Before S.S. Saron & Ramendra Jain, JJ.

JAGMOHAN SINGH BHATTI—*Petitioner*

versus

UNION OF INDIA—*Respondents*

CWP No. 6715 of 2012

August 12, 2016

Constitution of India, 1950—Arts. 164(1A), 162, and 309—Constitution (Ninety-first Amendment) Act, 2003—Appointment of MLAs as Chief Parliamentary secretaries by Punjab Govt.—Constitutional validity—Held, Parliamentary Secretaries are in nature of Junior Ministers who change with Government of day such, appointments of Chief Parliamentary Secretaries amounts to infraction of provisions of Article 164 (1A) of the Constitution.

Held that, the Parliamentary Secretaries are in the nature of Junior Ministers who change with the Government of the day. As such, appointments of Chief Parliamentary Secretaries amount to infraction of the provisions of Article 164 (1A) of the Constitution.

(Para 94)

Further held that, it is quite evident that:-

(a) The Governor of the State or the legislature has no competence or legislative sanction to frame rules regulating the conditions of appointment and services of Chief Parliamentary Secretaries and Parliamentary Secretaries for their functioning within the House of the State Assembly. Such posts are not part of regular services of the State under the executive forming part of the bodies involved in the governance of the State;

(b) The services under the State are entirely different from services within the Assembly House. Rules for governing the services under the State or its executive can be made in exercise of powers conferred by the proviso to Article 309 of the Constitution as also under the authority conferred by Entry 41 of List-II of the Seventh Schedule of the Constitution, i.e. the State List, which provides for: "State Public Services; State Public Service Commissions". These evidently relate to executive services under the State. However, in case a person is working as a Parliamentary Secretary under the State executive, he shall not be disqualified for being a member of the Punjab State

Assembly in view of the provisions of the Disqualification Act 1952 which provides that a person shall not be disqualified for being chosen as, and for being, a member of Punjab State Legislature by reason for the fact that he holds the office of Parliamentary Secretary or Parliamentary Under Secretary under the Government of the State of Punjab. The holding of the office of Chief Parliamentary Secretary, therefore, is evidently contemplated under the Government of the State of Punjab and not as a link between the Ministers and the administrative Secretaries.

(c) The provisions of Article 162 of the Constitution relate to the extent of executive power of the State and that the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. The power sought to be derived by the officials respondents is in the context of Article 309 of the Constitution. The 2006 Rules have been framed by the State in exercise of the powers of Article 162 of the Constitution relate to services under the State of the executive and not that of the legislature.

(d) The appointments of Chief Parliamentary Secretaries are contrary to the Constitutional intent of limiting the number of Ministers or the size of the Cabinet. The appointments as made, therefore, are in fact a roundabout way of bypassing the Constitutional mandate of the provisions of Article 164 (1A) of the Constitution and, therefore, have to be invalidated.

(Para 95)

H.C. Arora, Advocate, *petitioner* in person in CWP No. 10167 of 2012.

A.K. Ganguli, Senior Advocate with Nikilesh Ramachandran, Advocate, Nikhil Nayyar, A.A.G., Punjab and Rajat Khanna, D.A.G., Punjab, for respondents No. 4 and 5 in CWP No. 6715 of 2012 and for respondents No. 1 and 2 in CWP No. 10167 of 2012.

None for the other respondents.

S.S. SARON, J.

(1) This order will dispose of the above two petitions, i.e. CWP No.6715 of 2012 titled ***Jagmohan Singh Bhatti*** *versus* ***Union of India and others*** and CWP No.10167 of 2012 titled 'H.C. Arora versus State of Punjab and others', as the petitioners in both the petitions seek the same relief of quashing the appointments of the private respondents in

the respective petitions as Chief Parliamentary Secretaries in the State of Punjab.

(2) Mr. Jagmohan Singh Bhatti, Advocate - the petitioner in CWP No. 6715 of 2012 seeks a writ in the nature of *quo warranto* declaring the posts of Chief Parliamentary Secretaries held by respondents No.6 to 26 in hispetition to be illegal, unconstitutional and contrary to; besides, being in utter disregard to the Constitution (Ninety-first Amendment) Act, 2003 to the Constitution of India and for quashing their appointments as such being illegal, unconstitutional, arbitrary and under undue influence of the respondents in the eyes of law. A further prayer has been made for issuance ofa writ in the nature of *prohibition* restraining the Finance Department of the State of Punjab not to bear the expenses of the said illegal appointees which are in violation of the Constitution (Ninety-first Amendment) Act, 2003 to the Constitution of India and to withdraw all the facilities extended to said respondents No.6 to 26 in the said petition in the interest of the State, its people and the State exchequer. A further writ has been sought for directing respondents No.1 to 4 to dispense with the services of respondents No.6 to 26 forthwith.

(3) Mr. H.C. Arora, Advocate - the petitioner in CWP No. 10167 of 2012 seeks quashing of the notification dated 04.05.2006 (Annexure P1 with the said writ petition) to the extent that it empowers the Chief Parliamentary Secretaries to function as intermediary channels between the Administrative Secretaries of the State Government and the concerned Ministers stating the same to be in violation of the provisions of Article 164 (3) of the Constitution of India, as read with the oath of secrecy administered to the Chief Minister/Deputy Chief Minister and other Ministers of Punjab, which makes it mandatory for them not to reveal any matter to anybody else, either directly or indirectly, which may come under their consideration. A prayer for issuance of a writ has been made for quashing the circular dated 09.05.2012 (Annexure P3 with the said writ petition) issued by the Principal Secretary to Government of Punjab, Department of Rural Development and Panchayats (Budget and Accounts Section), Punjab (respondent No.2) to the extent it confers powers on the Chief Parliamentary Secretaries to disburse discretionary grants to the extent of Rs.1.50 crore each, terming the same to be in violation of even the functions of the Chief Parliamentary Secretaries vide notification dated 04.05.2006 (Annexure P1 with the said writ petition) and for restraining respondents No.3 to 23 (Chief

Parliamentary Secretaries) in the said petition from dealing with the files going from the Administrative Secretaries of the concerned departments of the State Government to the Chief Minister/Deputy Chief Minister and other Ministers.

(4) It is submitted by Mr. Jagmohan Singh Bhatti, Advocate that he has been practising as an advocate in this Court and the Supreme Court of India for the last more than 28 years. He is a resident of Sahibzada Ajit SinghNagar (Mohali) in the State of Punjab and he is a conscious and an awakened citizen; besides, he is interested in the affairs of the State of Punjab and he takes up various causes of the general public at large by way of filing and presenting petitions before this Court. Since the affairs relate to the State of Punjab and its general public, therefore, it is submitted that he is entitled to invoke the extraordinary writ jurisdiction of this Court by filing and presenting the present petition in the larger public interest.

(5) Mr. H.C. Arora, Advocate submits that he is a public spirited person and he has earlier also filed civil writ petitions by way of PILs for various purposes in public interest. The present writ petition, it is submitted, raises very important and substantial questions of law of public importance. The petitioner does not have any vested interest in filing the present petition. He is not going to be benefited either directly or indirectly through the relief being sought by him in the present petition. The present petition it is submitted is, therefore, maintainable in public interest as a PIL.

(6) The primary contention of the petitioners in their respective petitions is that the appointments of the private respondents as Chief Parliamentary Secretaries in the State of Punjab in spite of the fact that there is no such post of the designation of Chief Parliamentary Secretary/ Parliamentary Secretary under the Constitution of India, under any Statute, Act passed by the Parliament of India or any State Legislature, the said impugned appointments have been made. All the appointees are Members of the Punjab State Legislative Assembly ('MLA' - for short) and have been appointed by the Chief Minister of Punjab illegally, unconstitutionally and in utter violation of law. Therefore, the petitioners in their respective petitions pray that the private respondents holding the posts of Chief Parliamentary Secretaries be removed forthwith from the said posts and no work be assigned to them; besides, the facilities and benefits, which they are illegally getting bewithdrawn forthwith from them.

(7) The State of Punjab vide notification dated 04.05.2006

framed the Punjab Parliamentary Secretaries and Chief Parliamentary Secretaries(Terms and Conditions of Appointment) Rules, 2006 ('2006 Rules' - for short). The said 2006 Rules have been framed in exercise of the powers conferred by Article 162 of the Constitution of India. It is mentioned in the notification dated 04.05.2006 framing the 2006 Rules that; "In exercise of the powers conferred by Article 162 of the Constitution of India, the Governor of Punjab is pleased to make the following Rules governing the terms and conditions of appointment of Parliamentary Secretaries and Chief Parliamentary Secretaries namely:".

(8) Mr. Jagmohan Singh Bhatti, Advocate and Mr. H.C. Arora, Advocate - petitioners in their respective petition have contended that the State of Punjab has 117 Assembly Constituencies in the Legislative Assembly of the State. Members are elected to the State Legislative Assembly. The total strength of Ministers including the Chief Minister, in view of the Constitution (Ninety-first Amendment) Act, 2003 to the Constitution of India, is not to exceed 15% of the total number of Members of the Legislative Assembly of that State. Therefore, the strength of the Council of Ministers including the Chief Minister is not liable to exceed 18 in a House of 117 Members within six months from such date as the President may by public notification appoint. The date of notification that has been nominated by the President of India is 07.01.2004. However, in order to circumvent the aforesaid mandatory Constitutional amendment and requirement, the official respondents of the State Government apparently out of political compulsions have appointed twenty-one Chief Parliamentary Secretaries, who are *de facto* Ministers enjoying the status of Deputy Ministers with all basic facilities and amenities available to the Ministers. This, it is submitted, is in sheer and in gross violation of the Constitution (Ninety-first Amendment) Act, 2003 to the Constitution of India, which came into force on 09.07.2004. Thus, due to thisact of the official respondents of the State, the entire object and purpose of the said Constitutional amendment to restrict the total number of members of the Council of Ministers to the maximum of 15% of the total Assembly seats or the House stands defeated. This army and large cavalcade of these Chief Parliamentary Secretaries, according to the petitioners, is a burden on the State exchequer to the tune of Rs.3,00,00,000/- annually or may be even more. The expenditure as incurred due to these appointments is a big drain and siphoning off the financial resources of the State of Punjab, which is already under a heavy debt. Therefore, it is submitted that the appointments of Chief

Parliamentary Secretaries in the State of Punjab be invalidated and their appointments be quashed.

(9) The State of Punjab and the Chief Minister, Punjab (respondents No. 4 and 5) through the Secretary to Government of Punjab, Department of General Administration (Co-ordination Wing), Chandigarh filed their response in Jagmohan Singh Bhatti's case (supra). The private respondents despite being served in one or the other of the petitions have not filed replies.

(10) In the reply filed by the Secretary to Government of Punjab, Department of General Administration (Co-ordination Wing), Chandigarh on behalf of State of Punjab and the Chief Minister, Punjab (respondents No. 4 and 5 in the case of Jagmohan Singh Bhatti) (hereinafter referred to as - the 'official respondents'), it is stated that the case of the petitioner revolves around the Constitution (Ninety-first Amendment) Act, 2003 to the Constitution by which Sub-Article (1A) to Article 164 has been added to the Constitution of India. It is accepted that according to the said provision, the Council of Ministers in the State of Punjab cannot exceed eighteen. However, the contention of the petitioner that the Chief Parliamentary Secretaries and Parliamentary Secretaries are Ministers and, therefore, the Council of Ministers exceeds the maximum strength permissible under Article 164 (1A) of the Constitution of India is incorrect. It is submitted that the posts of Chief Parliamentary Secretaries and Parliamentary Secretaries are not mentioned in the Constitution of India. A Chief Parliamentary Secretary is deputed with a Minister to assist him and he is to function as an intermediary channel between the Administrative Secretary of the State Government and the Minister according to the 2006 Rules. It is submitted that by the Constitution (Ninety-first Amendment) Act, 2003 by which Sub-Article (1A) has been inserted to Article 164 of the Constitution of India *inter alia* provides that the number of Ministers including the Chief Minister in a State shall not exceed 15% of the total number of Members of the Legislative Assembly of that State. It is stated as pertinent to mention that the said amendment mentions the offices of the Ministers and Chief Minister only. Therefore, the office of Chief Parliamentary Secretary/Parliamentary Secretary is not a Constitutional post and an appointee to the same cannot be termed as a Member of the Council of Ministers.

(11) It is further submitted that in pursuance of Article 166 (2) and (3) of the Constitution of India, the Rules of Business of the Government of Punjab, 1992 ('Business Rules 1992' - for short) and

the Government of Punjab Allocation of Business Rules, 1994 ('Allocation Rules 1994' - for short) have been framed. In terms of Rule 2 (b) of the Business Rules 1992, the 'Council' has been defined as 'Council of Ministers Constituted under Article 163 of the Constitution of India'. Again, a reference to 'Council', Chief Minister and Ministers only has been made under Rules 4, 11 and 13 of the Business Rules 1992. Besides, Rule 18 of the Business Rules 1992 envisages that except as otherwise provided by any other Rule, cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge, who may with the prior approval of the Chief Minister, by means of 'Standing Orders' give such directions as he thinks fit for the disposal of cases in the Department and copy of such 'Standing Orders' are to be sent to the Chief Minister and to the Governor. A reference has been made to Rules 19, 21 and 24 of the Business Rules 1992, which make a mention regarding the functionsof Ministers only. Therefore, according to the official respondents, it is clear from the aforesaid Business Rules 1992 that there is a mention of the functions of 'Council', 'Minister-in-Charge', 'Ministers' and 'Chief Minister'only. The functions of the Chief Parliamentary Secretary and Parliamentary Secretary do not find any mention in the Business Rules 1992 or in the Constitution of India. It is submitted that only in Rule 28, Sub-Rule (2), Clause (ix) of the Business Rules 1992, it has been provided that the case for appointment and resignation of Chief Parliamentary Secretary, besides others, would be submitted by the Chief Minister to the Governor before issue of order. Likewise, Rule 3 of the Allocation Rules 1994 provides that the Governor shall, on the advice of the Chief Minister allot among the Ministers the business of the government by assigning one or more department (s) to the charge of a Minister. In terms of the proviso to said Rule 3, the charge of one department may be given to more than one Minister.

(12) In view of the position, as explained above, it is submitted by the official respondents that it is clear that in the Constitution of India, as also the aforesaid Business Rules 1992 and the Allocation Rules 1994 framed under the Constitutional provisions, relevant extract of which have been annexed as Annexures R1 and R2 respectively, provide for the functions of the Chief Minister and Ministers only who form part of the Council of Ministers. The functions of the Chief Parliamentary Secretary/Parliamentary Secretary do not find any mention either in the Constitution or in the aforementioned Rules. It is, therefore, submitted that Chief Parliamentary Secretaries/Parliamentary Secretaries are not a Member of the Council of Ministers. Therefore,

they are not Ministers. As such, no cause of action has accrued to the petitioner and the present petition is not at all maintainable.

(13) The Speaker of Punjab Vidhan Sabha by way of notification dated 09.03.2006 made modification/amendment to Rule 2 (1) of the 'Rules of Procedure and Conduct of Business in the Punjab Vidhan Sabha' whereby from the definition of 'Minister' the following namely: "Chief Parliamentary Secretary or a Parliamentary Secretary" have been deleted. Therefore, according to the official respondents, the reliance placed by the petitioner on the unmodified Rules, is misplaced. The definition of 'Minister', it is submitted, is to be interpreted in the context of the Constitutional provisions itself and the reliance placed upon the subordinate legislations is misconceived for this purpose. The rules framed under the Constitution are subservient to the provisions of the Constitution itself and, thus, on the basis of the said definitions Chief Parliamentary Secretaries, therefore, cannot be included in the Council of Ministers for the purposes of the Constitution of India. A person to be a Minister under the Constitution has to fulfill the requirements provided under Article 164 thereof. Since the Chief Parliamentary Secretaries do not fulfill the mandatory provisions of Article 164 of the Constitution of India, therefore, they cannot be termed as 'Ministers'. They are not the Members of the Council of Ministers and they are as such not Ministers. It is, therefore, submitted that the writ petition is liable to be dismissed.

(14) It is also submitted that the oath of office and secrecy is not administered by the Governor in terms of the oath contained in Schedule-IIIto the Constitution of India as envisaged by Article 164 of the Constitution. The Chief Parliamentary Secretaries are deputed to assist a Minister and function as an intermediary channel between the Administrative Secretary and the Minister. No oath of secrecy has been administered to the Chief Parliamentary Secretaries by the Governor of Punjab. They do not perform any function of Ministers as envisaged under the Constitution. Therefore, it issubmitted that the writ petition is not maintainable and is liable to be dismissed.

(15) Mr. A.K. Ganguli, learned Senior Counsel appearing with Mr. Nikilesh Ramachandran, Advocate, Mr. Nikhil Nayyar, learned Additional Advocate General, Punjab and Mr. Rajat Khanna, learned Deputy Advocate General, Punjab for the official respondents submitted that the posts of Chief Parliamentary Secretaries /Parliamentary Secretaries, in fact, existed even prior to the Constitution of India being framed. The Government of India Act,

1919 recognized the office of Parliamentary Secretaries then called 'Council Secretaries'. This is evident from Section 52 (4) of the Government of India Act, 1919. However, there is no express reference to Parliamentary Secretaries in the Government of India Act, 1935 although Section 69 read with Section 241 of the Government of India Act, 1935 contemplated their appointments.

(16) It is submitted that the government in exercise of powers under Section 69 (1) (a) of the Government of India Act, 1935 enacted the Punjab Legislative Assembly (Removal of Disqualifications) Act, 1937 ('Disqualification Act 1937' - for short) listing the post of Parliamentary Secretary in Section 2 (1) thereof. The said Disqualification Act 1937 was replaced by the Punjab State Legislature (Prevention of Disqualification) Act, 1952 ('Disqualification Act 1952' - for short). Section 2 (f) of the said Disqualification Act 1952 provides that a person shall not be disqualified for being chosen as, and for being, a member of the Punjab State Legislature by reason only of the fact that he holds the office of a Parliamentary Secretary or Parliamentary Under Secretary under the Government of the State of Punjab. A reference is also made to Section 3 (b) of the Parliament (Prevention of Disqualification) Act, 1959 ('Parliament Disqualification Act 1959' - for short) which saves the holders of the office of Parliamentary Secretary from disqualification from being chosen as, or being, Member of Parliament.

(17) It is further submitted by Mr. A.K. Ganguli, learned Senior Counsel that the State has executive powers to create office of Chief Parliamentary Secretaries/Parliamentary Secretaries. Article 154 of the Constitution vests the executive power of the State in the Governor and Article 162 provides that the executive power of the State shall extend to the matters with respect to which legislature of the State has power to make laws. Besides, a reference is made to Article 246 (3) of the Constitution to contend that the State has the exclusive power to make laws for the State with respect to any matter enumerated in List-II of the Seventh Schedule which in the Constitution is referred to as the 'State List'. A reference has been made to Entry 41 of List-II of the Seventh Schedule, which provides for making law in respect of, "State public services; State Public Service Commission".

(18) Therefore, the State has executive power to create office of Chief Parliamentary Secretaries/Parliamentary Secretaries. The 2006 Rules providing for governing the terms and conditions of appointment of Parliamentary Secretary/Chief Parliamentary Secretary by virtue of

Article 162 of the Constitution are derived from the said provisions. The Chief Parliamentary Secretaries that have been appointed are deputed by the Chief Minister to assist such Ministers, as may be decided by him and to act as an intermediary channel between the Administrative Secretaries of the government and the Minister. Therefore, historically the Parliamentary Secretary was expected to do the work delegated by the Minister and had status below that of a Minister.

(19) A reference has been made to the handbook of the Ministry of Parliamentary Affairs notes to contend that the functions of Parliamentary Secretaries appointed at the Centre include (i) assisting the Minister in his official work; (ii) representing the Department /Ministry in the House to which he belongs; (iii) performing such functions as may be assigned to him by the Minister. Under the Parliament Disqualification Act 1959, the office of Parliamentary Secretaries is listed along with the office of Chief Whip, Deputy Chief Whip or Whip in Parliament in Section 3 (b). These functionaries performed the role of intermediaries in the administrative set up. The functionaries like the Chief Parliamentary Secretary and Parliamentary Secretaries, being members of the legislature, are intermediaries between the leaders i.e. the concerned Ministers, administration and the rank and file of their parties in order to keep each informed of the views of the other.

(20) It is further submitted that Article 309 of the Constitution of India provides that 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. Therefore, it is contended that irrespective of the powers under Article 162 of the Constitution of India, the States have the power in terms of the proviso to Article 309 of the Constitution to create posts of Chief Parliamentary Secretaries/Parliamentary Secretaries and make appointments against the same.

(21) A reference is made to the case of ***A.B. Krishna*** *versus* ***State of Karnataka***[1] wherein it has been observed that the legislative field indicated in Article 309 is the same as is indicated in Entry 71 of List-I of the Seventh Schedule or Entry 41 of List-II of that Schedule. The power to make rules regulating conditions of service of persons appointed to government posts is available under the proviso to Article

[1] (1998) 3 SCC 495

309. Besides, executive instructions may also be issued for the purpose. It is submitted that the Supreme Court in ***B.N. Nagarajan*** *versus* ***State of Mysore***[2] has categorically held that it is not obligatory on the government to make rules of service under Article 309 before a post is created and that in any case it would be open to it to issue executive instructionsunder Article 162 for the said purpose. The said view of the Supreme Court has been reiterated in ***Swaran Lata*** *versus* ***Union of India***[3].

(22) The State is, therefore, competent to create the posts of Chief Parliamentary Secretaries/Parliamentary Secretaries as posts in connection with the affairs of the State. It is submitted that the executive power of the State under Article 162 of the Constitution is not dependent upon a pre- existing legislation on the subject enacted by the State Legislature. Nothing that the executive power connotes the residue of governmental functions that remains after legislative and judicial functions are taken away. It is further submitted that the creation of a post is an administrative decision and is not amenable to judicial review. Even suitability of the appointees or determining the validity of their appointments on the basis of their suitability does not come within the ambit of judicial review.

(23) We have given our thoughtful considerations to the contentions of the learned counsel for the parties and with their assistance gone through the records of the case.

(24) The present petitions are in the nature of Public Interest Litigations filed by two advocates of this Court to contend that the Constitution does not provide for or contemplate the posts of Chief Parliamentary Secretaries or Parliamentary Secretaries. The Constitution (Ninety-first Amendment) Act, 2003 to the Constitution of India has been brought into effect w.e.f. 01.04.2004 and under the heading 'Council of Ministers' in Article 164, Sub-Articles (1A) and (1B) have been added. Article 163 provides for the Council of Ministers to aid and advice theGovernor. Article 164 provides for other provisions as to Ministers. In terms of Sub-Article (1A) to Article 164, it is provided that the total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed 15% of the total number of members of the Legislative Assembly of that State. Sub-Articles (1A) and (1B) of Article 164 of the Constitution read as

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[2] (1996) 3 SCR 682:AIR 1966 SC 1942
[3] (1979) 3 SCC 165

under:

> "(1A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent of the total number of members of the LegislativeAssembly of that State:
>
> Provided that the number of Ministers, including the Chief Minister, in a State shall not be less than twelve:
>
> Provided further that where the total number of Ministers, including the Chief Minister, in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent or the number specified in the first proviso, as the case may be, then the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date as the President may by public notification appoint.
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> (1B) A member of the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the dateof his disqualification till the date on which the term of his office as such member would expire or where he contests any election to the Legislative Assembly of a State or either House of the Legislature of a State having Legislative Council, as the case may be, before the expiry of such period, till the date on which he is declared elected, whichever is earlier."

(25) According to the petitioners, the said provisions have been subverted by the official respondents by appointing Chief Parliamentary Secretaries with the powers of Deputy Ministers and thereby deriding the Constitution.

(26) As against this, learned Senior Counsel appearing for the official respondents has supported the appointments as absolutely necessary to which there is a historical importance; besides, the appointments have been made in accordance with 2006 Rules, which rules have been framed in exercise of powers under Article 162 of the Constitution dealing with the executivepower of the State.

(27) In order to ascertain the nature of posts of Chief Parliamentary Secretaries and Parliamentary Secretaries a background of the said posts may be noticed. Besides, the consequential question that would require consideration is whether the State Government has the legislative sanction to frame the 2006 Rules in the context of the powers conferred by Article 162 ofthe Constitution of India.

(28) The posts of Parliamentary Secretaries were earlier mentioned in the Government of India Act, 1919. These were then called 'Council Secretaries'. Section 52 (4) of the Government of India Act, 1919 reads as follows:

> "The Governor of a Governor's province may at his discretion appoint from among the non-official members of the local legislature Council Secretaries who shall hold office during his pleasure, and discharge such duties in assisting members of the executive council and Ministers, as he may assign to them.
>
> There shall be paid to Council Secretaries so appointedsuch salary as may be provided by vote of the legislative council.
>
> A Council Secretary shall cease to hold office if he ceases for more than six months to be a member of the legislativecouncil."

(29) There was no express reference to Parliamentary Secretaries under the Government of India Act, 1935. However, Mr. A.K. Ganguli, learned Senior Counsel for official respondents submits that commentators suggest that Section 69 read with Section 241 of the said Government of India Act, 1935 contemplated their appointments. The same, however, now would be of no consequence as the Government of India Act, 1919 stands repealed by Section 321 of the Government of India Act, 1935 and the latter Act standsrepealed by Article 395 of the Constitution of India.

(30) The Disqualification Act 1937 was enacted to provide in accordance with Section 69 (1) (a) of the Government of India Act, 1935, that the holder of offices mentioned therein shall not be disqualified for election to the Punjab Legislative Assembly. The said Disqualification Act 1937 had been framed for removal of certain disqualifications for elections to the Punjab Legislative Assembly. Section 69 (1) (a) of the Government of India Act, 1935 *inter alia* provided that a person shall be disqualified for being chosen as, and for being, a member of the Provincial Legislative Assembly or Legislative Council - "(a) if he holds any office of profit under the Crown in India, other than an office declared by the Act of the

Provincial Legislaturenot to disqualify its holder". The Disqualification Act 1937 provided for removal of such and certain disqualifications. The object of the Disqualification Act 1937 was that Section 69 (1) (a) of the Government of India Act, 1935 provided that a person shall be disqualified from being chosen as, and for being, a member of the Provincial Legislative Assembly if he holds any office of profit under the Crown in India, other than an office declared by the Act of the Provincial Legislature not to disqualify its holder. For the purpose of first elections to the Provincial Legislature Section 307 of the Government of India Act, 1935 saved from disqualification the holder of an office which is not a whole time office remunerated either by salaries or fees, and the Section continued to operate during the lifetime of the first Assembly to save persons who had been duly elected from being disqualified under the provisions of Section 69 (1) (a) from sitting and voting as members even though the office they held may be an office of profit under the Crown. The first object of the Disqualification Act 1937 was to secure that for the future the electorate shall not be debarred from choosing members to the legislature, persons who, though they held certain offices which might be called offices of profit under the Crown, were at the same time not whole timegovernment servants. Such posts were that of 'lambardars', inamdars', sufedposhes', 'zaildars' and sub-registrars. The second object was to save from disqualification persons who may be appointed to be Parliamentary Secretaries. Such persons were to be chosen from amongst the members of the Legislative Assembly. Section 2 of the Disqualification Act 1937 provided for removal of certain disqualifications. It was envisaged that a person shall not be disqualified for being chosen as, or for being a member of the Punjab Legislative Assembly by reason only of the fact that he holds any of the offices mentioned therein, namely, the office of Parliamentary Secretary or of Parliamentary Private Secretary, if and when created; besides, any of the offices shown in the Schedule to the said Disqualification Act 1937. In the Schedule, it is mentioned (1) 'Lambardars', inamdars', sufedposhes' or 'zaildars' whether called by this or any other title; (2) Sub- Registrars, whether departmental or honorary; (3) Officer in the Army in India Reserve of Officers, or Officer, non-commissioned officer, or other member of the Indian Territorial Force; and (4) Members of the Auxiliary Force in India.

(31) The Disqualification Act 1937 and the Punjab Provisional Legislature (Prevention of Disqualification) Act, 1950 were repealed by the Disqualification Act 1952. The latter Act was an Act to

declare certain offices of profit not to disqualify their holders for being chosen as, and for being, members of the State Legislature. Section 2 of the Disqualification Act 1952 relates to 'Prevention of disqualification for membership of State Legislature'. It is provided therein that a person shall not be disqualified for being chosen as, and for being, a member of the Punjab State Legislature by reason only of the fact that he holds any of the office of the offices of profit under the Government of India or under the Government of the State of Punjab, the offices as mentioned therein. Clause (f) of Section 2 mentions the office of a Parliamentary Secretary or Parliamentary Under Secretary. The holding of the office of Chief Parliamentary Secretary, therefore, is evidently contemplated under the Government of the State of Punjab and not as a link or an intermediary channel between the Ministers and the administrativeSecretaries.

(32) The Disqualification Act 1952 gives an indication that there were posts of Parliamentary Secretaries and Parliamentary Under Secretaries; however, the same does not give or even indicate the source or the provision of any legislative act or legislative sanction by or under which these posts were created. These have primarily been continued and reiterated from the earlier Disqualification Act 1937. These could well be posts of the legislative secretariat and not necessarily from amongst the Members of the House although the object of the Disqualification Act 1937 makes a mention that such persons, i.e. Parliamentary Secretaries, would be chosen from amongst the members of the Legislative Assembly. However, there is no such indication in the Disqualification Act 1952.

(33) Section 3 of the Parliament Disqualification Act 1959 provides for certain offices of profit not to disqualify. It is declared therein that none of the offices as mentioned therein insofar as it is an office of profit under the Government of India or the Government of any State, shall disqualify the holder thereof for being chosen as, or for being, a Member of Parliament namely:- (b) the office of Chief Whip, Deputy Chief Whip, or Whip in Parliament or of a Parliamentary Secretary. The said Section 3 (b) of the Parliament Disqualification Act 1959 saves the holders of the office of Parliamentary Secretary from disqualification from being chosen as, or being, Members of Parliament. The Parliament Disqualification Act 1959 relates to the Parliament as provided for under Chapter-II of the Constitution of India and it does not relate to the State Legislature. In other words, the State Legislature is not shown to have any power under a statutory provision

to create a post of Parliamentary Secretary.

(34) Mr. A.K. Ganguli, learned Senior Counsel appearing for the official respondents has emphasized that the State has power to enact the 2006 Rules in terms of Article 162 which provides for the executive power of a State shall extend to matters with respect to which the Legislature of the State has power to make law. The Legislature of the State, it is submitted, has the powers to make law for governing the terms and conditions of appointment of Parliamentary Secretaries and Chief Parliamentary Secretaries by virtue of the proviso to Article 309 of the Constitution of India.

(35) Article 162 of the Constitution of India, in terms of which the 2006 Rules have been framed, relates to 'extent of executive power of State'. It is provided that subject to the provisions of the 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. In terms of the proviso to Article 162 of the Constitution, it is 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 the Constitution or by any law made by Parliament upon the Union or authorities thereof. The executive power of the State in terms of Article 162 is co-extensive with that of the State legislature. Therefore, the State executive may make rules for regulating any matter which is within the jurisdiction and ambit of the State.

(36) Article 73 of the Constitution may also be noticed, which relates to 'extent of executive power of the Union'. It is provided that subject to the provisions of the Constitution, the executive power of the Union shall extend - (a) to the matter with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as areexercisable by the Government of India by virtue of any treaty or agreement.

(37) In ***Rai Sahib Ram Jawaya Kapur*** *versus* ***State of Punjab and others***[4], it was held by the Hon'ble Supreme Court that neither of these Articles, i.e. Article 73 and 162, contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of executive power between the Union on the one hand and the

[4] AIR 1955 SC 549

component States on the other. They do not mean that it is only when Parliament or the State legislature has legislated on certain items appertaining to their respective lists that the Union executive or the State executive, as the casemay be, can proceed to function in respect to them. On the other hand, the language of Article 162 clearly indicates that the power of the State executive do extend to matters upon which the State legislature is competent to legislate and are not confined to matters over which the legislation has been passed already. The same principle underlies Article 73 of the Constitution.

(38) Therefore, it is to be ascertained whether the State legislature haspower to enact the 2006 Rules so as to validate them in exercise of power under Article 162 of the Constitution of India by deriving the source of powerto legislate for creating the posts of Chief Parliamentary Secretaries from the proviso to Article 309 of the Constitution.

(39) Article 310 of the Constitution may be noticed. The same relates to 'Tenure of office of persons serving the Union or a State'. Sub-Article (1) provides that except as expressly provided by the Constitution, every person who is a member of a defence service or a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of the civil service of a State or holds any civil post under the State holds office under the pleasure of the Governor. The doctrine of pleasure, thus, stands codified in Article 310 (1) of the Constitution. A public servant in terms thereof holds office during the pleasure of the sovereign. However, in order to protect the civil servants against political interference Article 311 provides for safeguards. In terms of Sub-Article (2) of Article 310 of the Constitution, it is provided that notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all India service or of a civil service of the Union or a State, is appointed under the Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

(40) In ***State of Bihar and another*** *versus* ***Bal Mukund Sah and others***[5], a Five Judge Bench of the Supreme Court considered the question whether the legislature of the appellant - State of Bihar in the said case was competent to enact the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991. In the consideration of the same, various Constitutional provisions were considered which would be relevant and apposite for the purpose of the present controversy as well. Part XIV of the Constitution dealing with 'Services under the Union and the States' as also Chapter I comprising of Articles 308 to 313 which deals with 'services', while Chapter II covering Article 315 to 323 which deals with 'Public Service Commissions' were considered. After making a reference to Article 309, it was observed that a mere look at the said Article showed that it is expressly made subject to other provisions of the Constitution and subject to that, an appropriate legislature or Governor can regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State concerned. The proviso to that Article permits the Governor of the State to fill up the gap, if there is no such statutory provision governing the aforesaid topics. For that purpose, the Governor may 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 competent legislature which may intervene and enact appropriate statutory provisions for the same.

(41) The manner of recruitment to the services contemplated by Article 309, it was observed, is provided by Chapter II dealing with the 'Public Service Commissions'. Article 320 deals with the 'Functions ofPublic Service Commissions' enjoining them to conduct examinations for appointment to the 'services' of the Union and the 'services' of the State respectively. That naturally has a direct linkage with the types of services contemplated by Article 309.

(42) It was further noted with pertinence that independently of general provisions of Article 309, the Constitution made special provisions for certain services. Even if they may be part of public services, still separate Constitutional schemes, it was held, were envisaged for regulating recruitment and conditions of services of officers governed by such services. A glance was made at such

[5] (2000) 4 SCC 640

specially dealt with services.

(43) Part VI of the Constitution dealing with the States, it was noticed; separately deals with the executive in Chapter II, the State legislatureunder Chapter III and thereafter Chapter IV dealing with the legislative powers of the Governor followed by Chapter V dealing with the High Courts in the States and Chapter VI dealing with the Subordinate Courts. In Chapters VI dealing with the Subordinate Courts, a provision was made for appointments of District Judges under Article 233, recruitment of persons other than the District Judges to the Judicial Services under Article 234 and also control of the High Court over the Subordinate Courts as laid down under Article 235.

(44) It was held that it, therefore, became obvious that the framers of the Constitution separately dealt with 'Judicial Services' of the State and made exclusive provisions regarding recruitment to the posts of District Judge and other civil judicial posts inferior to the posts of the District Judge. Therefore, these provisions, it was held, were found entirely in a different part of the Constitution and stand on their own; quite independent of Part XIV dealing with services in general under the 'State'. Article 309, therefore, which, on its express terms, is made subject to other provisions of the Constitution does get circumscribed to the extent to which from its general field of operation is carved out a separate and exclusive field for operation by the relevant provisions of Article dealing with Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution.

(45) A further reference was made to Article 146 of the Constitution dealing with service under the Supreme Court which laid down the procedure for appointments of officers and servants of the Supreme Court and Sub- Article (2) of Article 146 provided that subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorized by the Chief Justice of India to make rules for the purpose. Similar provision, it was noticed, is found in Article 229 dealing with recruitment of officers and servants and the expenses of the High Court. Sub-Article (2) of Article 229 lays down the rule making power of the Chief Justice of the Court concerned or by some other Judge or officer of the Court authorized by the Chief Justice to make rules for the purpose subject to the provisions of any law made by any Legislature of the State.

(46) Article 148 of the Constitution was also noticed which deals

with Comptroller and Auditor General of India. Sub-Article (5) of Article 148 deals with rule making power of the President regarding the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor General subject to any provisions of the Constitution or any law made by the Parliament in this connection.

(47) Article 98 of the Constitution which deals with the Secretariat of the Parliament and its Sub-Article (3) were noticed. Similarly, for the Secretariat of the State Legislature, Article 187 which deals with separate secretariat staff for the House or each House of the Legislature of a State was noticed. Sub-Article (3) of Article 187, it was observed, runs parallel to Sub- Article (3) of Article 98. Sub-Article (3) of Article 187 which relates to Secretarial Staff reads as under:

> "(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause."

(48) A reference was made to Article 324 which is found in Part XV which deals with superintendence, direction and control of elections to be vested in an Election Commission. Article 324 (5) provides that subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine.

(49) The aforesaid Constitutional provisions, it was observed, clearly indicated that independently of the general provisions regarding services as mentioned in Part XIV, different types of services had been contemplated by the Constitution in other parts and these had their own procedural schemes for recruitment and regulation of conditions of these services and, therefore, Article 309 found in Part XIV necessarily would have to be read subject to these special provisions regarding recruitment and conditions of services of diverse types governed by the relevant different Constitutional provisions as indicated. The Supreme Court, therefore, noticed the services in respect of the Judiciary; the services under Supreme Court; the High Courts'; the Comptroller and

Auditor General; as also the Secretariat of Parliament, the State Legislature and for making rules regulating the recruitment and condition of service of persons appointed to the Secretarial Staff of the Parliament, and of the Assembly or the Council in the State.

(50) A perusal of the aforesaid observations of the Supreme Court in ***Bal Mukund Sah's*** *case (supra)* evidently shows that there is no provision in the Constitution for making rules regarding recruitment and conditions of service from amongst the Members of the State Legislature itself for functioning in the State Assemblies. A provision is there only for secretarial staff of the State Legislatures. The 2006 Rules have been framed in exercise of power under Article 162 of the Constitution, which provides for the extent of executive power of the State, which is subject to the provisions of the Constitution. It extends to matters with respect to which the Legislature of the State has power to make laws. The official respondents have taken the stand that the power to make rules for governing the terms and conditions of appointment of Parliamentary Secretaries and Chief Parliamentary Secretaries is derived from Article 309 of the Constitution and more particularly its proviso. Article 309 of the Constitution to which the executive power of the State to make laws is referred to falls under Part XIV of the Constitution which relates to 'Services under the Union and the States'. Article 309 of the Constitution of India and its proviso read as under:

> "**309. Recruitment and conditions of service of persons serving the Union or a State –** Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:
>
> Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of 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."

(51) The provisions of Article 309 relate to 'recruitment and

conditions of service of persons serving the Union or a State'. Article 310 of the Constitution relates to 'tenure of office of persons serving the Union or a State'. Sub-Article (1) of Article 310 relates to the Union while Sub-Article (2) relates to the States. It is to be kept in view that at present the Chief Parliamentary Secretaries have been appointed from amongst the Members of the Punjab State Legislative Assembly which posts evidently and admittedly do not find a mention in the Constitution or any statutory enactment for appointment to such posts. The creation of the posts is sought to be justified by resort to the 2006 Rules on which a statutory character is pressed. A perusal of the 2006 Rules shows that the source for framing and enforcing the said Rules is in exercise of powers under Article 162 of the Constitution of India. Article 162 as has already been noticed relates to the executive power of the State which extends to the matters with respect to which the legislature of the State has power to make laws. The said proviso to Article 309 of the Constitution relates to appointment of public services and posts in connection with the affairs of the Union and the State. These do not relate to the posts in the legislature of the State. The services of posts in connection with the affairs of the Union or the State, as the case may be, would be under the President in case of the Union and under the Governor in the case of States. Such posts in the States are governed by statutory Rules framed by the Governor in exercise of his powers under the proviso to Article 309 of the Constitution. The Rules of Business and the Rules of Allocation of Business that are framed by the Governor confer power on others in the Secretariat administration of the government to make appointments to these posts. The controlling authority of appointees to the posts under the State created by Article 162 deriving its source from the proviso to Article 309 of the Constitution of India would be the Governor of the State or the State Government. The theory of the doctrine of pleasure would apply to such civil posts, which though is subject to the provisions of Article 311 of the Constitution. The same provides that no person, who is a member of the civil service or holds a civil post under the Union or the State, shall be dismissed or removed by an authority subordinate to that by which he was appointed. Besides, Sub-Article (2) of Article 311 provides that no such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

(52) The provisions of the 2006 Rules by which the private respondents have come to hold the posts of Chief Parliamentary

Secretaries may be noticed. Rule 2 (b) of the 2006 Rules defines 'Parliamentary Secretary' or 'Chief Parliamentary Secretary', which reads as under:

> "2. **Definitions**
>
> In these rules, unless the context otherwise requires:
>
> (a) Xxxx
>
> (b) 'Parliamentary Secretary' or 'Chief Parliamentary Secretary' means a member of the Punjab Vidhan Sabha, who is appointed as Parliamentary Secretary or Chief Parliamentary Secretary, as the case may be, and;
>
> (c) xxxx"

(53) Rules 3 to 8 of the 2006 Rules, deal with creation of posts, qualifications, mode of appointment, functions, tenure, salary and allowances of the Parliamentary Secretary and the Chief Parliamentary Secretary. The same read as under:

> "**3**. **Creation of Posts**
>
> The Government may create such number of posts of Parliamentary Secretaries or Chief Parliamentary Secretaries, as it may consider necessary from time totime.
>
> **4. Qualifications**
>
> Only the members of the Punjab Vidhan Sabha shall be qualified for appointment as Parliamentary Secretary and Chief Parliamentary Secretary.
>
> **5. Mode of Appointment**
>
> The Chief Minister, in consultation with the Speaker of the Punjab Vidhan Sabha and with the approval of the Governor, will be competent to make appointment of a Parliamentary Secretary or Chief Parliamentary Secretary.
>
> **6. Functions**
>
> The Parliamentary Secretary or the Chief Parliamentary Secretary may be deputed by the Chief Minister to assist such Minister, as may be decided by him. The Parliamentary Secretary or the Chief Parliamentary Secretary so deputed, will function as a intermediary channel between the Administrative Secretary and the

Minister.

7. Tenure

The Parliamentary Secretary or the Chief Parliamentary Secretary shall hold office during the pleasure of the Governor.

8. Salary and Allowances

The Parliamentary Secretary and the Chief Parliamentary Secretary shall be entitled to such salary and allowance as may be notified by the Government from time to time."

(54) The Speaker of the Punjab Vidhan Sabha in exercise of the powers conferred by Article 208 of the Constitution by a notification dated 09.03.2006 amended the Rules of Procedure and Conduct of Business in the Vidhan Sabha. By the said notification, Rule 2 (1) containing the definition of 'Minister', was amended to delete the expression, "a Chief Parliamentary Secretary or a Parliamentary Secretary". This was done so as to avoid incurring disqualification by such Chief Parliamentary Secretaries and Parliamentary Secretaries in view of the restrictive provisions of Article 164 (1A), which restricts the total number of Ministers including the Chief Minister in the Council of Ministers in a State to 15% of the total number of Members of the Legislative Assembly of that State. By including the posts of Chief Parliamentary Secretaries in the definition of Ministers would have resulted in the increase of the strength of the Ministers in the House to more than 15%. The amendment was, therefore, brought about to avoid such a situation.

(55) The proviso to Article 309 confers power on 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 the said Article, and any rules so made shall have effect subject to the provisions of any such Act. The Governor of aState or such person as he may direct, therefore, may make rules with respect to services and posts in connection with the affairs of the State. The posts of Chief Parliamentary Secretaries and Parliamentary Secretaries are for the purposes of the Legislative House or the State Assembly and according to the official respondents, they are to function as intermediary channels between the Administrative Secretaries of the State

Government and the concerned Ministers. Therefore, the said posts of Chief Parliamentary Secretaries are above the executive of the State and cannot be said to fall in connection with the affairs of the State administration for which posts in terms of the provisoto Article 309 of the Constitution can be created.

(56) It may be noticed that Part VI of the Constitution relates to 'the States' and Chapter II thereof deals with 'the Executive'; Chapter III deals with 'the State Legislature'; Chapter IV deals with 'Legislative Power of the Governor'; Chapter V deals with 'the High Courts in the States'; Chapter VI deals with 'Subordinate Courts'. Part XIV of the Constitution relates to 'Services under the Union and the States' and Chapter I thereof relates to, 'Services' and is from Articles 308 to 313; Chapter II relates to 'Public Service Commissions' and is from Articles 315 to 323. The proviso to Article 309, as already noticed, confers power on 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. The manner of recruitment to the services contemplated by Article 309 is to be done by the Public Service Commission in accordance with Article 320 which deals with the 'Functions of Public Service Commissions' enjoining them to conduct examinations for appointment to the 'services' of the Union and the 'services' of the State respectively or may be even by exempting any post or taking it out from the purview of the Public Service Commission. The posts that are to be filled or recruitment made in accordance with rules framed under Article 309 of the Constitution have a direct linkage with public posts in connection with the affairs of the Union or the States and not posts from amongst the Members of the Legislative Assembly of the State within the Legislative Assembly. Admittedly, there is no post of Parliamentary Secretary or Chief Parliamentary Secretary in the Constitution. In fact, this is the specific stand even of the official respondents in their written statement that has been filed. It is *inter alia* stated in the reply that insofar as Parliamentary Secretaries and Chief Parliamentary Secretaries are concerned, the said posts are not mentioned in the Constitution of India.

(57) The contention of Mr. A.K. Ganguli, learned Senior

Counsel appearing for the official respondents that the State has executive power to create office of Chief Parliamentary Secretaries/Parliamentary Secretaries and Article 154 of the Constitution vests the executive power of the State in the Governor and Article 162 provides that the executive power of the State shall extend to the matters with respect to which legislature of the State has power to make laws is, therefore, not tenable and devoid of any merit. As already noticed, the power in terms of Article 162 of the Constitution extends to matters with respect to which the legislature of the State has power to make laws. Article 246 (3) of the Constitution envisages that subject to Clauses (1) and (2) of Article 246, the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-II in the Seventh Schedule which in the Constitution is referred to as the 'State List'. Entry 41 of List-II provides the subject matter of legislation i.e. State Public Services. Entry 41 reads:

"State public services; State Public Service Commission".

(58) The State public services, therefore, are relatable to Public Service Commission. This would indeed relate to services of the executive under the State and not that of the legislature. This, in fact, is the Constitutional scheme in terms of Part XIV of the Constitution as referred to above. The 'State public services' are to be read *ejusdem generis* to 'State Public Service Commission' in Entry 41 of List-II of the Seventh Schedule of the Constitution. The rule of *ejusdem generis* relates to of the same kind, class or nature. In Black's Law Dictionary, Sixth Edition, it is stated that the "*ejusdem generis rule*" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. The expressions '*ejusdem generis*' or of the same kind or nature have been applied with general words in a statutory context are followed by words which are restricted, then the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. Therefore, the use of words 'State public services' in Entry 41 of List-II of the Seventh Schedule of the Constitution is followed by the words 'State Public Service Commission', which would mean with the State public services mentioned in said Entry 41 of List-II are restricted to State Public Service Commission or with ancillary services connected to the same

and it cannot be extended to mean services of the State Legislature, which are entirely different from the services of the State under the executive. In fact, the Chief Parliamentary Secretaries in accordance with the scheme of the functions are placed above the Secretaries to the Government of Punjab and they are to act as intermediaries between the Ministers and the Government Secretariat whereas the public posts are to be under the State Government andit cannot be contemplated that the Secretary to the Government through the Governor would be the appointing authority of the Chief Parliamentary Secretaries.

(59) In the case of ***A.B. Krishna*** *versus* ***State of Karnataka*** *(supra)* referredto by Mr. A.K. Ganguly, learned Senior Counsel for the official respondents, it has been held that it is primarily the legislature, namely, Parliament or the State Legislative Assembly, in 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 the State, is vested. The legislative field indicated in the said Article, it was observed, is the same as is indicated in Entry 71 (sic 70) of List-I of the Seventh Schedule or Entry 41 of List-II of that Schedule. The proviso, however, gives power to the President or the Governor to make Service Rules, but this is only a transitional provision as such power under the proviso can be exercised only so long as the legislature does not make an Act whereby recruitment to public posts as also other conditions of service relating to that post are laid down.

(60) Entry 70 of List-I of the Seventh Schedule of the Constitution relates to the "Union Public Services; All India Services; Union Public Service Commission", while Entry 41 of List-II relates to the "State public services; State Public Service Commission", which, as already noticed, relatesto the executive power of the State to make rules regulating the recruitment, and the conditions of service of persons appointed to, to such services and posts under the State executive and not of the legislature. The provisions of Article 162 of the Constitution in exercise of the powers of which the 2006 Rules have been framed by the State, therefore, can be said to relate to services under the State executive and not that of the legislature.

(61) In fact, as has already been noticed and more particularly in ***Bal Mukund Sah's*** *case (supra),* the provisions of Article 187 (3) of the Constitution envisages that until a provision is made by the legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the

Chairman of the Legislative Council, asthe case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause. Therefore, even for secretarial staff of the Legislative Assembly, consultation of the Speaker of the Legislative Assembly is required. As such, it is difficult to perceive for appointment of Chief Parliamentary Secretaries, in the absence of any statutory provision. The exercise of appointments of Chief Parliamentary Secretaries has been undertaken by the State on its own *de hors* legal sanctity of any Constitutionalprovisions. The 2006 Rules that have been framed by the Governor though may be with the concurrence of the Speaker would not confer a power on the State Government to make laws for the services within the Legislative Assembly. In case, however, a person is working as a Parliamentary Secretary under the State executive, he shall not be disqualified for being a member of the Punjab State Assembly in view of the provisions of the Disqualification Act 1952 which provides that a person shall not be disqualified for being chosen as, and for being, a member of Punjab State Legislature by reason of the fact that he holds the office of Parliamentary Secretary or Parliamentary Under Secretary under the Government of the State of Punjab. The holding of the office of Chief Parliamentary Secretary, therefore, is evidently contemplated under the Government of the State of Punjab and not as a link between the Ministers and the administrative Secretaries of the State Government.

(62) In ***B.N. Nagarajan*** *versus* ***State of Mysore*** *(supra)* on which also a strong reliance has been placed by the learned Senior Counsel for the official respondents to contend that it was categorically held that it is not obligatoryon the government to make rules of service under proviso to Article 309 before a post is created and that in any case it would be open to it to issue executive instructions under Article 162 for the said purpose. There is no dispute to the said proposition, however, the post to be created under the Stateis the executive post in connection with the affairs of the State and not posts from amongst the elected Members of the State Legislative Assembly to post within the House.

(63) Learned Senior Counsel for the official respondents on this aspect has referred to other cases, namely, ***Swaran Lata*** *versus* ***Union***

of India *(supra)* and ***Ravi Paul*** *versus* ***Union of India***[6], which again, in fact, would be cases in relation to the executive posts of the State. Therefore, the State has no legislative sanction to create posts of Chief Parliamentary Secretaries, as these are posts in connection with the affairs of the State legislature.

(64) Learned Senior Counsel for the official respondents has also referred to the case of ***M.T. Khan*** *versus* ***Government of A.P.***[7] to contend that the Supreme Court held that in exercise of power under Article 162, the State has power to appoint any lawyer as Additional Advocate General though such appointees may not hold Constitutional post. It was held that the matter relating to the appointment of a legal practitioner by a government may be subject matter of legislation. The State by amending the provisions of Sections 24 and 25 of the Code of Criminal Procedure may make a law regulating the appointments of Public Prosecutors or Additional Public Prosecutors. Such a law can also be made for regulating appointment of other State counsel. In absence of any legislation in this behalf, various States have laid down executive instructions. Thus, the State in exercise of its jurisdiction under Article 162 of the Constitution of India, it was held, was competent to appoint a lawyer of its choice and designate him in such manner as it may deem fit and proper. Once it is held that such persons who are although designated as Additional Advocate Generals are not authorized to perform any Constitutional or statutory functions, indisputably, such an appointment must be held to have been made by the State in exercise of its executive power and not in exercise of its Constitutional power.

(65) The law as enunciated by the Supreme Court relates to appointment of Additional Advocate General and is not in any manner to be treated as equivalent to the posts or services in a State legislature like the Chief Parliamentary Secretaries/Parliamentary Secretaries.

(66) It is further contended by Mr. A.K. Ganguli, learned Senior Counsel for the official respondents that creation of a post is an administrative decision, which is not amenable to judicial review. A reference has been made to **N.C.** ***Singhal (Dr)*** *versus* ***Union of India***[8] wherein it has been held that creation and abolition of posts is a matter of government policy and every sovereign government has this power

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[6] (1995) 3 SCC 300
[7] (2004) 2 SCC 267
[8] (1980) 3 SCC 29

in the interest and necessityof internal administration. The creation or abolition of posts is dictated by policy decision, exigencies of circumstances and administrative necessity. The Court would be the least competent in the face of scanty material to decide whether the government acted honestly in creating a post or refusing tocreate a post or its decision suffers from *mala fides*.

(67) There is again no doubt to the said proposition but the posts or offices of Chief Parliamentary Secretaries/Parliamentary Secretaries are not posts under the State executive rather are posts for which no legislative sanction has been shown. It is well known that every executive action must be supported by legislative sanction and in absence thereof, the same is to be invalidated. The Rules made are not open to attack on the basis of malaise, but can be assailed for want of legislative competence to which none has beenshown.

(68) Mr. Ganguli, learned Senior Counsel for official respondents has further made a reference to the case, ***A. Sanjeevi Naidu*** *versus* ***State of Madras***[9]. The said case relates to validity of a draft scheme under Section 68 (C) of the Motor Vehicles Act, 1939. It was held that under the Constitution, the Governor is essentially a Constitutional head; the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the government. In order to obviate that difficulty, the Constitution has authorized the Governor under Sub-Article (3) of Article 166 to make rules for the more convenient transaction of the business of the Government of the State and for the allocation amongst its Ministers, the business of 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 onthe 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. But this again he can do only on the advice of the Council of Ministers.

(69) It is to be noticed that the fact that the Governor can designate a particular official to discharge any particular function, in fact, is confined to the officials that are available and not that the

[9] (1970) 1 SCC 443

Governor can create posts inthe Legislative House from amongst the elected members and that too in exercise of power under Article 309 of the Constitution of India.

(70) Another contention of Mr. A.K. Ganguli, learned Senior Counsel for the official respondents that the finance and budget have been sanctioned for the Chief Parliamentary Secretaries and, therefore, their appointments cannot be faulted, is of not much consequence as their appointments are invalid for want of legislative competence of the State to frame rules regulating their terms of appointments and conditions of service in the State Assembly.

(71) The question regarding appointments of Chief Parliamentary Secretaries and Parliamentary Secretaries was considered by a Division Bench of the Hon'ble Himachal Pradesh High Court in ***Citizen's Rights Protection Forum*** *versus* ***Union of India and others***, (CWP No. 1087 of 2004, decided on 18.08.2005), 2006 (1) Service Cases Today 514. The petitioner inthe said case *inter alia* prayed for quashing the appointments of respondents No.3 to 10 in the said case as Chief Parliamentary Secretaries and respondents No.11 to 14 as Parliamentary Secretaries being illegal; besides, the State be directed to abide by the Constitution and the amendment made in Article 164 of the Constitution. The Hon'ble Himachal Pradesh High Court was persuaded to allow the petition, besides, quash and set aside the appointments of respondents No. 3 to 14 as Chief Parliamentary Secretaries and Parliamentary Secretaries in the State of Himachal Pradesh was the manner of their appointments. It was contended on behalf of the petitioner in the said case that neither the Constitution nor any statutory enactment provided for and caters to the appointment of Chief Parliamentary Secretaries and Parliamentary Secretaries and in the absence of any enabling provision or source of power, there was no jurisdiction, power, authority on the State to appoint them as such. In response, the State had submitted gazette notification dated 18.04.2005 issued by the General Administration Department (Confidential and Cabinet) which suggested that respondents No.3 to 14 had been appointed as Chief Parliamentary Secretaries and Parliamentary Secretaries. The notification was to the effect that consequent upon the appointment of Chief Parliamentary Secretaries/Parliamentary Secretaries, the Chief Minister was pleased to approve their attachment with the Chief Minister and the Ministers with immediate effect in public interest. There was no other document prior to this showing the appointments of Chief Parliamentary

Secretaries and Parliamentary Secretaries. The notification dated 18.04.2005, it was held, was not an instrument which could be called as the source of appointments of these persons. Thereafter, noting on the file dated 21.04.2005 was shown which was held to be an event three days after the allocation of business to them. From the noting files that were shown, two things emerged. The first and foremost was that it appeared that the Chief Parliamentary Secretaries and Parliamentary had been appointed on 18.04.2005 and on that very day they subscribed to the oath of office and also entered upon their duties. There was no order in the name of the Governor or the Government or in the name of any competent authority. The second aspect that emerged was that the State Government had also understood that the concurrence of the competent authority of the State Government was required to be obtained which in other words meant that without obtaining such concurrence these persons had been appointed as Chief Parliamentary Secretaries and Parliamentary Secretaries. However, no file or document or any paper was shown to the Hon'ble Himachal Pradesh High Court which contained any proposal for creation of these posts. It appeared that the persons appointed as Chief Parliamentary Secretaries and Parliamentary Secretaries were appointed without any proposal having been mooted for such appointment in any government file by any functionary at any point of time. It was also observed on the basis of examination of file relating to budget and finance that it became irrefutably amply clear that the notification dated 21.04.2005 was issued in derogation of the principle of fair-play inasmuch as it wrongly recorded that prior concurrence of the Finance Department had been obtained on 19.04.2005. The facts that were narrated on the contrary stated that the ACS (Finance) had recorded his approval not on 19.04.2005 as had wrongly, incorrectly and falsely been mentioned by the Deputy Secretary (Finance Regulations).

(72) It was also noticed that the Chief Minister had appointed Chief Parliamentary Secretaries and Parliamentary Secretaries and was also shown to have administered oath of office and secrecy to the respondents in the said case; however, it was not shown from where he derived the power to appoint such persons and under which law did he have the power to administer the oath of office and secrecy to these persons; besides, who authorized the Chief Minister to administer oath of office and secrecy to these persons. Similarly, under which law and based on whose authority these persons subscribed to the oath of office and secrecy before the Chief Minister. These questions remained unanswered by the respondents in the said case and in the omission to

answer, it was held that it was inescapable and inevitable conclusion that these persons were appointed without there being any authority of law vested in any person. A reference was made to Article 154 of the Constitution whichrelates to the exercise of executive power of the State; besides, a reference was made to Article 162 relating to the extent of executive power of the State and Article 163 relating to Council of Ministers to aid and advice the Governor. It was held that even though it is a well settled principle of Constitution that the Governor while exercising the executive power does so on the aid and advice of his Council of Ministers, yet the Constitution also specifically provided that the exercise of the executive power by the State has to be carried out only in the name of the Governor. It was found that in the said case no order, notification or action of the Government had been shown to the Hon'ble Himachal Pradesh High Court whereby they could be persuaded to infer or presume that the appointment of respondents No. 3 to 14was made by the State Government in exercise of the executive power of the State in the name of the Governor of the State. As regards the oath that was administered, it was observed as follows:-

> "Now, comes the issue of a far greater importance, touching gravely upon very basic fabric and edifice of constitutional law. This relates to the administering of oath of office and secrecy to respondents No. 3 to 14 by the ChiefMinister and these persons subscribing oath before the Chief Minister. This issue cannot be viewed in isolation. It is to be viewed in the context of Chief Parliamentary Secretaries and Parliamentary Secretaries being privy to official information, all of them having access to official files, official documents in the course of decision making process by the Government. Their being privy to official information and their having access to official records exposes them to the corresponding obligation and duty of maintaining secrecy and not disclosing unauthorisedly to any one secret official information. It is in this backdrop that administering oath to them by a person duly authorized by law todo so becomes important. To repeat the question, did any law empower the Chief Minister to administer oath to these persons? We have not been shown any law, not even a law in the nature of subordinate or delegated Legislation which either prescribes the form of oath or the person before whom respondents No. 3 to 14 were to subscribe oath or the

> person who would administer oath to them. Respondents No. 3 to 14 being the holders of public office, it is not open to any individual to evolve a private arrangement whereby, by his whims he would administer oath because any such private arrangement not having the sanction of law would not cast upon respondents No. 3 to 14 the corresponding obligation of maintaining secrecy as well as the resultant legal consequences of their being exposed to the rigors in the realm of penal law if the oath is ever violated. We, therefore, hold that the act of the Chief Minister in administering oath to respondents No. 3 to 14 and respondents No. 3 to 14 subscribing oath before the Chief Minister is without any sanction of law on the simple ground that no law empowers the Chief Minister to administer oath to them nor does any lawprescribe the form of any such oath."

(73) A further reference was made to Article 166 of the Constitution relating to conduct of business of Government of a State. It was held as follows:-

> "Whether rules of business were framed by the Government or not, with respect to the creation of the posts of Chief Parliamentary Secretaries/Parliamentary Secretaries and the appointment of persons concerned and if so whether the impugned action was taken in accordance with these rules, has not been at all shown to us. Respondent No. 2 did not come forward before this Court to demonstrate to us that this was done in accordance with the rules of business framed under Article166 or for that matter whether any rules of business have been framed at all or not for this purpose. This is one aspect of the matter."

(74) Mr. A.K. Ganguli, learned Senior Counsel for the official respondents has, however, contended that the judgment of the Hon'ble Himachal Pradesh High Court in Citizens' Rights Protection Forum v. Union of India and others (supra) is inapplicable to the present case inasmuch as an *ex-post facto* notification was issued which was subsequent to the appointment of the persons as Chief Parliamentary Secretaries and Parliamentary Secretaries. However, in the present case, it is submitted that there are 2006 Rules in pursuance of which appointments had been made. Besides, arguments were advanced by the parties before the High Court on the scope of Article 164 (1A) vis-

à-vis creation of posts of Chief Parliamentary Secretaries and Parliamentary Secretaries, however, the Hon'ble High Court did not go into the same. Therefore, the Hon'ble High Court did not entertain any question as regards scope and interpretation of Article 164 (1A) and did not test the contention of the parties with regard to the Constitution scheme. The decision rested entirely on the facts of the said case, which are inapplicable to the present case. Besides, it is submitted that in the present case, the Finance Department although initially had objected to the creation of posts, but subsequently after considering the entirety of the subject matter accorded financial approval for the creation of the posts on 03.05.2007. It is submitted that in the present case 2006 Rules have been framed and the Chief Parliamentary Secretaries and the Parliamentary Secretaries have been appointed in pursuance of the Rules that have been framed.

(75) To this extent, the learned Senior Counsel for the official respondents may be right, however, as already noticed the 2006 Rules are without legislative sanction or competence. Besides, in the present case as well, oath of office and secrecy has been administered by the Chief Minister and it is not shown as to how the Chief Minister was competent to administer such oath. In the said circumstances, the ratio of judgment of Citizen Rights Protection Forum v. Union of India (supra) to the said extent in any case clearly applies.

(76) The Hon'ble Bombay High Court in the case of ***Aires Rodrigues*** *versus* ***State of Goa***[10] alsohad the occasion to consider the appointments of Chief Parliamentary Secretaries and Parliamentary Secretaries in the State legislature. A practising advocate in public interest approached the High Court on the strength of Constitutional mandate contained in Article 164 (1A) of the Constitutionquestioning the authority of respondents No. 2 to 4 therein to hold the posts of 'Parliamentary Secretaries' and enjoy the status of Cabinet Ministers and also questioning the respondents No. 5 to 7 in the said case appointed to different posts in the State administration as to how they enjoyed the status and rank of Cabinet Ministers. A further prayer was made that the orders relating to respective group of respondents be revoked and cancelled being violative of the Constitutional mandate. It was contended that despite the fact that the prescribed strength of Ministers including the Chief Minister had already been filled up, the Government in a hurried manner and to frustrate the Constitutional

[10] 2001 (Sup) BCR 16; (2009) 111 Bom. L.R. 737 (DB)

directive appointed 'Parliamentary Secretaries' with cabinet rank/status without any formal notification. However, notifications in this regard were issued on 06.07.2007, 09.07.2007 and 10.07.2007 appointing three Members of the Legislative Assembly as 'Parliamentary Secretaries'. The Parliamentary Secretaries were sworn in by the Chief Minister. All these respondents had been accorded status or rank of a Cabinet Minister andpermitted to engage eleven staff members of their own in line with the status and had also been provided with all the facilities and privileges of the Cabinet Minister. In addition to this, respondents No. 5 to 7 were appointed to different posts in the Government administration with rank/status of Cabinet Minister conferred upon them.

(77) According to the petitioner in the said case, the very purpose of the Constitution Ninety-first Amendment which restricted the size of the cabinet was to prevent the installation of jumbo cabinets and resultant huge drain on the public exchequer was defeated. The respondents therein were not only appointed ostensibly as 'Parliamentary Secretaries' and as heads of Board, Corporation and Commission, but they were permitted to enjoy the status of Cabinet Minister thus, in fact, defeating the very purpose of the amendment. In view of the prohibition contemplated under Article 164 (1A), the appointment of said respondents, it was submitted, was a back door entry and a willful disobedience of mandate of law. There was no legal power vested in the Government for making appointment as 'Parliamentary Secretaries' with the status of Cabinet Minister and they could not be made in the garb of exercise of executive powers. Besides, the Chief Minister did not have any power or authority to administer oath not being backed by any appropriate law. They were privy to official information and had access to official files and documents in the course of the decision making process of the government. It was submitted specifically by the petitioner in the said case that the Members of the Legislative Assembly or party functionaries could not be appointed to these posts even if there was some authority in law for making such appointments.

(78) The Hon'ble Bombay High Court traced the history and status regarding the posts of 'Parliamentary Secretaries'. It was noticed that the 'Parliamentary Secretaries' were appointed by different political parties in power probably with the idea of accommodating some of their elected members. Some of the State Governments enacted laws in relation to appointment of 'Parliamentary Secretaries'

and even their terms and conditions of appointment; besides, dues and perks payable to them were legislated upon. The State of Karnataka enacted the Karnataka Parliamentary Secretaries Allowances Act, 1963. The Government of Assam also enacted the Assam Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2004. A reference was also made to the Arunachal Pradesh Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Ordinance, 2007; the Parliamentary Secretary (Payment of Special Allowance and Prevention of Disqualification) Act, 1971 (Pondicherry) and the West Bengal Legislature (Removal of Disqualifications) Act, 1952. It was noticed that what to talk of these States in India, even the Government of Punjab, Pakistan issued an Ordinance, namely, the Punjab Parliament Secretaries Salary, Allowances and Privileges Ordinance, 2002. All these laws, it was observed, were enacted by the competent Legislatures to provide methodology for appointment and grant salary, allowances and perks to the 'Parliamentary Secretaries'. As an example, it was noticed that the law in relation to the State of Assam, required the Chief Minister to apply his mind with regard to the circumstances and the need of situations and then may appoint 'Parliamentary Secretaries' for such function as were deemed fit and proper. Their functions and duties were expected to be specified in a proper manner. The object behind such legislation obviously was to have better governance as well as to ensure public good. Any of these laws enacted by respective States were bound to be in conformity with the Constitutional law and must give meaning to the Constitutional mandate. They could not and ought not to be in violation to the Constitutional mandate.

(79) It was noticed that ours is a federal Constitution. The Government of India Act, 1935 dealt with administration of federal affairs under Chapter 2 of the Act and Section 9 thereof while dealing with Council of Ministers stated that there shall be a Council of Ministers, not exceeding 10 in number, to aid and advice the Governor General in exercise of his function, except for matters which by or under that Act were required to be exercised in the discretionary of the Governor General. This historical piece of legislation showed that it was always in the mind of his majesty to limit the strength of Council of Ministers, with the object of avoiding undue burden on the State revenue. The framers of the Constitution placed no such restriction on the Council of Ministers in terms of Articles 131, 163 and 164 of the Constitution. With the passage of time and with experience gained by

the parliamentarians of jumbo Council of Ministers putting immense pressure on the State revenue, the Parliament in its wisdom added Article 164A by the Constitution (Ninety-first Amendment) Act, 2003 which came into effect from 01.01.2004. This provision put an embargo on huge Council of Ministers and provided that the same shall not exceed 15% of the totalMembers of Legislative Assembly of that State and further providing that number of Ministers including the Chief Minister in a State shall not be less than 12. The second proviso to Article 164 (1A) even mandated that whenever the total number of Ministers including the Chief Minister in the Council of Ministers exceeded 15% or the number specified in the firstproviso, as the case may be, then the total number of Ministers in that State shall be brought in conformity with the provisions of the said clause within six months from such date as the President may by notification appoint. The proviso thus undoubtedly indicated the legislative intent that the provisions of Article 164 (1A) should be strictly adhered to and even the size of Council of Ministers in excess of specified percentage or number should be brought in conformity to the Constitutional mandate. It was further noticed that the Parliamentary Standing Committee had discussed the size of Council of Ministers under clause 3.1 and it was felt that the idea of limiting the size of Council of Ministers had been floated since pre-independence era and even the Committee on Defection in 1969 in its report expressed the view that suchactivity was affected significantly by the lure of Ministership in the political defection, thus, limiting the size of Council of Ministers might not only act as a dampener on political defectors but might offer the Prime Minister or the Chief Ministers, as the case may be, a convenient escape-latch when faced with pressure which he or she may be unable to withstand. The National Commission to review the working of the Constitution (2002) also deliberatedthe size of Council of Ministers and made the following recommendations:-

> "(ii) Also, the practice of creating a number of political offices with the position, perks and privileges of a Minister should be discouraged and at all events their number should be limited to two percent of the total strength of the Lower House."

(80) The respondents-State in the said case placed on record a study report on 'Parliamentary Secretaries' prepared by the Ministry of Parliamentary Affairs, Union of India. The report *inter alia* discussed the status of 'Parliamentary Secretaries' in UK and Canada. While referring to 'Parliamentary Secretary' in India, the report stated that

institution of the office of the 'Parliamentary Secretary' had no statutory origin nor did it derive any authority from the Constitution of India. Unlike the Ministers, oath may be administered to a 'Parliamentary Secretary' by the Prime Minister or the Chief Minister and they were expected to do the work as given by the Minister. They were treated not even as Deputy Minister and had no executive powers. In the earlier times, they were not even paid salaries and they used to work only in honorary capacity. However, with the passage of time, these appointments were said to be in the discretion of the Prime Minister and the Chief Minister, as the case may be, and they were to possess said status, power and functions as were defined. The report, it was observed, specifically noticed that the 'Parliamentary Secretaries' were to perform such functions as may be assigned by the Minister and oath of secrecy administered to them indicated that they would have access to official papers. As per the said report, the practice of appointing 'Parliamentary Secretary' was primarily followed till the year 1967. From 1967 to 1984, no 'Parliamentary Secretaries' were appointed. However, after 1984, this practice had been reviving though sparingly.

(81) The important question that was considered was whether the respondents had the power to create posts of 'Parliamentary Secretaries' and power of conferring the status of Ministers of cabinet rank upon the appointees. Ancillary thereto was the question with reference to the facts of the said case. It was observed that Article 162 of the Constitution vests the executive with wide powers. These executive powers could be exercised in respect of all matters in regard to which the State Legislature had the power to make laws. This wide power carried with itself an important restriction. Powers under this Article could be exercised subject to the provisions of the Constitution and law framed by the Union shall take precedence. The Legislature of the State, it was noticed, was vested with wide powers in regard to regulation of the recruitment and conditions of service of person appointed to public service and posts in connection with the affairs of the State. Under proviso to Article 309, the Governor would be competent 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 rule so made shall have effect subject to the provisions of any such Act. Thus, the State exercises its executive powers under this Article till proper legislation was framed by the competent legislature.

(82) Mr. A.K. Ganguli, learned Senior Counsel for the official respondents has contended that the judgment of the Hon'ble Bombay High Court is confined to its own facts and circumstances. In the present case, the Governor of the State of Punjab in exercise of powers conferred by Article 162 promulgated the 2006 Rules vide notification dated 04.05.2006 for creation of posts of Chief Parliamentary Secretaries/Parliamentary Secretaries. It is submitted that, in fact, the Hon'ble Bombay High Court held that the executive power of the State conferred under Article 162 of the Constitution permitted the creation of the posts of Chief Parliamentary Secretaries and Parliamentary Secretaries to lay down their recruitment procedure and prescribe conditions of services of persons appointed to the public service and posts in connection with the affairs of the State.

(83) The said line of reasoning is valid insofar as the post is concerned with the affairs of the State executive and public posts which have some relevance and semblance to recommendations for appointments made by the Public Service Commission or the posts are otherwise taken out from the purview of the Public Service Commission may be by way of the Public Service Commission (Limitation of Functions) Regulations, 1955 ('Regulations' - for short). Part-II of the Regulations relates to 'Limitations'.It is provided by Regulation 3 that it shall not be necessary to consult the Commission i.e. the Punjab Public Service Commission on the suitability of candidates for various posts as mentioned in Clauses (a) to (i) and (l) to (o). Clause (b) of the Regulation 3 envisages that initial appointment to services or posts enumerated in Schedule 'A' annexed thereto. In respect of the posts mentioned in Schedule 'A', therefore, consultation with the Commission is not required. Besides, Regulation 4 provides that it shall not be necessary to consult the Commission in respect of any of the matters mentioned in Clauses (a) to (e) of Article 320 (3) of the Constitution of India in the case of officers of Indian Defence Services other than the Indian Territorial and Auxiliary Forces holding posts in connection with the affairs of the State of Punjab.

(84) The posts of the State for the executive are entirely different and distinct from that of the State Assembly. Therefore, the posts cannot be created in exercise of powers in terms of Article 309 or its proviso in the Legislative Assembly or the House or Vidhan Sabha of the State from amongst the members of the House or Assembly, as has already been discussed above.

(85) The Hon'ble Bombay High Court in Aires Rodrigue's case (supra) held that the Governor would be competent to make rules regulating the recruitment, and the conditions of services of the persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature under the said Article, and any rule so made shall have effect subject to provision of any such Act. Thus, the Stateexercises its executive powers under this Article till proper legislation isframed by the competent legislature.

(86) The said observations in fact relate to posts under the State executive and the State can make rules for appointment of Parliamentary Secretaries as a service under the State who would be under the administrative control of the State executive and they would not be disqualified for being elected to the State Assembly in view of the Disqualification Act 1952. However, the Parliamentary Secretaries are being made from amongst the Members of the House or the State Assemblies and they are to act as intermediaries between the Ministers and the administrative Secretaries of the Government. Rule 6 of the 2006 Rules provides for functions of the Parliamentary Secretary or the Chief Parliamentary Secretary. It is provided therein that the Parliamentary Secretary or the Chief Parliamentary Secretary may be deputed by the Chief Minister to assist such Minister as may be decided by him. The Parliamentary Secretary or the Chief Parliamentary Secretary so deputed would function as an intermediary channel between the Administrative Secretary and the Minister. The said posts and appointments are not in any manner in connection with the affairs of the State and are not services under the State so as to fall within the requirement of Part XIV of the Constitution relating to 'Services under the Union and the States'. In fact, the Hon'ble Bombay High Court in ***Aires Rodrigue's*** *case (supra)* held as follows:

> "34. The other important question that we are called upon to discuss is whether the respondents have the power to create postsof 'Parliamentary Secretaries' and power of conferring the status of Ministers of cabinet rank upon the appointees. Ancillary thereto shall be the question with reference to facts of the present case. Article 162 of the Constitution vests the Executive with wide powers. These Executive powers can be exercised in respect of all matters in regard to which the State Legislature has the power to make laws. This wide power carries with itself an important restriction. Powers under this Article can be exercised subject to the

provisions of the Constitution and law framed by the Union shall take precedence. The Legislature of the State is vested with wide powers in regard to regulation of the recruitment and conditions of service of person appointed to public service and post in connection with the affairs of the State. Under proviso to Article 309, the Governor would be competent 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 rule so made shall have effect subject to the provisions of any such Act. Thus, the State exercises its executive powers under this Article till proper legislation is framed by the competent Legislature.

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48. It needs to be examined as to what is the purpose of appointing 'Parliamentary Secretaries' as it appears that there is no regular cadre carrying this nomenclature originating from any statute or deriving authority from the Constitution of India. In other words, they are not part of the regular State services nor Executive authorities forming part of the bodies involved in Governance of the State. Number of Cabinet Ministers/State Ministers as contemplated under section (sic - Article) 164 (1A) are appointed immediately after election. At the same time, the 'Parliamentary Secretaries' are appointed. Normally and as even conceded now in the reply affidavit, their functions and duties are to assist the Minister with whom they are working. They are given all privileges and perks of a Minister. Their staff is equivalent to that of a Minister. It cannot be said that they do not have access to the Government records and Government files. Their main role, as it appears from the record before us is to participate in Government functioning, may be with some limitations but they are no way outsiders to the Government functioning, its records and interaction with the public. The distinction between these two is primarily marked with their nomenclature. One is called a regular Minister while other is called 'Parliamentary Secretary'. Which is and what is the main line of distinction between these two public officers is a

question left to anybody's imagination and in any case, the record reflects nothing. Viewed from the normal conduct of the Government, these appointments are primarily made with the purpose of accommodating an elected member who could not be included in the regular Cabinet for one reason or the other and primarily for the limitation contained in Article 164 (1A) of the Constitution. They are given the status, functions and privileges of a Minister though without the title of the Minister. The situation created as a result of this exercise of power does appear to be paradoxical as, in fact, 'Parliamentary Secretary' carry all that a Minister does except the name. 'Minister personally' is de jure Minister while the Parliamentary Secretary is Minister de facto who exercises all such authority, power, perks, status and privileges of Minister.

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67. Therefore, an action which is unsupported by reasoning and has no record to show the need and necessity for taking such a decision would tilt the law in favour of the action being termed as arbitrary. There is no reference to the source of power, no explanation for the undue haste in making appointments and administering oath of office. The motive to appoint Respondent Nos.2 to 4 as Parliamentary Secretaries in the rank and status of Cabinet Ministers was merely an attempt to create political balance by accommodating the elected members. Lack of any reasoning further supported by the fact that it was not even considered appropriate to spell out the duty and function of the persons appointed to such high public office in the State beforehand and granting them rank and status of Cabinet Ministers, is sufficiently suggestive of unjustifiable motive on the part of the authorities concerned and it entirely defeats the very purpose even if it is assumed that such a power of appointment and administering oath indeed vested in the Chief Minister.

68. There is a clear distinction in law between the 'equivalence in status and rank' and 'making appointment to a public office or post with status and rank of that post'. These are the expressions quite often used and are known to service jurisprudence. One may be appointed to a post in

the State Administration in terms of its own rules, regulations and for the purposes of perks and benefits may be equated with another post without assigning any functions of the equated posts. For example, respondent Nos.5 to 7 have been appointed as Chairman, Deputy Chairman and Commissioner of different Companies/Corporate Sectors/Departments owned or run by the State of Goa in accordance with the Articles of Association and Memorandum and Service Rules framed in exercise of its power under sub-ordinate legislation or as per regulations framed thereunder. After their appointment in the respective sectors for the purpose of granting perks and benefits, they have been placedat parity with Ministers. This is primarily a decision of the Government and those Companies collectively and is based on policy decision. Such appointments, where equivalence is granted per se, may not infringe the limitations imposed under Article 164 (1A) of the Constitution. Another example which can usefully be referred to in the facts and circumstances of the case in relation to such appointments is an appointment under certain special statutes like, Administrative Tribunals Act, 1985, Debt Recovery Tribunals Act, etc. where civil servants or judicialofficers are eligible to be considered for the post of member provided they satisfy the qualifications laid down. By their appointments to the post of Member of Tribunal, they are entitled to perks and benefits equivalent to the District Judges or specified category of civil servants. It does not mean that by its equivalence, they become District Judges or Civil Servants of the specified category despite the fact that they may be performing judicial functions. In contradistinction to this equivalence of perks and benefits while appointing a person to that public office or post gives him the authority to discharge functions, duties, responsibilities and enjoy the privileges of that public office or post. Thus, the Petitioner hardly has any cause of action against respondent Nos. 5 to 7 and the Petition qua them is liable to be rejected."

(87) The Hon'ble Calcutta High Court also in the case of ***Vishak Bhattacharya*** *versus* ***State of West Bengal and others***, W.P. No. 7326 (W) of 2013, decided on 01.06.2015, had the occasion to consider the scope of Parliamentary Secretaries appointed for the West Bengal

Legislative Assembly. It was held as under:-

> "42. Parliamentary Secretaries cannot be equated with that of service of persons serving the Union or the State. Article 309 authorizes the Legislature to regulate the recruitment and conditions of persons appointed in connection with the affairs of the Union or State as the case may be. These appointments are regulated by rules with reference to recruitment and other conditions of service. It would be inappropriate to equate the services of Parliamentary Secretaries with that of the services of persons serving the Union or a State with reference to public service i.e., in connection with the affairs of the Union or the State. Therefore, there is no justification for the State to rely upon Article 309 so far as the controversy before us.
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> 43. Similarly Articles 186 and 187 cannot be relied upon as the Speaker and Deputy Speaker so also Chairman and Deputy Chairman referred to in these Articles cannot be equated with that of Parliamentary Secretaries. None of the persons referred to under Articles 186 and 187 are required to discharge the duties and functions of Parliamentary Secretaries as referred to at para 37 which are akin to functions of Council of Ministers.
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> 44. There cannot be any dispute that the Legislature of a State by law is empowered to define powers, privileges and amenities of a House of such Legislature or its Members. We are not deciding any issue with regard to the status of the party respondents as members of the Legislative Assembly. We are examining their status as Parliamentary Secretaries. They cannot fit in the description of House of the Legislature of a State, its Members and the Committees of the House.
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> 45. Article 195 definitely takes care of salaries and allowances of the Members of the Legislative Assembly and the Legislative Council of the State. It does not speak of Parliamentary Secretaries. The rules so far as persons of public service or persons holding any posts by virtue of Article 309, only the President of India or the Governor of a State is empowered to do so and not the Chief Minister.
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> 46. Article 154 of the Constitution of India clearly indicates

that the executive power of the State is vested in the Governor, who shall exercise such executive power either directly or through officers subordinate to him, but it has to be in accordance with the Constitution. The powers defined under Article 162, no doubt give/vest executive powers to the State but it also defines or qualifies the executive powers of the State, i.e., to what extent it can be exercised since it is subject to the provisions of the Constitution and proviso to Article 162.

47. Article 163 empowers the Chief Minister of a State as Head of the Council of Ministers to assist and advice the Governor. The Governor shall appoint such number of Ministers, who will hold office during the pleasure of the Governor, on the advice of the Chief Minister.

48. It is needless to say much exercise must have gone into during the deliberations before bringing amendment to Article 164. It was amended so as to place a check on the size ofCouncil of Ministers in every State. It was to operate prospectively from the date of commencement of the 91st amendment of the Act by putting a restriction on the size of the Council of Ministers not exceeding 15% of the total number of Members of the State Assembly with minimum limit of 12%. The provisions were expected to be retroactive requiring the authority concerned to bring down the size of Council of Ministers in conformity with the provisions of Article 164 (1A)of the Constitution. This had to be done within a period of 6 months from the date of coming into force of amended provisions. The amended provision came into effect from 1.1.2004. It is also seen that, several States adopted the amendment, enacted laws for appointment and fixation of salaries and allowances payable to the Parliamentary Secretaries. Apparently, various Acts enacted by different States concerned remain valid piece of Legislation till their correctness or validity is challenged in the face of Constitutional mandate by 91st Amendment.

49. The functions of the Parliamentary Secretary defined in the Statute do not go beyond the purview of the duties and functions of the Council of Ministers. Their functions are not like that of an Advocate General, Speaker

> and Deputy Speaker which are created by virtue of other provisions of Constitution. The function attached to the post of Parliamentary Secretary is that of the functions of the Ministers. In other words, they share the responsibility of the Minister of a State. Their deliberation orinvolvement in the duties and functions of the Department to which they are attached to, have an impact on the decision making process so far as that Department is concerned. In other words, they without being called as Ministers, do discharge functions of Ministers. They are not Secretaries, who come through the public service referred to under Article 309. The Parliamentary Secretary is also a political executive like other political executives in the State."

(88) The ratio of the said judgment of the Hon'ble Calcutta High Court applies to the facts and circumstances of the present controversy as well. Parliamentary Secretaries indeed cannot be equated with that of service of persons serving the Union or the State. Besides, Article 309 authorizes the Legislature to regulate the recruitment and conditions of persons appointed in connection with the affairs of the Union or State as the case may be. These appointments are regulated by rules with reference to recruitment and other conditions of service. It would be inappropriate to equate the services of Parliamentary Secretaries with that of the services of persons serving the Union or a State with reference to public service. Therefore, there is indeedno justification for the State to rely upon Articles 162 or 309.

(89) It is, however, submitted by learned Senior Counsel for the official respondents that thrust of the judgments of the Hon'ble High Courts and more particularly the Hon'ble Bombay High Court is that the posts of Chief Parliamentary Secretaries and Parliamentary Secretaries have been equated with that of the Minister whereas in the present case the Chief Parliamentary Secretaries or the Parliamentary Secretaries have neither been conferred with status of a Minister or Deputy Minister nor they have been given any equivalent status. Therefore, there is no violation of Article 164 (1A) of the Constitution.

(90) The statement of objects and reasons as recorded in the Constitution (Ninety-first Amendment) Act, 2003 was enacted for strengthening and amending the Anti-defection law as contained in the Tenth Schedule to the Constitution of India, on the ground that these provisions had not been able to achieve the desired goal of checking

defections. The Tenth Schedule had also been criticized on the ground that it allows bulk defection while declaring individual defections as illegal. The provisions for exemption from disqualification in case of splits as provided in paragraph 3 of the Tenth Schedule of the Constitution of India had, in particular, come under severe criticism on account of its de-establishing effect on the government. It is also mentioned that the National Commission to Review the Working of the Constitution (NCRWC) in its report dated 31.03.2002 had *inter alia* recommended omission of said paragraph 3 of the Tenth Schedule of the Constitution of India pertaining to exemption from disqualification in the caseof splits. The NCRWC was also of the view that a defector should be penalized for his action by debarring him from holding any public office as a Minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until, the next fresh elections whichever was earlier. It was proposed to accept these suggestions. The NCRWC, it was noticed, had also observed that abnormally large Council of Ministers were being constituted by various governments at Centre and Statesand this practice had to be prohibited by law and that a ceiling on the number of Ministers in a State or the Union Government be fixed at the maximum of 10% of the total strength of the popular House of the legislature. In the light of the above, it was proposed to amend the Constitution by omitting paragraph 3 of the Tenth Schedule to the Constitution of India and to provide that the size of the Council of Ministers should not be more than 10% of the strength of House or Houses concerned whether unicameral or bicameral.

(91) It is in consequence of the said proposals as outlined in thestatement of objects and reasons of the Constitution (Ninety-first Amendment) Act, 2003 that Articles 164 (1A) and 164 (1B) were inserted in the Constitution limiting the total number of Ministers including the Chief Minister in the Council of Ministers to 15% of the total number of Members of the Legislative Assembly of that State. Besides, Article 361B was also inserted which reads as under:-

> "**361B. Disqualification for appointment on remunerative political post –** A member of a House belonging to any political party who is disqualified for being a member of the House under paragraph 2 of the Tenth Schedule shall also be disqualified to hold any remunerative political post for duration of the period commencing from the date of his disqualification till the

date on which the term of his office as such member would expire or till the date on which he contests an election to a House and is declared elected, whichever is earlier.

Explanation — For the purposes of this article, —

(a) the expression "House" has the meaning assigned to it in clause (a) of paragraph 1 of the Tenth Schedule;

(b) the expression "remunerative political post" means any office —

(i) under the Government of India or the Government of a State where the salary or remuneration for such office is paid out of the public revenue of the Government of India or the Government of the State, as the case may be; or

(ii) under a body, whether incorporated or not, which is wholly or partially owned by the Government of India or the Government of a State and the salary or remuneration for such office is paid by such body, except where such salary or remuneration paid is compensatory in nature."

(92) The object of the Constitution (Ninety-first Amendment) Act, 2003 has been to down size of the Ministers in a House. The Constitutional mandate cannot be discarded or infringed in a manner so as to negate the affect of the same. Therefore, the interpretation which is to be given for consideration of the validity of the posts of Chief Parliamentary Secretaries and Parliamentary Secretaries is to be in the light of the Constitutional object i.e. to keep a fix size of the Council of Ministers which cannot be undone by creating posts of Chief Parliamentary Secretaries/Parliamentary Secretaries and thereby achieve indirectly what cannot be achieved directly.

(93) The Parliamentary Secretaries in fact though the State has taken the stand are not the Ministers, but in fact they perform the functions almost like Ministers; besides, they have perks and facilities equivalent to that of Ministers. In ***State (Delhi Admn.)*** *versus* ***V.C. Shukla***[11] (at page 1410), it was observed in para 67 of the report that O. Hood Phillips in 'Constitutional And Administrative Law' (4th Edition

[11] AIR 1980 SC 1382

p. 312 and 314) defines the hierarchy of Government Departments thus:

> "Ministers – At the head of each Department – except the "non- political" Departments, which are not important for present purposes – is the minister, whether he is called Minister or Secretary of State or President of the Board. He is a member of the Government and changes with the Ministry of the day, and he may also be a member of the Cabinet.
>
> Parliamentary Secretaries – Under the minister will be one or more Parliamentary Secretaries, or Parliamentary Under-Secretaries of State if the minister himself is a Secretary of State. As their name implies, Parliamentary Secretaries are members ofone or other of the Houses of Parliament; they are Junior Ministers who change with the Government of the day. They assist their chief in the Parliamentary or political side of hiswork, as well as in the administration of his Department …..
>
> The detailed administration of the work of a GovernmentDepartment is carried out by "permanent" civil servants. Although, like Ministers, they are servants of the Crown, civil servants are called "permanent" since their appointment is non- political and in practice lasts during good behavior, as opposed to Ministers, Parliamentary Secretaries, etc., who are responsible to Parliament and change office with the Government."

(94) Therefore, the Parliamentary Secretaries are in the nature of Junior Ministers who change with the Government of the day. As such, appointments of Chief Parliamentary Secretaries amount to infraction of the provisions of Article 164 (1A) of the Constitution.

(95) In the light of the above, it is quite evident that:-

> (a) The Governor of the State or the legislature has no competence or legislative sanction to frame rules regulating the conditions of appointment and services of Chief Parliamentary Secretaries and Parliamentary Secretaries for their functioning within the House of the State Assembly. Such posts are not part of regular servicesof the State under the executive forming part of the bodies involved in the governance of the State;

(b) The services under the State are entirely different from services within the Assembly House. Rules for governing the services under the State or its executive can be made in exercise of powers conferred by the proviso to Article 309 of the Constitution as also under the authority conferred by Entry 41 of List-II of the Seventh Schedule of the Constitution, i.e. the State List, which provides for: "State Public Services; State Public Service Commissions". These evidently relate to executive services under the State. However, in case a person is working as a Parliamentary Secretary under the State executive, he shall not be disqualified for being a member of the Punjab State Assembly in view of the provisions of the Disqualification Act 1952 which provides that a person shall not be disqualified for being chosen as, and for being, a member of Punjab State Legislature by reason for the fact that he holds the office of ParliamentarySecretary or Parliamentary Under Secretary under the Government of the State of Punjab. The holding of the office of Chief Parliamentary Secretary, therefore, is evidently contemplated under the Government of the State of Punjab and not as a link between the Ministers and the administrative Secretaries.

(c) The provisions of Article 162 of the Constitution relate to the extent of executive power of the State and that the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. The power sought to be derived by the officials respondents is in the context of Article 309 of the Constitution. The 2006 Rules have been framed by the State in exercise of the powers of Article 162 of the Constitution relate to services under the State of the executive and not that of the legislature.

(d) The appointments of Chief Parliamentary Secretaries are contrary to the Constitutional intent of limiting the number of Ministers or the size of the Cabinet. The appointments as made, therefore, are in fact a roundabout way of bypassing the Constitutional mandate of the provisions of Article 164 (1A) of the Constitution and, therefore, have to be invalidated.

(96) For the foregoing reasons, both the writ petitions are

allowed and the appointment of the private respondents in both the petitions and their continuing as Chief Parliamentary Secretaries are set aside, invalidated and quashed. There shall, however, be no order as to costs.

Ritambhra Rishi