

Before Hon'ble Ashok Bhan & P. K. Jain, JJ.

BHAGAT SINGH & OTHERS,—Petitioners.

versus

STATE OF HARYANA & OTHERS,—Respondents.

C.W.P. No. 2323 of 1995.

20th December, 1995.

Constitution of India, 1950—Arts. 226/227—Punjab Public Works (Irrigation Branch) Patwaris State Service, Class III, Rules, 1955 (as adopted by State of Haryana)—Rls. 10 to 12—Challenge to selection of canal patwaris made by Selection Committee—Rules framed for selection of Canal Patwaris—However Selection Committee formulated own criteria for selection—No provision in any rule for constitution of Selection Committee or for conducting any interview—Challenge upheld—Selection and appointments made by Selection Committee ultra vires and illegal.

Held, that for the recruitment of the Canal Patwaris and their conditions of service statutory Rules, 1955 have been enacted. These rules in themselves provide a complete scheme for the selection and appointment of the Canal Patwaris. The method of recruitment and the mode of appointment are expressly laid down in Rules 10 to 12. According to Rule 8, all appointments to posts in the service shall be made by the Divisional Officers.

(Para 33)

Further held, that there is, thus, no provision in any of the Rules for the constitution of any other Selection Committee or for conducting an interview of the candidates who passed the Patwar examination.

(Para 33)

Further held, that the constitution of the Selection Committee or the approval accorded to the constitution thereof by the respondent-State,—*vide* Annexure R.1 is in direct contravention of the Rules, 1955. The requirement of an interview by the said Selection Committee on the basis of the criteria laid down by it is an additional requirement for selection as to suitability which is not permitted by the statutory Rules and the same shall be termed as illegal and without authority.

(Para 34)

Further held, that the Selection Committee was constituted by the executive instructions for a laudable object, it had no power or jurisdiction to lay down any criteria for making selection for the

Canal Patwaris. The said selection Committee did not have any inherent jurisdiction even to lay down the norms for selection. Still further, the Selection Committee could not be said to have jurisdiction to lay down any standard or basis for selection as it would amount to legislate a rule of selection.

(Para 37)

Constitution of India, 1950—Arts. 226/227—Punjab Public Works (Irrigation Branch) Patwaris State Service, Class III, Rules, 1955—Doctrine of desuetude—Setting up of the Subordinate Services Selection Board—‘Rules’ no longer followed selection made through the Board—Whether Rules 1955 stood impliedly repealed on the basis of doctrine of desuetude—Held to attract doctrine of desuetude statute in question must be in disuse and instead a contrary practice being in use—Mere fact that once recruitment to the post of Canal Patwari was made through the Subordinate Services Selection Board not enough to hold that Rules stand impliedly repealed on the basis of doctrine of desuetude.

*Held, that to attract the doctrine of desuetude, the statute in question must be in disuse for a long duration and instead a contrary practice being in use. This doctrine requires for its operation a very considerable period of contrary usage of such a character as practical to infer such completely established habit of the community as to set a counter of law or establish a *quashi repeal*.*

(Para 24)

Further held, that during the last 30 years, once recruitment to the posts of Canal Patwaris was made through the Subordinate Services Selection Board on an examination and interview conducted by it is not enough to hold that the Rules 1955 stand impliedly repealed on the basis of the doctrine of desuetude.

(Para 27)

Further held, that if the Subordinate Services Selection Board had recommended the candidates for recruitment to the posts of Canal Patwaris even in contravention of the Rules, 1955 only once in the year 1974, could not affect the legality and the binding effect of the said Rules.

(Para 27)

Constitution of India, 1950—Arts. 226/227—Punjab Public Works (Irrigation Branch) Patwaris State Service, Class III, Rules, 1955—Waiver—Petitioners appeared voluntarily before the Selection Committee—Whether they can now be allowed to raise plea that the Selection Committee was not properly constituted—Held that to constitute waiver person is said to have waived if fully informed as to his rights and with full knowledge he intentionally abandons it—Cannot be said that petitioners waived their right to challenge.

Held, that there can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it.

(Para 42)

Further held, that it could not be pointed out by the respondents that any communication before hand was sent to the petitioners indicating that after passing the Patwar examination they would have to appear before any Selection Committee, nor they were informed about the persons with their designations who constituted the selection Committee for the interview. The petitioners were also never made to know the so-called criteria stated to have been laid down by the Selection Committee on the basis of which the selection was to be made for appointment to the posts of Canal Patwaris. Therefore, it cannot be said that the petitioners who had appeared for the interview before the Selection Committee waived their right to challenge the constitution of the Committee or the criteria laid down by it for the selection to be *ultra vires* the Rules.

(Para 44)

Further held, that the petitioners cannot be said to have waived their right to challenge the constitution of the Selection Committee and the criteria laid down by it for selection to be *ultra vires* the Rules, 1955.

(Para 44)

Further held, that the constitution of the Selection Committee in itself was illegal and contrary to the statutory Rules. This Selection Committee had no power or jurisdiction to lay down any criteria for the said selection. The selection made by the Committee is not only contrary to the Rules but in violation of the norms of selection.

(Para 40)

R. K. Malik, Advocate, for the Petitioner.

H. L. Sibal, Advocate General Haryana with Kamal Sharma, Addl. Adv. Gen. Haryana, for respondents Nos. 1 to 7.

Dharamvir Sharma, Advocate for respondents Nos. 8 to 16, 18 to 30, 33, 35, 36, 38, 41, 42, 45 & 47.

Surya Kant, Advocate, for respondents Nos. 14 to 22, 24 to 26, 31 and 32.

JUDGMENT

P. K. Jain, J.

(1) By this judgment we propose to dispose of a bunch of 62 civil writ petitions bearing numbers 596, 2323, 2589, 2923, 2938, 3153, 3163, 3341, 3384, 3587, 3655, 3772, 3814, 4268, 4269, 4270, 4283, 4362, 4369, 4370, 5499, 5516, 6316, 6326, 6390, 6553, 6816, 6882,

7958, 8451, 9074, 9739, 9743, 10007, 10170, 10171, 10201, 10248, 10531, 10811, 11040, 11109, 11560, 11858, 12169, 12170, 12188, 12938, 13142, 13307, 13563, 13986, 14149, 14838, 14908, 14918, 14927, 15013, 15057, 15105, 15283 and 15458 of 1995 since common questions of law and facts are involved therein. In all these writ petitions the petitioners have made more or less identical prayers for the issuance of a writ in the nature of *certiorari* quashing the impugned selection of Canal Patwaris in the Irrigation Department of the State of Haryana and consequently the appointment of the private respondents also. A writ in the nature of *mandamus* has also been prayed for a direction to the official respondents to make appointment to the said posts of Canal Patwaris in the said department strictly in accordance with law.

(2) For the purpose of appreciation of the rival cases, we propose to refer to the facts set out in C.W.P. No. 2323 of 1995 (Bhagat Singh and others v. State of Haryana and others).

(3) In C.W.P. No. 2323 of 1995, the petitioners have stated that the recruitment and service conditions of Canal Patwaris in the Irrigation Department of the State are regulated by the statutory rules known as the Punjab Public Works (Irrigation Branch) Patwaris State Service, Class III, Rules, 1955, (hereinafter referred to as 'the Rules 1955) adopted by the State of Haryana by virtue of Punjab Re-Organisation Act, 1966. According to the said Rules, the candidates for Patwar training are to be selected by the Divisional Officer. The accepted candidates are to be deputed to the Patwar training with Zileedars. After completion of the Patwar training, the accepted candidates have to appear in the Patwar examination. The successful candidates are brought on the Circle Register. Whenever the posts are available, the appointments are to be made from amongst the candidates who have passed the Patwar examination and are borne on the Circle Register in order of merit/position secured in the Patwar examination. Their *inter-se* seniority has to be determined in order of merit securing in the Patwar examination.

(4) The petitioners have further stated that they were selected by the Divisional Officer and were deputed for Patwar training. After completing the Patwar training, they appeared in the Patwar examination held from 25th April, 1992 to 28th April, 1992. All the petitioners have passed the Patwar examination. The position

secured/marks obtained by the petitioners in the Patwar examination are as under :—

"No. & Name of the petitioner S/Sh.	Total Marks of the Patwar Examination	Marks secured in the Patwar Examination
1. Bhagat Singh	375	302
2. Krishan Kumar	375	289
3. Baldev Singh	375	289
4. Balraj Singh	375	288
5. Dharaminder Kumar	375	285½
6. Raj Kumar	375	279
7. Om Parkash	375	303
8. Radhey Shyam	375	280
9. Surinder Kumar	375	282½
10. Siri Niwas	375	280½
11. Pawan Kumar	375	308½
12. Ram Mehar	375	279
13. Rajesh Kumar	375	284
14. Moman Ram	375	287
15. Gursharan Singh	375	289
16. Narinder Kumar	375	277"

On passing the Patwar examination in accordance with Rule 12 of the said Rules 1955, the names of the petitioners were entered in the Circle Register of the Bhakra Water Service Circle at Kaithal and the appointments to the posts of Canal Patwaris were to be made in order of merit. However, contrary to the Rules 1955, a Selection

Committee was constituted consisting of five members which interviewed the candidates who had passed the Patwar examination. According to the petitioners, the Selection Committee finalised the impugned selection on the basis of the following criteria :—

(i) Marks allocated for the Patwar examination :	375
(ii) Marks allocated for interview :	25
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Total Marks : 400	
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A list of selected candidates was sent to Bhakra Water Services Circle, Kaithal, for appointment. The particulars of such candidates along with the marks obtained by them in the Patwar Examination are as under :—

“Respon- dent No.	Name of respondent S/Shri	Marks obtained in the Patwar Examination
8.	Jagmal Singh	272
9.	Rajiv Kumar	284
10.	Ram Phal son of Om Parkash	272
11.	Ram Phal	265
12.	Ram Niwas	259
13.	Ashok Kumar	288
14.	Suresh Kumar	280
15.	Mohan Lal	269½

"Respon- dent No.	Name of respondent S/Shri	Marks obtained in the Patwar Examination
16.	Surinder Rathi	235
17.	Sunil Kumar	257
19.	Om Parkash	262
21.	Jasbir Singh	262
26.	Harish Chander	261½
29.	Dharam Pal	257
30.	Bhag Mal	282
31.	Santokh Singh	274
33.	Hari Om Singh	273
34.	Rajesh Kumar	286
35.	Sanjeev Kumar	262
36.	Rohtash	277
41.	Jai Parkash	267½
42.	Ramesh Chand	246
45.	Dil Bagh Singh	238
46.	Ashok Kumar	264½
47.	Phal Singh	273½"

(5) The petitioners have challenged the impugned selection of the private candidates and their appointments as Canal Patwaris being illegal, unconstitutional, arbitrary and violative of the Rules

1955. It has been alleged that the constitution of the Selection Committee by the Government is bad in law being contrary to the Rules 1955 which are self-contained and cannot be altered or modified by any executive instructions. It has been further alleged that the Selection Committee had no powers to lay down any criteria of its own for the selection of Canal Patwaris, nor there is any provision in the statutory Rules nor any marks could be prescribed for the interview. Thus, according to the petitioners the entire process of selection and appointments of the private respondents as Canal Patwaris is alleged to be violative of the statutory rules and liable to be quashed.

(6) Notice of motion was given to the respondents.

(7) In a separate written statement filed on behalf of the official-respondents Nos. 1 to 7, it is stated that the services of the Canal Patwaris are governed by the statutory Rules 1955, but these Rules have to be applied in conjunction with order issued by the Government of Punjab,—*vide* Chief Engineer, Irrigation Works (Punjab), Chandigarh, letter No. 3124-48/05/1741/58, dated 27th March, 1962, whereunder recruitment to the post of Irrigation Booking Clerks or apprentice Irrigation Booking Clerks is to be made through the Subordinate Services Selection Board. These Service Rules and the Instructions have to be read and applied in conjunction with the Government orders that all appointment are required to be made by requisitioning candidates through Employment Exchange. Since recruitment through Employment Exchange/Subordinate Services Selection Board has been made mandatory, the practice of maintaining Circle Register at Divisional Level and appointments being made on its basis has been annulled.

(8) It is further stated that in the year 1992 a large number of vacancies of Canal Patwaris were reported by the various Field Superintendent Engineers. To fill up the said vacancies the Government authorised for conducting Canal Patwar Examination centrally under the control of the Chief Engineer/Divisional Canal Officers. The said examination was conducted at four centres where the candidates from four Zones of the State composed of different circles appeared in examination held in April, 1992. Successful candidates got their names registered with the Employment Exchanges of various districts of the State. The respondent-State had taken out 427 posts of Canal Patwaris from the purview of the Subordinate Selection Board,—*vide* notifications dated October 4,

1994, January 25, 1995 and Government letter No. 40/30/94-3 IW dated March 2, 1995 for appointment through the Selection Committee constituted by the Government,—*vide* Memo No. 40/30/94-3 IW dated October 6, 1994 (Annexure R.1). The eligible candidates were sponsored by the Employment Exchanges and interviewed by the said Selection Committee. The Committee made the selection after considering academic qualifications, qualification in the Canal Patwar examination, experience and other extra-curricular activities like sports etc. of the candidates as per criteria laid down by it, and recommended the names to the Government for appointment. It has been further stated that the selection has been made on merits after assessing an overall performance and not merely on performance in the Canal Patwar examination which is essentially and basically a qualifying training test.

(9) It has been explained that since the practice of maintaining Circle Registers at Divisional Level stood repealed the recruitment to the posts of Canal Patwaris was made in the year 1974 through the Haryana Subordinate Services Selection Board after conducting an examination at State level and holding an interview of the successful candidates. This procedure for the recruitment was in the explicit knowledge of the petitioners and other qualified candidates who willingly registered themselves with the various Employment Exchanges and then appeared in the interview. It is thus stated that the Selection Committee has acted fairly with high standard of consideration on merits and has not exposed itself to the pressure whatsoever and the selection made by it is legal, just, fair and strictly constitutional and does not violate any Rule as alleged.

(10) In their written statement filed by the private respondents it has been added that the petitioners had appeared for interview before the duly constituted Selection Committee and were considered for selection also. After having done so, the petitioners cannot make a grievance either against the constitution of the Selection Committee or the mode of selection adopted by it and they are estopped by their own conduct. It has been further stated that it was for the Selection Committee to lay down a criteria for making selection and the criteria laid down by the Committee is quite fair, just and in accordance with the Rules and Regulations.

(11) In a rejoinder, the petitioners have stated that only a Divisional Officer is competent under the Rules 1955 to appoint Canal Patwaris and such powers could not be taken away by any executive instructions. It has been explained that in August 1979

about 250 Canal Patwaris were appointed in different circles as per the procedure prescribed under the Rules 1955 and no candidate was recommended by any Selection Board. Again in the year 1991, twenty Canal Patwaris were appointed in Kaithal circle by the Divisional Officer in accordance with the Rules, 1955, without there being any recommendation by the Subordinate Services Selection Board.

(12) We have heard Sarvshri R. K. Malik, Rajeev Atma Ram, R. S. Surjewala, I. S. Balhara, I. D. Singla, and Ms. Vandana Arora, Advocates, on behalf of the petitioners in these writ petitions. We have also heard Shri H. L. Sibal, learned Advocate General, Haryana, assisted by Shri Kamal Sharma, Additional Advocate General, Haryana, Sarvshri Dharmvir Sharma, Surya Kant, D. D. Sharma and K. K. Jagia, Advocates, on behalf of the respondents.

(13) While opening the case for the petitioners, Shri R. K. Malik, Advocate, learned counsel for the petitioners, has argued that once the rule making authority has exercised its powers under proviso to Article 309 of the Constitution of India and has framed Rules regulating recruitment and conditions of service for the appointment to the posts of Canal Patwaris, it is not open to the Government to issue administrative orders/circulars/instructions modifying or varying these Rules. If the Government feels that the Rules do not fulfil the objectives with which they are framed, the only course open to the Government is to amend the Rules and the amendment in the Rules can only be made by exercising powers under proviso to Article 309 of the Constitution. In substance, Mr. Malik argued that the Government has no authority to amend the statutory Rules by issuing executive instructions. He urged that the administrative powers of the Government cannot be used to bye-pass or supersede or amend Rules framed under proviso to Article 309. It has been explained by Mr. Malik that if there is any lacuna in these statutory Rules, the same can be filled up by issuing executive instructions by the Government but there was no such lacuna in the Rules 1955. According to the learned counsel, the Rules 1955 are self-contained and prescribe a specific mode of selection and appointments to the posts of Canal Patwaris and the respondent-Government had no power to constitute or accord approval for the constitution of a Selection Committee,—(vide Annexure R.1) for the selection of those Canal Patwaris. It has been further contended that once the constitution of the Selection Committee is bad in law, the selection made by it becomes illegal and *ultra vires*

the Rules and liable to be quashed. Reliance has been placed by the learned counsel upon certain decision of the apex Court rendered in *State of Haryana v. Shamsher Jang Bahadur and others* (1), *Shri Durgacharan Misra v. State of Orissa and others* (2), *Paluru Ram Krishnaiah and others v. Union of India and another* (3), *A. K. Bhatnagar and others v. Union of India and others* (4) and *Dr. Krishan Chandra Sahu and others v. State of Orissa and others* (5).

(14) In the alternative it has been argued that the so-called Selection Committee constituted,—*vide* Annexure R.1 had no power to lay down any criteria of its own for the selection of Canal Patwaris. The criteria could have been laid down either by the Government by way of amendment of the Rules in exercise of its powers under proviso to Article 309 of the Constitution of India or by the Appointing Authority who is the Divisional Officer under the Rules. Thus, it is argued that the criteria laid down by the Selection Committee in itself was illegal and *ultra vires* and any selection based thereon is liable to be set aside. Reliance has been placed upon *Dr. Krishan Chandra Sahu's case* (supra) ; *B. S. Yadav and others v. State of Haryana and others* (6), and *The Excise and Taxation Commissioner, Punjab and another v. Jagan Nath Sharma and others* (7).

(15) On the other hand Shri Hira Lal Sibal, learned Advocate General, Haryana, has argued that after the commencement of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 and setting up the Subordinate Services Selection Board, the Rules 1955 were not followed, and the selection and appointment to the posts of Canal Patwaris has been continuously made through the Subordinate Services Selection Board on the basis of an interview in respect of the candidates sponsored by the Employment Exchange. It is thus argued that on the basis of doctrine of *desuetude*, the Rules 1955 stood impliedly repealed. In support of his contention reliance has been placed upon a recent judgment of the apex Court

(1) 1972 S.L.R. 441.

(2) 4 J.T. 1987 (3) S.C. 459.

(3) 1989 (2) Recent Services Judgments 153.

(4) (1991) 1 S.C.C. 544.

(5) J.T. 1996 (7) S.C. 137.

(6) A.I.R. 1981 S.C. 561.

(7) 1980 (2) S.L.R. 744.

rendered in *The Municipal Corporation for City of Pune and another v. Bharat Forge Co. Ltd. and others* (8).

(16) It has been further explained that respondent No. 1 constituted a Selection Committee of experts under its executive powers with the object to fill up a large number of vacancies in the interest of public as well as the State, and this Selection Committee assessed the performance and capacity of the candidates at the time of interview and recommended their appointments as per seniority list framed after considering the academic qualifications, qualification in the canal Patwar examination, experience, other extracurricular activities, sports etc. It is thus contended that the Selection Committee made recommendation of the selected candidates as per criteria laid down by it keeping overall merit of the candidates in view, and cannot be said to be arbitrary or illegal in any manner. Reliance for this contention has been placed upon a judgment of the apex Court in *Anzar Ahmad v. State of Bihar and others* (9).

(17) It is further argued that the petitioners on their own appeared as the oral interview conducted by the Selection Committee which interviewed the petitioners as well as the contesting respondents. Thus, the petitioners took a chance to get themselves selected at the said oral interview. Once they have taken a calculated chance and appeared at the interview, then, only because the result of the interview is not favourable to them, they cannot turn round and subsequently contend that the Selection Committee was not properly constituted or that the process of interview was unfair or contrary to the Rules 1955. Therefore, the petitioners cannot successfully challenge the present selection or the appointments of the private respondents. For this contention reliance has been placed upon the decisions reported as *Dr. G. Sarana v. University of Lucknow and others* (S.C.) (10), *Swaran Lata v. Union of India and others* (11), *North Malabar Gramin Bank Officers' Association v. North Malabar Gramin Bank and others* (12), *Dr. (Mrs.) M. Thaha*

(8) J.T. 1995 (3) S.C. 312.

(9) J.T. 1993 (6) 168.

(10) 1976 (2) S.L.R. 509.

(11) 1979 (1) S.L.R. 710 S.C.

(12) 1989 (3) S.L.R. 324 (Kerala).

and another v. National Institute of Rural Development and others (13), and Madan Lal and others v. State of Jammu and Kashmir (14).

(18) While meeting the arguments of the learned Advocate General, Haryana, and the counsel for the private respondents. Shri Rajeev Atma Ram, learned counsel for the petitioners, has argued that once the posts of Canal Patwaris have been taken out of the purview of the Haryana Subordinate Services Selection Board, then the selection has to be made strictly in accordance with the Rules 1955 and no qualification or condition by way of interview or otherwise could be added thereto. It has been further pointed out by the learned counsel that the Selection Committee is stated to have interviewed the candidates between 28th November, 1994 till 6th December, 1994, whereas certain posts are stated to have been taken out of the purview of the Haryana Subordinate Services Selection Board,—vide letter dated 25th January, 1995 (Annexure R.3) and dated 2nd March, 1995 (Annexure R.4). It has also been pointed out that under the Rules a Divisional Officer is the Appointing Authority but he was not associated in any manner either in or by the so-called Selection Committee. It has also been urged that Annexure P.2 is not a recommendation but a direction to make appointments by the Competent Authority. A power can be exercised by the person in whom it vests. It cannot be exercised by anybody else including the Government. Therefore, the appointments of the private respondents as a result of the direction contained in Annexure P.2 are bad in law because the selection is not the ultimate decision of the Appointing Authority, Reliance has been placed by the learned counsel upon *Atam Parkash Mohan and others v. Kurukshetra University Kurukshetra and others* (15), *Amar Singh and others v. The State of Punjab and others* (16), and *Pradyat Kumar Bose v. The Hon'ble Chief Justice of Calcutta High Court* (17).

(19) To controvert the plea of waiver/estoppel raised by the respondents, it has been argued that the petitioners were never

(13) 1992 (4) S.L.R. 65 (A.P.).

(14) 1995 (2) Services Cases Today 880 (S.C.).

(15) 1970 S.L.R. 16.

(16) 1983 (3) S.L.R. 264.

(17) A.I.R. 1956 S.T. 285.

made to know that any such Selection Committee had been constituted nor they were ever made familiar by any letter or notification regarding the criteria adopted by the said Committee for selection. It has been explained by the learned counsel that after passing the Patwar examination, the petitioners and others successful candidates were registered with the respective Employment Exchanges. On the receipt of the letter from the Employment Exchange the petitioners appeared before the said Selection Committee without having any knowledge regarding its constitution, source of its power and the criteria adopted by it for making selection. It was only after the names were sent to the Divisional Officer, Kaithal Circle, for appointment of the private respondents that the petitioners came to know as to how the Selection Committee was constituted and criteria was laid down by it which was contrary to the Rules. Thus, it is argued that the petitioners cannot be said to have waived their right to challenge the constitution of the Selection Committee and the criteria laid down by it. Reliance in this connection has been placed upon the judgments rendered in *M/s Motilal Padempat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others* (18), *Manak Lal v. Dr. Prem Chand Singhvi and others* (19), *Sansar Chand v. Union of India and others* (20), and *Devinder Singh and others v. The State of Haryana and others* (21).

(20) We have considered the respective arguments advanced at the Bar. From the pleadings of the parties and the various contentions raised at the Bar on their behalf, we formulate the following questions for our answer :—

- (1) Whether the Rules, 1955 stood impliedly repealed on the basis of the doctrine of *desuetude* ?
- (2) Whether the constitution of the Selection Committee and the criteria laid down by it for selection are bad in law ?
- (3) Whether the petitioners are estopped by their conduct from challenging the validity of the constitution of the

(18) A.I.R. 1979 S.C. 621.

(19) A.I.R. 1957 S.C. 425.

(20) 1980 (3) S.L.R. 124 (H.P.).

(21) 1988 (2) S.L.R. 412.

Selection Committee, and the criteria laid down by it for selection ?

- (4) Whether the recommendations made by the Selection Committee and the appointments of the private respondents are *ultra vires* ?

QUESTION NO. 1 :

(21) It is not disputed that the Punjab Public Works Department (Irrigation Branch) Patwaris State Service, Class III, Rules, 1955 were framed in pursuance of the powers conferred by proviso to Article 309 of the Constitution of India. Sub-rule (2) of Rule 1 supersedes the Rules regarding Patwari and Mirabs printed in Chapter 8 of the Manual of Administration 1st Edition, as amended from time to time. Rule 2 contains the definition of various terms. Clause (d) defines the term 'Superintending Engineer' which means an officer incharge of a canal system or area known as a Circle. Clause (e) defines the term 'Divisional Officer' to mean an officer incharge of a portion of a canal system of area known as a Division. Clause (g) defines the term "Service" to mean the Punjab Public Works Department (Irrigation Branch), Patwaris, State Service Class II. Rule 3 contains the number of posts to be included in the service as shown in Appendix 'A' thereto. Rules 4 and 5 prescribe the requisite Nationality and the age of the candidates to be considered for being appointed. Rule 6 lays down the qualification for appointment and reads as under :—

“QUALIFICATION FOR APPOINTMENT :

No person shall be appointed to the Service unless he has passed the Matriculation or School Leaving Certificate Examination of a recognized university or its equivalent, but preference shall be given to candidates possessing higher qualifications :—

Provided that other things being equal, preference will be given to a candidate who has himself worked for the cause of national independence or has rendered some outstanding social or public service.”

Rule 7 prescribes the disqualification for appointment. Then Rule 8 prescribed the Appointing Authority. It provides :—

“All appointments to the posts in the Service shall be made by the Divisional Officers.”

Rule 9 prescribes the procedure for making an application for appointment. Rules 10, 11 and 12 provide for the method of recruitment, training and Patwar examination, maintenance of a Circle register and the appointment of Canal Patwaris. These Rules read as under :—

“10. METHOD OF RECRUITMENT :

- (a) Appointments to the Services shall be made by direct appointment.
- (b) The Divisional Officer shall keep a register of accepted candidates for training purposes. Not more than twice the number of candidates required to fill the vacancies for the ensuing year shall be brought on to the list of accepted candidates and trained and sent up for the examination. No candidate shall be accepted for enrolment in the Divisional Candidate's List unless he complies with the conditions mentioned in Rules 4, 5, 6, 7 and 9 of these rules.

11. TRAINING AND PATWAR EXAMINATION

Every accepted candidate Patwari shall be posted to a Zilladar's Section to be trained for a period of not less than three months in the practical duties of a canal Patwari and shall have to pass parts (iv), (v), (vi) and (vii) of the Patwar examination detailed in Appendix 'B'. At the expiration of the training course, the Zilladar will give to each accepted candidate, who may have earned it, the certificate required under parts (iv) and (vi) without which no candidate will be allowed to present himself for examination. No candidate shall be allowed to appear in the examination more than twice.

12. REGISTER OF PASSED CANDIDATES :

- (a) All candidates, who pass the examination, shall be brought on to the Circle register of passed candidates in serial order of passing the examination. When a permanent vacancy occurs in any Division the next passed candidate shall be posted from the Circle register irrespective of whether he is serving in a leave or temporary vacancy in

another Division of the Circle. The order of appointment shall be issued by the Divisional Officer. The name of a passed candidate who reaches the age of 25 years without having been employed temporarily as a patwari shall be struck off the list. Provided that this maximum age limit shall be relaxed in the case of members of scheduled castes, scheduled tribes and other backward classes to the extent of such period as may be prescribed by Government in this behalf from time to time, in respect of entry of such candidates into service under Government and the names of such candidates shall be retained on the list upto that age. It is the duty of the Superintending Engineer to examine the Circle register of passed candidates early in January each year, in order to see that the sufficient candidates are borne on the register to fill all vacancies that are likely to occur during the next two years, and to ensure as far as possible that all candidates shall ordinarily obtain permanent employment before they reach the maximum age prescribed under this rule. A selection board consisting of all the Divisional Officers of the Circle shall sit before June 1st every year to select the candidates for training for the year in accordance with rule 11.

“(b) No person may be brought on to the Circle register of passed candidates unless he has passed the Patwar examination.”

Then Rule 14 prescribes the method of determining the seniority of the members of the Service. The same reads as under :—

“14. SENIORITY OF MEMBERS OF THE SERVICE :
The seniority of members of the Service shall be determined in accordance with Circle register of passed candidates in serial order of passing the patwar examination. If the position secured in the examination is the same, in the case of two or more persons, their seniority shall be determined by age, a younger member being junior to an older member.”

Rules 15 to 21 provide for pay and bonus of members of the Service ; the authority who can transfer the members of the Service ; the authorities empowered to impose penalties ; leave, pension and other cogent matters etc. Appendix 'B' provides the detailed procedure, syllabus for Patwar examination as well as the authority competent to conduct the said examination.

(22) From a bare perusal of the above Rules, it is evident that the same are in a way a complete Code in themselves prescribing the qualifications and the conditions for being eligible, mode of selection and the authority competent to conduct examination and to make appointments.

(23) To repeat the argument of the learned Advocate General, Haryana, it has been contended that after the commencement of the Rules 1955, two statutory Bodies, known as Employment Exchange constituted under the Act No. XXXI of 1959 and Punjab Subordinate Services Selection Board constituted in view of the powers conferred by Article 309 of the Constitution were interposed. Thereafter, all the candidates were being sponsored by the Employment Exchange. The necessary examination for the recruitment of Canal Patwaris was being conducted by the said Subordinate Services Selection Board. The successful candidates were then interviewed by the said Board. On the basis of an overall performance in the examination as well as in the interview, the candidates were recommended for appointment. The practice of maintaining a Register at the Circle level was thus done away with. By way of a precedent, it has been mentioned in the reply that in the year 1974 examination for the recruitment of Canal Patwaris was conducted at State level, the candidates were sponsored by various Employment Exchanges and they were interviewed by the said Board and final selection was made on the basis of the performance in the examination as well as in the interview. Thus, it has been contended that the Rules 1955 stood impliedly repealed on the basis of the doctrine *desuetude*.

(24) It is correct that the doctrine of *desuetude* has now been recognised and accepted in our country. In *The Municipal Corporation, Pune's case* (supra) their lordships of the Supreme Court, after noticing English as well as Scottish law on the point, were pleased to observe as under :—

“Though in India the doctrine of *desuetude* does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still

required to act as per the 'dead letter'. We would think it would advance the cause of justice to accept the application of doctrine of *desuetude* in our country also. Our soil is ready to accept this principle ; indeed, there is need for its implantation, because persons residing in free India, who have accured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become 'dead letter'. A new path is, therefore, required to be laid and trodden."

To arrive at the above decision, their lordships placed reliance, *inter alia*, on the views expressed by Lord Mackay in *Brown v. Magistrate of Edinburgh*, (22), which read as under :—

"I hold it clear in law that *desuetude* requires for its operation a very considerable period, not merely of neglect, but of contrary usage of such a character as practically to infer such completely established habit of the community as to set a counter of law or establish a *quasi-repeal*.

It is, thus, evident that to attract the doctrine of *desuetude*, the statute in question must be in disuse for a long duration and instead a contrary practice being in use. This doctrine requires for its operation a very considerable period of contrary usage of such a character as practical to infer such completely establish habit of the community as to set a counter of law or establish a *quasi-repeal*.

(25) In the present case, the respondent-State has given only one precedent of the year 1974 when the recruitment to the posts of Canal Patwaris is stated to have been made through the Subordinate Services Selection Board on the basis of examination and interview. On the other hand, the petitioners have pointed out that in August 1979, about 250 Canal Patwaris were appointed in different circles as per the procedure prescribed under the Rules 1955 and no candidate was recommended by any Selection Board. It has been further pointed out that in the year 1991, twenty Canal Patwaris were appointed in Kaithal Circle by the Divisional Officer in accordance with the Rules 1955 without there being any recommendation of the Subordinate Services Selection Board.

(26) Further a copy of the written statement filed by the Executive Engineer, Faridabad Division/GC, Faridabad (Irrigation Department) in C.W.P. No. 6982 of 1993, titled as *Shri Sukhbir Singh v. State of Haryana and others* has been placed on the record of C.W.P. No. 5516 of 1995 as Annexure P.2. This written statement was filed on behalf of the Chief Engineer/Canals (Irrigation Department), Haryana, Superintending Engineer, WJC Feeder/GC Circle, (Irrigation Department) and the Executive Engineer, Faridabad Division/GC, Canal Colony, Faridabad, on 28th July, 1993. In para 2 of this written statement it is expressly admitted that the appointment of Canal Patwaris in the State of Haryana is governed by the Rules 1955 and according to which a register of passed candidates is to be maintained in each Circle, and appointment is to be made by the Divisional Officers out of the candidates so registered in the serial order of passing the examination. In para 4 of the said written statement it is further stated that the result of the Patwar examination held during April, 1992, at Karnal Centre was declared on 19th April, 1993 in which as many as 59 candidates relating to Faridabad Division and 94 other candidates of WJC Feeder (GC Circle), Delhi, were declared successful, and these candidates had a prior legal right for appointment being candidates of the circle in preference to the petitioners who had not passed the Patwar examination from that circle. This categorical admission made by the respondent-State and its officers leads to the only conclusion that the Rules 1955 are still in force and the appointments are being made by the concerned Divisional Officers in accordance with a register maintained on the basis of the Patwar examination.

(27) The mere fact that during the last 30 years, once recruitment to the posts of Canal Patwaris was made through the Subordinate Services Selection Board on an examination and interview conducted by it is not enough to hold that the Rules 1955 stand impliedly repealed on the basis of the doctrine of *desuetude*. In *C. C. Padmanabhan and others v. The Director of Public Instruction and others* (21), the apex Court explained the law as under :—

“The only argument which Mr. Abdul Khader advanced against the proposition that the post of an A.E.O. lay in a higher category may be stated thus. According to the

available rules and instructions an H.S.A., but not an A.E.O., may be appointed to the post of Head-master of a High School. However, the Government has been appointing A.E.Os. also as Headmaster of High Schools which means that A.E.Os. are equated with H.S.As. Now this is, to say the least, a strange argument. If the rules do not permit A.E.Os. to become Headmasters of High Schools but the Government has been posting them as such in contravention of the rules it would not follow that the rules automatically stand amended to be read in conformity with the contravention."

Therefore, if the Subordinate Services Selection Board had recommended the candidates for appointment to the posts of Canal Patwaris even in contravention of the Rules 1955 only once in the year 1974, could not affect the legality and the binding effect of the said Rules. It may be clarified here that the State has not placed anything on the record to show as to what procedure and criteria the Subordinate Services Selection Board had adopted in the year 1974 to recruit the Canal Patwaris. At the fag end of his arguments, the learned Advocate General, Haryana, has fairly conceded that even in the impugned selection the Rules 1955 have been followed upto Rule 11, and it is only the Rule 12 which has not been followed on account of the interposition of two authorities stated above. In other words even according to the learned Advocate General, the Rules 1955 are still being followed and have not been impliedly repealed by non-user thereof.

(28) It may be added that one Rajesh Kumar had filed Civil Writ Petition No. 2867 of 1995 for the issuance of a writ commanding the State of Haryana, Engineer-in-Chief, Irrigation Department, Haryana, and Chief Engineer, Irrigation Department, Rohtak to quash the selection of Canal Patwaris or in the alternative to select and appoint the petitioner as Canal Patwari because the persons lower in merit such as respondent No. 4 in that case had been selected, whereas the rightful claim of the petitioner had been arbitrarily ignored. This writ petition was never opposed by the State or the other official respondents. While allowing the said writ petition and issuing directions to select and appoint the petitioner as Canal Patwari, a Division Bench of this Court, by order dated July 17, 1995 made the following observations :—

"It is the claim of the petitioner that he has passed the 10+2 examination as also the Canal Patwar examination. In 10+2 examination, he has secured 156 marks out of 400 marks. He also stated that he has passed Canal Patwar examination and secured 292 marks out of 375 marks. In

paragraph 3 of the writ petition, it has been stated by the petitioner that respondent No. 4, has secured less marks in the Canal Patwar examination, yet he has been preferred to him and given appointment ignoring the claim of the petitioner. He has also stated that the 4th respondent is only a matriculate. In paragraphs Nos. 4 and 5, *mala fides* have been pleaded against the respondents in giving appointment to the 4th respondent. As regards the *mala fides* we do not wish to say one way or the other at this stage. The fact remains that the petitioner, who has secured higher marks than respondent No. 4 in Canal Patwar examination, ought to have been given appointment as Canal Patwari. Respondents Nos. 1 to 3 have totally overlooked the merit of the petitioner while giving appointment to the 4th respondent.”

This writ along with its decision and the observations made therein reproduced above further fortify the conclusion that the Rules 1955 are still in force and are being followed in the appointment of Canal Patwaris in the State of Haryana without any alteration or modification.

(29) Accordingly, we do not find any merit in the contention of the learned Advocate General on the point in hand. This question is accordingly answered in the negative.

QUESTION NO. 2 :—

(30) Admittedly, the petitioners and all others accepted candidates, as envisaged by Rule 11 of the Rules 1955, passed their Patwar training with their respective Ziledars. After completing the said training and obtaining the necessary certificates under the Rules, they appeared in the Patwar examination held centrally at four different zones in the State of Haryana from 25th April, 1992 to 28th April, 1992. The result was declared somewhere in the year 1993. The successful candidates were made to get themselves registered with their respective District Employment Exchanges. On 6th October, 1994, the Financial Commissioner and Secretary to Government Haryana, Irrigation and Power Department sent a Memo. (Annexure R. 1) dated October 6, 1994 to the Engineer-in-Chief, Irrigation Department, Haryana, Chandigarh, which reads as under :—

“Subject :—Filling up of vacancies of Canal Patwaris and Apprentice Canal Patwaris in Irrigation Department, Haryana.

Reference your U.O. No. 5817/6NNGE-II, dated 11th August, 1994, on the subject cited above.

2. Approval of the State Government is hereby accorded for the constitution of the Selection Committee for the selection of those Canal Patwaris, whose posts have been taken out of the purview of the Subordinate Service Selection Board, Haryana as under :—

Chairman	...	CE YWS Unit
Member	...	CE BWS Unit
Member-Secretary	...	GM (P) Irrigation Deptt.
Member	...	Deputy Collector, BWS/C. Kaithal
Co-opted Member	...	Xen Canals, Hisar.

3. You are requested to proceed further in the matter immediately.

Sd/-

Under Secretary/Irrigation & Power
for Financial Commissioner & Secretary to
Govt. Haryana, Irrigation & Power Deptt."

Accordingly, the various Employment Exchanges called these candidates in their offices to consider the question of their being interviewed and ultimately they were referred to the said Committee constituted,—vide Annexure R. 1. These candidates were interviewed by the Committee from 28th November, 1994 to 6th December, 1994. It may be noted that during the course of hearing the learned Advocate General, Haryana, supplied a copy of the

criteria laid down by the said Committee for making selection which is Mark 'C1'. It lays down the following criteria :—

“Mark ‘C.1’

ACADEMIC QUALIFICATION

Matric 3rd Divn.	=	20	
Matric 2nd, Prep. or +1	=	21	
Matric 1st +SSLC +2	=	22	
+2 1st +BA Part I & II	=	23	
B.A.	=	24	
B.A. 1st or M.A. or			
B. Ed. etc.	=	25	25
PATWAR EXAMINATION			
230—240	=	20	
241—260	=	21	
261—280	=	22	
281—290	=	23	
291—300	=	24	
301+	=	25	25
SPORTS	=	5	
Experience :	=	10	
Extra-curricular	=	5	20
Viva Voce	=	30	30
<hr/>			
Total Marks	=	100	100
<hr/>			

On the basis of the interview held by the Committee, a list of selection candidates was prepared and selected candidates were allocated circle-wise as per vacancies intimated by the concerned Superintending Engineers. A copy of letter dated 3rd February, 1995 (Annexure P.2) filed in C.W.P. No. 4283 of 1995 is reproduced below :—

“Subject :—Appointment of Canal Patwari in Irrigation Department, Haryana.

In continuation of my UU Note No. 135—39, OI(P), dated 2nd February, 1993 on the subject cited above.

In view of committee's recommendations a joint merit covering all categories has been prepared and candidates have been allocated circlewise giving their merit as per vacancies intimated by SEs of your line units.

You are requested to get issued appointment letters to these candidates through the appointing authority after observing all the formalities as per service Rules, to the respective Employment Exchanges.

List of candidates allocated to your Unit, Circlewise as per merit indicated against each is sent herewith for necessary action.

Encl. :—As above.

CC : RCIP for information.”

In view of this material we are to see as to whether the constitution of the Selection Committee,—*vide* letter Annexure R. 1, the criteria laid down by it for selection,—*vide* Annexure 'C. 1' and consequently the selection of the candidates are valid in law ?

(31) It is now well-settled that once the Rule-making authority has exercised its powers under proviso to Article 309 of the Constitution and has framed Rules regulating recruitment and conditions of service of persons for the particular post, it is not open to the Government to issue any administrative orders/circulars/instructions modifying or varying these Rules. If the Government feels that the Rules do not fulfil the objectives with which they are framed, the only course open to it is to amend the Rules by exercising its powers under proviso to Article 309 of the Constitution. If there is any lacuna in the Rules, it can certainly be filled up by executive instructions but the Government has no powers to prescribe any additional requirement either as to eligibility or to suitability of a candidate for a particular post by instructions/circulars.

(32) In *A. K. Bhatnagar's case* (supra), a note of caution was sounded by their lordships of the Supreme Court that the Rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn in nature having binding effect. In *Shri Durgacharan Misra's case* (supra) the apex Court pointed out that the statutory Rules framed under the proviso to Article 309 of the Constitution must be faithfully followed and the selection should be made in accordance therewith. It was further pointed out that

no additional requirements for selection either as to eligibility or as to suitability can be prescribed by the Selection Committee. Similar views have been expressed by the apex Court in *Shamsher Jang Bahadur's case* (supra).

(33) It has already been stated above that for the recruitment of the Canal Patwaris and their conditions of service statutory Rules 1955 have been enacted. These Rules in themselves provide a complete scheme for the selection and appointment of the Canal Patwaris. The method of recruitment and the mode of appointment are expressly laid down in Rules 10 to 12. According to Rule 8, all appointments to posts in the Service shall be made by the Divisional Officers. In Appendix 'B' to the Rules, it is further provided that the Patwar examination for each Circle shall be conducted by the Divisional Officer in rotation. A Divisional Officer is empowered to convene a Board consisting of himself as President and the Deputy Collector and a Sub-Divisional Officer as members, for the purpose of examining trained candidates in the subjects detailed in the said Appendix. There is, thus, no provision in any of the Rules for the constitution of any other Selection Committee or for conducting an interview of the candidates who passed the Patwar examination.

(34) Therefore, the constitution of the Selection Committee or the approval accorded to the constitution thereof by the respondent-State,—*vide* Annexure R.1 is in direct contravention of the Rules 1955. The requirement of an interview by the said Selection Committee on the basis of the criteria laid down by it, reproduced above, is an additional requirement for selection as to suitability which is not permitted by the statutory Rules and the same shall be termed as illegal and without authority.

(35) It deserves to be highlighted that Annexure R.1 containing the executive instructions was issued by the respondent-State itself and not by any Divisional Officer in whom the power of appointing of the Canal Patwaris is vested by the Rules 1955. Had the situation been the latter, it might perhaps been arguable that the appointing authority had either delegated its powers or created merely an advisory body for its own aid. This, however, is not remotely the case here. The constitution of the Selection Committee was by an authority other than the Divisional Officer. This virtually by-passed the powers of appointment laid down by the Rules in the Divisional Officer. Viewed in this light, we are clearly of the view that the executive instructions (Annexure R.1) and the constitution

of the Selection Committee herein cannot be held as either supplementary to the Rules or a mere filling up a gap therein. In other words, the constitution of the Selection Committee,—*vide* Annexure R.1, in itself is illegal. Similar views have been expressed in *Jagan Nath Sharma's* case (*supra*), *Shri Ravinder Kumar v. The State of Punjab and others* (22), and *Palwinder Singh and others v. Director of Public Instruction Punjab and others* (23).

(36) The matter stands authoritatively concluded by a recent pronouncement of the apex Court in *Dr. Krushan Chandra Sahu's* case (*supra*). In that case the appointment was to be made to the post of junior teachers. The selection procedure was governed by Orissa Homoeopathy Medical Teaching Service (Methods of Recruitment and Conditions of Service) Rules, 1980. The relevant rule was silent as to the guidelines on the basis of which suitability of the candidate was to be adjudged. The Government did not issue any administrative instructions in this respect. The Selection Board itself laid down the criteria to be followed by it to determine the suitability of the candidates by the said Committee on the basis of the said criteria and their appointments was challenged. While holding that the basis adopted by the Selection Board was wholly arbitrary besides being without authority or jurisdiction, their lordships stated the law as under :—

“Now, power to make rules regulating the conditions of service of persons appointed on Government posts is available to the Governor of the State under the Proviso to Article 309 and it was in exercise of this power that the present Rules were made. If the statutory Rules, in a given case, have not been made, either by the Parliament or the State legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government (the Central Government under Article 73 and the State Government under Article 162) to issue executive instructions. However, if the Rules have been made but they are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions (See : *Sant Ram v. State of Rajasthan* (1967 S.C. 1910).

(22) 1983 (1) S.L.R. 247.

(23) 1983 (1) S.L.R. 271.

In the instant case, the Government did neither issue any administrative instruction nor did it supply the omission with regard to the criteria on the basis of which suitability of the candidates was to be determined. The members of the Selection Board, of their own, decided to adopt the confidential character rolls of the candidates who were already employed as Homeopathic Medical Officers, as the basis for determining their suitability.

The members of the Selection Board or for that matter, any other Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the Rules made under Article 309. It is basically the function of the Rule making authority to provide the basis for selection. This Court in *State of Andhra Pradesh and another v. Sadanandam and others* (J.T. 1989 (Supp.) S.C. 232=A.I.R. 1989 S.C. 2060) observed as under :—

“We are now only left with the reasoning of the Tribunal that there is no jurisdiction for the continuance of the old Rules and for personnel belonging to either zones being transferred on promotion to offices in other zones. In drawing such conclusion, the Tribunal has travelled beyond the limits of its jurisdiction. We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive.”
(Emphasis supplied).

Their lordships were pleased to observe further that the Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such powers be assumed by necessary implication. Then in para 38 of the judgment, their lordships explained the law as under :—

“It may be pointed out that rule making function under Article 309 is legislative and not executive as was laid

down by this Court in *B. S. Yadav and others v. State of Haryana and others*, (A.I.R. 1981 S.C. 561). For this reason also, the Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection."

The present case is fully covered by the ratio laid down by the apex Court in the aforesaid case.

(37) Even assuming that the Selection Committee was constituted by the executive instructions for a laudable object, it had no power or jurisdiction to lay down any criteria for making selection for the Canal Patwaris. The said Selection Committee did not have any inherent jurisdiction even to lay down the norms for selection. Still further, the Selection Committee could not be said to have jurisdiction to lay down any standard or basis for selection as it would amount to legislate a rule of selection. We would like to clarify here that the executive instructions contained in Annexure R.1 would show that the Selection Committee constituted thereby was not a mere advisory or a fact finding body but indeed had been virtually vested with the power of appointments of Canal Patwaris, which otherwise by Rules lay in the hands of the Divisional Officer. From a conjoint reading of Annexure R.1 in the present case and Annexure P.2 in C.W.P. No. 4283 of 1995, to our mind, undoubtedly indicate that far from being supplementary to Rule 8, the same tended virtually to supplant the power of appointment from the Divisional Officer to the Selection Committee rendering the former as a mere rubber stamp therefor. The intent and purpose of these executive instructions run diametrically opposite to Rule 8 of the Rules 1955 and in patent conflict therewith.

(38) Another fact which requires attention is that the Selection Committee laid down the criteria for selection as contained in Annexure 'C.1'. It divided the said criteria into 6 sub-heads and allocated marks for each of them. During the course of arguments, on our direction the respondent-State produced the record prepared by the Selection Committee after interviewing the candidates. No other record has been produced in spite of our specific direction. From a bare perusal of the record produced, it is evident that the Selection Committee has awarded the marks to every candidate in a lump. The record has been produced to show that the candidates were awarded marks on itemised basis. This is clearly illegal and the interview stands vitiated for this simple reason. This view

finds affirmation in a judgment of the apex Court rendered in *Minor A. Pseriakaruogan v. State of Tamil Nadu and others* (24).

(39) There is another interesting angle in this case. The examination for the recruitment of Canal Patwaris took place from 25th April, 1992 to 28th April, 1992. The result was declared in 1993. The Selection Committee was constituted,—*vide* Memo dated 6th October, 1994 (Annexure R.1). Admittedly, the Selection Committee interviewed the candidates from 28th November, 1994 to 6th December, 1994. The posts of Canal Patwaris were taken out of the purview of the Subordinate Services Selection Board, Haryana,—*vide* notifications dated 4th October, 1995 (Annexure R.2), 25th January, 1995 (Annexure R.3) and Memo dated 2nd March, 1995 (Annexure R.4). Thus, the majority of the posts of Canal Patwaris were taken out of the purview of the Subordinate Services Selection Board much after the completion of the so called interview. In other words the Selection Committee had started counting its Chickens before the eggs were hatched.

(40) Therefore, we have no hesitation in holding that the constitution of the Selection Committee in itself was illegal and contrary to the statutory Rules. We further hold that this Selection Committee had no power or jurisdiction to lay down any criteria for the said selection. We further hold that the selection made by the Committee is not only contrary to the Pulet but in violation of the norms of selection. This question is accordingly answered in the affirmative.

QUESTION NO. 3 :

(41) On behalf of the respondents, strong reliance has been placed on the plea of waiver. According to them, once the petitioners voluntarily appeared for interview before the Selection Committee and took a chance to get themselves selected, then, only because the result of the interview is not favourable to them, they cannot turn round and subsequently contend that the Selection Committee was not properly constituted or the process of interview was unfair or contrary to the Rules 1955. It is also contended that the said plea is not affected even where there is a total want of

jurisdiction in a Tribunal. Reliance has been placed upon certain judgments which shall be noted hereinafter.

(42) According to us, it is difficult to say how on the facts, the plea of waiver could be said to have been made out by the State Government, or for that matter by the respondents. In *M/s Motilal Padamgat Sugar Mills Co. Ltd. v. The State of U.P. and others* (25), the term 'waiver' has been defined as follows :—

“Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be an intentional act with knowledge. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right he intentionally abandons it.”

Thus, there can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. Similar views have been expressed by the apex Court in *Manak Lal v. Dr. Prem Chand Singhvi and others* (26).

(43) In *Dr. G. Sarana's* case (supra) relied upon by the respondents, the appellant appeared before the Selection Committee knowingly very well as to who were the members thereof. He never raised any objection against the constitution of the Selection Committee resolved to recommend respondent No. 8 therein for appointment. On coming to know of the said recommendation the appellant by filing a writ petition under Article 226 of the Constitution challenged the recommendation mainly on the ground that two out of the three Experts constituting the Selection Committee were biased against him and in favour of respondent No. 8 therein. On these facts the apex Court held :

“It is not necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knows all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He

(25) A.I.R. 1979 S.C. 621.

(26) A.I.R. 1957 S.C. 423.

seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the Committee.”

Similarly in *Swaran Lata's* case (supra), it was found that the appellant therein was trying to approbate and reprobate. She had willingly, of her own accord, and without any persuasion by anyone, applied for the post, in response to the advertisement issued by the Union Public Service Commission for direct recruitment. She, therefore, took her chance and simply because the Selection Committee did not find her suitable for appointment, it was observed that she could not be heard to say that the selection of respondent No. 6 therein by direct recruitment through the Commission was invalid, as being contrary to the directions issued by the Central Government or the Commission had exceeded its powers. A similar view on identical facts was expressed by a Division Bench of Andhra Pradesh High Court in *Dr. (Mrs.) M. Thaha's* case (supra). In *North Malabar Gramin Bank Officers Association's* case (supra), for the selection of Area Manager/Senior Managers as per the guidelines, the first respondent therein issued a circular laying down the norms which provided for the award of marks to the candidates in the selection process. The first respondent also issued a circular informing the officers about the selection to four posts of Area Managers/Senior Managers. Thus, having full knowledge about the guidelines and the norms laid down for the selection of Area Managers/Senior Managers, the petitioners appeared for the interview but without success. On these facts, it was held that after knowing fully well that such a selection process is to be undergone and after having participated in the interview and taken the chance of getting promoted, the petitioners could not be heard to contend that the method adopted for promotion was illegal. Reference was made to an earlier decision in *District Wholesale Co-operative v. Deputy Registrar* (27), which dealt with a case of total want of jurisdiction in a Tribunal. Even in that case it was held that the Court's discretion under Article 226 of the Constitution could not be exercised in favour of a person who took the chance of obtaining a favourable decision from it without raising any objection on the

point. Reference has also been made to a decision of the Supreme Court in *Madan Lal's* case (supra), wherein similar law has been laid down.

(44) None of the above quoted precedents is applicable to the facts of the case in hand. It could not be pointed out by the respondents that any communication before hand was sent to the petitioners indicating that after passing the Patwar examination they would have to appear before any Selection Committee, nor they were informed about the persons with their designations who constituted the Selection Committee for the interview. The petitioners were also never made to know the so-called criteria stated to have been laid down by the Selection Committee on the basis of which the selection was to be made for appointment to the posts of Canal Patwaris. Therefore, it cannot be said that the petitioners who had appeared for the interview before the Selection Committee waived their right to challenge the constitution of the Committee or the criteria laid down by it for the selection to be *ultra vires* the Rules. There is no material on the record to counter the assertion on behalf of the petitioners that they had no knowledge about the constitution of the Selection Committee or the criteria laid down by it, and they came to know about it for the first time when a list of selected candidates was received in the office of Bhakra Water Services Circle, Kaithal, for appointment. Consequently, the petitioners cannot be said to have waived their right to challenge the constitution of the Selection Committee and the criteria laid down by it for selection to be *ultra vires* the Rules 1955. This question is, therefore, answered in the negative.

(45) In our answer to question Nos. 1 to 3, we conclude that the selection and the recommendations made by the Selection Committee as a result of the interview held by it from 28th November, 1994 to 6th December, 1994, and the consequent appointments of the private respondents, or for that matter any other person, are illegal and *ultra vires* the Rules 1955.

(46) As a result of the above discussion, this writ petition is allowed. The impugned selection and appointment of the private respondents as Canal Patwaris are hereby quashed. The official respondents are directed to make appointments to the posts of Canal Patwaris in the Irrigation Department, Haryana, strictly in accordance with the Rules 1955. While making appointment to the said posts, only those candidates would be considered who have

been declared successful in the Canal Patwar examination held from 25th April, 1992 to 28th April, 1992, and fulfil all other requirements under the said Rules. It is further made clear that while making such appointments the official respondents shall take into consideration the constitutional or legislative reservations, if any. The parties are left to bear their own costs.

J.S.T.