Taking this view of the matter, I find the application to be within time, it not being disputed that the notices issued in obedience to the orders of M. L. Verma, J., were not served on the respondents and the period of limitation in this case would, therefore, run from the date of knowledge of the decision of the appeal. The applicants' case is that they only came to know on the 11th July, 1974, and they filed the application within a few days. This contention of the applicants has not been contested. The application is consequently allowed and the order dated the 22nd March, 1974, is set aside and it is directed that the appeal be set down for re-hearing. The parties will bear their own costs in this application.

B.S.G.

FULL BENCH.

Before A. D. Koshal, S. S. Sandhawalia and Prem Chand Jain, JJ.

CHATTAR SINGH, ETC.—*Petitioners.*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ No. 4527 of 1975.

November 20, 1975.

Punjab Food and Supplies Department (State Service Class III) Rules (1968)—Rule 9(X)—Appointment to higher post by selection or promotion—Statutory Service Rules not providing a written test for—Prescription of such test by executive instructions—Whether valid—Use of word "promotion" in Rule 9(X) (ii) and of word "selection" in Rule 9(X) (iii)—Whether of any legal significance.

Held, that where the statutory Service Rules do not provide for a written test for the purpose of appointment to a higher post either by promotion or selection, such a test cannot be indirectly imposed by the devious method of introducing it through executive instructions. The prescription of written test by executive instructions obviously not only adds or alters the statutory requirements but is derogatory or contradictory thereto. The introduction of a written test by virtue of executive instructions tantamounts to altering or adding to the rule and is not warranted by law and is therefore, invalid.

Held, that Article 16 of the Constitution guarantees only a right to be considered for promotion but does not confer any vested right to be in fact promoted to the next grade in the public service. In every promotion there is a selection though the converse is not true and in every selection there need not necessarily be an element of promotion. However, one thing is evident that an element of choice is common to both that is in either case whether the appointment is made by way of promotion or by way of selection from a class of persons. Hence the use of word "selection" in clause 9(x)(ii) and the use of word 'promotion' in Rule 9(x)(iii) is without any significant legal difference.

Petition under Article 226 of the Constitution of India, praying that a writ of certiorari, Mandamus or any other suitable Writ, Direction or Order be issued directing the respondents:—

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

(ii) *it be declared that no test can be held for purposes of promotion to the posts of Assistant Food and Supplies Officer and that the appointments have to be made on the basis of seniority-cum-merit. The decision of the respondents in this behalf may be quashed ;*

(iii) *the order calling upon the petitioners,—vide letters like the one at Annexure P-2 be quashed and it be declared that the posts have to be filled up by seniority-cum-merit only ;*

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

(v) *this Hon'ble Court may also grant all the consequential reliefs like the arrears of salary, seniority, etc., etc.*

(vi) *pending the disposal of the writ petition, the respondents be restrained from holding the test fixed for August 8, 1975 ;*

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

J. L. Gupta, Advocate with Mr. Gian Chand Gupta, Advocate, *for the petitioners.*

I. S. Tiwana, Deputy Advocate-General, Punjab, *for the respondents.*

JUDGMENT

S. S. SANDHAWALIA, J.—(1) Whether the prescription of a written test by executive instruction, for the purpose of appointment to

the posts of Assistant Food and Supplies Officers is violative of Rule 9(X) of the Punjab Food and Supplies Department (State Service Class III) Rules is the primary question which falls for determination in this writ petition admitted to a hearing by the Full Bench.

(2) The facts are not in dispute. The three petitioners joined service as clerks in the Department in late fifties and were subsequently appointed as Junior Auditors on different dates and later were promoted as Assistants by the mid sixties. It is averred on their behalf that till the year 1968 there were no rules governing their conditions of service in the Food and Supplies Department and it was on the 9th of August, 1968, that the Governor of Punjab promulgated the Punjab Food and Supplies Department (State Service Class III) Rules, which were duly published in the gazette (hereinafter called the Rules). Rule 9 prescribes the method of appointment to the different categories of posts within the department and in particular clause (X) thereof relates to the mode of appointment in the case of Assistant Food and Supplies Officers. Further subclause (iii) of the above-said provision lays down that 13 per cent of the posts would be filled by selection from amongst Assistants, Head Clerks, Stenographers, Junior Auditors who had worked in that capacity for a period of not less than three years in that Department. In accordance with Rule 11, the *inter-se* seniority of the petitioners stands determined and the relevant extract from the Seniority List is annexure P. 1 to the writ petition.

(3) It is the case of the petitioners that ever since the promulgation of the Rules the promotion from amongst Assistants, etc., (to which category the petitioners belong) has always been on the basis of seniority-cum-merit and no written test has either been held or prescribed for the said purpose. It was primarily on the consideration of the service record, etc., that promotions had been made earlier. As an instance, it is pointed out that Bachittar Singh petitioner was granted officiating promotion in July 1974, without any qualifying test but was subsequently reverted in October, 1974 on account of lack of sanction by the Finance Department. Further it has been averred that persons already working as Assistant Food and Supplies Officers have been promoted from the numerous categories in the service without holding any competitive test whatsoever.

(4) At the material time as many as 18 posts were stated to have fallen to the share of the ministerial establishment, to which

the petitioners belong. It is their claim that a large number of persons who were similarly placed had already been promoted as Assistant Food and Supplies Officers without ever having been required to pass or qualify any written test. The names of 12 such persons have been specified in the writ petition and it is claimed that the prescription of the written test now after a period of nearly seven years from the promulgation of the Rules would operate unfairly against the petitioners and would enable their juniors to steal a march over them.

(5) The Director of Food and Supplies Punjab, respondent No. 2 invited options from the members of the ministerial establishment for the posts of Assistant Food and Supplies Officers and the three petitioners along with others gave their consent for promotion to the posts above-said. It is their primary grievance that instead of considering their cases for promotion on the basis of their service records, respondent No. 2 issued the impugned instructions, annexure P. 2, to the effect that the Departmental Selection Committee will conduct a written test and interview for appointments to the above-said posts. This test would consist of General Knowledge, Departmental Rules and working, D.R. Manual and Control Orders, etc. The date for holding the test was fixed for the 8th of August, 1975, and interviews in the same connection were to start from the next date.

(6) The petitioners' claim is that the holding of a written test is absolutely illegal and plainly violative of the Service Rules applicable to them. It is also their case that the action operates unfairly and amounts to an illegal discrimination against them which is prohibited under Article 16 of the Constitution of India. An ancillary ground has also been taken that the impugned instructions, annexure P. 2, have been issued by the Director and not by the Government and are, therefore, of no validity.

(7) In the return filed by the Deputy Secretary to Government, Punjab, Food and Supplies, the broad factual position is not put in controversy. It is admitted that earlier no written test has been held for the purpose of appointment to the posts of Assistant Food and Supplies Officers. The respondent's case is that the selection for the post is on the basis of a written test, interview and the assessment of service records, and it is claimed that Exhibit P. 2 itself indicates that the written test has not been made the sole criterion

for selection. A reference has been made to sub-rule (x) of Rule 9 and it is claimed that the prescription of a test is justified under the statutory provisions. In particular it is high-lighted that so far as the ministerial establishment is concerned (to which the petitioners belong) the language used in the statutory provisions is 'selection' in contra-distinction to the word 'promotion' used as regards other categories. On these premises it is claimed that different criteria may be laid for these separate modes of appointment to the post. It is then averred that respondent No. 2 is the appointing authority of the petitioners and, therefore, he is the competent person to issue the necessary instructions for the purposes of selection to the relevant posts. The validity of annexure D. 2 has been repeatedly reiterated in terms.

(8) The sheet-anchor of the petitioners' case is the Division Bench judgment of this Court in *State of Haryana* v. *Shamsher Jang Bahadur Shukla* (1), which stands affirmed on appeal by their Lordships of the Supreme Court in *State of Haryana* v. *S. J. Shukla* (2). Two distinct ratioes *deci dendi* are deducable from this case. Firstly, it was laid down that the prescription of a written test by virtue of a mere administrative instruction for the purposes of promotion without amending the statutory service rules (wherein no such requirement was provided for) was invalid. Secondly, it was held that the introduction of such a test amounted to a change in the condition of service of the employee and thus violated sub-section (7) of Section 115 of the States Re-organisation Act. 1956, in the absence of a valid sanction by the Central Government. Mr. Gupta's forceful contention on behalf of the petitioners is that their case stands fully covered by the first principle above-mentioned and indeed has no relevance to the second one.

(9) Since a passing doubt has been raised during the course of argument that *Shukla's case* now stands entirely overruled, it becomes necessary to advert briefly to the judgment in *Mohd. Shujat Ali and others* v. *Union of India and others* (3). A close analysis of this judgment would, however, reveal that their Lordships in this case had overruled their earlier view enunciated in *Shukla's case*

(1) 1968 S.L.R. 162.
(2) A.I.R. 1972 S.C. 1546.
(3) 1974 S.C. 1631.

(as also in a number of other cases) regarding the violation of section 115(7) of the States Reorganisation Act, 1956. However, no opinion whatsoever was expressed on the point whether the introduction of an examination by virtue of administrative instruction as a condition for promotion to the higher post was violative of the statutory rules which did not provide for the same. Consequently it is manifest that despite the subsequent judgment in *Shujat Ali's case*, the first principle aforementioned laid down in *Shukla's case* still holds the field. In any case so far as this Court is concerned, it has been authoritatively so held by a Full Bench in *Jagjit Rai Vohra* v. *The Chief Secretary to Government, Haryana* (4). It was apparently because of this fact that Mr. I. S. Tiwana appearing for the respondent—State fairly conceded that *Shujat Ali's case* had overruled only one principle enunciated in *Shukla's case* whilst the other had been retained intact.

(10) It being thus evident that the relevant ratio of *Shukla's case* still holds the field and consequently the matter being governed by binding precedent it is obviously wasteful to consider it afresh on principle. The core of the matter, therefore, is whether the present case is directly or by way of analogy covered fully by the ratio of the case afore-mentioned. Therein Hegde, J., speaking for the Court posed the following question—

> "The first question arising for decision is whether the Government was competent to add by means of administrative instructions to the qualifications prescribed under the Rules framed under Article 309."

and recorded the following categorical answer thereto:—

> "* * *. Undoubtedly the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service. The instructions issued by the Government undoubtedly affect the promotion of concerned officials and, therefore, they relate to their conditions of service. The Government is not competent to alter the rules framed under Article 309

(4) C.W. 3314/73 decided on 4th March, 1975.

by means of administrative instructions. We are unable to agree with the contention of the State that by issuing the instructions in question. the Government had merely filled up a gap in the rules. The rules can be implemented without any difficulty. We see no gap in the rules."

(11) In order to test whether the aforementioned authoritative enunciation of the law fully governs the present case, it is obviously necessary to advert to the relevant statutory rules around which the controversy in the present case is revolved. The relevant provision of rule 9 is in the following terms:—

"9. Method of appointment.—Appointments to posts in the Service shall be made in the following manner:—

* * *

(X) In the case of Assistant Food and Supplies Officers:—

(i) 20 per cent by direct appointment; or

(ii) by promotion from amongst Inspectors Food and Supplies and Head Analysts in the Department; provided they have worked on their respective posts for a minimum period of 3 years; or

(iii) 13 per cent by selection from amongst Assistants/ Head Clerks/Stenographers/Junior Auditors who have worked in the capacity for a period of not less than three years;

(iv) by transfer or deputation of an official already in the service of the Government of India or of a State Government already holding an appointment equivalent to the post held by departmental official eligible for appointment by promotion."

The plain language of this provision would show that the rules have provided five modes for appointments to the posts of Assistant Food and Supplies Officers, namely, by direct appointment; by promotion from amongst Inspectors, etc., by selection from amongst the Assistants, etc., by transfer and by deputation of an official already in

Government service. The material provision for the purposes of the present case is clause (iii) above which provides for the method of appointment by selection from amongst the qualified members of the ministerial establishment.

(12) In a vain attempt to distinguish the present case and to exclude it from the relevant ratio of *Shukla's case,* Mr. Tiwana for the respondent-State has placed reliance on the use of the word 'selection' in clause (iii) in contra-distinction to the word 'promotion' used in clause (ii) above. On these premises it was sought to be contended that the two words have been designedly used by the framers of the rules and that there was a substantial distinction and difference betwixt this terminology in the present set of Rules. It was submitted that whilst promotion implied a normal going up in the rung of the service from the same line thereof, selection on the other hand implied an induction of persons from different lines to a post. Consequently it was contended that different criteria or methods may be resorted to by the appointing authority in the two situations.

(13) Reference to the numerous sub-heads of rule 9 would show that the word 'selection' has been used only in sub-clause (iii) of rule 9 (X) quoted above. It may perhaps be conceded that the use of the word is not merely accidental. However, the distinction drawn between the words 'selection' and 'promotion' in the context of the present rule appears to us as being without any significant legal difference. It has to be borne in mind that the two words are not terms of art but ordinary words of the language which may have a variety or different nuances of meaning. They may take a peculiar shade or a specialised connotation by virtue of the context which they have been used.

(14) In service law, one is familiar with and in any case may visualise a statutory rule by which a public servant is required to be necessarily promoted to the next higher rank after a fixed period of time. This is sometimes conveniently referred to in service terminology as a time-scale promotion. Such a provision, however, is exceptional and would depend on the specific language of the relevant rule. It is the common case that in the present case, and indeed in the whole of rule 9, there is no such provision. Leaving such an exceptional provision apart and upon which we are not herein called upon to pronounce, we may revert back to construe the relevant provision.

(15) Even Mr. Tiwana fairly conceded that barring exceptional cases (one of which has been referred to above) there existed no legal right in any public servant to be promoted to the next higher rank. It is well-settled that Article 16 of the Constitution guarantees only a right to be considered for promotion but does not confer any vested right to be in fact promoted to the next grade in the public service. Once this position is accepted and truly visualised in practice then it is manifest that an element of choice or selection becomes inherent in the process of promotion. The appointing or promoting authority is, in this context, obliged by law to do no more than to consider the respective cases of persons eligible for promotion and thereafter to make a fair choice therefrom. It cannot be gain-said that in the aforementioned exiomatic position the element of selection is inherent and unavoidable if not primary for the purpose of promotion. To put it in other words, in every promotion there is a selection, though the converse is not true and in every selection there need not necessarily be an element of promotion. However, one thing is evident that an element of choice is common to both—that is in either case whether the appointment is made by way of promotion or by way of selection from a class of persons. In the present case, therefore. the use of slightly different terminology in clauses (ii) and (iii) of rule 9(X) appears to us as a distinction without a difference and the drawing of any sharp line between the two may be either finical or amount to no more than a pun on the language.

(16) Even though repeatedly pressed to cite any authority which drew a meaningful distinction between the use of the terminology of 'promotion' against 'selection' (in any identical or similar statutory rules) Mr. Tiwana was forced to concede that his contention was wholly unsupported by precedent. Consequently both on principle and authority we see no adequate cause to draw any artificial line of distinction between the use of the two words in the present context of rule 9(X) or to infer that different legal results would flow therefrom.

(17) In fairness to Mr. Gupta we must also notice that he pointed out that the relevant ratio of *Shukla's case* was not related entirely to cases of promotion but was also attracted in matters of selection from a class of employees. This submission is not without substance.

The Division Bench judgment in that case in terms noticed the following argument advanced on behalf of the appellants:—

> "It is next contended that if the Service Rules are silent on a particular point, the gap or lacuna could be filled by administrative instructions. It is argued that selection being the test of promotion and no means of selection having been prescribed in the rules it was within the competence of the Executive Government to say that the employees' promotion would be conditional on passing a test."

After a full consideration and discussion on the point, the aforementioned argument was rejected. It deserves repetition that this judgment was affirmed on appeal by their Lordships of the Supreme Court.

(18) The second ground on which Mr. Tiwana attempted to distinguish *Sukla's case* was that therein the test provided by the executive instruction was a condition precedent for the promotion. He pointed out that it was laid down therein that those who did not qualify in the said test would be rendered ineligible for promotion and even those already officiating in the higher posts were to be reverted, if they failed to qualify in the same. Relying on para 8(ii) of the return, Mr. Tiwana submitted that in the present case the situation was not identical and was consequently different. This was said to be on the ground that the selection was to rest not only on the test but on a three-fold consideration, namely, the written test, followed by an interview, and also the consideration of the service record which would be before the Selection Committee.

(19) Firstly we are unable to discover any adequate factual foundation for the submission made on behalf of the respondent-State. In he return, to which a reference has already been made, it has nowhere been stated in terms that in case a candidate does not take the test or takes it and fails therein even then he would continue to be eligible for promotion in case he does well on the basis of the interview and his service record. Even when particularly pressed, the learned counsel for the State was unable to travel beyond the equivocal averments made in the return and would not categorically say that the total avoidance of the written test or a failure therein would not have the significant effect of making the petitioners ineligible for promotion. We assume that normally when a

written test is prescribed it means that the candidate must pass or qualify in the same. It thus becomes a pre-requisite or at least a necessary qualification before the public servant can be considered for promotion. Therefore, unless it is expressly stated to the contrary, the prescription of a written test in practice virtually lays down an additional qualification for the purposes of promotion or selection. As already noticed, in the present case there is no such categorical assertion on behalf of the respondents and we are, therefore, unable to spell out any inference therefrom that the test is either optional or a failure therein would not be material for the purposes of selection. Indeed, it appears that a failure in the prescribed test or in the alternative not taking the same at all, would to all intents and purposes, make the petitioners ineligible for promotion. That being so, the contention of Mr. Tiwana has to be rejected on this ground.

(20) Apart from the above, we are not satisfied that the ratio of *Shukla's case* is confined merely to those cases where the written test is made the sole or in any case the pre-eminent hurdle which must be crossed for the purpose of eligibility to promotion. Indeed the basic assumption in that case proceeds on the reasoning that where the statutory service rules do not provide for a written test then introducing it by virtue of a mere executive instruction is tantamount to altering or adding to the rules which is not warranted by law. Their Lordships of the Supreme Court have categorically observed that merely because there was no prescription of a written test in the statutory rules then they saw no gap in the same which could be or deserved to be filled in by way of an executive instruction. Therefore, the plain ratio of *Shukla's case* appears to be that where the statutory rules do not provide for a written test for the purposes of promotion or selection then the same cannot be indirectly done by the devious method of introducing the same through an executive instruction. The position in the present case appears to be identical and the present set of rules does not appear to be in any way different so as to warrant the introduction of a written test through an executive fiat.

(21) Rather curiously but perhaps fairly Mr. Tiwana also drew our attention to Rule 9(K) (ii) and Rule 9(L) (ii). These in terms provide that the public servant must qualify in a test for the purposes of promotion to the next rank. On further probing we also find a similar requirement in Rule 9(I) (ii). An analysis of all these provisions would patently lend support to and substantially buttress

the argument on behalf of the petitioners. If follows from these provisions that in the detailed rules providing for the different methods of appointment to a large variety of posts in the service, the framers thereof were fully conscious of the methods of providing departmental tests written or otherwise for the said purpose. Wherever it was thought necessary or desirable to do so, the authors of the rules expressly made provision for them in the relevant context. Consequently it is apparent that in all those cases where no such terminology was used, the framers of the Rules did not visualise the holding of any such departmental test. Thus far from there being any silence or gap on the point of holding a written test, the rules had themselves prescribed the same where called for. The dictum of the Supreme Court that they saw no gap in the rules in this context is thus even more forcefully applicable to the present set of rules. The prescription of a written test here by an executive instruction, therefore, obviously not only adds or alters the statutory requirements but in fact appears to be derogatory or contradictory thereto. It is more then well-settled that a mere executive instruction cannot possibly overide or supplant the statutory rules duly prescribed by a competent authority.

(22) We conclude that in the present case there is no point of distinction which could possibly exclude it from the ambit of the relevant ratio in the binding precedent of *Shukla's case*. Consequently the impugned executive instruction, annexure P. 2, must be held as *ultra vires* and violative of the statutory rules and is hereby quashed.

(23) Before parting with the judgment we may notice that the learned counsel for petitioners did not seriously press his submission regarding the alleged violation of Article 16 of the Constitution. Because we have already held in the petitioners' favour on the principal point, we do not deem it necessary to examine an ancillary contention raised on their behalf that the impugned instruction was invalid because it emanated from the Director of Civil Supplies and not from the State Government itself.

(24) This writ petition is hereby allowed with costs.

A. D. KOSHAL, J.—I agree.

PREM CHAND, JAIN, J.—I also agree.

N.K.S.