section 87 of the Act and stoutly supported the judgment in *Lakhwant Singh's case* (supra).

11. In view of the above, we find that the challenge on behalf of the appellant, both on the point of law and also on merits must necessarily fail. The F.A.O. is hereby dismissed with costs.

D. S. Tewatia, J.—I agree.

S. S. Kang, J.—I also agree.

N.K.S.

FULL BENCH

Before S. S. Sandhawalia C.J., Prem Chand Jain and Harbans Lal, JJ.

GULAB SINGH and others,—*Petitioners.*

versus

STATE OF HARYANA and others,—*Respondents.*

Amended Civil Writ Petition No. 5194 *of* 1978.

May 9, 1980.

Punjab District Attorneys Service Rules 1960—*Rules* 5, 9 *and* 12—*Haryana State Prosecution Legal Service (Group A) Rules,* 1979—*Rules* 9 *and* 19—*Constitution of India* 1950—*Article* 309—*Appointments made to the service under* 1960 *Rules of persons not eligible* —1979 *Rules repealing* 1960 *rules governing the service—Persons not eligible under the* 1960 *Rules made eligible retrospectively under rule* 19—*Rules* 9 *and* 19 *of* 1979 *rules—Whether valid—Such rules—Whether could be deemed to be valedictory.*

Held, that once effect is to be given to the retrospectivity clause of sub-rule (2) of Rule 19 of the Haryana State Prosecution Legal Service (Grade A) Rules, 1979, it is evident that the provisions of the sub-rule must be deemed to have been on the statute book with effect from the 1st day of April, 1974). By virtue of this legal fiction the orders of appointment passed under the 1960 rules after the aforesaid date would be wholly in accordance with the provisions of rule 19(1). Consequently, it necessarily follows that the orders of appointment in view of the retrospective operation of rule 19 must be deemed to be in accordance with law and therefore, indeed no validation thereof was required. Even otherwise a plain look at the provisions of rule 19 would indicate that it does not either expressly or implicitly intend to validate anything invalid, but primarily provides for the eligibility for promotion to the post of the

District Attorneys of a certain class of incumbents of other posts. Neither rule 9 nor rule 19 of the 1979 Rules, therefore, appear to be even remotely valedictory. Once that is so, it cannot be said that Rules 9 and 19 were unauthorised and unwarranted exercise of power under Article 309 of the Constitution of India.

(Paras 15 and 17).

Case referred by a Division Bench Consisting of Hon'ble Mr. Justice Prem Chand Jain and Hon'ble Mr. Justice, D. S. Tewatia on 19th September, 1979, to a larger Bench for decisions of the important question of law involved in this case. The Full Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice Prem Chand Jain and Hon'ble Mr. Justice Harbans Lal finally decided the case on 9th May, 1980.

Petition under Article 226 of the Constitution of India praying that a writ of Certiorari, *Mandamus or any other suitable Writ, Direction or order be issued, directing the respondents.*

(i) to produce the complete records of the case;

(ii) the orders at Annexures 'P-4', 'P-5' and 'P-6' be quashed;

(iii) the provisions of 1979 *Rules be declared* ultra-vires *the Constitution of India; and set aside;*

(iv) a Writ of Mandamus be issued directing the respondents to consider the claims of the petitioners for promotion to the cadre of District Attorneys with effect from the dates respondents Nos. 3 *to* 7 *have been promoted;*

(v) this Hon'ble Court may also pass any other order which it may deem just and fit in the circumstances of the case;

(vi) this Hon'ble Court may also grant all the consequential reliefs in the nature of seniority, arrears of salary etc. etc;

(vii) it is further prayed that pending the disposal of the Writ Peition, the promotions from amongst the Prosecuting Inspectors appointed as Assistant District Attorneys/ Additional Public Prosecutors after the petitioners be stayed ;

(viii) the costs of this writ petition may also be awarded to be petitioners.

The Hon'ble The Chief Justice Mr. S. S. Sandhawalia.

The Hon'ble Mr. Justice Prem Chand Jain.

The Hon'ble Mr. Justice Harbans Lal.

J. L. Gupta. Advocate with Jagdish Singh, Advocate, *for the Petitioners.*

Mr. U. D. Gaur, A. G. Haryana, *for Respondents Nos.* 1 *and* 2.

M. R. Agnihotri, Advocate, with Anil Seth, Advocate, *for Nos.* 3 *to* 7.

JUDGMENT OF THE FULL BENCH

S. S. Sandhawalia, C.J.

1. The constitutional validity of Rules 9 and 19 of the Haryana State Prosecution Legal Service (Group 'A'), Rules, 1979 is sought to be tested on the anvil of Articles 14, 16 and 309 of the Constitution of India, in this Writ Petition under Articles 226/227 of the Constitution of India.

2. Despite the volume of pleadings, the matter is not in a wide compass and indeed narrows down primarily to the validity of the aforesaid challenged provisions. It, therefore, suffices to notice the facts mainly with regard to the points really in issue. The eight petitioners were appointed as Assistant District Attorneys in December, 1972, which posts were designated as Deputy District Attorneys in May, 1976, and they claim to have completed the period of probation successfully on different dates and also to have crossed the departmental efficiency bars. At the time of the appointment and till recently the conditions of service of District Attorneys and Assistant District Attorneys were governed by the Punjab District Attorneys Service Rules, 1960 (hereinafter referred to as 1960 Rules) and thereunder rule 9 prescribed the qualifications, etc., for recruitment to the service whilst Rule 12 laid down the method of determination of *inter se* seniority. It is the petitioners' stand that at the material time, there was a separate cadre consisting of prosecuting Deputy Superintendents of Police, prosecuting Inspectors and Prosecuting Sub-Inspectors and the persons recruited to this cadre were members of the Police Department and consequently governed entirely by the Punjab Police Rules. It is their claim that the post of Assistant District Attorney carried much higher scale of pay than the Prosecuting Inspector and further had gazetted status whilst that of the prosecuting Inspector was a non-gazetted post.

3. The primary challenge herein is to the promotion of respondents Nos. 3 to 7 as District Attorneys,—**vide** Annexures P/4 to P/6 to the writ petition. It has been averred that the aforesaid respondents were originally recruited as prosecuting Sub-Inspectors and were much later promoted as Prosecuting Inspectors. Whilst they were working in the latter posts the

government in the year 1974 decided to abolish the cadre of prosecuting Inspectors and to appoint them as Assistant District Attorneys. In order to maintain the distinction between the two cadres, the Prosecuting Inspectors, on their appointment to the Cadre of Assistant District Attorneys were designated as Additional Public Prosecutors, though the pay scale given to them was made identical with that to which the petitioners were entitled. It was also specifically provided that the aforesaid five respondents and their class would be governed by the provisions of Punjab District Attorneys Serivce Rules, 1960, In pursuance of this decision, identical letters of appointment were issued to the various Prosecuting Inspectors as also the prosecuting Deputy Superintendents of Police, copy of which is Annexure P/1 to the writ petition. In pursuance thereto, the five respondents joined as Assistant District Attorneys on or about April 1, 1974.

4. The petitioners claim that since respondents Nos. 3 to 7 joined the cadre of Assistant District Attorneys in April, 1974, they inevitably ranked junior to the petitioners as also to other persons who had been appointed as such much prior to the aforesaid date in view of the governing provision of Rule 12 of the Punjab District Attorneys Service Rules, 1960. Consequently, in the gradation list issued by the department, the names of the five respondents found mention after those of the petitioners and in a separate category. It has been highlighted that 1960 Rules did not provide for any post of Additional Public Prosecutors, but as the pay scales and other conditions of service were identical, they were deemed to have been appointed to the cadre of the Assistant District Attorneys. It is the stand of the petitioners that in any event, the five respondents were either ranked junior to the petitioneres or were ineligible for promotion to the post of District Attorneys under the existing Rules, Reliance for this is placed on Rule 5 of the Punjab District Attorneys Service Rules, 1960, which *inter alia* laid down the method of recruitment in the case of District Attorneys. Nevertheless, the petitioners aver that in flagrant violation of the said Rule, the five respondents were promoted as District Attorneys,—*vide* Annexures P/4, P/5 and P/6 dated May 7, 1976, January 2, 1978 and September 18, 1978, respectively. Further these promotions were made subject to the approval of the Haryana Public Service Commission.

5. By way of explanation for not having challenged the earliest promotion of May 7, 1976,—*vide* Annexure P/4, it is averred that this was not done because similar orders passed by the State of Punjab had been challenged and were pending decision before the High Court which was not rendered till as late as May 18, 1978 and further because the promotion of the five respondents was subject to the approval of the Public Service Commission which had not been accorded and the matter was, therefore, in a state of flux. Consequently, it was only on December 20, 1978, that the writ petition was filed in this Court and during its chequered course of hearing whilst it was still pending argument and decision, the State of Haryana promulgated the Haryana State Prosecution Legal Service (Group A) Rules, 1979, (hereinafter referred as 1978 Rules). Thereby the earlier 1960 Rules were repealed and in Rule 9 thereof, a specific provision has been made to the effect that the recruitment to the service shall be made by promotion from amongst the Deputy District Attorneys and Additional Public Prosecutors in accordance with the slab mentioned in Appendix 'C' to the 1979 Rules. A proviso was added to sub-rule (2) of Rule 9 and rule 11 for the determination of seniority and lastly in order to validated some of the promotions, a special provision was made in Rule 19 to the effect that notwithstanding any other provisions, the Additional Public Prosecutors shall be eligible for appointment by promotion to the posts of District Attorneys immediately before coming into force of the 1979 Rules, Rule 19 was in terms given retrospectivity and was deemed to have come into force on April 7, 1974. The petitioners, grievance is that the 1979 Rules and in particular Rule 9 and 19 thereof were promulgated to validate the promotion of five respondents and other persons similarly situated and to defeat the claim of the petitioners which accrued to them under the existing 1960 Rules. As has been noticed at the very out set, the constitutionality of Rules 9 and 19 of the 1979 Rules has been vigorously assailed and as a necessary consequence, the promotion orders Annexures P/4 to P/6 of the five respondents have, in terms been impugned.

6. In the written statement filed on behalf of the respondent-State to the amended writ petition, it has been pointed out that consequent upon the enforcement of the Code of Criminal Procedure of 1974 the Haryana Government formulated a scheme for absorption of the Prosecuting Inspectors which was duly conveyed

to respondents Nos. 3 to 7. Thereby the prosecuting inspectors were to be absorbed as Additional Public Prosecutors in a higher scale of pay and they formed a separate cadre from the Assistant District Attorneys Grade-1, and were further eligible for promotion as District Attorneys along with Assistant District Attorneys in the ratio to be fixed by the government subsequently. It is, however, admitted that identical letters of appointment, copy of which is Annexure P/1 were duly issued to respondents Nos. 3 to 7. It is the stand of the respondent-State that the five respondents had not joined the cadre of the Assistant District Attorneys in April, 1974, but were in a special cadre of Additional Public Prosecutors and therefore, no question of *inter se* seniority or juniority would arise betwixt them. Whilst admitting that the 1960 Rules did not provide for any post for Additional Public Prosecutors, it is nevertheless stated that there were two separate cadres of Assistant District Attorneys (now Deputy District Attorneys) and Additional Public prosecutors. It is claimed that Rule 5 of 1960 Rules, was not attracted in the case of five respondents as the method of their promotion to the higher post of District Attorneys was to be governed by the scheme formulated by the government for the absorption of the Prosecuting Inspectors. A copy of the government scheme has been annexed to the Written Statement as Annexure R-4/1. It also seems to be the stand that under Rule 18 of 1960 Rules, there was ample power to relax the rules and the same should have been deemed to be relaxed so far as the promotion of Additional Public Prosecutors to the rank of District Attorneys was concerned.

7. As regards the 1979 Rules, categoric stand of the respondent-State is that these were framed by the Governor under Article 309 of the Constitution of India after due deliberation and patently in the interest of public administration. The statutory power in this regard has been exercised both validly and *bona fide* in order to equitably absorb the former members of the prosecuting agency.

8. A similar, if not an identical, stand has been taken on behalf of respondents Nos 3 to 7 as well.

9. In passing, it may be noticed that the case was first heard by a learned Single Judge who referred the same to a Division Bench in view of the challenge to the validity of 1970 Rules by his

order, dated May 10, 1979. During the course of hearing before the Division Bench, certain amendments in the pleadings were duly allowed and apparently in view of the ticklish questions involved and their larger remifications the Division Bench referred the case to a Larger Bench and that is how the matter is before us.

10. Mr. J. L. Gupta, the learned counsel for the petitioners opened his argument with a flourish by contending that the promotion of respondents Nos. 3 to 7 as District Attorneys,—*vide* Annexures P/4 to P/6, at the time they were passed, was in direct violation of the existing 1960 Rules and therefore, void **ab initio.** Relying on rules 5 and 12 of the aforesaid Rules, it was forcefully contended that there could be no promotion to the posts of District Attorneys from amongst Additional Public Prosecutors and admittedly respondents Nos. 3 to 7 were incumbents of these posts. The basic submission was that the 1960 Rules, at the material time betwixt 1976 to 1978 so completely covered the field that no appointment to the service outside the pale thereof could be permissible. Pointed reference in this connection, was made to Annexure P/6 which on the face of it said that the promotion was being made in exercise of the powers conferred under rule 5(d) of the Punjab District Attorney Service Rules, 1960.

11. The aforesaid argument of the learned counsel for the petitioners is impecable. Nevertheless, from what follows, it would be evident that he wins a rather vain victory on this limited aspect. At the very out set it may, therefore, be noticed that the learned Advocate-General of Haryana himself fairly conceded his inability to sustain the promotion orders Annexures P/4 to P/6 under any of the provisions of 1960 Rules. With illimitable candour it was stated on behalf of the respondent-State that the then existing rules did not at all visualize the promotion to the posts of District Attorneys from those of Additional Public Prosecutors and as a necessary consequence, the appointments of respondents Nos. 3 to 7,—*vide* the impugned orders must inevitably be deemed as irregular and not fully sanctified by the existing Rules. It was precisely for this reasons, according to the learned Advocate-General, that the necessity of the enactment of the subsequent 1979 Rules arose and in particular rule 19 thereof and the retrospectivity sought to be given thereof by sub-rule (2) of the same. The basic stand taken on behalf of the respondent-State therefore, was that once rules 9

and 19 of the 1979 Rules come into play and in particular the latter rule with retrospective effect from 1st day of April,, 1974, then the impugned promotion orders, Annexures P/4 to P/6 which were passed subsequent to that date were completely in accord with the statutory provisions and therefore, unassailable.

12. It is, therefore, manifest from the above, that in view of the stand of the respondent-State, the question of any violation of the 1960 Rules, in passing the promotion orders Annexures P/4 pales into total insignificance. The core of the matter is whether the impugned promotion orders are sustainble by the retrospective operation of the 1979 Rules.

13. Inevitably, the argument here must revolve around the provisions of rules 9 and 19 of the 1979 Rules which, therefore, must be read at the very out set:—

> 9. (1) Recruitment to the Service shall be made,—
>
> (i) by promotion from amongst Deputy District Attorneys and Additional Public Prosecutors in accordance with the slab mentioned in Appendix C to these rules; or
>
> (ii) by direct recruitment.
>
> *Note*: When there are no Additional Public Prosecutors, promotion shall be made from amongst Deputy District Attorneys.
>
> (2) Of the total number of posts, three-fourth shall be manned by promoted officers and one-fourth by direct recruits;
>
> Provided that nothing in this sub-rule shall prevent the officiating appointment of a member of the Haryana Prosecution group B Service on any post which is to be filled up by direct recruitment, till a direct recruit is appointed.
>
> * * * * *
>
> * * * * *
>
> "19. (i) Notwithstanding anything contained in these rules or the Punjab District Attorneys Services Rules, 1960, the per-

sons who have held the posts of Assistant District Attorneys Grade-1 or Additional Public Prosecutors, for a period of at least two years shall be eligible for appointment by promotion to any post of District Attorney immediately before coming into force of these rules, in accordance with the following slab :—

First two posts	Assistant District Attorney, Grade-1.
third post	Additional Public Prosecutor;
fourth post	Assistant District Attorney, Grade-1.
fifth post	Additional Public Prosecutor;
sixth and seventh posts.	Assistant District Attorneys, Grade-1 and Deputy District Attorney.

(2) *This rule shall be deemed to have come into force on the 1st day of April,* 1974.

14. To clear the ground for the appreciation of the second and indeed the main argument of the learned counsel for the petitioners, it is first apt to notice that no challenge whatsoever to sub-rule (2) of Rule 19 giving a retrospective effect to its provisions with effect from the Ist day of April, 1974, was posed on behalf of the petitioners before us. This way apparently so because the 1979 Rules had been framed in exercise of the powers conferred by Article 309 of the Constitution of India and it is now well settled that the rules so framed can operate with retrospective effect. If authority was needed for this patent proposition, it exists in the following unequivocal observations of the final Court in *B. S. Vadera etc.* v. *Union of India and others.*

> "..... 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

(1-A) 1969 S.L.R. 6.

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."

Patently in view of the aforesaid settled legal position, Mr J. L. Gupta did not and indeed could not assail the retrospectivity of the aforesaid rule 19. Equally, in this context it deserves highlighting that he did not raise even a hint of argument to the effect that the impugned promotion orders, Annexures P/4 to P/3, were in anyway in conflict with or in contravention of rules 9 and 19 aforesaid. It would inevitably follow that if the constitutonality of rules 9 and 19 is upheld, then the inevitable retrospectivity can throw a cloak of protection around Annexure P/4 to P/6.

15. In assailing the constitutionality of rules 9 and 19, the spear-head of the learned counsel for the petitioners attack was rested on Article 309 of the Constitution of India. It was submitted that rules 9 and 19 were intended to validate the promotion orders Annexures P/4 to P/6, which at the time of their passing were in patent contravention of the 1960 Rules and this, according to the learned counsel was an unauthorised and unwarranted exercise of power under Article 309 of the Constitution of India. It was sought to be contended that the validation of what was irregular or contrary to the existing law is within the scope of the legislature itself which has plenary powers, but no rule framed under Article 309 of the Constitution of India can do so and sanctify or make valid what

at the material time was not legal. Primary reliance in this context was on *State of Mysore* v. *Padmanabhacharya and others,* (1) and *R. N. Nanjundappa* v. *T. Thimmaiah and another,* (2).

16. It is plain that in order to attract the aforesaid argument, it must first be factually or legally found that rules 9 and 19 are in essence valedictory. Only if it is so, then alone the aforesaid contention would arise for consideration, whilst on the other hand if it is to be held that by virtue of the retrospective effect of rule 19, the promotion orders are in consonance therewith, then it would be evident that these would be *ipso facto* valid and no question of validating or sanctifying them would arise. The first and the primary question therefore, herein is whether in view of the accepted restrospectivity of rule 19, the promotion orders Annexures P/4 to P/6 are to be deemed as valid when passed.

17. The answer to the question appears to me as plain and wholly in favour of the stand taken by the respondent-State. Once effect is to be given to the retrospectivity clause of sub-rule (2) of rule 19, it is evident that the provisions of the sub-rule must be deemed to have been on the statute book with effect from the Ist day of April, 1974. By virtue of this legal fiction (and as already noticed, no challenge to the retrospectivity of the provision could be or was laid) the orders Annexure P/4 to P/6, which were admittedly passed after the first day of April, 1974, would be wholly in accordance with the provisions of rule 19(1). It deserves repetition that the learned counsel for the petitioners did not even remotely attempt to argue that the impugned promotion orders were in any way in conflict with the aforesaid provision or with those of rule 9 of 1979 Rules. Consequently, it necessarily follows that the impugned orders in view of the retrospective operation of rule 19 must be deemed to be in accordance with law and, therefore, indeed no validation thereof was required. Even otherwise a plain look at the provisions of rule 19 would indicate that it does not either expressly or implicitly intend to validate anything invalid, but primarily provides for the eligibility for promotion to the post of the District Attorneys of a certain class of incumbents of other posts. Neither rule 9 nor rule 19 of the 1979 Rules, therefore, appears to me as even

(1) 1967 S.L.R. 8.

(2) A.I.R. 1972 S.C. 1767.

remotely valedictory. Once that is so, it is evident that the argument of the learned counsel for the petitioners resting on this assumption must necessarily crumble.

18. Though the matter appears to be plain on principle and the language of the challenged provisions, authority is not lacking in support of the aforesaid view. In *Raj Kumar* v. *Union of India and others*, (3), Alagiriswami, J. speaking for the Court observed as follows:—

> ".....Once a law is give retrospective effect as from a particular date all actions taken under the Act even before the amendment was made would be deemed to have been taken under the Act as amended and there could be really no question of having to validate any action already taken provided it is subsequent to the date from which the amendment is given retrospective effect. The question of the particular form of the validation would always depend on the circumstances of a case and no general formula can be devised for all circumstances. It is enough to say that in the present case the action taken against the appellant was on a date subsequent to the date on which the amended rule takes effect and therefore, that action being in accordance with the amended rule is legally a valid action and there is no need to have a validating provision in respect thereof."

19. Mr Gupta was rather half-hearted in challenging the constitutionality of rules 9 and 19 on the basis of Articles 14 and 16 of the Constitution of InIdia. The only argument raised in this context was curiously sought to be rested on the promulgation of a subsequent set of rules on May 14, 1979, namely; Haryana State Prosecution Legal Service (Group-B) Rules, 1979. On an assumed conflict of rule 11 of this latter promulgation of May 14, 1979 with rules 9 and 19 of the 1979 Rules, it was sought to be contended that the equality clauses of the Constitution were violated. The argument merely deserves to be noticed and rejected. I am unable to see how the promulgation of a separate set of rules subsequent to the

(3) A.I.R. 1975 S.C. 1116.

1979 Rules would in any way impinge upon the constitutionality or otherwise of the existing rules 9 and 19. Mr Gupta was wholly unable to show any infringement of the rule of equality before law as enshrined in the Constitution and indeed when confronted with the inherent implausibility of the contention raised by him, he did not seriously press the point.

20. No other argument was raised and in the light of the aforesaid discussion, the constitutional validity of rule 9 and 19 of the Haryana State Prosecution Legal Service (Group 'A') Rules, 1979 is hereby upheld. Inevitably the challenge to the impugned orders, Annexures P/4 to P/6 also fails. The writ petition is without merit and is hereby dismissed. The parties are, however, left to bear their own costs.

Prem Chand Jain, J.—*I agree.*

Harbans Lal, J.—*I agree.*

N.K.S.

43397 ILR—Govt Press, Chd.