BLE MR. JUSTICE UJJAL BHUYAN  
HON'BLE MR. JUSTICE KALYAN RAI SURANA

Judgment & Order

Ujjal Bhuyan, J.

Basic challenge in this bunch of writ petitions and writ appeals is to the constitutionality of the Assam Secondary Education (Provincialised) Service (Amendment) Rules, 1991 and the Assam Secondary Education (Provincialised) Service Rules, 2003, more particularly, Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2012. Incidental relief claimed is for a direction to fill up the posts of Headmaster and Principal of High Schools and Higher Secondary Schools in accordance with the provisions of the Assam Secondary Education (Provincialised) Service Rules, 1982. In the writ appeals, the additional challenge is to the judgments of the learned Single Judge rejecting the individual grievance of the appellants for holding the said posts by relying upon the Assam Secondary Education (Provincialised) Service Rules, 1982.

02. Raison d'etre for the aforesaid challenge is insistence on B.Ed./BT degree as an essential educational qualification for appointment to the aforesaid posts which was not the requirement under the unamended Assam Secondary Education (Provincialised) Service Rules, 1982 and the Assam Secondary Education (Provincialised) Service Rules, 2003 which are banked upon by the petitioners and appellants, since they do not possess the said qualification; as it was not one of the prescribed qualifications when they had entered into service.

03. There is hardly any factual controversy which may require a detailed factual narration for the purpose of adjudication of the present bunch of writ petitions and writ appeals. However, to put the matter in proper perspective, it would be appropriate to provide a brief legislative narration.

04. Assam Secondary Education (Provincialisation) Act, 1977 (1977 Act) was enacted by the Assam Legislative Assembly, which was gazetted and notified, to provide for provincialisation of secondary education covered by the deficit-scheme of the Government of Assam. Preamble to the 1977 Act says that it was expedient to provincialise secondary education covered by the deficit-scheme of the Government of Assam for its improvement and for better control and management of such education in the State of Assam. As per the definition clause, Section 2(vi), an existing employee has been defined to mean an employee who was on the appointed day in the regular pay roll, against regular sanctioned post and whose appointment had been approved by the school authority. Appointed day has been defined under Section 2(i) to mean the day on which the 1977 Act came into force. Deficit School has been defined under Section 2 (iii) to mean a school receiving grants from the State Government under the deficit-scheme of grants-in-aid. As per Section 2 (x), secondary education has been defined to mean education imparted up-to Class-XII in different types of schools. Section 3 of the 1977 Act, which is the main provision, provides that on and from the appointed day, all employees of secondary schools in the State of Assam shall be deemed to have become employees of the State Government of Assam with effect from the date of appointment on the terms and conditions mentioned therein. The said provision is however, subject to the provision of Article 30 of the Constitution of India dealing with minority institutions. The terms and conditions include applicability of all rules, including service rules and conduct and discipline rules of Government servants, payment of salary and allowances as may be prescribed and encadrement of the employees in appropriate cadres. As per Sub-section (4) of Section 3, the inter-se seniority of the employees of a cadre or class shall be determined on the basis of principles laid down in the rules framed under the 1977 Act. Section 4 deals with superannuation and pension. As per Section 5(1), administration, management and control of all employees of all secondary schools coming within the

purview of the 1977 Act shall vest in the State Government from the appointed day. Section 8 is the rule making provision. As per Sub-section (1), State Govt. may, by notification, published in the Official Gazette, make rules for giving effect to the provisions of the 1977 Act. Sub-section (2) lays down the matters in respect of which rules may be framed by the State Government. As per Sub-section (3), such Rules shall be laid before the Assam Legislative Assembly in the manner provided.

05. In exercise of powers conferred under Section 3(3) of the 1977 Act, the Assam Secondary Education (Provincialised) Service Rules, 1982 (1982 Rules) were framed to regulate the service conditions of the teachers and the employees of the secondary schools. Rule 2(k) defined service to mean the Assam Secondary Education (Provincialised) Service. Rule 3 mentioned the classes and cadres comprising the service which included Principal of Higher Secondary Schools in Class-I (Gazetted), Headmaster of High Schools and Superintendents of High Madrassas in Class-II (Gazetted) etc.. While Rules 7 and 8 dealt with direct recruitment to the post of Post Graduate Teacher, Graduate Teacher and Junior Teacher; Rule 9 dealt with recruitment by promotion to the posts of Principal, Headmaster, Superintendent etc.. The educational qualifications required for appointment to the various posts comprising the service were laid down in Schedule-II to the Rules. For Post Graduate Teacher, the qualification prescribed was 2nd Class Post Graduate degree in the concerned subject whereas, for Graduate Teacher of High Schools and High Madrassas, it was Bachelor of Arts or Science or Commerce. For the post of Headmaster, which was to be filled up by way of promotion from the select list of Vice Principal, Assistant Headmaster and Post Graduate Teacher, the requirement was having 15 years of continuous teaching experience in the service; for the post of Superintendent, it was to be filled up from the select list of Assistant Superintendents having 15 years of continuous teaching experience in the service. Post of Principal was to be filled up from the select list of Headmaster and Vice Principal having 15 years of continuous teaching experience in the service. Thus it would be evident that under the 1982 Rules, B.Ed./BT degree was not a qualifying criteria for either entering into service or for promotion to the above posts.

06. In exercise of the powers conferred under the proviso to Article 309 of the Constitution of India, Governor of Assam made the Assam Secondary Education (Provincialised) Service (Amendment) Rules, 1991 (1991 Rules) to amend the 1982 Rules. As per Rule 2, preamble of the 1982 Rules was amended by making the 1982 Rules, a set of rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India to regulate the conditions of service of the teachers of the secondary schools which had been provincialised under 1977 Act.

07. Though the 1991 Rules laid down other provisions, those are not necessary to be gone into at this stage, except Rule 8, which dealt with amendment of Rule 9 of the 1982 Rules. As per amended Rule 9 of the 1982 Rules, proviso to Sub-rule (3) mentioned that in all cases, preference shall be given to candidates having a Post Graduate degree in teaching or a degree in Post Graduate teaching (B.Ed. or BT) for the post of Principal. Likewise, as per proviso to Sub-rule (4) of Rule 9 of the 1982 Rules, for the post of Headmaster or Superintendent, preference shall be given to candidates having B.Ed. or BT degree, which was also the provision for the post of Vice Principal.

08. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, Governor of Assam made the Assam Secondary Education (Provincialised) Service (Amendment) Rules, 1997 (1997 Rules) to further amend the 1982 Rules. As per the 1997 Rules, further amendments were made in Rule 8 of the 1982 Rules which dealt with direct recruitment of Graduate Teachers and Post Graduate Teachers. In the selection of High School Teachers, a credit of 65 marks was earmarked for B.Ed./M.Ed. examination whereas, for Teacher of Higher Seconda

ry Schools, the credit for B.Ed./M.Ed. was 85 marks.

09. In the year 2003, the State decided to introduce a new set of rules to regulate the recruitment and conditions of service of persons appointed to the Assam Secondary Education (Provincialised) Service. Accordingly, in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, Governor of Assam made the Assam Secondary Education (Provincialised) Service Rules, 2003 (2003 Rules). Relevant provisions are Rules 12(d), 14(2) and (4). As per Rule 12(d), minimum qualification for the post of Principal of Higher Secondary School, which is to be filled up by direct recruitment, were -

- i) 15 years of teaching experience as Post Graduate Teacher in Higher Secondary School/Higher Secondary and Multipurpose School or 17 years of teaching experience as Graduate Teacher in any Higher Secondary School/Higher Secondary and Multipurpose School;
- ii) Must not be less than 40 years of age; and
- iii) The candidate must possess commanding personality, administrative ability and integrity.

10. As per Rule 14(2), the post of Headmaster/Headmistress/Superintendent shall be filled up by promotion from school wise seniority list. Sub-rule (4) lays down the eligibility criteria as under: -

- i) Minimum qualification shall be Graduate in Arts or Science or Commerce with B.T or B.Ed. degree; and
- ii) 10 years of teaching experience as Graduate Teacher.

11. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India, Governor of Assam made the Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2012 (2012 Rules) to amend the 2003 Rules. Rule 3 of the 2003 Rules has been amended by including cadres of Principal, Vice Principal, Post Graduate Teacher and Headmaster/Superintendent in Class-II (Senior); Graduate Teacher is included in Class-II (Junior), so also Demonstrator. Rule 12 of the 2003 Rules was substituted by making MA/M.Sc./M.Com. with BT/B.Ed. degree as one of the minimum eligibility qualifications for the post of Principal in Higher Secondary Schools. As per Rule 12, Schedule-I of the 2003 Rules was amended by providing 100 marks for BT/B.Ed. examination in the selection for Post Graduate Teacher as well as Demonstrator. Schedule-II was also substituted by introducing B.Ed./BT degree as one of the minimum educational qualifications for Post Graduate Teacher, Graduate Teacher, Demonstrator etc. with the proviso that Government may relax the requirement of B.Ed./BT degree up-to 01.01.2015, provided that selected candidates not having the above qualification must acquire such qualification within 5 years of joining.

12. An advertisement dated 02.11.2010 was issued by the Director of Secondary Education-cum-Member Secretary, State Selection Board, Assam for selection for the purpose of appointment to the posts of Principal, Vice Principal, Headmaster/Headmistress/Superintendent and Assistant Headmaster/Assistant Headmistress/Assistant Superintendent as per provisions of the 2003 Rules. For the posts of Headmaster/Headmistress/Superintendent and Assistant Headmaster/Assistant Headmistress/Assistant Superintendent of High Schools and High Madrassas, in addition to other qualifications, it was mentioned that a candidate must possess BT/B.Ed. degree. This advertisement led to filing of a large number of writ petitions before this Court including WP(C) No.1526/2012 (Mahendra Nath Mudo Vs. State of Assam). In this writ petition, vires of the 1991 Rules as well as the 2003 Rules were assailed. Prayer made was for quashing of the selection process/appointment pursuant to the advertisement dated 02.11.2010 and for a direction to the respondents to fill up the posts of Headmaster/Headmistress in the High Schools of the State in accordance with the provisions of the 1982 Rules. Some writ petitions were filed assailing individual selection and some relating to holding of charge of the office of Headmaster/Headmistress. Those writ petitions were dismissed by

the learned Single Judge which led to filing of writ appeals. Resultant writ appeals together with other writ petitions were heard along with the case of Mahendra Nath Mudoi, which was the lead case. By the common judgment and order dated 18.12.2012, the bunch of writ petitions and writ appeals were disposed of by declaring the 1991 Rules and the 2003 Rules as unconstitutional, null and void. However, the Division Bench was not inclined to annul the process of selection and appointments based on the 1991 Rules and the 2003 Rules; thus, it was declared that invalidation of the 1991 Rules and the 2003 Rules would be prospective in effect.

13. State of Assam filed a petition for review of the aforesaid common judgment and order dated 18.12.2012, which was registered as Review Petition No.21/2013 (in WP(C) No.1526/2012). By judgment and order dated 20.12.2013, review petition filed by the State was allowed and judgment and order dated 18.12.2012 was recalled. The writ petitions and writ appeals were restored to their respective files for hearing afresh by the Division Bench on merit.

14. Special Leave to Appeal petition was filed by some of the petitioners/appellants before the Supreme Court against the judgment and order dated 20.12.2013 in Review Petition No.21/2013, which was registered as Petition for Special Leave to Appeal (Civil) No.8991/2014. The said petition was disposed of by the Supreme Court vide order dated 21.04.2014 leaving the matter to be decided by the High Court on its own merit in terms of the observations made in the review judgment with one clarification, namely, that High Court should re-determine the controversy uninfluenced by the decisions rendered by the Full Bench in Jamaluddin Ahmed Vs. State of Assam, 2012 (1) GLT 1 and Kanak Chandra Nath Vs. State of Assam, 2012 (1) GLT 728.

15. In the meanwhile, as stated above, the 2012 Rules were made providing for BT/B. Ed degree as qualifying criteria for the post of Principal as well as for the posts of Post-Graduate Teacher, Demonstrator, Graduate Teacher, etc. Thereafter, advertisement dated 11.09.2012 was issued for the post of Graduate Teacher with such qualification. This led to filing of another batch of writ petitions seeking quashing of the said advertisement as well as for declaration of the 2012 Rules as unconstitutional.

16. On 14.05.2015, advertisement was issued by the Director of Secondary Education, Assam for the post of Headmaster/Superintendent and Assistant Headmaster/Assistant Superintendent of provincialised High Schools and High Madrassas of the State as per the 2003 Rules, with possession of BT/B. Ed degree as one of the mandatory educational qualifications. Similar advertisement dated 27.05.2015 was issued by the Bodoland Territorial Council (BTC) Selection Board. At this stage, WP(C) No.4514/2015 (Labanya Bhuyan Vs. State of Assam) came to be filed seeking quashing of the aforesaid two advertisements while reiterating the prayers made in the earlier bunch of writ petitions and writ appeals.

17. Several writ petitions were filed in the year 2016 relating to appointment of Principal in the provincialised Higher Secondary Schools/Higher Secondary and Multi-purpose Schools primarily with the grievance that post of Principal should be filled up as per the 1982 Rules or as per the unamended 2003 Rules (prior to 2012) by doing away with the requirement of having B. Ed/BT degree.

18. Basic grievance of the petitioners and appellants is that while they had entered service as Graduate Teacher and Post-Graduate Teacher, there was no requirement of having B. Ed/BT degree. Consequently, they do not possess such qualification. Change of qualification for appointment to the post of Headmaster, Principal, etc by making B.Ed/BT degree mandatory has rendered the petitioners and appellants ineligible for such posts notwithstanding the fact that they fulfill other qualifications and are senior teachers of the respective schools. Addition

al grievance of the Post Graduate Teachers is that unlike Graduate Teachers, they were not provided any opportunity to acquire the additional qualification. Because of the new criteria brought in by the 2003 Rules, further reinforced by the 2012 Rules, they are staring at the prospect of their juniors overtaking them and being appointed as Headmaster and Principal respectively. Primary legal contention of the petitioners is that the 1982 Rules were framed under the 1977 Act and thus were statutory rules. Such statutory rules could not have been amended or repealed by rules framed under the proviso to Article 309 of the Constitution of India. On this count itself, both the 1991 Rules and the 2003 Rules are unconstitutional.

19. In WP(C) No.4514/2015 (Labanya Bhuyan Vs. State of Assam), an interim order was passed on 07.08.2015 to the effect that selection process may be continued but finalization of the select list shall not be done till disposal of the batch of writ petitions.

20. State has filed two affidavits. In the affidavit filed by Md. Nawab M. Hussain, Secretary to the Government of Assam, Education (Secondary) Department on 01.06.2012, preliminary objections have been raised as to the maintainability of the writ petition. Be it stated that the said affidavit was filed in the case of Mahendra Nath Mudoi. It was averred that cause of action had arisen on 30.12.1991 when the 1991 Rules were framed amending the original 1982 Rules. These writ petitions were filed in the year 2012 after more than 2 decades and thus are hit by undue delay, laches, acquiescence and waiver. Persons appointed pursuant to the advertisement dated 02.11.2010 were not made parties to the writ petitions though they are necessary parties. About 880 persons were appointed as Headmasters which fact was known to the petitioners but none of them were made respondents. Therefore, writ petitions should be dismissed for non-joinder of necessary party. That apart, there being no challenge to the appointment orders issued in favour of the selected candidates following the selection process pursuant to the advertisement dated 02.11.2010, writ petitions are not maintainable. Petitioners did not institute any challenge when the 1991 Rules were made amending the 1982 Rules. Even when the 2003 Rules were made, they remained silent. It was only after selection process was over following the advertisement dated 02.11.2010 that the writ petitions came to be filed.

21. In the second affidavit filed on 23.07.2012, the said Secretary stated that the 1982 Rules were not framed under the 1977 Act and, therefore, preamble to the 1982 Rules was rightly amended by the 1991 Rules. There was no illegality in this. Thus, following amendment made in the year 1991, 1982 Rules came to be framed under the proviso to Article 309 of the Constitution of India. That being the position, there was no question of the field of recruitment and conditions of service of persons belonging to the Assam Secondary Education (Provincialised) Service being occupied by any statutory rules. Incorporation of B. Ed/BT degree as an essential qualification for appointment as Headmaster was challenged before this Court which was, however, rejected in Mukul Chandra Bordoloi Vs. State of Assam, 2012 (1) GLT 739 and again in Kanak Chandra Nath (supra). As such, challenge made in the present bunch of writ petitions is barred by the principle of constructive res judicata. Therefore, it is contended that the 1982 Rules being framed under the proviso to Article 309 of the Constitution of India, State of Assam has the power and competence to amend as well as repeal the 1982 Rules by invoking power under the proviso to Article 309 of the Constitution of India.

22. Petitioners in their reply affidavit have refuted the contentions made by Md. Nawab M. Hussain, Secretary to the Govt. of Assam, Education (Secondary) Department on behalf of the respondents and have reiterated their contentions as averred in the writ petition. It is contended that the 1982 Rules were statutory rules framed under the 1977 Act which occupied the field relating to recruitment and conditions of service of persons belonging to the Assam Secondary Education (Provincialised) Service. Such statutory rules could not have been repealed by

the 2003 Rules made by the Governor of Assam in exercise of powers under the proviso to Article 309 of the Constitution of India. Therefore, the 2003 Rules are wholly illegal and non est in the eye of law.

23. We have heard Mr. DK Mishra, learned Senior Counsel assisted by Ms. S Jahan, Advocate; Mr. KN Choudhury, learned Senior Counsel assisted by Ms. Ahana Deka, Advocate; Mr. PK Goswami, learned Senior Counsel assisted by Ms. B Choudhury, Advocate; Mr. IH Saikia, Mr. MU Mondal, Ms. P Barman, Ms. D Borgohain, Mr. NM Hazarika and Ms. S Kanungoe, Advocates for the petitioners and appellants. Also heard Mr. D Saikia, learned Senior Addl. Advocate General, Assam assisted by Mr. A Deka, Standing Counsel, Education Department for the State; Mr. AK Bhattacharya, learned Senior Counsel assisted by Mr. AK Chaudhury, Advocate; Mr. MK Choudhury, learned Senior Counsel assisted by Mr. N Barua, Advocate; Mr. SK Goswami, Mr. G Goswami, Mr. SK Das, GZ Ahmed and Mr. S Saikia, Advocates for the other respondents.

24. Mr. D.K. Mishra, learned Senior counsel for the petitioners, submits that the 1977 Act was enacted for provincialisation of secondary schools in the State of Assam. Section 8 of the 1977 Act empowers the State Government to frame rules to give effect to the provisions of the 1977 Act. Accordingly, State Government framed the 1982 Rules which was gazetted and had the sanction of the Assam Legislative Assembly. Though the 1982 Rules were ostensibly framed under Section 3(3) of the 1977 Act, it was a case of wrong mentioning of the provision inasmuch as the 1982 Rules were in fact framed under Section 8 of the 1977 Act. Under the 1982 Rules, there was no requirement of B.T./B. Ed degree for appointment as Headmaster. It was by the 1991 Rules that amendment was made in Rule 9 of the 1982 Rules providing for preference to those having B. Ed/BT qualification. Ultimately by the 2003 Rules, 1982 Rules were repealed. The 1982 Rules were statutory rules framed under the 1977 Act and occupying the field relating to recruitment and conditions of service of persons to the Assam Secondary Education (Provincialised) Service. On the other hand, 1991 Rules were framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India amending the preamble of the 1982 Rules by making it a set of rules framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. This is impermissible in law. Thereafter, the 2003 Rules were framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India not only on the subject covered by the statutory 1982 Rules but also repealing the same, which again is impermissible in law.

25. Learned Senior counsel, referring to Article 246(3) of the Constitution of India read with Entry 41 of List-II of the Seventh Schedule submits that State is empowered to frame laws to regulate recruitment and conditions of service of its employees. On the other hand, proviso to Article 309 provides that till such time the State legislature frames law regulating recruitment and conditions of service of its employees, it shall be competent for the Governor of the State to make rules regulating recruitment and conditions of service of the State employees. Thus, under the proviso to Article 309, Governor steps in when the legislature do not act. In the instant case, the 1982 Rules were already framed by the State legislature under the 1977 Act occupying the field of recruitment and conditions of service of persons entering into and belonging to the Assam Secondary Education (Provincialised) Service. Therefore, it was not open to the Governor to step in and frame the 1991 Rules and thereafter the 2003 Rules under the proviso to Article 309 of the Constitution of India firstly to amend and thereafter to repeal the 1982 Rules altogether. When the statutory rules, i.e., the 1982 Rules, were in place, the same could not have been amended or repealed by invoking power under the proviso to Article 309 of the Constitution of India. Therefore, the 1991 Rules as well as the 2003 Rules are ultravires the Constitution and should be adjudged as null and void. In support of his submissions, Mr. Mishra has placed reliance on the following decisions:-

1. 1980 (Supp) SCC 624, (B.S. Yadav Vs. State of Haryana),

2. (1998) 4 SCC 485, (A.B. Krishna Vs. State of Karnataka),
3. (2003) 7 SCC 110, (D.R. Yadav Vs. R.K. Singh).

26. Mr. KN Choudhury, learned Senior counsel appearing for another set of petitioners while adopting the submissions of Mr. Mishra, additionally laid emphasis on the point that a Division Bench of this Court in All Assam Higher Secondary Teachers and Employees Association Vs. State of Assam, 2014 (5) GLT 69 had given a categorical finding that insistence on B.Ed./BT degree for the post of Principal of Higher Secondary Schools when it was not prescribed as an entry level qualification for Post Graduate Teachers was arbitrary and discriminatory.

27. Mr. D. Saikia, learned Senior Additional Advocate General, Assam appearing for the State has raised preliminary objections regarding maintainability of the writ petitions, more particularly, the first writ petition, i.e., the case of Mahendra Nath Mudoi. He submits that vires of the 1991 Rules have been challenged in 2012 after more than 2 decades whereas vires of the 2003 Rules have been questioned after a lapse of about 9 years. Such inordinate delay has not been satisfactorily explained. There is deliberate laches on the part of the petitioner's disentitling them to a decision on merit.

28. Referring to the stand of the petitioners that since the 1991 Rules did not prejudicially affect them in any manner, the same was not put to challenge, he submits that it is evident that petitioners had no grievance with regard to the 1991 Rules which amended the preamble of the 1982 Rules by making it a rule made under the proviso to Article 309 of the Constitution. Petitioners had participated in the selection process for the post of Headmaster in 1999 which was conducted under the 1982 Rules as amended by the 1991 and 1997 Rules. Petitioners having accepted and having submitted themselves to the 1991 Rules are estopped from questioning the same, that too, so belatedly. Writ petitions are also hit by waiver and acquiescence, he submits.

29. Mr. Saikia further submits that a Division Bench of this Court in Kanak Chandra Nath (supra) has held that requirement of BT/B. Ed degree for the post of Headmaster of High Schools in terms of Rule 14(4)(i) of the 2003 Rules and the advertisement dated 02.11.2010 to be not irrational and did not find any infirmity with the advertisement dated 02.11.2010. The said Rule 14(4)(i) of the 2003 Rules prescribing BT/B. Ed degree for the post of Headmaster having been questioned and held to be valid, present challenge would be hit by the doctrine of constructive res judicata.

30. His further preliminary objection is that pursuant to the advertisement dated 02.11.2010, selection process was completed in August, 2011. About 1000 Headmasters have been appointed in High Schools and they are discharging their duties. Such selected candidates who were appointed as Headmasters and who had joined are necessary parties to the present proceeding inasmuch as if the relief sought for by the petitioners are granted, they would be adversely affected. Their presence is necessary for a full and complete adjudication of the issues raised in this proceeding. Such selected candidates having not been impleaded as respondents, writ petitions are liable to be dismissed on the ground of non-joinder of necessary parties.

31. Regarding merit, Mr. Saikia submits that though initially the 1982 Rules were framed under Section 3(3) of the 1977 Act, later on, noticing the lacuna regarding the source of power for framing of the 1982 Rules to govern recruitment and conditions of service, the 1991 Rules were framed for amending the preamble of the 1982 Rules whereby the 1982 Rules were converted to a set of rules framed in exercise of powers under the proviso to Article 309 of the Constitution of India. Such amendment was given retrospective effect from the date when the 1982 Rules came into force. The 1991 Rules were framed to enable the 1982 Rules to regulate conditions of service of persons belonging to the Assam Secondary Education

ion (Provincialised) Service. However, the 1997 Rules amended the same to include conditions of recruitment. Be that as it may, since the 1982 Rules, in essence, were framed under the proviso to Article 309 of the Constitution of India, the same could be repealed by another set of rules framed under the proviso to Article 309 of the Constitution of India, in this case being the 2003 Rules.

32. His further submission is that a Full Bench of this Court in *Jamaluddin Ahmed* (supra) had categorically declared the 1982 Rules as well as the 2003 Rules as being framed under the proviso to Article 309 of the Constitution of India and thereafter held the 2003 Rules to be a clarificatory law having retrospective operation on and from the date of enactment of the 1982 Rules. He categorically asserts that doctrine of occupied field would have no application in the present case as both the Rules in question were framed under the proviso to Article 309 of the Constitution of India and it is not a case of one being framed under the statute and not amenable to repealment by a rule framed under the proviso to Article 309 of the Constitution. The areas covered by the 2003 Rules are not mentioned in the 1977 Act and Section 8 of the 1977 Act, which is the rule-making provision, does not visualize recruitment and conditions of service. In other words, State Government cannot frame rules to govern recruitment and conditions of service under the 1977 Act and therefore there was no bar for invoking the proviso under Article 309 of the Constitution of India to frame the 2003 Rules. He also made submission regarding the distinction between conditions of service and conditions of recruitment by contending that appointment and recruitment cannot be included within the expression conditions of service because conditions of recruitment operate prior to commencement of the service itself and therefore recruitment as such will not come within the ambit of conditions of service. He also submits that promotion is not a condition of service but a condition of recruitment. Additional submission of Mr. Saikia is that Governor's power to make rules under the proviso to Article 309 of the Constitution is a legislative power. Placing of the 1982 Rules before the State Legislative Assembly and getting the same ratified has no relevance inasmuch as the 1982 Rules so framed were beyond the scope of the 1977 Act. Therefore, it was void till it was rectified by the 1991 Rules.

33. Regarding objections raised by the petitioners to the swearing of affidavit by the departmental Secretary, he submits that there cannot be any infirmity if he swears the affidavit on the basis of available notifications wherefrom he acquired the knowledge about the particulars of the 1982 Rules as amended in 1991 and 1997. There is no infirmity in the affidavit so sworn by the departmental Secretary. Therefore, writ petitions and the writ appeals are devoid of merit and are liable to be dismissed. His parting submission is that petitioners and the appellants cannot object to the requirement of BT/B. Ed degree for the post of Headmaster/Headmistress of High Schools which is well within the right of the rule-making authority to prescribe. Just because petitioners and appellants do not possess such qualification would not render insistence on such qualification arbitrary and unreasonable. Regarding the decision in *All Assam Higher Secondary Teachers and Employees Association*, he submits that State had reconsidered the 2003 Rules as amended by the 2012 Rules as directed by the Court whereafter requirement of B.Ed./BT degree as one of the minimum eligibility criteria for the post of Principal has been reiterated.

34. Mr. AK Bhattacharyya, learned Senior Counsel appearing for the impleaded respondent Nos.62 to 142 in WP(C) No.4514/2015 (*Labanya Bhuyan Vs. State of Assam*), at the outset, posed a question as to whether the field relating to recruitment and conditions of service of Assam Secondary Education (Provincialised) Service could be said to be occupied. He extensively referred to the statement of objects and reasons of the 1977 Act to contend that the said Act neither visualized nor dealt with recruitment and conditions of service of persons belonging to the Assam Secondary Education (Provincialised) Service. The 1977 Act was an act to provincialise secondary education in the State of Assam covered by the defici-

t- scheme of the Government for its improvement and for better control and management of such education in the State of Assam. While supporting the arguments of Mr. Saikia, learned Senior Addl. Advocate General, Mr. Bhattacharyya submits that Section 8 of the 1977 Act did not confer any power to frame rules relating to recruitment and conditions of service. He has taken us through various amendments to the 1982 Rules by virtue of which the 1982 Rules became a set of rules framed in exercise of powers under the proviso to Article 309 of the Constitution of India. Original preamble of the 1982 Rules indicated that the said rules were framed under Section 3(3) of the 1977 Act to regulate the service conditions of teachers and employees of secondary schools. By the 1991 Rules, the original preamble of the 1982 Rules were amended to make the 1982 Rules a set of rules framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India for regulating the conditions of service of teachers of secondary schools provincialised under the 1977 Act. He submits that by this amendment, the 1982 Rules were confined to teachers only as the word employees appearing in the original preamble was dropped. The 1991 Rules clarified that the amendment would come into force from the date on which the 1982 Rules came into force. Referring to the 1977 Act, he submits that by this Act, the 1982 Rules were made applicable to teachers of High and Higher Secondary Schools provincialised under the 1977 Act. The 1982 Rules, as amended in 1991 and 1997, stood repealed by the 2003 Rules framed by the Governor of Assam in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India regulating recruitment and conditions of service of persons appointed to the Assam Secondary Education (Provincialised) Service.

35. Referring to Article 309 of the Constitution of India, he submits that under the said provision, more particularly, the proviso thereto, Governor of a State has the power to make rules regulating the recruitment and the conditions of service of persons appointed to such service and posts in connection with the affairs of the State until provision in that behalf is made by or under an act of the appropriate legislature and any such rule made, shall have effect subject to the provisions of the Constitution. Further submission is that no right of the petitioners have been affected inasmuch as, they can undertake a course of B.Ed./BT degree and obtain the same to be eligible for recruitment as Headmaster or Principal. In any case, service of the petitioners is protected. His further submission is that it is too late in the day for anyone to raise an objection regarding insistence on B.Ed./BT degree for the purpose of appointment to the post of Headmaster and Principal. In support of his submission, learned Senior Counsel has placed reliance on the following decisions: -

1. AIR 1956 SC 285 (Pradyut Kr. Bose Vs. Chief Justice, High Court of Calcutta),
2. AIR 1962 SC 1139 (Kishori Mohanlal Bakshi Vs. Union of India),
3. AIR 1965 SC 1107 (Corporation of Calcutta Vs. Ajoy Kr. Mukherjee),
4. (1970) 1 SCC 108 (State of Madhya Pradesh Vs. Shardul Singh),
5. (1974) 2 All. ER 1128 (Hoffman La-Roche Vs. Secretary of State),
6. (1979) 2 SCC 196 (Atlas Cycle Industries Ltd. Vs. State of Haryana),
7. 1993 Suppl. (3) SCC 575 (Sayed Khalid Rezvi Vs. Union of India),
8. 1994 Suppl. (1) SCC 44 (K Narayanan Vs. State of Karnataka),
9. (2003) 3 SCC 321 (St. Jhons Teachers Training Institute Vs. Regional Director NCTE),
10. (2003) 7 SCC 628 (Balram Kumawat Vs. Union of India),
11. (2004) 3 SCC 734 (Chandravathi PK Vs. CK Saji)
- 12) (2006) 2 SCC 482 (Union Public Service Commission Vs. Girish Jyanti Lal Vaghela),
13. (2015) 6 SCC 727 (Dholey Gobind Sahebrao Vs. Union of India)

36. Mr. MK Choudhury, learned Senior Counsel appearing for respondent Nos.143 to 227 in WP(C) No.4514/2015, at the outset, submits that all the respondents represented by him had obtained B.Ed./BT degree after entering into service. He

submits that beneath the veneer of constitutional challenge made by the petitioners, the real issue is possession of B.Ed./BT degree, which is now one of the mandatory requirements for holding the post of Headmaster of High Schools and Principal of Higher Secondary Schools. He submits that the subject education is covered by Entry 25 of the Concurrent List and, therefore, both Union and the State can legislate in respect of this entry. In this connection, he has referred to the National Council for Teacher Education Act, 1993, (NCTE Act for short) and submits that the said Act had come into force on 30.12.1993, which was the appointed date as per Central Government notification published in the Official Gazette. Section 3 of the NCTE Act provides for establishment of a council, called, National Council for Teacher Education; one of the functions of the council being to lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher in schools or in recognized institutions. He submits that National Council for Teachers Education was established on 17.08.1995. As per Section 32 (2) (d) of the NCTE Act, National Council for Teacher Education is empowered to make regulations providing for norms, guidelines and standards in respect of minimum qualifications for a person to be employed as a teacher in schools or in recognized institutions. Continuing his submission, Mr. MK Choudhury, Senior Counsel submits that in exercise of powers conferred under Section 32 (2) (d) (i) of the NCTE Act, read with Section 12(d) of the said Act, National Council for Teacher Education has framed a set of regulations, called, the National Council for Teacher Education (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001, which was gazetted on 03.09.2001. As per this Regulations, for Secondary/High School level, minimum academic and professional qualification for teachers is graduation with Bachelor of Education (B.Ed.) or its equivalent course. For Senior Secondary/PU/Intermediate, it is degree in the relevant subject with Bachelor of Education (B.Ed.) or its equivalent qualification. Regulation 4 thereof, provides for amendment of recruitment rules. As per Regulation 4, the existing recruitment rules were required to be modified within a period of 3 years so as to bring them in conformity with the qualifications prescribed while existing teachers would be required to acquire the prescribed qualifications.

37. He, therefore, submits that the 2003 Rules are in conformity with the NCTE Act and in case of repugnancy, it is the central law which shall prevail. 1982 Rules were repugnant to the NCTE Act and as such, the 1982 Rules were rightly repealed. In this connection, he has placed reliance in the case of M. Karunanidhi Vs. Union of Union, reported in (1979) 3 SCC 431.

38. Further submission of Mr. Choudhury, learned Senior Counsel is that if there is any occupied field, it is the NCTE Act and the regulations framed thereunder. The 2003 Rules being in conformity with the NCTE Act and the regulations framed thereunder cannot be said to be unconstitutional on any account. Further submission is that the first advertisement was issued in the year 2009 and the second advertisement was issued on 02.11.2010. Petitioners of Labanya Bhuyan's case had applied. However, outcome of the selection was unsuccessfully challenged in Kanak Ch. Nath (supa). The subsequent advertisement dated 07.08.2015 has been challenged by the same set of petitioners in Labanya Bhuyan's case. Therefore, he submits that the present round of litigation by those petitioners is barred by the principle of constructive res judicata. In this connection, he has referred to the provisions of Section 11 Explanation-6 of the Code of Civil Procedure, 1908 to buttress his above submission.

39. Mr. SK Das, learned counsel appearing for respondent Nos.6 & 7 in WP(C) No.1526/2012 (Mahendra Nath Mudo Vs. State of Assam), 5 & 6 in WP(C) No.3743/2016 (All Assam Higher Secondary Teachers and Employees Association Vs. State of Assam) and respondent Nos.4 & 5 in WP(C) No.3781/2016 (All Assam Provincialised Higher Secondary Schools In-charge Members Association Vs. State of Assam) also made submissions regarding doctrine of occupied field and contends that since nothing has been provided pertaining to conditions of service in the 1977 Act, ther

efore, a rule can be framed under the proviso to Article 309 of the Constitution of India regulating recruitment and conditions of service of persons seeking entry into and belonging to the Assam Secondary Education (Provincialised) Service. Petitioners knew about this requirement as far back as in 1991. Despite this, they could not obtain B.Ed. or BT degree all this while. Mere fact that they would stand disqualified in a selection for the post of Headmaster or Principal would not render the 2003 Rules invalid. Even if for arguments sake, 2003 Rules are held to be invalid, as per the NCTE Act and the regulations framed thereunder, B.Ed./BT degree would be an essential qualification. Thus the field is primarily covered by the central law. Though the State can exercise its legislative power under Entry 25 of List-III, but such law cannot be repugnant to the central law. In case, the two sets of rules cannot be reconciled, the State law must give way to the central law. Referring to the case of Jamaluddin Ahmed (supra), he submits that by the said judgment, a Full Bench of this Court held the 2003 Rules to be a clarificatory law having retrospective operation from the date when the 1982 Rules came into force. Referring to Kanak Ch. Nath (supra), he submits that a Division Bench of this Court has held that qualification for promotion can be laid down by the appointing authority and higher qualification can be the basis for classification. Requirement of B.Ed./BT degree in the context of school education cannot be held to be irrational. In so far the direction of the Court in All Assam Higher Secondary Teachers and Employees Association is concerned, he submits that State had reconsidered the rules whereafter requirement of B.Ed./BT qualification for the post of Principal was reiterated vide Government notification dated 24.06.2014. Therefore, there is no merit in the writ petitions and writ appeals which are liable to be dismissed.

40. Mr. G Goswami, learned counsel appearing for respondent Nos. 8 to 62 in WP(C) No.4514/2015 (Labanya Bhuyan Vs. State of Assam) adopted the arguments of Mr. D Saikia, learned Senior Addl. Advocate General, Assam, Mr. AK Bhattacharyya and Mr. MK Choudhury, learned Senior Counsel for the respondents. He additionally submits that it is too late in the day for anyone to become a Headmaster or Principal of High School and Higher Secondary School without having B.Ed./BT degree. Such qualification has been mandatorily laid down in the NCTE Regulations and would have to be followed by all concerned. Reverting back to the 1982 Rules is totally ruled out because qualifications prescribed under the 1982 Rules for the post of Headmaster and Principal are not in conformity with the NCTE Regulations, which is a statutory requirement. Education being a subject in the Concurrent List, in case of any conflict between two sets of rules, one of the centre and the other of the State, it is the central rule which will prevail to the extent of the repugnancy. He, therefore, submits that writ petitions are totally misconceived and are liable to be dismissed.

41. Mr. DK Mishra and Mr. KN Choudhury, learned Senior Counsel for the petitioners have made elaborate submissions in reply. Regarding the objection raised by the State as to the delay in instituting the challenge to the 1991 Rules and the 2003 Rules, Mr. Mishra, learned Senior Counsel for the petitioners submits that there is no laches or delay on the part of the petitioners. Petitioners were allowed to participate in the selection for the post of Headmaster in 1999; as a matter of fact, they were interviewed by the Interview Board; because of Court intervention, the selection could not be taken to its logical conclusion, therefore, there was no question of their challenging the 1991 Rules, as it did not affect the petitioners in any manner. In so far the 2003 Rules are concerned, petitioners were under the expectation that since the vacancies had occurred much prior to 2003, selection for filling up those vacancies would be made in accordance with the 1982 Rules. Therefore, the occasion to challenge the 2003 Rules arose only after the advertisement dated 02.11.2010 was issued when it became clear that the selection would be under the 2003 Rules. He submits that it is a settled law that constitutional validity of an enactment can be challenged only when a person is aggrieved by such enactment and, therefore, petitioners could not have challenged the 2003 Rules until they were prevented from taking part in the se

lection for the post of Headmaster. Moreover, when the question is of constitutionality, the fact that an enactment is in the statute book for a long period would not clothe it with constitutionality, since time does not run in favour of constitutionality of an enactment which is otherwise unconstitutional. Regarding non-challenge to the appointment orders of the selected candidates and their non-impleadment, he submits that since petitioners have raised the issue of constitutionality, if the Court holds the 1991 Rules and the 2003 Rules as unconstitutional, all consequential actions would be rendered illegal, null and void. Moreover, since the issue raised is based on pure question of law and no individual relief is claimed qua the selected candidates, question of impleading them as respondents also does not arise. However, he submits that this objection no longer survives as the selected candidates have got themselves impleaded as respondents and have participated in the proceeding.

42. Regarding the stand taken by the State and as argued by Mr. Saikia, learned Senior Addl. Advocate General that the 1982 Rules were not framed under the provisions of the 1977 Act, Mr. Mishra, learned Senior Counsel has taken strong exception to the affidavits sworn by Md. Nawab N. Hussain, Secretary to the Govt. of Assam, Secondary Education Department wherein, he had verified such averments as being true to his knowledge. In 1982, Mr. Hussain could not have held any responsible position in the State Government dealing with the files. Therefore, such a statement cannot be verified as being true to his knowledge. Moreover, the 1982 Rules were published in the Assam Gazette Extraordinary on 29.05.1982, which disclosed that the said Rules were framed under the provisions of the 1977 Act. Referring to Section 81 of the Evidence Act, 1872, he submits that Court shall presume genuineness of every document published in the Official Gazette. Referring to Section 8 of the 1977 Act, Mr. Mishra submits that the 1982 Rules were framed to give effect to the provisions of the 1977 Act. Infact, various provisions of the 1982 Rules makes it abundantly clear that the said rules were framed under the 1977 Act. To buttress his argument on this point, he submits that the 1982 Rules were placed before the Assam Legislative Assembly after it was framed as per the requirement of law. Therefore, it was a statutory rule and could not have been amended and subsequently repealed by a rule framed under the proviso to Article 309 of the Constitution of India. A rule framed under the proviso to Article 309 of the Constitution of India is not required to be placed before the State Legislative Assembly.

43. On the submission relating to constructive res judicata, learned Senior Counsel submits that the said principle would not be attracted in the facts and circumstances of the present case. Constitutionality of a rule cannot be deemed to have been questioned and decided on the principle of might and ought or it being directly and substantially in issue. It cannot be taken as a rule that one of the pleas either by the plaintiff or by the defendant in every suit or proceeding must necessarily relate to constitutionality of the law on which the cause is founded or defended. He finally submits that the 1991 Rules and the 2003 Rules are wholly unconstitutional and those are liable to be declared as non est and void in law. In support of his submissions, learned Senior Counsel has placed reliance on the following decisions: -

1. AIR 1955 SC 367, (Hans Muller of Nuremberg Vs. Supdt., Presidency Jail Calcutta),
2. (1974) 4 SCC 335 (The General Manager, South Central Railway),
3. (1984) 1 SCC 222 ( Motor General Traders & Anr. Vs. State of AP & Ors.),
4. (1995) 6 SCC 614 (Nand Kishore Vs. State of Punjab),
5. (1996) 6 SCC 634 (LTC Bhadrachalam Paper Boards & Anr. Vs. Mandal Revenue Officer, AP & Ors.),
6. 1995 Supp. SCC 432,
7. 2012 (2) GLT 893 (Sapam Jiten Singh Vs. Manipur Public Service Comission), Secunderabad & Anr. Vs. AVR Siddhantti & Ors.)

44. While adopting the arguments of Mr. DK Mishra, learned Senior Counsel, Mr. KN Choudhury, learned Senior Counsel representing another set of petitioners submits that while Graduate Teachers got an opportunity to acquire the additional qualification of B.Ed./BT degree, Post Graduate Teachers did not get any such opportunity. Referring to the Division Bench decision of this Court in All Assam Higher Secondary Teachers and Employees Association Vs. State of Assam, 2014 (5) GLT 69, he submits that the Bench had already given a finding that no such qualification (B.Ed./BT) was laid down at the time of entry into service as Post Graduate Teacher; nor at any point thereafter, so that they could obtain such degree. A categorical finding was recorded that eligible candidates with 15 years of experience would be rendered ineligible because of insistence on such qualification which is arbitrary and discriminatory. It was further held that while Graduate Teachers were allowed to acquire these qualifications during service, Post Graduate Teachers were not. After holding that the 2012 Rules may either require to be set aside or may have to be reconsidered by the rule making authority, direction was issued for reconsideration of the rules and pending such reconsideration not to make regular promotion to the post of Principal of Higher Secondary Schools. Mr. Choudhury, learned Senior Counsel submits that this finding of the Division Bench has not been interfered with and has attained finality. Referring to various provisions of the 1977 Act, he submits that the said Act covers conditions of service as provincialisation has to be given a broad meaning. He has made detailed submissions as to what constitutes conditions of service and thereafter has refuted the submissions made on behalf of the respondents that since the 1977 Act did not provide for framing of rules governing conditions of service, the 1982 Rules lacked legitimacy. He submits that case presented by the petitioners is straight forward. A statutory rule occupying the field cannot be replaced by a rule framed under the proviso to Article 309 of the Constitution of India. In support of his submissions, Mr. Choudhury has placed reliance on the following decisions: -

1. AIR 1966 SC 529 (Martin Burn Ltd. Vs. Corporation of Calcutta),
2. (1972) 2 SCC 275 (Zabar Singh Vs. State of Haryana),
3. (1986) Suppl. SCC 584 (TR Kapur Vs. State of Haryana),
4. (1997) 3 SCC 641 (RS Ajara Vs. State of Gujarat),
5. (2001) 1 SCC 534 (Raymond Ltd. Vs. MP Electricity Board),
6. (2004) 10 SCC 201 (State of West Bengal Vs. Keshoram Industries Ltd.),
7. (2006) 9 SCC 69 (Satya Narayan Shukla Vs. Union of India),
8. (2011) 3 SCC 793 (KK Baskaran Vs. State Represented by its Secretary, Tamil Nadu),

45. Mr. IH Saikia, learned counsel representing another set of petitioners, while adopting the submissions of Mr. DK Mishra and Mr. KN Choudhury, learned Senior Counsel, additionally submits that the 1991 Rules and the 2003 Rules are unconstitutional from their very inception. There is no question of declaring the said Rules unconstitutional prospectively. In other words, question of prospective overruling of the aforesaid Rules does not arise. Those Rules are illegal from day one. There cannot be equity in favour of those persons who are beneficiaries of an unconstitutional law. In support of his submissions, he has placed reliance on the following decisions: -

1. AIR 1987 SC 1794 (D Navinchandra & Company Vs. Union of India),
2. (1993) 4 SCC 727 (Managing Director, ECIL, Hyderabad Vs. Karunakaran),
3. (2011) 4 SCC 266 (B. Premanand Vs. Mohan Koikal).

46. Ms. D Borgohain, learned counsel appearing for the petitioner in WP(C) No. 4993/2014 (Nabin Ch. Brahma Vs. State of Assam) submits that Rule 14(2) of the 2003 Rules, discriminates against junior Classical Teachers and junior teachers of High Schools inasmuch, as Classical Teachers with graduate qualification and Graduate Teachers are entitled to count their seniority from the date of acquiring degree qualification while a junior teacher having degree qualification is e

ntitled to count his seniority only from the date of receiving graduate scale. Therefore, Rule 14(2) of the 2003 Rules is constitutionally invalid. In this connection, she placed reliance on the following decisions: -

1. (1983) 2 SCC 33 (State of Gujarat Vs. Raman Lal Keshav Lal Soni),
2. 2009 (3) GLT 834 (Rukmini Bora Vs. State of Assam).

47. Submissions were also made by Smti. P Barman and Mr. MU Mondal, learned counsel for the petitioners attacking the constitutionality of the 2003 Rules.

48. Mr. PK Goswami, learned Senior Counsel appearing for the petitioner in W P(C) No.3796/2016 (Ajanta Bhuyan Vs. State of Assam), after referring to various averments and documents on record submitted that Post Graduate Teachers were not deputed to undergo B.Ed./BT course. He has also referred to the provisions of Right of Children to Free and Compulsory Education Act, 2009, more particularly, Section 23 thereof, as well as the provisions of Right of Children to Free and Compulsory Education Rules, 2010, more particularly, Rules 16 and 17 thereof, to contend that even these enactments provide for relaxation of the prescribed minimum qualification. He has also referred to provisions of the National Council for Teacher Education Act, 1993 as well as Section 29 of the 2003 Rules. Mr. Goswami's basic submission is that even if the 2003 Rules are held to be invalid, the relaxation provision contained in the said Rules should be applied and invoked, particularly in the light of the fact that the additional qualification was not prescribed at the time of entry into service of the Post Graduate Teachers and in the course of their service, they were not provided any opportunity to acquire such qualification. In support of his submission, Mr. Goswami has placed reliance on the following decisions: -

1. (1970) 2 SCC 355 (Hirday Narain Vs. Income Tax Officer, Bareilly),
2. (1985) 1 SCC 641 (Indian Express Newspaper (Bombay) Pvt. Ltd. Union of India),
3. (1989) 4 SCC 187 (Supreme Court of India Employees Welfare Association Vs. Union of India).
4. (2000) 8 SCC 437 (Dadu Alias Tulsidas Vs. State of Maharashtra),

49. Submissions made by learned counsel for the parties have received the due consideration of the Court.

50. At the outset, it would be apposite to bear in mind the core contentions of the petitioners. According to the petitioners, the 1982 Rules were framed under the 1977 Act. Procedure laid down for placement of the said Rules before the Assam Legislative Assembly was duly applied. Therefore, the 1982 Rules were statutory rules. Statutory rules can be amended only by a rule framed under the statute. Statutory rules can be repealed only by a statutory rule. Proviso to Article 309 of the Constitution of India is a transitional provision. Until legislature of a State enacts a law to regulate recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of that State, Governor of the State has the power to frame rules in that regard in exercise of powers conferred under the proviso to Article 309 of the Constitution of India. The moment statutory rules are framed, rules framed under the proviso to Article 309 of the Constitution of India would no longer hold the field. Conversely, if there is a statutory rule occupying the aforesaid field, question of framing of rule under the proviso to Article 309 of the Constitution of India would not arise. A statutory rule cannot be amended or repealed by a rule framed under the proviso to Article 309 of the Constitution of India. Therefore, the 1991 Rules and the 2003 Rules framed under the proviso to Article 309 of the Constitution of India amending and repealing the statutory 1982 Rules are ultra-vires the Constitution and are liable to be declared as null and void.

51. To appreciate the above contention, let us examine the provision of Article 309 of the Constitution of India. Article 309 of the Constitution of India d

eals with recruitment and conditions of service of persons serving the Union or a State. It says that subject to the provisions of the Constitution, acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. As per the proviso, 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 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 rule so made shall have effect subject to the provisions of any such act.

52. A careful analysis of Article 309 of the Constitution of India would go to show that as per the said Article, appropriate legislature may enact laws to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or any State which shall, however, be subject to the provisions of the Constitution. In other words, it is the appropriate legislature, which is to frame laws regulating recruitment and conditions of service of persons appointed to public services and posts which must, however, conform to the constitutional requirement. However, the proviso says that till such law is framed by the appropriate legislature, 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 conditions of service of persons appointed to such services and posts till appropriate legislation is framed by the appropriate legislature. Thus a rule framed under the proviso to Article 309 of the Constitution of India has a transitional character. Such rules can be framed when there is a vacuum in the statutory field i.e., there being no statutory enactment governing the field. But once such statutory enactment is made, rules framed under the proviso to Article 309 will have to give way to such act or rules framed thereunder.

53. In BS Yadav (*supra*), while dealing with the proviso to Article 309 of the Constitution of India, Supreme Court held that proviso to Article 309 provides that until the State legislature passes a law on the particular subject, it shall be competent for the Governor of the State to make rules regulating the recruitment and conditions of service on the particular subject. Governor thus steps in when the legislature does not act. The power exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise, but has in fact not yet exercised. It partakes the characteristics of legislative and not executive power; it is legislative power. Under the proviso to Article 309, the Governor substitutes for the legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject.

54. Again in AB Krishna (*supra*), Supreme Court referring to Article 309 of the Constitution of India held that it is primarily the legislature, namely, Parliament or the State Legislative Assembly with whom power to make law regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or State is vested. The proviso however, gives power to the President or the Governor to make service rules, but this is only a transitional provision as the power under the proviso can be exercised only so long as the legislature does not make an act whereby, recruitment to public post, as also other conditions of service relating to that post are laid down. However, the rule making function under the proviso to Article 309 of the Constitution of India is a legislative function. Elaborating further, Supreme Court held that under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of service

, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the doctrine of occupied field. Power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, rules can be made under the law so made by the legislature and not under Article 309. Rules made in exercise of the rule making power under an act constitute delegated or sub-ordinate legislation, but the rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of occupied field, the rules under Article 309 cannot supersede the rules made by the legislature. However, if any matter is not touched by that enactment, it will be competent for the Executive to either issue executive instructions or to make a rule under Article 309 in respect of that matter.

55. This position was reiterated in DR Yadav (*supra*) wherein, it was held that there cannot be any doubt whatsoever that rules framed under the proviso to Article 309 of the Constitution of India would apply so long as a statute or statutory rules or any other sub-ordinate legislation governing the conditions of service are not enacted.