

PRASAD KURIEN AND ORS.

v.

K.J. AUGUSTIN AND ORS.
(Civil Appeal No. 122 of 2002)

FEBRUARY 19, 2008

(A.K. MATHUR AND B. SUDERSHAN REDDY, JJ.)

Kerala State and Subordinate Service Rules, 1958,

Rule 5-Note (3)-Appointment to cadre of Excise Inspectors – By direct recruitment as also by promotion and/or/transfer – Fixed ratio or percentage to be applied to cadre strength and not to existing vacancies – Direct recruits claiming that in view of the special rules, namely, Kerala Excise and Prohibition Subordinate Service Rules, 1974, ratio of 75% and 25% for promotees and direct recruits, respectively, was to be applied to existing vacancies and every fourth existing vacancy was to be filled by direct recruits – Held: The ratio is to be maintained taking into consideration the entire cadre strength and not the existing vacancies – The 1958 Rules having been saved by Kerala Public Service Act, 1968, Note (3) appended to r.5 of 1958 Rules much after the 1974 Rules, was incorporated in exercise of power under the Act and not under proviso to Article 309 of the Constitution – The general rule which has come later in point of time and which governs all service rules and is not derogant to special rules, will prevail and not the special rules – Kerala Public Service Act 1968 – r.3 – Kerala Excise and Prohibition Subordinate Service Rules, 1974 – Rule 2 – Constitution of India, 1950 – Article 309 – Proviso – Interpretation of Statutes – Legal Fiction.

Legal Maxim:

“Generalia specialibus non derogant” – Applicability of.

A select list of 40 direct recruits was published by the Kerala Public Service Commission for appointment

A to the cadre of Excise Inspectors. Writ Petitions were filed challenging the select list on the ground that keeping in view the ratio of direct recruits and promotees as envisaged by Note (3) to Rule 5 of the Kerala State and Subordinate Service Rules, 1958, direct recruitment could be made only to 10 posts. Single Judge of the High Court allowed the claim of promotees and held that direct recruitment must be confined to the ratio as applicable to cadre strength and not to the existing vacancies. In appeal, the Division Bench of the High Court held that 25% of the posts were to be filled by direct recruits. Aggrieved, the direct recruits filed the appeals.

D It was contended for the appellants that in the instant case the special rules, namely, the Kerala Excise and Prohibition Subordinate Service Rules, 1974 framed under the Kerala Public Service Act, 1968, were applicable, and not the general rules, namely, the Kerala State and Subordinate Service Rules, 1958, which, according to the appellants, were framed under the proviso to Article 309 of the Constitution. On the strength of the 1974 Rules, it was submitted that every fourth vacancy de hors the cadre strength was to be filled by direct recruitment.

Dismissing the appeals, the Court

F HELD: 1.1 So long as the State Legislature does not pass any Act, the State Government can frame rules under proviso to Article 309 of the Constitution. But the moment an Act is framed, then the power of the State Government to frame Rules under proviso to Article 309 of the Constitution comes to an end. However, by virtue of Section 3 of the Kerala Public Services Act, 1968, which saves the existing Rules framed under proviso to Article 309 of the Constitution, the Kerala State and Subordinate Services Rules, 1958 which were in existence governing the service conditions of persons appointed to public services and posts in connection with the affairs of the

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State of Kerala, shall be deemed to have been issued under the 1968 Act by legal fiction. [para 4] [10-F, G; 11-B]

1.2 Rule 2 of the 1958 Rules lays down that these rules will govern all holders of posts whether temporary or permanent under the State, only to the extent that they are not inconsistent with the special Rules governing the special services. Note (3) to Rule 5 inserted in the 1958 Rules in 1992 subsequent to the Rules of 1974, was framed under the 1968 Act and not under proviso to Article 309 of the Constitution. The Rules of 1958 are of general nature which clearly stipulate that cadre strength has to be taken into consideration for maintaining the ratio in the special Rules, meaning thereby, these Rules which have come into being in subsequent point of time under the Act of 1968, will hold the field and they are not repugnant to the 1974 Rules. [para 4 and 6] [11-C, D; 18-E, F, G; 19-A]

2.1 Rule 5 of the 1958 Rules says that normal method of recruitment to any service, class or category is both by direct recruitment and by transfer and the proportion can be laid down by the special Rules which are normally reflected from Rule 5 (a). Note.-(3) further says that in order to decide the proportion between the direct recruits and promotees, the entire cadre strength of the service has to be taken into consideration and not the vacancies existing at a particular time. Therefore, as per the schemes of the general Rules, it is provided that the proportion between direct recruits and appointees has to be laid down by the special Rules and at the time of recruitment one has to see the proportion which is to be maintained between the direct recruits and promotees on the basis of the total cadre strength and not to the vacancies existing at that point of time. [para 4] [12-F, H; 13-A, B, C]

2.2 The 1974 Rules which govern the recruitment and promotion of Excise Inspectors and Excise Preventive Inspectors, only lay down that every fourth substantive

A vacancy shall be filled or reserved to be filled by direct recruitment. On harmoniously reading Note (3) to Rule 5 of the 1958 Rules along with the 1974 Rules, it becomes clear that at the time of determination of fourth substantive vacancy the ratio or percentage has to be maintained of the cadre strength of the posts to which the recruitment is made and not of the existing vacancies at that time. If the relevant provisions are construed in such a harmonious manner, then the desired result can be achieved. [para 5-6] [13-G; 14-A; 19-A, B]

2.3 When the Rules say that every 4th vacancy is to be filled up by a direct recruit that means that the ratio is 25% by direct recruitment and 75 % by promotion. The intention of the Rules is that the proportion of 1: 4 is to be maintained i.e. the 4th vacancy has to be filled up by a direct recruit. This ratio could be maintained only when the entire cadre strength of the service is taken into consideration. If every fourth vacancy is to be allowed to be filled by direct recruitment then this proportion is likely to be disturbed and that was not the intention of the framers of the Rules. [para 6] [19-F, G, H; 20-A]

3.1 In the instant case, the principle, "Generalibus specialia derogant" will not be applicable but what is applicable is "Generalia specialibus non derogant", which means general things do not derogate from special things. The general rule, which has come in the later point of time and which governs all service rules and is not derogant to the special rules, will prevail and not the special rule. In fact, both could be read harmoniously as the intention of both the Rules, if read together, is that the ratio of 75%: 25% is to be maintained in the whole of the cadre and was accordingly reflected in the subsequent amendment which was brought about in Rules of 1958 in purported exercise of the power under Act of 1968. Therefore, this general rule which is not repugnant with the Rules of 1974 will prevail and the ratio of 75% promotion posts and 25%

direct recruit posts is to be maintained on the basis of the cadre strength. [para 8] [21-G, H; 22-A, B]

S.Prakash and Anr. V. K.M.Kurian and Ors. [1999] 5 SCC 624 – relied on.

S.C. Jain v. State of Haryana and Anr. [(1985) 4 SCC 645; Chandra Prakash Tiwari and Ors. V. Shakuntala Shukla and Ors. [(2002) 6 SCC 127] and D.R. Yadav and Anr. V.R.K. Singh and Anr. [(2003) 7 SCC 110] held inapplicable.

3.2 The same principle which is applicable in the case of Excise Inspectors is squarely applicable in Kerala Public Health Engineering Service also. [para 9]

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 122 of 2002.

From the final Judgment and Order dated 3/10/2001 of the High Court of Kerala at Ernakulam in W.A. No. 552/2000.

WITH

Civil Appeal Nos. 833, 5663, 6478/2002, 1776, 1847, 1848 and 1849 of 2007.

Jaideep Gupta, P.S. Patwalia, Mukul Rohtagi, U.U. Lalit, L. Nageshwara Rao, P. Krishnamurty, T.L.V. Iyer, C.S. Rajan, Malini Poduval, M.T. George, P.S. Narasimha, K.V. Vishwanathan, M. Gireesh Kumar, Avjeeth K. Lala, Khwairakpam Nobin Singh, Vijay Kumar, Krishnan Venugopal, Sreedharan Kodoth, A. Raghunath, Hari Kumar G., M.P. Vinod, Dillep Pillai, Ajay K. Jain, Romy Chacko, Arpit Gupta, B. Raghunath, R. Nedumaran, P.V. Dinesh, K.R. Sasiprabhu, B. Sunita Rao, K.R. Nambiar, Vipin Nair, P.B. Suresh and Vivek Sharma (for M/s. temple Law Firm) for the appearing parties.

The Judgment of the Court was delivered by

A.K. MATHUR, J. 1. In all these appeals, identical questions of law are involved, therefore, they are disposed of

A by this common order. For the convenient disposal of these appeals, the facts given in C.A.No.5663 of 2002 (A.K.Narayanan Kutty & Ors. V. State of Kerala & Ors.) are taken into consideration.

B 2. The common facts in this batch of petitions is that the Public Service Commission started the process of recruitment of 40 direct recruits to the cadre of Excise Inspectors in the year 1988 and the applications were called for in 1989 and the select list was published on 12.6.1992. Note 3 was added to Rule 5 of the Kerala State and Subordinate Services Rules, 1958 (hereinafter to be referred to as the 'Rules of 1958') on 5.12.1992. Writ petitions were filed claiming that direct recruitment can be made only for 10 posts and not for 40 posts and recruiting 40 persons directly would adversely affect the claim of promotion of the appellants and similarly situated. The writ petitioners claimed that they were entitled to a writ of mandamus directing the respondents to make appointments only in accordance with the ratio fixed under the Special Rules for direct recruitment and promotees and further prayed that the State of Kerala be directed to report all the vacancies of Excise Inspectors including those occupied by the promotees to the Kerala Public Service Commission (hereinafter to be referred to as the ' Commission') for filling up the vacancies in accordance with the Rules. The service conditions of the Excise Inspectors are governed by the Special Rules for the Kerala Excise and Prohibition Subordinate Service Rules, 1974 (hereinafter to be referred to as the 'Rules of 1974'). These Rules have been framed in exercise of power conferred by subsection (1) of Section 2 of the Kerala Public Services Act, 1968 (hereinafter to be referred to as the 'Act of 1968') read with Section 3 thereof and in supersession of all the existing rules and orders on the subject. Therefore, these Rules of 1974 came to be framed under the purported exercise of the Act of 1968. The constitution of the service so far as the following categories of Officers namely; (1) Excise Inspectors, (1A) Assistant Excise Inspectors, (2) Excise Preventive Officers, (3) Excise Guards

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and (4) Drivers is governed by these Rules. The method of appointment as Excise Inspector is by direct recruitment or by promotion from category (1A) and recruitment by transfer from among Upper Division Clerks employed in the Excise Department and it further provided that every fourth vacancy in the category shall be filled or reserved to be filled by direct recruitment. It is this provision which is relevant for our purpose. The promotion of Excise Preventive Officers is from the post of Excise Guards and there also the ratio is 1: 3 between the graduates and non-graduates. Here also the promotion is by way of direct recruitment or by promotion from category (3) and a further proviso is added that every fourth vacancy in the category shall be filled or reserved to be filled by direct recruitment. The whole litigation started by one Excise Preventive Officer for promotion to the post of Excise Inspector challenging the direct recruitment. In that writ petition his contention was that direct recruitment should be confined to 25 per cent of the cadre strength only in view of Note 3 to Rule 5 of the Rules of 1958 and the direct recruitment beyond that percentage would adversely affect the claim of the promotees. Learned Single Judge allowed the original petition and gave a declaration that the direct recruitment to the cadre of Excise Preventive Officer must be confined to the ratio as applicable to the cadre strength and not to the existing vacancies. Learned Single Judge followed the dictum laid down by this Court in *S.Prakash & Anr. V. K.M.Kurian & Ors. [(1999) 5 SCC 624]*. It was contended before the Division Bench that the Excise Rules are different from the Kerala Agricultural Income Tax and Sales Rules which was the subject matter before this Court and therefore, this case was sought to be distinguished and it was contended that no percentage was fixed i.e. as in the present case fourth substantive vacancy should be filled or reserved to be filled by direct recruitment. The Division Bench held that every fourth substantive vacancy shall be filled or reserved to be filled by direct recruitment itself meaning thereby 25 percent of the posts are to be reserved to be filled up by direct recruits and no different meaning could be attributed to the Special Rules and

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A therefore, the dictum laid down in S. Prakash & Anr. (supra)
was followed and all the three contentions were dismissed by
the Division Bench of the High Court. Aggrieved against this
number of petitions were filed from time to time before this Court.
However, we are concerned with the legal submission made by
B Mr.P.S.Patwalia, learned senior counsel and others that the
Excise Rules are special Rules and they will prevail and not the
general Rules, known as Kerala State and Subordinate Services
Rules, 1958 and the Note 3 appended to Rule 5 of these general
Rules.

C 3. Mr.Patwalia, learned senior counsel for the appellants
took us through the Special Rules for the Kerala Excise and
Prohibition Subordinate Service Rules, 1974 and also the Kerala
State and Subordinate Services Rules, 1958 and submitted that
the Excise Rules of 1974 were framed under the Act of 1968,
D when the Act had been framed by the State Legislature then the
Rules framed under proviso to Article 309 of the Constitution
cannot hold the field and the Rules which have been framed
under the Act passed by the State Legislature shall prevail. It
was contended that the Rules of 1958 were framed under proviso
E to Article 309 of the Constitution and therefore, they will not
govern the service conditions of the appellants and the Rules of
1974 which have been framed in exercise of power under the
Act of 1968 will hold the field. As per the Rules of 1974 every
fourth vacancy is to be filled by direct recruitment. Therefore, it
F was contended that every fourth vacancy in the cadre of Excise
Inspectors or Excise Preventive Officers has to be filled up by
the direct recruitment. Learned senior counsel for the appellants
submitted that every fourth vacancy should be construed as
appearing in the Rules of 1974, meaning thereby as and when
G the recruitment to the post of Excise Inspectors and Excise
Preventive Officers is held, the fourth vacancy should go to the
direct quota and the remaining vacancies should be filled up by
promotion. Mr.Patwalia tried to distinguish the decision in
S.Prakash & Anr. (supra) that the recruitment made under the
H Rules to the post of Sales Tax Officer in the case of S.Prakash

* & Anr. (supra) was governed by different Service Rules and that judgment cannot hold good so far as these Special Rules are concerned.

4. However, in order to understand the controversy involved in the matter, it will be necessary to refer to various Rules which have been framed by the State of Kerala from time to time. Under proviso to Article 309 of the Constitution, the State Government has power to frame Rules till the State Legislature passes the Act. Article 309 of the Constitution reads as under:

"309. Recruitment and conditions of service of persons serving the Union or a State. - Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

Under purported exercise of power under Article 309 of the Constitution, the State Government framed an Act known as the Kerala Public Services Act, 1968. The preamble of the Act reads as under:

" Preamble.- Whereas it is considered necessary that the recruitment, and conditions of service of persons appointed, to public services and posts in connection with

A the affairs of the State of Kerala should be regulated by an Act of the Kerala State Legislature;

Be it enacted in the Nineteenth Year of the Republic of India as follows:-

B **1. Short title and commencement.**- This Act may be called the Kerala Public Services Act, 1968."

C Section 2 lays down that the Government may make rules either prospectively or retrospectively to regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State of Kerala. Section 3 provides continuance of existing Rules framed by State under proviso to Article 309 which is relevant for our purpose reads as under :

D "3. **Continuance of existing rules.**- All rules made under the proviso to article 309 of the Constitution of India, regulating the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State of Kerala and in force immediately before the 17th September, 1968, shall be deemed to have been made under this Act and shall continue to be in force unless and until they are superseded by rules made under this Act."

F Therefore, now all the Rules under this Act will have to be framed by State. So long as State Legislature does not pass the Act, State can frame rules under proviso to Article 309 of the Constitution. But the moment the State Government frames an Act then the power of the State Government to frame the Rules under provisions to Article 309 of the Constitution comes to an end. But one thing may be noted here that by virtue of Section 3 all the Rules which have been framed under proviso to Article 309 of the Constitution regulating the recruitment, and conditions of service of persons appointed to public services and posts in

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connection with the affairs of the State of Kerala were deemed to have been made under these Rules. The result of this is that all the Rules which had been framed by the State of Kerala under proviso to Article 309 of the Constitution have been saved and they are continued and deemed to continue under the Act of 1968. The general Rules which were in existence governing the service conditions of persons appointed, to public services and posts in connection with the affairs of the State of Kerala i.e. the Kerala State and Subordinate Services Rules, 1958 shall be deemed to have been issued under this Act by legal fiction. These were the rules of general governance which used to apply to all the services & post under the State of Kerala. They were of general applications. Rule 2 which is of general rules laid down that these rules will govern all holder of posts whether temporary or permanent under the State. It further lays down that the special rule shall govern the special services and these Rules i.e. the general rules will only govern to the extent that they are not inconsistent with the special Rules. Rule 2 reads as under:

“ 2. Relation to the Special Rules.- If any provision in the general rules contained in the Part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall, in respect of that service, prevail over the provision in the general rules in this part.”

Rule 5 which deals with the method of recruitment reads as under:

“ 5. Method of recruitment.- Where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer, but is both by direct recruitment and by transfer-

(a) the proportion or order in which the Special Rules concerned may require vacancies to be filled by persons recruited direct and b those recruited by transfer shall be applicable only to substantive

A vacancies in the permanent cadre;

(b) a person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the Special Rules referred to in clause (a); and

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(c) recruitment to all other vacancies shall be made by transfer.

C [Note .- (1) All permanent vacancies and temporary vacancies except those of short duration shall be treated as substantive vacancies.

(2) Leave vacancies and vacancies of less than 6 months' duration shall be treated as vacancies of short duration]

D [(3) Whenever a ratio or percentage is fixed for different methods of recruitment/ appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post to which the recruitment/ transfer is made and not to the vacancies existing at that time.]

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F Rule 5 says that normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer, but is both by direct recruitment and by transfer and the proportion can be laid down by the special Rules which is normally reflected from Rule 5 (a). Rule 5(b) further provides that a person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the Special Rules referred to in clause (a) and it is provided in clause (c) of Rule 5 that recruitment to all other vacancies shall be made by transfer. But Note.-(3) further says whenever a ratio

G or percentage is fixed for different methods of recruitment/

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appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post to which the recruitment/ transfer is made and not to the vacancies existing at that time meaning thereby in order to decide the proportion the entire cadre strength of the service has to be taken into consideration and not the vacancies existing at that time. Therefore, as per the schemes of the general Rules it is provided that what shall be the proportion between the direct recruit and promotion or transfer that has to be laid down by the Special Rules and at the time of recruitment one has to see the proportion which is to be maintained between the direct recruit and promotion or transfer on the basis of the total cadre strength and not to the vacancies existing at that point of time. To illustrate this point what it conveys is that one has to see the cadre strength of the service and the proportion laid down in the Special Rules and that proportion has to be maintained by taking the entire cadre strength into consideration and not the vacancies. Therefore, determination of the posts against the direct recruit and promotion/ transfer has to be made looking to the cadre strength of the service and not looking to the vacancies which are sought to be advertised. The Department has to work out the total cadre strength and then work out if the ratio is 25 percent by direct recruitment and 75 percent by promotion. Then they will take into consideration whole cadre as to how many persons are already working against direct recruitment quota and how many persons are working against promotion quota and thereafter they will take a decision how much of vacancies will be advertised for direct recruits and how much of vacancies will be retained for promotion. It is not correct to contend that ratio between direct and promotion quota is to be worked of the existing vacancies de hors the cadre strength.

5. Now, let us examine the Rules which govern the service conditions. The recruitment and promotion to the post of Excise Inspector and Excise Preventive Inspector is governed by the Kerala Excise and Prohibition Subordinate Service Rules, 1974.

- A Here as mentioned above, the recruitment for the post of Excise Inspector is governed by the provision which says that every fourth substantive vacancy in the category shall be filled or reserved to be filled by direct recruitment and likewise in the cadre of Excise Preventive Officers. Rule 2 of the Rules of 1974
- B deals with the appointment of various categories and method of appointment which reads as under :

“ **2. Appointment.** - Appointment to the various categories shall be made as follows:-

C	Category (1)	Method of appointment (2)
1.	Excise Inspectors	(1) Direct recruitment, or (2) Promotion from category 1A (3) Recruitment by transfer from among Upper Division Clerks employed in the Excise Department :
D		Provided that every fourth vacancy in the category shall be filled or reserved to be filled by direct recruitment.
E		Xx xx xx

F Note 1:- Ladies shall not be eligible to be considered for appointment to vacancies other than in the Offices, Pharmaceuticals, Distilleries, Breweries, Wineries and Bonded Warehouses involving no outdoor work, in view of the arduous and special nature of the duties and responsibilities attached to other posts.

G Note 2:- For the purpose of appointments by promotion and by transfer the category of Excise Inspectors shall be a selection category.

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- 1A. Assistant Excise Inspectors. Promotion from category 2. A

Note:- Promotion from category 2 shall be made in the ratio of 1 :3 between graduates and non-graduates.

Provided that no senior graduate shall be superseded by a junior non-graduate in implementing the ratio. B

2. Excise Preventive Officers (1) Direct recruitment, or (2) Promotion from Category 3. C

Provided that every fourth substantive vacancy shall be filled or reserved to be filled by direct recruitment: D

Provided further that the remaining vacancies shall be filled by promotion from among Excise Guards possessing the minimum qualification of the S.S.L.C. standard and those who do not possess this qualification in the ratio of 1:1. E

3. Excise Guards (i) Recruitment by transfer from among members of the Last Grade Service employed in the Excise Department, and F

(ii) Direct recruitment.

Note :- (1) Recruitment to the post by direct recruitment and by transfer shall be made by the Kerala Public Service Commission. G

(2) 90 per cent of the vacancies shall be filled or reserved to be filled by direct recruitment and the remaining 10 per H

A cent of the vacancies shall be filled by transfer from members of the Last Grade Service employed in the Department, who possess the required qualification. In the absence of qualified last grade employees in the Department for such transfer the vacancies shall be filled up by direct recruitment.

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Therefore, as per these Rules every fourth substantive vacancy is to be filled or reserved to be filled by direct recruitment.

C 6. Mr.Patwalia, learned senior counsel for the appellants along with other senior counsel submitted that every fourth vacancy has to be filled up by direct recruitment de hors the cadre strength. Mr.Patwalia submitted that Note (3) to Rule 5 of the General Rules which is of general application cannot be made applicable to these Special Rules. Learned senior counsel submitted that these special rules override the general rules and invoked the principle of 'Generalibus speciali derogant' (i.e. special things derogate from general things). Learned senior counsel further submitted that since the Act of D 1968 was promulgated by the State and these special Rules had been framed in exercise of the power under sub-section E (1) of Section 2 of the Act of 1968 read with Section 3 superseding all existing Rules, therefore, this proviso which is specially meant for recruitment of these services will govern and not the general rules which was framed in exercise of proviso to F Article 309 of the Constitution. In this connection, learned senior counsel on the principle of ' special rules override the general rules' invited our attention to the following decisions of this Court,

G (i) [(1985) 4 SCC 645]
S.C.Jain v. State of Haryana & Anr.

(ii) [(2002)6 SCC 127]
Chandra Prakash Tiwari & Ors. V.
Shakuntala Shukla & Ors.

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(iii) [(2003) 7 SCC 110]

D.R.Yadav & Anr. V. R.K.Singh & Anr.

and tried to distinguish the judgment of this Court in S.Prakash & Anr.(supra). Learned senior counsel submitted that Note (3) to Rule 5 of the Rules of 1958 was framed under proviso to Article 309 of the Constitution and that note cannot override the provisions of the Special Rules as the same is repugnant with that of the proviso to Rule 2 of the Rules of 1974 as the Rules of 1974 were framed under the Act of 1968, therefore these Rules will prevail and not the general Rules. In this connection, learned senior counsel submitted that Rule 2 of the Rules of 1958 which contemplates that in case of special Rules having been framed and if there are repugnant to that of general Rules, these Special Rules will prevail. The argument of learned senior counsel is very attractive but after deeper examination of the matter, we find that the argument of learned senior counsel is not sustainable because he has ignored the notification by which Note (3) to Rule 5 was inserted in the Rules of 1958. It may be relevant to mention here that Rules of 1958 were also saved by virtue of Section 3 of the Act of 1968 which clearly says that all the Rules which had been framed under proviso to Article 309 of the Constitution shall be deemed to have been framed under the said Act and Not (3) which was appended to Rule 5 of the Rules of 1958 was also framed under the purported exercise of power under Section 2 of the Act of 1968. The notification by which this Note (3) to Rule 5 of the Rules of 1958, was brought into force reads as under :

"S.R.O. No.194/93.- In exercise of the powers conferred by sub-section (1) of section 2 of the Kerala Public Services Act, 1968 (19 of 1968) read with section 3 thereof, the Government of Kerala hereby make the following rules further to amend the Kerala State and Subordinate Services Rules, 1958, namely:-

1. Short title and commencement.- (a) These rules may be called the Kerala State and Subordinate Services (Amendment) Rules, 1992.

field and these rules are not repugnant to the Rules of 1974. A
The Rules of 1974 only laid down that every fourth substantive
vacancy shall be filled or reserved to be filled by direct recruitment
and now on reading of this Note (3) along with the Rules of 1974
harmoniously then it comes to, at the time of determination of
fourth substantive vacancy one has to maintain the ratio or B
percentage of the cadre strength of the posts to which the
recruitment is made and not to the existing vacancies at that
time. If we construe the whole thing in this light and read the
service rules in a harmonious manner, then the desired result C
can be achieved. If the interpretation which is sought to be given
by learned senior counsel for the appellants is to be accepted,
then it is likely to disturb the ratio in the cadre strength. If every
time vacancy is to be filled up and in that fourth vacancy has to
go to the direct recruit then the proportion which is maintained D
i.e. 25% and 75 % is likely to be disturbed. A rough chart of the
vacancies has been given to us from which it appears that as
per the proviso that every fourth vacancy is to be filled up by
direct recruitment, then it appears that on the basis of the total
cadre strength as on 1.1.2008, i.e. 310 and if 75 % is to go to
promotees and 25% to the direct recruits, it appears that there E
are already 105 promotee Officers existing in this cadre strength.
The percentage of promotee Excise Inspectors as on date will
be 34 % and number to be reserved for direct recruitment as on
date as per the calculation by the appellants, will be 205, then
as on date the direct recruits will become 66 %. If the contention F
of learned senior counsel for the appellants is to be accepted,
then naturally at every time when vacancy arises, and the fourth
vacancy is to be filled up by direct recruits then the proportion is
likely to be disturbed. That is not the intention of the Rules. When
the Rules say that every 4th vacancy is to be filled up by direct G
recruit that means that the ratio is 25% by direct recruitment
and 75 % by promotion. We cannot ignore the intention of the
Rules that the proportion of 1: 4 is to be maintained i.e. the 4th
vacancy has to be filled up by direct recruit then that ratio could
only be maintained if the entire cadre strength of the service is
taken into consideration. If every fourth vacancy is to be allowed H

A then this proportion is likely to be disturbed and that was not the
intention of the framers of the Rules. Therefore, the contention
of Mr. Patwalia, learned senior counsel for the appellants cannot
be accepted.

B 7. This Court in S.Prakash & Anr. (supra) referring to
various Acts on the subject with relation to this service has
observed as follows :

C "14. From the aforesaid discussion, it is clear that if
the intention of the rule-making authority was to establish
a rule of universal application to all the services in the
State of Kerala for which the Special Rules are made,
then the Special Rules will give way to the General Rules
enacted for that purpose. This has to be found out from
D the language used in the rules which may be express or
by implication. If the language is clear and unqualified, the
subsequent General Rule would prevail despite
repugnancy. If the intention of the rule-making authority is
E to sweep away all the Special Rules and to establish a
uniform pattern for computation of the ratio or percentage
of direct recruits and by transfer, in such a case, the Special
Rules will give way. On the basis of the aforesaid settled
principles, let us interpret Rule 5 as well as Note (3) and
the method of recruitment prescribed under the Special
Rules. Rule 5 quoted above provides the method of
F recruitment to any service, class or category where the
method of recruitment is neither solely by direct recruitment
nor by transfer but is both by direct recruitment and by
transfer. It is made specifically applicable to the "Special
Rules". Clause (a) provides that the proportion or order
will be applicable only to substantive vacancies in
G permanent cadre; clause b) provides that direct recruitment
shall be only against substantive vacancy in permanent
cadre; and recruitment to all other vacancies shall be made
by transfer. Notes (1) and (2) provide that all permanent
vacancies and temporary vacancies except those of short
H duration shall be treated as substantive vacancies. Note

(3) specifically provides that "whenever" a ratio or percentage is fixed (in the Special Rules) for different methods of recruitment to a post, the number of vacancies to be filled up by candidates from each method is to be decided by applying a fixed ratio or percentage to the cadre strength of the post to which the recruitment is made and "not to the vacancies existing at that time". Therefore, the entire Rule 5 deals with the Special Rules which provide for filling up of the vacancies to any service, class or category by direct recruitment and by transfer. The language of Note (3) is crystal clear and is for removal of any ambiguity by using positive and negative terms. It applies to all the Special Rules whenever a ratio or percentage is prescribed in the rules. It also emphatically states that it has to be computed on the cadre strength of the post to which the recruitment is to be made and not on the basis of the vacancies existing at that time."

8. Learned counsel for the appellant tried to distinguish the decision in S.Prakash & Anr. (Supra) and submitted that in fact this case related to the recruitment to the post of Sales Tax Officer in the Income Tax and Sales Tax Department and there a provision was that proportion of 20% of successive substantive vacancies shall be filled or reserved to be filled by direct recruitment and the remaining shall be filled or reserved to be filled by transfer of Assistant Sales Tax Officers. The attempt on the part of learned senior counsel for the appellants to distinguish this case is futile. The percentage may vary. Here it is 25% , there it may be 20% of the successive vacancies. But the principle which has been laid down by this Court in S.Prakash & Anr. (supra) clearly governs this case also as we have already dealt with in detail that the principle, " Generaliabus specialia derogant" will not be applicable in the present case but what is applicable is "Generalia specialibus non derogant" which means general things do not derogate from special things. In this case, the general rule which has come in the later point of time and which governs all service rules and not derogant to the special

A rules will prevail and not the special rules. In fact both could be read harmoniously as the intention of both the Rules, if read together is the ratio of 75%: 25% is to be maintained in the whole of the cadre and was accordingly reflected in the subsequent amendment which was brought about in Rules of 1958 in purported exercise of the power under Act of 1958. Therefore, this general rule which is not repugnant with the Rules of 1974 will prevail and the ratio of 75% promotion and 25% direct recruit is to be maintained on the basis of the cadre strength.

C 9. Mr. Jaideep Gupta, learned senior counsel appearing for the appellants in C.A.No.122 of 2002 [Prasad Kurien & Ors. V. K.J.Augustin & Ors.] submitted that this case relates to Kerala Public Health Engineering Service and there the method of recruitment is by transfer and there also the proportion has been maintained and he tried to point out that this case relates to different service but after going through the Rules we find that the same principle which is applicable in the case of Excise Inspectors is squarely applicable in this service also. Consequently, we do not find any merit in this submission of Mr.Gupta.

E 10. Since we do not find any merit in this batch of appeals, therefore, we need not to consider other submissions made by Mr.Mukul Rohtagi, learned Senior Counsel appearing for the appellants in C.A.No.1776 of 2007. Mr. Rohtagi submitted that the list which has been prepared by the Kerala Public Service Commission though has exhausted, but the appellants have come up before this Court in time, therefore, that list should be retained. We regret that this question does not survive in view of the view taken by us and more so, the list has already exhausted. Therefore, we need not to consider this aspect any more.

G 11. As a result of our aforesaid discussion, we don't find any merit in these appeals and the same are dismissed with no order as to costs.