rest there because issues Nos. 2 and 3 framed by him were left undecided in view of the fact that he accepted the election petition before him on the ground of the nomination papers filed by the petitioners being invalid for the reason that they had not produced the receipts in respect of the security deposited by them. He shall, therefore, decide the said two issues after hearing the parties who have been directed to appear before him on 7th October, 1974. No order as to costs.

Pattar, J.—I agree.

Before R. S. Narula, C.J. & M. R. Sharma, J.

BALBIR SINGH,—*Petitioner.*

versus

STATE OF PUNJAB AND OTHERS,—*Respondents.*

C.W. No. 4333 of 1973.

September 12, 1974.

Constitution of India (1950)—*Articles* 16, 162 *and* 187—Appointments *to promoted ranks—Whether can be made by the Government with restrospective effect—Executive instructions issued by the Government—Whether have to be published in the official Gazette for conferring a binding status on them—Chances of promotion of a Government servant—Whether can be regarded as a condition of service.*

Held, that when public functionaries have to perform some statutory functions under the provisions of an Act, their actions can be considered to be valid only if they are taken after the appropriate powers have been conferred upon them under the provisions of a particular Act. Such functionaries in most cases decide the conflicting rights of the parties in a *quasi judicial* manner. Decisions given by them, while they were not invested with statutory powers, cannot be subsequently rendered legal by conferring these powers, on them with restrospective effect. The same considerations, however, do not apply when the competent authority after hearing the representation of an employee confers upon him the status to which he was entitled. In a given case the promotion of an employee may have to be deferred because of the pendency of some complaint

against him. After he is cleared off the charges he has to be promoted to the higher rank with effect from the date when this promotion fell due. If this were not done, the right of equality afforded to such employee under Article 16 of the Constitution would be violated. Hence it is open to the Govenment to make appointments to the prompted rank with retrospective effect.

Held, that the executive instructions issued by the Government cannot be equated with a statutory rule. A rule framed under an Act becomes its integral part and binds even its framer. A statutory rule is a positive law and it comes into being only after its promulgation or publication of some reasonable sort. Act of the Parliament and Legislative Assemblies are usually published in the official gazette to post the public with knowledge. But this rule of publication does not apply to the executive instructions. These instructions are capable of being altered. They constitute rules of guidance and remain in froce so long as the executive policy is not changed. Moreover, whenever an executive action is taken under Article 162 of the Constitution it does not have to be published in the official Gazette. The issuance of executive instructions is a chain in the link of executive action taken under Article 162 of the Constitution. If the main decision of the action does not require to be published there is no warrant to hold that executive action taken under unpublished instructions should be declared as illegal on the ground that the instructions have not been published in the official gazette. However, it is highly desirable that important policy decisions of the Government which affect the rights of the public servants should be given due publicity and one such method is to publish them in the official Gazette. If the public servants are clear about the Government policy in matters relating to their service career they would perhaps refrain from raising service disputes and a better understanding between the master and the servants would come into being but the publication of executive instructions in the official gazette is not the *sine qua non* of the validity of the action taken under them.

Held, that chances of promotion especially when their availability is remote and speculative in nature, can never be regarded as case of service of government employee.

Petition under Article 226/227 of the Constitution of India, praying that a writ of Certiorari, Mandamus or any other appropriate writ, order or direction be issued quashing the office order No. 104 of 1973 of the Speaker issued by the Secretary, Punjab Vidhan Sabha on the 14th November, 1973 by which Shri Gurbachan Chand Respondent No. 4 has been given an assumed date of appointment as Deputy Superintendent as 20th December, 1968 instead of 5th January, 1971 and thereby making him senior to the petitioner and directing the respondents not to disturb the established authority of the petitioner as

Deputy Superintendent in the Punjab Vidhan Sabha Secretariat, and further praying that during the pendency of the writ petition, the operation of the impugned order annexure 'D' dated 14th November, 1973 be stayed.

R. S. Mongia, Advocate, for the *petitioner.*

H. L. Sibal, Senior Advocate with Mr. Gurmukh Singh Chawla, Advocate, for respondents 1 to 3.

Anand Sarup, Senior Advocate, with K. G. Chaudhry, Advocate, for respondent No. 4.

JUDGMENT

SHARMA, J.—The petitioner joined the Punjab Vidhan Sabha Secretariat as a Clerk in 1952. He was promoted as an Assistant in 1958 and thereafter appointed to the post of Deputy Superintendent on December 23, 1970.

Shri Gurbachan Chand respondent No. 4 is the member of a Scheduled Caste. He was appointed as a Clerk in the said Secretariat in July, 1956, and was promoted as an Assistant in November, 1966. On January 5, 1971, Shri Didar Singh Bedi, Deputy Superintendent proceeded on earned leave for 32 days and in the resultant leave vacancy Shri Gurbachan Chand respondent No. 4 was promoted as Deputy Superintendent on *ad hoc* basis. The note appended to the order of promotion dated January 14, 1971, Annexure 'A', shows that respondent No. 4 had been appointed out of turn against the post reserved for the member of the scheduled castes. On the return from leave of Shri Didar Singh Bedi, respondent No. 4 Shri Gurbachan Chand was again reverted to the post of an Assistant.

The petitioner was promoted to the post of Superintendent in November, 1972, in a leave vacancy. The post of Deputy Superintendent, which the petitioner had vacated on account of his temporary promotion, was filled in by promoting Shri Gurbachan Chand respondent No. 4. It so happened that the post of Superintendent continued to exist till September 15, 1973 (with a short break of about one week). The petitioner continued to hold this post and respondent No. 4 continued to hold the post of Deputy Superintendent. When the regular incumbent of the office of Superintendent reported for duty, the petitioner was reverted to the post

of Deputy Superintendent and respondent No. 4 was reverted to his substantive post of an Assistant.

On August 18, 1971, respondent No. 2 passed orders Annexure 'C' to the effect that in order to give represenation to the members of the scheduled castes, scheduled tribes and backward classes in the promotion cases in his secretariat, the next two vacancies of Deputy Superintendents will go to Shri Gurbachan Chand respondent No. 4 and Shri Sewa Singh on *ad hoc* basis, who were the senior most Assistants belonging to the scheduled castes among the cadre of Assistants. These two vacancies were being given to these two officials in lieu of the first and 6th position to which the members of the scheduled castes were entitled in terms of Government instructions. It was further ordered that thence onwards the members of the scheduled castes and the backward classes would get reserved posts in accordance with the Government instructions. The petitioner is not dissatisfied with the arrangement regarding the preferential treatment given to the scheduled castes up to this stage. He has, however, submitted that Shri Krishan Swaroop respondent No. 3, Secretary of the Punjab Vidhan Sabha, had sponsored the case of one Shri Jaidev Singh for promotion to the post of Research Officer. The petitioner was also entitled to be considered for this post. Since his name was not being considered, he served a notice under section 80, Civil Procedure Code, on the Speaker on November 2, 1973. It is also alleged that respondent No. 3 was to retire on September 15, 1973, after having put in service up to the age of 58 years. However, he was keen to get extension. The petitioner and the other gazetted officers of the Vidhan Sabha Secretariat were opposed to the extension being granted to respondent No. 3. Because of this, he began to nurse an illwill against the petitioner and persuaded Mr. Speaker to issue orders dated November 14, 1973, Annexure 'D', under which Shri Gurbachan Chand respondent No. 4 was given an assumed date of appointment as Deputy Superintendent with effect from December 20, 1968. This giving of assumed date of appointment as Deputy Superintendent to respondent No. 4 resulted in making the petitioner junior to him even though he had joined service earlier and had also occupied the post of Deputy Superintendent earlier. Paragraph No. 4 of this order reads as under:—

> "4. Shri Balbir Singh Walia's appointment as Deputy Superintendent from 23rd December, 1970, will not be

affected only because of acceptance of Shri Gurbachan Chand's claim from the assumed date, i.e., 20th December, 1968, for the post of Deputy Superintendent. But Shri Gurbachan Chand will rank senior to Shri Balbir Singh Walia for promotion purposes in the general cadre. In other words, Sardar Balbir Singh Walia's claim for Superintendentship will be considered along with others after Shri Gurbachan Chand is appointed as Superintendent.

Further, Shri Gurbachan Chand will not claim any arrears or any other advantage of appointment as Deputy Superintendent or Superintendent for the period from the assumed date till his appointment as Superintendent.

In case Shri Gurbachan Chand is appointed as Superintendent and a contingency arises when he may have to revert, he will revert as Deputy Superintendent if a post is available below Sardar Balbir Singh Walia or otherwise as Assistant."

This order of Mr. Speaker, dated November 14, 1973, Annexure 'D' has been challenged in this petition, *inter alia*, on the grounds—

(1) that the reservations for the scheduled castes and backward classes were ordered to be made with effect from 1971 onwards and Mr. Speaker who acted as delegated authority was not competent to order the promotion of respondent No. 4 as Deputy Superintendent with retrospective effect from December 20, 1968;

(2) that under Article 187 of the Constitution, the Legislature of the State is to regulate the recruitment and conditions of service of the secretariat staff of the Vidhan Sabha and till such law is made the Governor has been authorised to make rules on the subject. In the absence of such rules, Mr. Speaker had no power to reserve any post for scheduled castes or to review the conditions of service of the employees working in the Vidhan Sabha Secretariat.

(3) that since there were only two posts of Deputy Superintendents in the Vidhan Sabha Secretariat, the reservation of the first, sixth and the eleventh posts for the

scheduled castes amounted to reservation of 50 per cent of posts in their favour which was violative of Article 16(1) of the Constitution; and

(4) that the order dated November 14, 1973, itself suffers from irreconcilable contradictions. Besides, the order was passed in violation of the principles of natural justice and is hence invalid.

In the return filed on behalf of respondent No. 3, it has been asserted that the then Speaker Shri J. S. Mann had never passed any orders that there would not be any reservation of any post for the members of the scheduled castes and backward classes in the Vidhan Sabha Secretariat. On the other hand, the State Government decided in the year 1963 that 10 per cent of the posts should be reserved for the members of the scheduled castes, scheduled tribes and backward classes for being filled by promotion subject to their suitability. Mr. Speaker had passed orders on October 11, 1963, that so far as the Vidhan Sabha was concerned efforts should be made to fall in line with the policy of the Government. On the basis of this order, Shri Gurbachan Chand respondent No. 4 was appointed to the post of Assistant out of turn against a reserved post on January 13, 1964, in a leave vacancy for the first time. Shri J. S. Mann who held the office of Speaker re-affirmed his earlier decision given in 1967, and ordered that the Government instructions regarding reservation be followed as far as possible but the efficiency of the Vidhan Sabha should not be jeopardised. Further, on April 2, 1970, Shri Darbara Singh, the then Speaker, passed the following orders:—

"I am of the view that there shall be no conditional application of Government instructions contained in letter No. 278-OSD(W)-67/27027, dated the 19th September, 1967, received from the Scheduled Castes and Backward Classes Department because like other Government Departments it is necessary for this secretariat also to give prescribed representation to scheduled castes and backward classes of Class III and Class IV posts through the method of reservation."

In the meantime, it appears that under instructions from the State Government the members of the scheduled castes were being given

the first vacancy in the promoted rank. This decision was challenged and a Division Bench of this Court in *Hira Lal* v. *The State of Punjab, etc.,* (1) held that the first vacancy could not be given to the members of the scheduled castes. Because of this decision the Government *vide* their letter No. 278-OSD-W-67/27027 dated September 19, 1967, issued executive instructions which envisaged the following methods to be adopted for filling up the reserved vacancies in a block of 100 vacancies :—

3, 8, 13, 18; 23, 28, 33; 38; 43, 48, 53; 58, 63; 68, 73, 78, 83, 88, 93, 98.

An Appeal was filed against the judgment rendered by this Court in *Hira Lal's case* (supra). In *State of Punjab* v. *Hira Lal and others* (2), their Lordships of the Supreme Court held that it was open to the State Government to reserve the first vacancy for the members of the scheduled castes. *Vide* letter No. 3180-SWI-70/893, dated January 11, 1971, Annexure 'B', the Government in supersession of the earlier instructions on the subject issued fresh instructions under which the first, 6th, 11th and so on vacancies which arose from August 23, 1966, were to be treated as reserved for the members of the scheduled castes. Furthermore, all cases of promotions decided on or after September 19, 1967, were to be reviewed and such scheduled caste officials who were entitled to promotion but were denied their right to promotion as a result of the decision of the High Court were to be promoted and assigned seniority against the reserved posts with effect from the dates they became eligible for promotion. In the light of these instructions and the representations made by the members of the scheduled castes and the non-scheduled caste employees from time to time, Mr. Speaker considered the claims of the members of the scheduled castes and other employees with a view to striking a reasonable balance between their claims and passed office order No. 104 of 1973. In pursuance of this order, Gurbachan Chand respondent No. 4 was given December 20, 1968, as the assumed date of his appointment as Deputy Superintendent. In paragraph No. 4 of this order, it was expressly mentioned that the petitioner's appointment as Deputy Superintendent with effect from December 23, 1970, would not be affected

(1) C.W. 271 of 1966 decided on 29th November, 1966.

(2) A.I.R. 1971 S.C. 1777.

merely because Gurbachan Chand respondent had been given December 20, 1968, as the assumed date of promotion to the rank of .Deputy Superintendent. It was further made clear that Gurbachan Chand respondent No. 4 will rank senior to the petitioner for the purposes of promotion in the general cadre. It is stated in the return filed by respondent No. 3 that the order passed by Mr. Speaker is fair, equitable and does justice to both the parties.

Since Gurbachan Chand respondent No. 4 had been promoted in the leave vacancy, he was reverted to the post of an Assistant on February 7, 1974, after the leave arrangement was over. On March 25, 1974, another leave vacancy of a Superintendent arose in the Punjab Vidhan Sabha. This time again Gurbachan Chand respondent No. 4 was appointed as Superintendent *vide* order No. 12 of 1974 passed on March 29, 1974, which is in the following terms:—

> "Hon'ble Speaker has been pleased to make the following appointment/promotions with effect from March 25, 1974:
>
> (1) Shri Gurbachan Chand, Superintendent (Given assumed date of appointment as Deputy Superintendent as December 20, 1968, on reservation basis *vide* office order No. 104 of 1973.)".

It appears that this time the vacancy arose on the regular basis. The petitioner filed C.M. No. 2746 of 1974 praying that respondent No. 2 be restrained from regularising the appointment of respondent No. 4. This petition came up for hearing before us on April 30, 1974, when the following order was passed:—

> "Gurbachan Chand respondent may be promoted in any vacancy of the post of a Superintendent, but his such promotion would not be regularised pending the decision of the writ petition."

In the meantime, on May 4, 1974, the Government issued fresh instructions which are contained in Annexure 'AA', the relevant portion of which reads as under:—

> "It has now been decided that except in the case of All-India Services, 16 per cent of the posts to be filled by promotion to or within Class I and II Services under the State

Government should be reserved for members of scheduled castes and backward classes (14 per cent for members of scheduled castes and 2 per cent for members of backward classes) subject to the following conditions:—

(a) the persons to be considered must possess the minimum necessary qualifications; and

(b) they should have a satisfactory record of service.

In a lot of 100 vacancies occuring from time to time, those falling at serial numbers mentioned below should be treated as reserved for the members of scheduled castes:

1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87, 94 and so on. Vacancies falling at serial numbers 26 and 76 should be treated as reserved for the members of backward classes.

The reservation prescribed shall be given effect to in accordance with a roster to be maintained in each department. The roster will be implemented in the form of a running account from year to year. Reservation in promotion for scheduled castes and backward classes in class III and IV services should continue to be followed as laid down in Punjab Government circular letters issued from time to time.

The above instructions will take effect from the 6th March, 1974, and vacancies arising in Class I and II services under the State Government, existing on/arising after the 6th March, 1974, should be filled up in accordance with these instructions."

Now, it cannot be disputed that it is open to the State Government to make provision for reservation of posts for scheduled castes and members of the Backward classes in any service of its employees. However, on the basis of these instructions the first vacancy has to go to a member of a scheduled caste. Because of the new situation which has emerged much of the sting in the argument advanced by the learned counsel for the petitioner has vanished. Even, if Gurbachan Chand respondent No. 4 was junior to the petitioner as Deputy Superintendent, it would be open to Mr. Speaker to promote him to the post of Superintendent in the first vacancy which

occurs after September 19, 1967. This is precisely what has been done. It is true that before passing order dated November 14, 1973, by which Gurbachan Chand respondent No. 4 was given December, 1968, as the assumed date of his promotion to the rank of Deputy Superintendent and before placing him senior to the petitioner, Mr. Speaker should have given him an opportunity of hearing. On this ground, the impugned order Annexure 'D' in so far as it affects the petitioner alone is liable to be set aside. I order accordingly. This will not, however, stand in the way of Mr. Speaker re-fixing the petitioner's *inter se* seniority with respondent No. 4 even as a Deputy Superintendent after hearing the petitioner and disposing of the objections, if any, raised by him against the proposed order.

There has been some controvercy on the point whether the Government can promote an officer to the higher rank with effect from an earlier date or not. In principle I find no justification for holding that the Government is debarred from doing so. When public functionaries have to perform some statutory functions under the provisions of an Act their actions can be considered to be valid only if they are taken after the appropriate powers have been conferred upon them under the provisions of a particular Act. Such functionaries in most cases decide the conflicting rights of the parties in a *quasi judicial* manner. Decisions given by them, while they were not invested with statutory powers, cannot be subsequently rendered legal by conferring these powers on them with retrospective effect. The same considerations, however, do not apply when the competent authority after hearing the representation of an employee confers upon him the status to which he was entitled. Again, in a given case the promotion of an employee may have to be deferred because of the pendency of some complaint against him. After he is cleared off the charges, he has to be promoted to the higher rank with effect from the date when this promotion fell due. If this were not done, the right of equality afforded to such an employee under Article 16 of the Constitution would be violated. I am of the considered opinion that in the absence of any rule or relevant consideration to the contrary, it is open to the Government to make appointments to the promoted rank with retrospective effect. In *Rajinder Pal Singh Sandhu* v. *Speaker, Punjab Vidhan Sabha and others* (3), a Division Bench of this Court, of which I

(3) C.W. 4556 of 1973.

was a member, took the view that Mr. Speaker was competent to recruit the members of the service of the Vidhan Sabha under instructions dated April 11, 1953, issued by the Governor of the erstwhile State of Punjab. It is not disputed that Mr. Speaker was the competent authority to order the promotion of respondent No. 4 to the higher post and I fail to see how any exception can be had to the action of Mr. Speaker merely because he ordered the promotion with retrospective effect. It has already been noticed that before doing so, Mr. Speaker should have given an opportunity of hearing to the petitioner but that is a matter which relates to the procedure for making promotions. The inherent right of Mr. Speaker to order promotion cannot be questioned. Similarly, in that very case it has been held that in the absence of rules under Article 187 of the Constitution Mr. Speaker can act on the executive instructions issued by the Governor. In this view of the matter, the first two contentions raised by the learned counsel for the petitioner must be repelled.

The third contention raised by him is also of no avail to him because the first vacancy had to go to a member of a scheduled caste. The petitioner being the senior most Deputy Superintendent would be entitled to the next higher post provided of course his service record remains satisfactory till then. If and when a person is aggrieved by the allocation of the 7th vacancy to the members of the scheduled castes, it shall be open to him to raise this question at that stage.

Coming now to the 4th point raised in the petition, it may be observed that the problem of making reservations for the members of the scheduled castes and backward classes had a chequered history which has been adverted to earlier. Mr. Speaker had before him the views of all the members of the service including those who belonged to the scheduled castes. It has been stated in the written statement filed on behalf of respondent No. 3 that "while reviewing all such cases the Speaker took lenient view on humanitarian ground and allowed the affected non-scheduled caste employees who were then in a position to continue to hold the posts from which they could normally be dislodged. By then, because of the judgment rendered by the Supreme Court of India it had become permissible for the Government to give the first vacancy to the members of the scheduled castes. If the order dated November 14, 1973,

passed by Mr. Speaker is read in the light of these considerations it becomes obvious that only Gurbachan Chand respondent No. 4 has suffered because his claim for arrears of pay and other advantages of appointment as Deputy Superintendent with effect from December 20, 1968, was not recognised. This order of course was passed in the absence of any hearing to the petitioner and to that extent it may be regarded as invalid so far as the petitioner is concerned. In that situation, the petitioner having been promoted to the post of Deputy Superintendent with effect from an earlier date would have to be regarded as senior to respondent No. 4; but principles of reservations in favour of the scheduled castes having been finally settled nothing would debar Mr. Speaker from passing a fresh order on the same lines after hearing the petitioner. In that case, the seniority of respondent No. 4 would again be restored to him. As already noticed because of the later instructions dated May 4, 1974, issued by the Government further consideration of this aspect of the case has become otiose.

It was then argued by Mr. Mongia that the instructions dated May 4, 1974, Annexure 'AA' had not been adopted by Mr. Speaker. He has also argued that these instructions were not duly published in the official gazette and are incapable of being acted upon. The learned counsel for the respondents has, however, produced the original office noting before us. I find that these instructions have been duly considered and dealt with in the office noting to which Mr. Speaker argeed. There is no magical formula by which an executive decision can be taken or adopted. Nor was it necessary for the Speaker to have passed orders regarding the adoption of these instructions before acting upon them in an individual case. On April 2, 1970, the then Speaker had passed orders that the Government instructions regarding the reservation of vacancies for scheduled castes and backward classes issued from time to time should be unconditionally followed in the Vidhan Sabha secretariat. The suggestion contained in the office noting was that respondent No. 4 should be given the first vacancy in the promoted rank on the basis of these instructions. This suggestion was duly accepted by Mr. Speaker. The cumulative effect of these circumstances is that these instructions had been duly adopted by him.

The next question which deserves consideration is whether or not these instructions should be published in the official gazette for

conferring a binding status on them. It suffices to say that the executive instructions are capable of being altered. They constitute rules of guidance and remain in force so long as the executive policy is not changed. The public servants who are governed by such instructions can always make a legitimate grievance if their rights under Article 16 are violated in the sense that these instructions have not been uniformally applied. But these instructions cannot be equated with a statutory rule. A rule framed under an Act becomes its integral part and binds even its framer. A statutory rule is a positive law and it comes into being only after its promulgation or publication of some reasonable sort. Acts of the Parliament and Legislative Assemblies are usually published in the official gazette to post the public with knowledge. The requirement of publication is all the more important in the case of penal statutes. In *Harla* v. *The State of Rajasthan* (4), the Court was concerned with a case in which the Regency Council appointed during the minority of the Maharaja of Jaipur passed a resolution by which Jaipur Opium Act was adopted. This resolution was not given any publicity. While setting aside the conviction of the appellant under section 7 of the Jaipur Opium Act in that case the Court observed as under:—

> "We were not shown any, nor was our attention drawn to any custom which could be said to govern the matter. In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the Subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence."

(4) A.I.R. 1951 S.C. 467.

These observations were, however, made with respect to a law proper which created a penal offence. The same cannot be said about the executive instructions. Furthermore, these instructions were issued from the office of the Secretary to Government, Punjab, Welfare of Scheduled Castes and Backward Classes Department, and addressed to all the Heads of Departments. It would be difficult to assume that the petitioner who officiated as Superintendent and remained Deputy Superintendent for a long time in the Vidhan Sabha secretariat did not come to know of these instructions. In the background of the prolonged controversy centring round the question of reservation of posts for scheduled castes and backward classes it would be fair to assume that these instructions had achieved sufficient notoriety and had attracted the attention of all the Government employees.

It is settled law that the Government can act under Article 162 of the Constitution even in the absence of rules in matters relating to the service of its employees. Whenever an executive action is taken under Article 162 of the Constitution, it does not have to be published in the official gazette. At least no statutory provision for making the publication of such a decision in the official gazette has been brought to my notice. As and when such a decision is challenged by the affected persons the executive authorities accord due consideration to the representations made. The issuance of executive instructions is a chain in the link of executive action taken under Article 162 of the Constitution. If the main decision or the action does not require to be published there is no warrant to hold that executive action taken under unpublished instructions should be declared as illegal on the ground that the instructions have not been published in the official gazette.

Lest I be misunderstood, I would like to make it clear that it is highly desirable that important policy decision of the Government which affect the rights of the public servants should be given due publicity and one such method is to publish them in the official gazette. If the public servants are clear about the Government policy in matters relating to their service career they would perhaps refrain from raising service disputes and a better understanding between the master and the servants would come into being, but the publication of executive instructions in the official gazette is not the *sine qua non* of the validity of the action taken under them.

The learned counsel for the petitioner then argued that in *Hari Singh* v. *Tilak Raj and others* (5), it has been held by a Division Bench of this Court that if in a particular service there is only one permanent vacancy and an additional one is created for a short term the first vacancy could be given to the members of the scheduled castes. According to him, if the ratio of that case is correctly applied and a roster is maintained, the vacancies would have to be distributed regardless of the fact that one arises for a short duration and the other is a permanent one. According to him, respondent No. 4 had been promoted for a short duration and when the term of the vacancy against which he had been promoted expires the petitioner being entitled to receive the next vacancy should then be promoted. The argument looks attractive on the face of it but if it is accepted it would entail serious consequences to the prejudice of the case of the petitioner himself. Furthermore, it would cause unimaginable injustice to the members of the service and would violate their rights guaranteed under Article 16 of the Constitution. Take for instance, respondent No. 4 officiates as Superintendent for three months and then reverts. When the vacancy occurs for a short period, say for two months, the petitioner if promoted on the basis of the argument advanced on his behalf would also have to revert after the expiry of that period. If afterwards the vacancy arises on a permanent basis then the officer whose name appears at No. 3 in the seniority list maintained for that service would be able to secure the vacancy on a permanent basis. The result would be that a person who is far junior would remain promoted till the rest of his service career. If this thing is allowed to happen, I am quite certain in my mind that the petitioner himself would feel frustrated. One of the proper ways of observing the instructions in the matter of reservation of vacancies and posts is that the first vacancy should be allowed to be occupied by a member of a scheduled caste as and when it arises till such a member is finally absorbed in the higher rank. The same procedure should be followed in case of the next four members of the non-scheduled castes in the service. This is precisely what is being done by the executive authorities in the matter of administration of these insructions and members of the service including those who belong to the scheduled castes are being afforded equality of treatment subject to the other provisions of the Constitution. In matters relating to the interpretation of executive instructions the opinion of the executive authority should

(5) L.P.A. 97 of 1974.

not be lightly interfered with so long as its action remains within the bounds of law. It is the case of the petitioner that respondent No. 4 is being permanently absorbed in the rank of Superintendent. If this is so, the petitioner himself would be entitled to receive the next post. It would be in his own interest to work on officiating basis as Superintendent even though this post falls vacant for short durations to begin with. As and when the vacancy occurs on a permanent basis the petitioner will step into it provided of course his service record does not stand in his way.

I would also like to notice that Mr. Hira Lal Sibal, the learned Senior Counsel for the State, conceded that in the next vacancy in the post of a Superintendent in the Vidhan Sabha Secretariat, the petitioner would be entitled to be promoted irrespective of whether the vacancy is of a casual nature or of a permanent nature till the petitioner is, like respondent No. 4, absorbed in a permanent vacancy in the higher post, whereafter it would be the chance of three other non-Scheduled Caste Deputy Superintendents to be similarly promoted, after which the 7th vacancy would go in the same manner to the member of a Scheduled Caste if a qualified eligible member of such class is available.

Last of all, it was argued that according to the long established practice in the Vidhan Sabha Secretariat promotions to the rank of Superintendent were being made on the basis of seniority-cum-merit principle and the introduction of reservation formula without the prior approval of the Central Government under proviso to sub-section (7) of section 115 of the States Reorganisation Act, 1956 was illegal. As shall be seen hereinafter this contention raised on behalf of the petitioner is also without any merit. The petitioner joined as a Clerk in 1952. His case was governed by the executive instructions dated April 11, 1953, issued by the then Governor of Punjab. The States Reorganisation Act, 1956, was brought on the statute book with effect from August 31, 1956. By that time, if at all he had any right he was entitled to be promoted as an Assistant on the basis of seniority-cum-merit formula. Admittedly, he was promoted to the rank of an Assistant on the basis of this principle. While he was serving as a Clerk it cannot be asserted with any justification that even in the distant future if a vacancy of the post of a Superintendent, which is at least three steps above the rank which he was holding, should continue to be filled in on seniority-cum-merit basis. Chances of promotion especially when their availability is remote and speculative in

nature can never be regarded as conditions of service. In *The State of Mysore and another* v. *G. N. Purohit and others* (6), a similar argument was repelled by the Hon'ble the Supreme Court of India in the following terms:—

> "It is then urged on behalf of the respondents that by changing the system from district-wise to state-wise the respondents have been very hard hit and have become very junior. It appears from the figures supplied by the respondents that there were 665 Junior Health Inspectors in the Old State of Mysore on November 1, 1956, while only 48 Junior Health Inspectors were allotted to the new State of Mysore after the Act. So long as the district-wise system continued these 48 persons would naturally have better chances of promotion in their districts but when the cadre was made state-wise these 48 were likely to go down in the seniority as the list of 1953 actually shows. It is urged that this has affected their chances of promotion which were protected under the proviso to S. 115(7) of the Act, which lays down that the conditions of service applicable immediately before the appointed day to the case of any person allotted to the new State shall not be varied to his disadvantage except with the previous approval of the Central Government. It is said on behalf of the respondents that as their chances of promotion have been affected their conditions of service have been changed to their disadvantage. We see no force in this argument because *chances of promotion are not conditions of service*. It is enough in this connection to refer to the *State of Orissa* v. *Durga Dass* (7)." (emphasis supplied).

The learned counsel for the petitioner, however, relied upon *Mohammed Bhakar and others* v. *Y. Krishna Reddy and others* (8) in which the introduction of an examination for promotion to the next higher rank was struck down on the ground that a rule which affects the promotion of a person relates to the conditions of his service and these could not be changed unless the prior approval of the Central Government has been obtained. The earlier

(6) 1967 S.L.R. 753.

(7) A.I.R. 1966 S.C. 1547.

(8) 1970 SL.R. 768:

decision given by the Supreme Court in *N. Raghavendra Rao* v. *Deputy Commissioner, South Kanara, Mangalore and others* (9), was distinguished in that case. In *N. Raghavendra Rao's* case (supra), the Court had upheld the blanket approval given by the Central Government to the Governments of the reorganised States to make changes in the conditions of service of the employees of the integrated States. In *Mohammed Bhakar's* case (supra), it was held that prior approval of the Central Government should be obtained on each occasion when the newly formed State intends to change the conditions of service of its employees. The view taken in *Mohammed Bhakar's* case (supra), has, however, been overruled by a recent judgment of the Supreme Court in *Mohammed Shujat Ali and others* v. *Union of India and others* (10). The Court while approving of the decision given in *N. Raghavendra Rao's* case (supra) observed as under:—

> "These observations made on behalf of a Bench of five Judges of this Court are binding upon us. Even otherwise, they have our full concurrence. The view taken by the Court in this case is sound and commends itself to us. In fact that is the only view possible on a conjoint reading of paragraphs 3 and 6 of the memorandum. This decision leaves no room for doubt that, by issuing the memorandum, the Central Government gave its previous approval to any variation which might be made in the conditions of service relating to promotion within the meaning of the proviso to section 115, sub-section (7). No alteration in the conditions of service relating to promotion could thereafter be struck down as invalid on the ground of contravention of the mandatory requirement of the proviso to section 115, sub-section (7)."

When considered from either point of view, this plea raised on behalf of the petitioner deserves to be rejected.

As a result of the foregoing discussion, I hold that the petitioner is senior to Gurbachan Chand respondent No. 4 as Deputy Superintendent as the matters stand at present; but this declaration will not stand in the way of Mr. Speaker in refixing the seniority

(9) A.I.R. 1965 S.C. 136
(10) 1974 S.L.W.R. 557.

of the petitioner and respondent No. 4. I further hold that the promotion of respondent No. 4 as Superintendents is in accordance with law.

The petition is allowed only to the extent indicated above and the parties are left to bear their own costs.

NARULA, C.J.—I agree.

K.S.K.

Before Shri P. S. Pattar, J.

RANJIT SINGH,—*Defendant-Appellant.*

versus

JASWANT SINGH.—*Plaintiff-Respondent.*

R.S.A. 1337 of 1968

September 12, 1974.

Trade and Merchandise Marks Act (XLIII of 1958)—Sections 27 and 105(c)—Law of passing off—General principle as to —Stated—Person entering trade under a same or similar name of another firm gaining reputation in particular class of goods—Whether can be restrained by the Court from using such name—Suits relating to misuse of trade names—Whether covered by Section 105(c)—Such suits—Whether triable by ordinary civil Courts.

Held, that the general principle of the law of passing off is that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. It is, therefore, an actionable wrong for any person to pass off his goods as and for the goods of another person. Further no man is entitled to represent his business as being the business of another by whatever means that result may be achieved. The object of passing off action is to restrain a trader from passing off his goods as and for the goods of another trader. The basis of such an action is deception and false representation by the defendant in regard to the trade origin of the goods.