ALLAHABAD HIGH COURT

Moinuddin

Vs.

State of U.P

Civil Misc. Writ Petn. No. 3559 of 1957

(S.S. Dhavan, J.)

30.01.1959

ORDER

S.S. Dhavan, J.

1. This is a petition under Article 226 of the Constitution impugning the decision of the State Government to impose a qualification test on the petitioners before granting them the new scales of pay and praying for an order directing the State to place the petitioners in the aforesaid higher revised scale of pay unconditionally.

2. The facts, as stated in the affidavit supporting the petitioners, are these. The petitioners, who are 37 in number, are Auditors in the Cooperative Department of the State of Uttar Pradesh. They have varying lengths of services to their credit, the number of years for each is being specified in paragraph 5 of the affidavit. They have been engaged in what the petitioners describe as the "highly qualified work of auditing." At the time of the recruitment of the petitioners the minimum educational qualification was the passing of the Intermediate Examination or any equivalent examination thereof. Previously the entire auditing Department consisted of a single section, in which every Auditor enjoyed the same status and rate of pay. But, with the growth of Cane Co-operative Societies in Uttar Pradesh, the Department was split up in two sections, the Cane Co-operative Societies Auditing Section and Co-operative Societies Auditing Section (General), to be called hereinafter as the Cane Auditors and General Auditors respectively. Since the splitting up of the Department, the petitioners have been placed in the General Section.

3. In the year 1948 a committee was appointed by the State of Uttar Pradesh to consider and Suggest revision of pay of the State employees in different Departments. It is generally known as 'the U. P. Pay Committee'. It made certain recommendations for raising the scales of pay for the Auditors of the Cooperative Department. These were partially accepted by the Government. The petitioners contend that the auditors in the Cane Department, who at one time formed part of the

Auditors of the Cooperative Department, were sanctioned a revised scale of pay in the grade of Rs. 120-6-200-E.B.-10-250. No qualifying test was prescribed in their case to enable them to enjoy the revised scale of pay. The same grade of pay was sanctioned for the General Auditors including the petitioners. But in their case a qualification test was prescribed by the Department.

4. The petitioners' grievance is that the imposition of this test on the auditors in the Cooperative Department (General) is arbitrary and unjust, and amounts to illegal discrimination between the General Auditors and the Cane Auditors. They allege that there is no difference in the work and qualification of Auditors employed in the two Branches of the Cooperative Audit Department. The experience of the employees in the two Departments is not distinguishable. There is no reasonable basis for distinguishing between the employees of the two Departments for the purpose of revising their scales of pay. The petitioners further contend that there is no difference in the nature of the work, to be done by the Auditors of the two Sections or the responsibility imposed on both of them. The petitioners further contend that the decision to revise the scale of pay was based on the consideration that changed economic conditions required higher scale of pay. It was not due to a decision to impose better or superior qualifications. Therefore, the requirement of a qualification test from the General Auditors while exempting the Cane Auditors amounts to an arbitrary discrimination against the former class of Auditors against which the petitioners have come to this court under Article 226 of the Constitution and pray for the reliefs mentioned above.

5. The petition is opposed by the State of Uttar Pradesh and a counter affidavit has been filed on its behalf. A preliminary objection has been taken that a joint writ petition containing a prayer for mandamus cannot be filed on behalf of 35 persons. The counter affidavit states the circumstances in which the impugned decision was made. It is stated that, prior to 1935, the auditors of the Cooperative Department audited the accounts of all Cooperative Societies. After 1935, the Auditors in the Subordinate Cooperative Service audited the accounts of the Cane Cooperative Societies. This system continued till 1939. In that year, a number of Cane Auditors were recruited by the Registrar, Cooperative Societies, U. P., in connection with the Cane Development Scheme. They were placed under the control of the Cane Commissioner. In 1945, the auditors serving in the Cane Development Scheme were transferred to the control of the Registrar, Cooperative Societies, U. P. and were amalgamated with the Auditors of the Cooperative Department. But in 1947, the control of the Auditors serving in the Cane Development Scheme was again transferred to the Cane Commissioner, U. P. Prior to 1947, auditors for the Cane Department were recruited by the Public Service Commission on three different occassions - in 1939, 1943 and 1945.

6. On April 1, 1952, the pay scale of the Auditors in the Cane Department was revised from 75-120 to 120-250. Simultaneously with the revision of scales of pay, the minimum educational qualification for Cane Auditors was raised to a Bachelor's Degree in Arts, Commerce or Science. The notification by which this change was made is dated 9th September, 1952, and filed as

Annexure '1' of the counter affidavit. The pay of scale of the Cooperative Auditors in the General Section was also raised to Rs. 120-250. In their case too, there was a simultaneous decision to raise the minimum educational qualification for future recruitment to a Bachelor's Degree in Arts, Commerce or Science. It is denied by the State that the reason for the raising of the scale of pay was to enable the employees to meet the increased cost of living. They state that the scales of pay were revised to attract persons of better qualifications. It is pointed out that the qualifications for future entrants to the service were raised simultaneously with the raising of the scale of pay.

7. The existing auditors in the General Section, many of whom were recruited a long time ago and did not possess a Bachelor's Degree, were also granted the higher scale of pay (on the date of notification they were enjoying a scale of pay of Rs. 75-5-120). But this privilege was made subject to the condition that every existing auditor must pass a qualifying test to be held by the Public Service Commission, before he could be selected for the higher scale of pay. No test was prescribed for the Cane Auditors who were also given the benefit of the new scales of pay.

8. It is denied by the State that exemption of the Cane Auditors from the test amounts to discrimination against the General Auditors. It is stated that the General Auditors are required to audit the accounts of bigger Cooperative institutions, such as the U. P. Cooperative Banks, District Cooperative Federations, Cooperative Unions and Societies of special types. According to the State, the auditing of institutions like these requires much greater knowledge and skill in auditing than in the case of Cane Unions. It was, therefore, thought that the skill and capability of the existing auditors in the General Section should be tested by means of a special test. It is further alleged by the State that the conditions of service and responsibility in the Cane Section are different from those in the General Section. The Cane Section contains 60 Auditors and the General Section 327. With the creation of a separate Cooperative Audit Organization, the scope for promotion for the General Auditors has considerably increased. There are five posts of Senior Auditors carrying scale of Rs. 200-350 and 51 more such posts are to be created shortly. In addition, there are five posts of Regional Audit Officer in the scale of Rs. 250-850. There is also a post of Deputy Chief Auditor and also Chief Audit Officer. Thus it is pointed out that the auditors of the General Section have ample scope of promotion in their own Section. They are also eligible for promotions as Inspectors in the Cooperative Department. But the Cane Auditors have hardly any scope for promotion in their Section. Thus according to the State, not only the standard of skill and responsibility required in the two sections are different, but the conditions of service and prospects of rise in the General Section are also better. The State, therefore, contend that the imposition of a test on the existing Auditors in the General Section is not an act of discrimination.

9. Before considering the legal points raised by the petitioners it is necessary to clarify the position as regards facts. It appears that the State decided to raise the minimum educational qualification for auditors to be recruited in the future. Simultaneously, the scales of pay were made more attractive. The auditors already in service, however, presented a problem. They had

been appointed at a time when the minimum qualification was lower than the proposed new qualification. Their scales of pay were also lower. The Government had two alternatives before them. They could have left the existing auditors untouched. The result would have been that these old auditors would not have been entitled to the new scales of pay. It was conceded by learned counsel for the petitioners that the existing auditors, whether in the Cane or the General Section, had no legal right to demand that the existing scales of pay should be given to them. But the Government, for reasons of policy, decided to extend the benefit of the higher sales of pay to the existing Auditors. In the case of Cane Auditors, the privilege was extended without the imposition of any condition.

But the auditors in the General Section were required to pass a qualifying test before they could be given the benefit of the new scales of pay. It is necessary to state this background for a proper understanding of the nature of the grievance of the present petitioners. Learned counsel for the petitioners admitted that he would have had no case if the Government had decided to leave all existing auditors in their old scales of pay. He also conceded that the petitioners could have no objection to the imposition of a test as such. If Government had imposed a test on all auditors, the petitioners could not have complained of any discrimination. Learned counsel for the petitioners also conceded that no existing right or privilege of the petitioners had been infringed. On the contrary, he even conceded that the Government have conferred a favour on all the existing auditors by deciding to extend the revised scale of pay to them. His grievance is that this favor has been distributed in a manner which is discriminatory. In conferring this favor, Government have placed the General Auditors under a disadvantage; it has imposed on them a test without passing which they could not avail of it, whereas the Cane Auditors get it without a test. This, he submits, amounts to discrimination which is forbidden by Article 16 of the Constitution.

10. Learned counsel for the petitioners, Mr. S. N. Dwivedi, who argued the case with ability, advanced the following argument against the validity of the decision to impose a qualifying test on the petitioners. He conceded that the State had a large area of executive discretion in its dealings with and control over its Civil servants, and that the courts will not ordinarily interfere with this discretion. But he contended that if, in its treatment of a civil servant, Government violate the principles laid down in Articles 16 and 14 of the Constitution, its decision will be unconstitutional. He further contended that the protection of these two Articles is not limited to the stage of initial appointment but extends to subsequent promotion, the increase or reduction of salaries, selection for posts and termination of services. In other words, he contended that the principle of equal opportunity laid down by the Constitution protects the Government servant throughout his service. If Government violates the principles laid down in Articles 16 and 14, either in making the initial appointment or subsequently in making promotions, raising or reducing salaries, selecting officers for special or prize posts or in the matter of termination of appointment, such action will be hit by either or both of these Articles.

11. The present case raises two questions: (1) whether the action of the State Government in

imposing a qualification test on the Auditors in the General Section without prescribing a similar test for the Cane Auditors amounts, in all the circumstances of the case, to discrimination; and (2) if it does, whether such discrimination is hit by Articles 16 and 14 of the Constitution.

12. A preliminary objection was taken by learned counsel for the State that the petition is misconceived. It was contended that Articles 14 and 16 do not apply to the petitioners' case at all, as the powers of the State in regard to the tenure of office of its employees are conferred by Article 310 of the Constitution and that these powers are not controlled by Articles 14 and 16. I shall deal with this objection first.

13. Counsel for the State relied on a Division Bench decision of this Court in *Raj Kishore v. State of Uttar Pradesh*[1], in which Agarwala J. held (Randhir J. concurring) that Article 14 does not control Article 310. Mr. Dwivedi, on the other hand, relied on two Bombay and Patna decisions (discussed below) and contended that the reasoning of Agarwala J. in AIR 1954 Allahabad 343 is not correct. In that case the Government had terminated the services of an employee in the exercise of their power, under Rule 465 of the Civil Service Regulations which gave it "the right to retire any Government servant after he has completed 25 years qualifying service without any reasons", and further made it clear that "no claim to special compensation on this ground shall be entertained". The employee, Raj Kishore, filed a petition under Article 226 of the Constitution on the ground that the decision of the Government retiring him was discriminatory. He alleged that Government had given no reasons for this action and that it had not indicated to him that he was considered to have outlived his usefulness or to be inefficient or mediocre. It was contended on behalf of the petitioner that Rule 465 was ultra vires of the Constitution because it vested an arbitrary power in Government to select a particular servant for unequal treatment and was contrary to the provisions of Article 18 of the Constitution. It was also contended that the rule violated the principle of equality in Article 14 the object of which is to prevent any person or class of persons from being singled out as a special subject for discrimination or hostile legislation. Agarwala J. held that Rule 465 vested arbitrary power in the hands of the Government to single out from the class of Government servants who have completed 25 years of service for special treatment by compulsorily retiring him without assigning any reason, while not applying the same rule to any Government servant belonging to the same class. He took the view that the rule violated "the spirit underlying Article 14 of the Constitution" but he "reluctantly" came to the conclusion that the rule was not ultra vires for that reason, because it was consonant with the principle embodied in Article 310. He further held that "it is Article 310 which governs the matter and not Article 14." He observed :

> "In the matter of termination of the service of a Government servant, the provisions to be considered arc Articles 310 and 311. The combined effect of these two provisions is that except as laid down in clauses (l) and (2) of Article 311 and except as laid down in clause (2) of Article 310, there is no restraint on the power of the State to terminate the services of a Government servant at pleasure. Clause (2) of Article 310 and clause (1) of Article 311 are admittedly inapplicable to the present case. I have already held that Clause (2) of

Article 311 also does not apply to the facts of the present case.

Therefore, it follows that the services of the applicant could be terminated at the pleasure of the State which means without assigning any reason. Article 14, in my judgment, does not control Article 310. The reason is that Article 14 is a general provision relating to all kinds of laws and all kinds of persons, while Article 310 deals with a special or particular matter, namely, Government servants and termination of their services. The maxim 'generalia special bus non derogant', that is, 'special provisions will control general provisions' applies. As the Judicial Committee observed in *Barker v. Edger*[2], that 'when the Legislature has given its attention to a

[1] AIR 1954 All 343

[2](1898) AC 748 at p. 754

separate subject and made provision for it, the presumption is

that a subsequent general enactment is not intended to interfere with the special provisions unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.'

There is all the more reason why the above rule should apply when the special provision is contained in the very same enactment in which the general provision finds place. Then, again, Article 14 speaks of 'law' and 'laws'. Article 310 is a constitutional provision and is not included within the term law' or 'laws' as mentioned in Article 14. The entire constitution must be read as one whole and every part of it must be given full effect. If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government can terminate the services of its servants 'at pleasure'. In my opinion Rule 465 is not rendered void by reasons of Article 14."

14. The maxim 'generalia specialibus non derogant' will apply only when a prior endeavour to harmonies two conflicting provisions of the same statute has been made and failed. With respect, no such attempt appears to have been made in Raj Kishore's case, AIR 1954 Allahabad 343 in accordance with the rule of harmonious construction. As was observed by the Supreme Court in *Venkataramana Devaru v. State of Mysore*[3], The rule of construction is well settled that where there are in an enactment two provisions which cannot be reconciled, with each other, they should be so interpreted that, if possible, effect should be given to both."

The question whether Article 14 controls the dealings of the State with its employees requires a careful adjustment of the respective spheres of Articles 14 and 310.

Agarwala, J. merely observed that Article 14 does not control Article 310 because

> "Article 14 is a general provision relating to all kinds of laws and all kinds of persons, while Article 310 deals with a special or particular, matter, namely Government servants and termination of their services."

With respect the matter is not so simply disposed of.
Generalia specialibus non derogant was explained by Earl of Selbourne L. C. in *Seward v. Vera Cruz*[4], in these words :

> "Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so."

This applies in the case of two statutes one of them being enacted later. In Maxwell's Interpretation of Statutes, 9th Edition, the rule has been thus described :

[3] AIR 1958 SC 255 (at p. 268)
[4](1884) 10 AC 59 at p. 68

> "It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute (sup p. 85) to say that a general Act is to be constructed as not repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later law does not abrogate an earlier special one by mere implication - Generalia specialibus non derogant."

But Maxwell made it clear that for this rule to apply the "Acts must cover the same territory" (P. 188).

15. When two parts of the same statute, and that statute a constitution, are being interpreted the limitations to the doctrine must not be lost sight of. On the one hand it is true that if a general intention is expressed in one part of the constitution and a particular intention in another part which is incompatible with the general one, the particular intention is treated as an exception to the genera] one. (Maxwell p. 176). On the other hand the following principles must be applied and exhausted before this rule is applied: First, the two provisions must cover the same area before one can be treated as an exception to the other. But it cannot be said that Article 310 and Part III cover the same area. The one deals with the tenure of office of State servants and the other with fundamental rights of citizens. It may be true that Articles 310 and 311 deal with a particular matter, but that matter is not a special area within the territory of Part III. It deals with the powers of the State in regard to its servants. But there are other provisions conferring other powers on other authorities in particular matters. If each of these provisions is accorded the status of a "special provision" within the general provision relating to fundamental rights and therefore an exception to it, fundamental rights may be so eaten away by "exceptions" as to be rendered illusory. Secondly, the two provisions must be so incompatible with each other that they cannot be reconciled and the special provision must be treated within its own area, as an exception to the general provision.

16. In this case even assuming that Article 310 is a special provision vis-a-vis Part III, a

proposition with which I do not agree, it is possible to reconcile the two. With respect, no attempt to this effect appears to have been made in Raj Kishore's case, AIR 1954 Allahabad 343. Article 14 does not in the least abrogate or derogate from the power of the State to terminate the services of any servant at its pleasure: it merely enjoins that this power should not be used in a discriminatory manner. But the content of the power vis-a-vis any particular employee is not diminished by Article 14. Thirdly, the entire constitution must be read as a whole, and each part must be given the same sanctity without giving undue weight to any particular part. This applies with particular force to the Constitution of India, which is very detailed and elaborate. The edifice of our Constitution contains, many mansions no part of which can claim a greater sanctity than others, except to the extent clearly specified expressly or by clear implication, in the Constitution itself. Fourthly, each and every part of the constitution must be so interpreted as to preserve the spirit of a constitution, which is a fundamentally different document from other statutes. As was observed by Higgins J. in *Attorney General for New South Wales v. Brewery Employees Union*[5]*,*

[5](1908) 6 Com. WLR 469 (611)

> "Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be".

17. The spirit of our Constitution is contained in the Preamble. The principles expressed in the Preamble must permeate every part of the Constitution without any exception. One of them is "to secure to all its citizens .... equality of status and of opportunity." I must not be understood to mean where the language of the statute is plain, the words must be twisted to bring the language in accordance with the spirit of the Preamble. But in considering the Scheme of the Constitution as a whole and the respective spheres of different parts, the Preamble can be treated as "a key to open the minds of the makers of the Act."

18. The real question is whether the powers of the Government under Article 310 are exempt From the injunctions contained in Articles 13 and 14. The scheme of the Constitution does not favor any exemptions except those specified in the Constitution itself. Article 13 says that all laws in force ....., in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. It further enjoins that the State shall not make any law which takes away or abridges the fundamental rights conferred by Part III and that any law made in contravention of this injunction shall, to the extent of the contravention, be void. The phrases "all laws" and "any law" have been made subject to no exceptions, with the result that any law, by whomsoever made or passed, shall be void if it contravenes the provisions of any Article relating to fundamental rights.

19. Agarwala, J. argued that Article 310 being a special provision dealing with a special or particular matter (Government servants and termination of their services) cannot be controlled by Article 14 which is a general provision. With respect, there are several answers to this argument. First, Article 310 is not a special provision within the area of Part III. By way of contrast Article 392 read with 291 is an illustration of a special provision for it preserves the rights and privileges of former Rulers of Indian States and enjoins, in effect, that Parliament shall not make laws taking away those rights. This, being a special provision, may be treated as an exception to Article 14 which enjoins that all citizens shall enjoy equality before the law and the equal protection of the laws. But Article 310 is neither a special provision nor an exception vis-a-vis Part III,. It says, "Any person.....holds office during the pleasure" of Government. This article deals with the power of the State in its relation with every servant individually. It invests the State with tie power to terminate at its pleasure the service of any particular employee. This power has no limitation vis-a-vis that employee (except of course the safeguard in Article 311). But to terminate the service of any particular employee is one thing, to use that power as a cloak for discrimination against or in favor of a whole class, community, race, or religion is quite another thing. The first is within the power under Article 310, the second is not.
If the State says to an employee, "You are, retired under rule 469 of the Civil Service' Regulations" the action is protected by Article 310 and the State is not called upon to explain why it selected X and not Y for compulsory retirement. But if the State says to X, "You are retired because you belong to this particular community," or if X, Y, Z and others prove that they have been retired because they belong to a particular community, the State has used Article 310 not merely to retire an individual but to discriminate against a whole class. Whether one views its action as an abuse of the power under Article 310 or exceeding that power, the result is the same: one must hold that the State has travelled beyond the orbit of Article 310 and wandered into the orbit of another Article, 14. As it has left the protective sphere of Article 310, its action will be attracted and dragged down by the constitutional pull or weight of the particular article into whose orbit it has stayed. The orbits of Part III and XIV are different, though they revolve round the same Constitution.

20. With profound respect, therefore, the entire argument of Agarwala, J.'s judgment treating Articles 14 and 310 as a special and general provision respectively is based on a premise which does not exist. Secondly, it ignores the all inclusive scope of Article 13 which says that all existing laws which are inconsistent with the provisions of Part III (including Article 14) shall be void and further that any future law which takes away or abridges the rights conferred by this part shall be void. Any rules or notifications made by the State under Article 309 of the Constitution are 'Laws' as defined by Article 13 and must obey the injunction contained in that article. Thirdly, the rule relating to general and special provision applies "whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense would overrule the former. (Craies on Statute Law Fifth Edition, P. 265, quoting Romilly M. R. in *Pretty v. Solly*[6], But Articles 14, 15 or 16 do not overrule Article 310 in any sense. There is no inconsistency between the powers conferred under-Article 310 and the

injunctions imposed by Articles 13, 14, 15 and 16. The power is capable of being exercised to the fullest extent against any particular servant without violating these injunctions. Fourthly, the language of Article 14 is all-embracing and means that the State shall not deny the right of equality in any sphere of its activity to any person. Fifthly, if the powers of the Government are to be exempted on the ground that they are contained in a particular provision, the powers of other authorities contained in other provisions may also have to be exempted. Chapter II deals with qualifications tor membership of Parliament, Chapter IV with the appointment et cetra of Supreme Court Judges, and Chapter V with High Court Judges. They ail empower Parliament to pass special laws. There are other provisions dealing with particular matters. If Agarwala, J.'s dictum is applied the result may be that all the special provisions with particular matters will be exempt from the control of Part III. In this manner, the freedoms conferred by this Part may be eaten away by exceptions. Sixthly, as mentioned above, the chapter relating to fundamental rights admits of no exceptions except those which are specified in the Constitution itself. Article 33 invests Parliament with the power to modify the rights conferred by Part III in their application to the members of the Armed Force or the Force charged with the maintenance of the public order: it has been given the power to restrict or abrogate these rights so as to ensure the proper discharge of their duties and the maintenance of discipline among them. Article 358 provides for the suspension of the provisions of Article 19 during emergencies. Article 359 provides for the suspension of the enforcement of fundamental rights during emergencies.

[6](1859) 26 Beav 606(610)

Subject to these and any other express exceptions in the Constitution, the provisions relating to fundamental rights in part III admit of no other exceptions. Seventhly, Agarwala J.'s dictum will place the Governor and his powers under Article 310 on a pedestal which even Parliament and its laws do not enjoy. If any law passed by Parliament can be struck down on the ground that it violates any provision of part III, there is no reason why any rule or notification or order of the Governor under Article 310 should not be subject to a similar control.

21. Agarwala, J. observed:

> "If Article 310 were to be limited or controlled by Article 14, it can hardly be 'said that the Government can terminate' the services of its servants "at pleasure."

Thus he apprehended that any control of Article 310 by Article 14 may render the powers under the former Article illusory. With respect, there is no ground for any such apprehension which is based on a misapprehension of the nature and purpose of the control of Article 14 over Article 310. Part III does not derogate in the least from the powers of Government to terminate the services of any employee at pleasure. It simply ensures that this vast power shall not be used in a discriminatory matter and that the State employees shall not be made the victims of bigotry, racialism, casteism, or provincialism, - evils expressly banned by Article 15. But within the constitutional limits imposed by part III, full effect must be given to the power under Article 310. No employee has any remedy against any action of the State, however, arbitrary it may be.

22. But 'arbitrary' is not the same thing as 'discriminatory.' If Government uses its power under Article 310 in a discriminatory manner, its action will be hit by Article 14. Several illustrations can be given. If the U. P. Government were to issue a notification compulsorily retiring every South Indian employee who has completed 25 years of service on the alleged ground that South Indians cannot adjust themselves to the social conditions in Uttar Pradesh, this would be an unconstitutional exercise of its absolute power under Rule 465. Again, if the Central Government revives the theory of 'martial' and 'non-martial' races and issues a notification terminating the services of every person belonging to specified 'non-martial' races in the defense services (to which the protection of Article 311 does not extend), the notification, even if issued in the honest belief in the truth of this doctrine, will be hit both by Articles 14 and 16 - by the first because it is generally discriminatory and by the second because it discriminates between citizens employed in the Armed Forces on the ground of race. But if Agarwala J.'s interpretation is accepted, these notifications, will be sacrosanct, as they were issued under a special provision of the Constitution.

23. The practical adjustment of the absolute power under Article 310 and the fundamental rights under Part III will depend upon the facts of each case. Any action which is patently discriminatory will be struct down. For example, to take the very rule which was considered by Agarwala J., any systematic attempt to apply Rule 465 of the Civil Service Regulations to officials belonging to a particular race, religion, or caste and to weed them out in the colorable exercise of the absolute power under Rule 465 will be hit both by Article 14 and Article 15. The action of the State on proper proof, will be declared unconstitutional on the ground that it is part of a policy of "purposeful discrimination," to quote the words of the U.S. Supreme Court in *Patton v. State of Mississippi*[7], On the other hand, if certain employees are compulsorily retired in the bona fide exercise of the power under Rule 465, while a few others though similarly placed are not, the decision is unassailable, and the State need not explain why it picked out ABC for retirement in preference to X Y Z. The decision is protected by Article 310, however unjust it may appear to the Court.

24. Practical wisdom and common-sense therefore suggest that the powers of the State under Article 310 are absolute as against any individual employee but should not be exercised in a manner which society will condemn as discriminatory. Cases which are patently discriminatory present no problem, nor do cases where the decision, though harsh is bona fide and not discriminatory. The difficulty is created by border-line cases - the border is always troublesome for those who guard it - where it is difficult to ascertain whether the impugned action is valid though arbitrary, or invalid because discriminatory. The Court will decide each case according to its own peculiar circumstances.

25. But the starting point of any discussion on the respective spheres of Articles 14 and 310 must be that Article 14 requires that the State shall not deny to any person equality in any sphere of its

activity, that this injunction transcends every power of the State, and that there are no exceptions to it except those which are specified in the Constitution itself. As was observed by Das J. (as he then was) in *State of Madras v. Smt. Champakam Dorairajan*[8]

> "The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate Article in Part III."

If I may respectfully paraphrase this observation it means that the corrections and injunctions in Part III transcend and control all powers including these which are derived from "special" provisions of the Constitution.

26. I am supported in my opinion by the fact that the Supreme Court, in every case in which a State employee alleged that he had been discriminated against in violation of Article 14, examined his contentions on merits. In not a single case did not the Court reject the submission based on Article 14 on the ground that the powers of the State under Article 310 were not controlled by Article 14. In *Satish Chandra Anand v. Union of India*[9], a Civil servant who had been engaged on a temporary basis of a contract was discharged from service after notice. He filed a petition before the Supreme Court under Article 32 of the Constitution and argued that his rights under Articles 14 and 16(1) had been infringed. The Supreme Court rejected this contention on merits and held that, in fact, there had been no discrimination against him. They also held that Article 16(1) was equally inapplicable as the whole matter rested in contract. In the *State of Madhya Pradesh v. G. C. Mandawar*[10], a Government

[7](1947) 332 US 463: 92 Law Ed 76
[8] AIR 1951 SC 226 (at p. 228)
[9] AIR 1953 SC 250
[10] AIR 1954 SC 493

employee filed a petition
under Article 32 on the ground that a resolution of the Government of Central Provinces and Berar (now Madhya Pradesh) fixing a scale of dearness allowance for its servants discriminated against him in violation of Article 14 of the Constitution. It was contended on his behalf that the .resolution of fixing a scale of dearness allowance under Rule 44 of the Fundamental Rules was "law" as defined in Article 13(3)(a) of the Constitution, and if that law infringed Article 14, it could be declared void. In considering this argument the Court observed :

> "That is a contention 'which is clearly open to him, and the question 'therefore that has to be decided is whether the 'resolution' dated 26-9-48 is bad as infringing "Article 14." The argument was examined on merits and rejected.

27. It appears, therefore, that the view expressed by Agarwala, J. in Raj Kishore's case, AIR 1954 Allahabad 343 cannot be reconciled with the view expressed by the Supreme Court in AIR 1954 Supreme Court 493 which is a later case (Agarwala and Singh JJ. delivered their judgment on 19-11-53 and the Supreme Court case was decided on 13-6-54). Following the example of

Mootham, J. in *Ishwari Prasad v. Registrar, Allahabad University*[11], when he ignored a Full Bench decision of this Court in favour of principles subsequently laid down by the Supreme Court, I prefer "to follow and apply what I believe to be the view of the Supreme Court." I therefore hold that the argument based on Articles 14 and 16 is open to the petitioners, and overrule the preliminary objection. I shall now proceed to examine both contentions on merits.

28. Mr. Dwivedi pointed out that Article 16 (1) does not refer to employment but "matters relating to employment." According to him the addition of the words "matters relating to" before the word "employment" makes a significant difference in the scope of this clause. If it had said, "there shall be equality of opportunity of all citizens in employment" it might have been possible to argue that the guarantee of equality is confined only to the stage of seeking employment. But the clause goes further and extends the guarantee "in all matters relating to employment." What are these "matters" relating to employment?

29. Mr. Dwivedi contended that they include such matters as promotion, selection for prize posts, termination of service and so on. These are, according to him "matters" relating to employment and, as the clause guarantees equality of opportunity for all citizens in such "matters", it means that it is intended to protect the citizen even after he has entered the service of the State. It is a safeguard against discrimination throughout his career as a servant.

30. I think that the addition of the words "matters relating to" is not of itself of much significance. It is noteworthy that these words govern not only "employment" but also the following words "appointment to any office under the State." The clause can really be split in two in the following manner :-

[11] AIR 1955 All 131

> "There shall be equality of opportunity for all citizens in matters relating to employment, and there shall be equality of opportunity for all citizens in matters relating to appointment to any office under the State."

31. It is obvious that "appointment to any office under the State" means the act of making appointment to a particular office. The word is not "appointment" but "appointment to any office." A man may hold an appointment for any length of time but his appointment to any office takes place only once as the result of an act of appointment. Therefore, the words "appointment to any office refer to the initial act of appointment to any office and not to subsequent matters like increase in pay, promotion or termination of service. Indeed, it would be absurd to suggest that the termination of a person's service is a matter relating to his "appointment to any office." Thus the addition of the words "matters relating to" does not of itself have the effect of extending the guarantee of equality beyond the stage of initial appointment.

32. In my view, the word "matters" includes such things as inviting applications for an appointment, advertising a particular post, prescribing qualifications for any office, facilities for

interview, and so on. All these things are "matters" relating to appointment to any office under the State and there must be equality of opportunity in respect of them. For example, if an all-India post is advertised only in an obscure provincial paper published in a regional language, the result would be a denial of opportunity to all qualified candidates who live in regions where the paper does not circulate or who do not know that particular regional language. Or again, if the place of interview is deliberately fixed at a place which is inaccessible to an overwhelming majority of the qualified candidates and is selected with the ulterior purpose of favoring a limited class of candidates resident in that place, there will be a denial of equality of opportunity in the matter of interview a "matter" relating to appointment to that office.

33. Thus the words "matters relating to" do not have the effect of extending the scope of the word "employment."

34. In *Sukhanandan Thakur v. State of Bihar*[12], Ahmad J. relying upon what he considered the dictionary meaning of the word "employment" held that it "refers to a condition in which a man is kept occupied in executing any work," and that "it means not only an appointment to any office for the first time but also the continuity of that appointment." According to him this implied wider meaning finds support from two things (1) the dictionary meaning of the word "employment" and (2) the expression "employment or appointment." With the utmost respect, the dictionary meaning of the word "employment" does not always mean "a condition in which a man is kept occupied in executing any work." My copy of Webster's Collegiate Dictionary contains the following meaning of the word "employment, act of employing, or state of being employed as to seek employment." The Great Oxford Dictionary gives the following three meanings of the word "emplyment" -1, the act of employing; 2, the state of being employed; 3. service". Thus according to the dictionary the "employment' may refer either to the initial act of employing a person or to his condition of being employed. Two alternative meanings of this word are possible, and

[12] AIR 1957 Pat 617

to determine its meaning in this case, one has to look to the context in which the word is employed.

35. The choice between two alternative constructions should be made in accordance with well-recognized canons of interpretation. I may summaries some of them very briefly. Firstly, if two constructions are possible, the Court must, as reiterated by the Supreme Court in *State of Punjab v. Ajaib Singh*[13], adopt the one which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or gave rise to practical inconvenience or make well-established provisions of existing law nugatory. Secondly, as was observed by P. B. Mukerji, J. in *Ram Hari v. Nilomani Das*[14], constitutional provisions are not to be interpreted and crippled by narrow technicalities but as embodying the working principles for practical Government. Thirdly, as laid down by the U.S. Supreme Court in *Gompers v. United States*[15], the provisions of a Constitution are not to be regarded as mathematical formulae and

that their significance is not formal but vital. I take this observation to mean that practical considerations rather than formal logic must govern the interpretation of those parts of a Constitution which are obscure or capable of two alternative meanings. Fourthly, as was observed by the Madras High Court in *Champakam Dorairaja v. State of Madras*[16], in a choice of two alternative constructions, the one which avoids a result unjust or injurious to the nation should be preferred. Fifthly, before making its choice between two alternative meanings, the Court must read the Constitution as a whole, take into consideration its different parts and try to harmonise them. Lastly, and above all, was observed by the Supreme Court in *Gopalan v. State of Madras*[17], the Court should proceed on the presumption that "no conflict or repugnancy (between the different parts) was intended by the framers of the Constitution. The last principle was laid down in slightly different language by the Privy Council in *James v. Commonwealth of Australia*[18]. in which Lord Wright observed as follows :

> "The question then is one of construction and in the ultimate result must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another."

36. These principles of constructions are well-known, though it is not always easy to apply them to particular case. I shall, however, Endeavour to consider the meaning of the phrases "matters relating to employment" and "appointment to any office under the State" in the light of these principles.

37. The question is whether the guarantee of equal opportunity under Article 16 is confined to the stage of initial employment or appointment or extends even beyond it. This question involves an interpretation of the language of clause 1, of Article 16. Two questions arise in this case. The first is whether Part III of the Constitution controls the powers of the State under Article 310; the second how far the control of Article 16 extends that is, whether the guarantee of equal opportunity under Article 16 is confined to the initial stage of employment or extends beyond it. The second

[13] AIR 1953 SC 10 at p. 14 [15](1913) 233 US 604 (610): 53 Law Ed. 1115 (at page 1120)
[14] AIR 1952 Cal184, [16] AIR 1951 Mad120 at p. 130 (FB) [17] AIR 1950 SC 27 at p. 93
[18]1936 AC 578

question does not arise if Part III (including Article 16) does not control Article 310. The first requires an inquiry into the respective spheres of Parts XIV and III of the Constitution, the second into the meaning of the actual words of Clause (1) of Article
16. Thus the two questions though connected are distinct. Even if the Court holds that Article 16 controls the powers under Article 310, it does not follow that clause 1 applies to the petitioner's case unless it is further held that the words "employment" and 'appointment' in that clause include the stage after the initial appointment. I must, therefore, examine the language of Article 16. Article 16 is as follows :-

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or

appointment to any office under the State.

> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence of any of them, be ineligible for or discriminated against in respect of, any employment or office under the State."
> (3) .....
> (4) .....
> (5) .....

38. Article 16 is an extension of the general principle of equality before the law to a particular sphere that is opportunity for State employment. The Article consists of 5 clauses. The first two contain the content of the guarantee and the last three are provisos which expressly reserve certain powers for the State. Clause 2 is wider than clause 1. It is negative in character and prohibits discrimination between citizens on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them. The purpose of this clause like that of Articles 15 and 4, is to ban from Indian life the conception of a master race or 'herrenvolk.' It forbids the relegation of any citizen to an inferior status, like the Jews in Hitlerite Germany or the Asians and Africans in South Africa, because of his religion or race or caste or sex or descent or place of birth or residence. It holds out a promise to all citizens that whenever and wherever a group of citizens compete for employment or office under the State, no particular religion or race etc. shall be considered either a disqualification or an extra qualification. It enjoins that religion, race and the other attributes specified in this Clause will be treated as irrelevant by the State when considering the qualification of citizens competing for any employment or office under the State.

39. Clause 1 provides a guarantee of equality of a positive nature. It enjoins that all citizens must have equality of opportunity in matters relating to employment or appointment to any office under the State. The scope of this Clause is wider than that of Clause 2. Without this clause, it would still be possible for the State, while fully observing the injunction against discrimination on the ground of religion, race, caste etcetera, to confine their recruitment to State services to a favored few. For example, not so very long ago, recruitment to the foreign and diplomatic service in Great Britain was so arranged that only the sons of the wealthiest classes could enter it. There was no discrimination on the ground of religion or race, but a poor man's son had practically no chance of entering the British diplomatic service. One of the qualifications, as far as I recollect, was the possession of a private income of ?500 a year. This sort of discrimination is banned by Clause 1. All citizens, rich or poor, must be given an equal opportunity when competing for the loaves and fishes of State jobs. It commands that the State must give equal opportunity to all citizens "in matters relating to employment or appointment to any office under the State." The two phrases requiring interpretation are "equality of opportunity" and "matters relating to employment or office."

40. The words equality of opportunity do not present any difficulty in interpretation. They

contain a guarantee that no avenue leading to employment under the State shall be closed to any citizen of India provided he has the necessary qualification. (A necessary corollary of this guarantee may be that the State shall not impose qualifications which are deliberately designed to keep out any particular class, community, or section of citizens.) Furthermore, the guarantee is not limited to services or paid jobs: it also extends to any office under the State, honorary or otherwise. It holds out to the people a solemn assurance that no office, however high, shall be legally beyond the reach of any citizen, however humble. The principle of social equality underlying this clause is a complete negation of the philosophy of some of our old Shastras which enjoin that Shudras must confine themselves to the service of the higher castes. We know how, under Ramarajya, Shambooka the Sudra was beheaded for the offence of practicing austerities and (presumably) reading the Vedas: today he would be qualified to be appointed a Professor of Vedic Studies in a State University. This clause reflects the general purpose and policy of the Constitution to prevent the division of the nation into superior and inferior groups like the Aryans and Jews in North Germany and whites and blacks in South Africa; and to achieve this purpose, it specifies certain things which the State is expressly prohibited from looking into when considering the qualifications of any citizen for any job or office. These are his or her religion, race, caste, sex, descent, place of birth and residence. The phrase equality of opportunity extends the concept of social democracy to the sector of State services and public offices.

41. The phrase in matters relating to employment presents the real controversy. It follows the words 'equality of opportunity.' The two phrases read together guarantee to every citizen equality of opportunity "in matters relating to employment or appointment to any office under the State". How far does this guarantee extend? The answer depends upon the meaning of the words 'in matters relating to employment.' According to Mr. Dwivedi, the guarantee of equal opportunity is not limited to the stage of initial appointment but also extends to subsequent promotion, selection or reduction of salary, or termination of service. If the State, in dealing with these matters, discriminates between citizen, its decision will be hit by Article 16. If I may put the matter in my own words, Mr. Dwivedi would like the guarantee of equality of opportunity to protect the citizen not only when he is looking for State employment but also throw its protective mantle over him throughout his career of service under the State. If at any stage the State discriminates against him in the matter of promotion or selection for promotion, recruitment, termination of service and other kindred matters the long arm of Article 16 should reach forth and crush the discrimination.

42. The words 'employment' and 'appointment to office' occur several times in Article 16 in its different clauses. Clause 2 says that no citizen shall be ineligible for or discriminated against in respect of any employment of office under the State. Now, a person is considered ineligible or eligible for employment only at the time of initial appointment. No question of his ineligibility can arise after he has been selected for the job or post. The word 'employment' in this clause refers to the stage of selection or appointment.

43. Clause 3 is in the nature of proviso to Article 16. It runs as follows :-

> "Nothing in this Article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointments to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment."

This clause reserves to the State the power to prescribe in respect of any job or office a qualification of residence, within the State prior to such employment or appointment. Now a prior residential qualification is relevant only at the stage of appointment. No question of a prior residential qualification arises after the employee has joined service, and such a requirement would be totally irrelevant in the matters of promotion, increase of salary, selection for higher posts or termination of service. The test of residence is never required for promotion. The State may not appoint any person on the ground that he does not have the minimum residential qualification, but for the State to say, "We shall not increase X's salary because ten years ago, he did not reside in this State for six months prior to his appointment" would be absurd. The words 'employment' and 'appointment' in Clause 3 appear to refer to the initial stage of employment only.

44. Clauses 4 and 5 also contain provisions reserving certain powers to the State. Clause 4 reserves the right of the State to reserve appointments or posts for backward classes. This obviously has no reference to any matter after appointment, such as promotion. It is well known that, after appointment no employee is promoted on the ground that he belongs to a backward class. Clause 5 saves any law requiring that any religious office must be given to a person professing the particular religion to which the office belongs. This clause saves laws imposing religious qualifications for appointments to religious posts - as for example, requiring that the priest of the temple at Badrinath must be a Namboodri Brahmin. This Clause is obviously concerned only with the initial appointment to a religious office.

45. Thus, clauses 3, 4 and 5, which are provisos to the first two clauses and which reserve to the State certain powers in the matter of employment and appointment to office, are concerned only with powers relating to initial acts of appointments. They completely ignore matters which may arise after appointment and during service. The omission is significant. It shows that the makers of the Constitution, when using the words in matters relating to employment or appointment to any office had in mind only the initial stage of appointment. They guaranteed equality of opportunity and fair competition at the stage of seeking State employment but reserved certain powers for the State relating to this stage. Had they intended to extend the right under Article 16(1) even beyond the initial stage of employment, the provisos would have reserved to the State some other powers in such vital matters as promotions, selection for higher posts, termination of service and particularly, retrenchment. But the provisos completely ignore every stage after the initial act of employment or appointment. The inference must be that the stage after the initial

appointment stage was not in the mind of the makers of the Constitution at all when they used the phrase in matters relating to employment or appointment to any office. They only reserved powers in regard to the initial stage of appointment Because the scope of equality under Clause 1 is confined to this stage.

46. Article 16 applies to citizens and the guarantee of equality of opportunity in matters relating to employment and appointment to office is meant for citizens only. On the other hand, under our Constitution, non-citizens are eligible for public services and posts under the Union and the States. This is made clear in Part XIV of the Constitution which relates to services under the Union and the States. Article 309 empowers the appropriate Legislature to regulate subject to the provisions of the Constitution the recruitment and conditions of service of persons appointed to public services and posts in connection with affairs of the Union or of any State. The use of the words persons is significant. It is not there by accident or mistake, for whenever the Fathers of the Constitution wanted a particular post to be reserved for citizen they did so by using the word citizen in the Article dealing with that post. Seven posts, specified in the Constitution have been expressly reserved for citizens. These are the office of President (Article 58(1) (a); Vice-President (Article 66 (3) (a); Governor of State (Article 107); Judge of the Supreme Court (Article 124 (3) or of a High Court (Article 217(2); Attorney General of India (Article 76 (1); and Advocate-General of State (Article 165). Apart from these posts, a non-citizen can hold any post or office under the Republic or join any service under the Union or the States. Even the Auditor General and Comptroller General of India and the Chairman of the Union or State Public Service Commission need not be citizens. Article 314 of the Constitution expressly Provides that every person who was appointed by the British Crown in India and should elect to continue, after the Constitution, to serve the State, shall be entitled to receive the same conditions of service and the same rights to which he was entitled before the commencement of the Constitution. This Article was inserted as an encouragement to non-citizen servants to continue in service.

47. These are not empty provisions, for hundreds of citizens are serving in various capacities under the Union and the State and some of them are holding important posts. The fathers of the Constitution for reasons of national policy, made non-citizen eligible for recruitment to public services and posts. Our Constitution was not framed by jurists sitting in an ivory tower or by professors shut up in a class room. It was drafted and finalized, after prolonged discussion and debate by persons with considerable administrative experience and intimate knowledge of the people and its needs. The Founding Fathers were conscious that India in 1950 was (it still continues to be) very backward as compared with the more advanced countries of the West in science, industry, agriculture, medicine and many other matters. They realised that the country would need the services and assistance of foreign workers and experts for a loner time. For this reason, they made non-citizens eligible for service under the Republic. Under Article 314, they gave the State power to recruit non-citizens to its services, at its discretion. Today, if the Union Government decides, in the national interests, to create an Indian Service of Scientists composed of citizens and non-citizens, it has the power to do so under the Constitution. Employment of

foreign labor, skilled and unskilled, on a large scale is frequently made by Sovereign States in their own interests. The British Government due to shortage of manpower in England, has encouraged the employment of foreign workers. During the First Year Plan of the U.S.S.R. the Soviet Government recruited a large number of foreign skilled workers whose number ran into lakhs. The makers of our Constitution were mindful of these considerations when they made non-citizens eligible for recruitment to public services and posts.

48. The meaning of the words 'employment and appointment' may be examined against this background. The guarantee of equality of opportunity in matters relating to appointment is meant for citizens only whereas all the services and posts under the Republic (barring a few specified posts) are open to non-citizens. Therefore in interpreting Article 16(1), care must be taken to avoid any interpretation which shall in the name of equality, create, inequality between the different classes of State servants. If the meaning of employment is restricted to the stage when citizens are competing for or seeking employment, there is no inequality. There can be no legitimate grievance if India like any other national sovereign State, confers a fundamental right on its own citizens. But if the meaning of 'employment' and 'appointment' is stretched to include all the stages beyond the initial employment, the nature of guarantee under Article 16(1) changes. It is converted from an equal right of citizens into an unequal right of employees who are citizens to the exclusion of employees who are not. The result may be inequality between citizen-employees and non-citizen employees, for it will give to the former a right which is denied to the latter. By way of illustration, both in the Patna and Bombay cases a non-citizen employee of the State would not have been entitled to impugn the validity of the impugned decision under Article 16(1). In the present case before me, assuming that the impugned test imposed on the petitioners is hit by Article 16(1), a non-citizen auditor (say of European descent) would not be able to avail of the protection of that Article. He would have to submit to the test, but not the petitioners.

49. This would not be in accord with the policy underlying the provisions making non-citizens eligible for public services and posts. The Constitution must be read as a whole and care must be taken to avoid giving a meaning to one part which will be inconsistent with the policy underlying another part. An intention to discriminate between citizen-employees and non-citizen employees would be inconsistent with a policy to make non-citizen eligible for every service and post (barring a few) under the Constitution. This inconsistency is avoided if the meaning of the words "matters relating to employment and appointment to office" is confined to the stage when citizens are seeking employment.

50. I shall now consider respectfully the authorities cited by learned counsel for the petitioners. Mr. Dwivedi relied on two cases in support of his contention that Article 16(1) is not limited to the stage of initial employment. The first is a judgment of a Division Bench of Bombay High Court (Tendolkar and Desai JJ.) in *Pandurang Kashinath v. Union of India*[19], The second is a decision of a Division Bench of the

[19]60 Bom LR 342: AIR 1959 Bom 134

Patna High Court, AIR 1957 Patna 617. In the first case, it was held that the opportunity of equality in matters of employment enures for the benefit of the citizen not merely in case of his initial engagement but also in case of matters relating to the termination of that engagement. The facts of that case were these. The plaintiff Pandurang Kashinath More was engaged in 1944 as a mistry in the Bombay Telephone Workshop. He was involved in a strike and was arrested in 1949 and detained under the Bombay Public Security Measures Act. On 2-7-1949, he was suspended from duty with effect from the date of his arrest and detention. Thereafter, on March 29, 1950, he was served with an order terminating his services with effect from the date of his arrest. On 25-10-1950, he was released from detention and applied to the Manager of the Workshop for reinstatement, which was refused. He brought a suit in which he pleaded, inter alia, that

> "the order of removal was in violation of Articles 14 and 16 of the Constitution in as much as the plaintiff was arbitrarily picked up and sacked."

51. The Bombay High Court held that the words "matters relating to employment" meant that the purpose of Article 16 was

> "to ensure similarity and equitable treatment .....in matters relating to initial engagement, during continuance of that engagement and at the terminal end of that engagement."

To quote once again from the judgment of Desai, J.,

> "The guarantee of equality embraces all matters of employment - the article in terms, clear and ample, speaks of 'all' matters relating to 'employment' - and it is impossible to accede to the suggestion that what is contemplated by Article 16 is only the initial stage when the citizen is employed to serve the State. Nothing so unfair and startling could have been within the contemplation of the framers of the Constitution. The guarantee, in our judgment, was intended to endure and not to be illusory."

For these reasons the learned Judges held that considerations of equality apply not merely at the initial stage, that is, when any citizen is engaged in service or appointed to any office by the State. All along during the continuance of the engagement or office the citizen is assured of that equality of opportunity.

> "Here also there can be no discrimination between one employee and another on any ground of prejudice or bias or one which is extraneous."

52. On the particular facts of the case, their Lordships held that the order terminating the services of the plaintiff was discriminatory and hit by Article 16 of the Constitution. It set aside the decree of the lower court dismissing the employee's suit and granting him a declaration that the order of

termination was void and illegal.

53. In the Patna case there was a difference of opinion between the two learned Judges who heard the case and, on the usual reference to a third Judge, Ramaswami, J. held (agreeing with Ahmad, J.) that the guarantee under Article 16 applies both to the case of appointment and termination of appointment. He took the view that unless the words of Article 16 were given a wider meaning, the guarantee of equality of opportunity in matters of employment would be nullified. The facts of that case were these. The petitioner Sukhnandan Thakur was appointed as a Market Inspector in the Supply and Rationing Department on 7-8-1946. On 9th December, 1947, his services were dispensed with as a measure of retrenchment. He was re-appointed as a Supply Inspector on 13-10-1948. He was holding this post on 27-2-1954, when he received an order from the District Magistrate of Muzaffarpur terminating his services with effect from the next date 28-2-1954. It was admitted by the State that the order terminating his services was made in pursuance of and in accordance with the policy of the Government laid down in a circular issued on 23-2-1954. This circular contained elaborate provisions for carrying into effect the policy of retrenchment for reasons of economy. It stated, inter alia, that the staff should be retained in order of seniority on the basis of their service records. But this principle was waived in favor of three classes of citizens- (1) members of scheduled tribes and scheduled castes, (2) displaced persons, and (3) political sufferers. The employees belonging to these three classes were to be retained on grounds of policy even if they were found to be junior in service. The petitioner took no objection to the exception in favor of the scheduled tribes and scheduled castes but he attacked the favor shown to political sufferers and displaced persons. He contended that, as a result of this favorable consideration of these two classes of employees, the petitioner though fully qualified, competent and senior to many, had been retrenched, while employee junior to him had been retained for no better reason than that they were either displaced persons or political sufferers. But for this discrimination, he would not have lost this job. He, therefore, impugned the constitutionality of the Government circular which contained the exception in favor of displaced persons and political sufferers. The petitioner relied upon Article 16(1) for his attack on the aforesaid circular. He contended that the guarantee of equality of opportunity in this clause prohibited discrimination even at the stage of termination of service. It was argued that the expression "employment to any office under the State" includes in it the notion of continuity in employment and that therefore the rule of equality is equally applicable to matters relating to termination of employment as well, and that any distinction in the matter relating to an employment under the State not having a rational relation to the office amounts to discrimination, and, therefore, offends against the rule of equality of opportunity.

54. In considering this argument, Ahmad, J. examined the meaning of the word "employment" in Webster's Dictionary ("occupation, business; that which engages the head or hands as agricultural employment or mechanical employment"). The learned Judge thought that this meaning clearly suggested that the word 'employment' referred "to a condition in which a man is kept occupied in executing any work." In other words "it means not in appointment to any office for the first time

but also the continuity of that appointment." On the facts of the case. Ahmad, J. held that the exception to rule of seniority in favor of displaced persons and political sufferers was on the face of it inconsistent with the guarantee of equality of opportunity in matters of employment contained in Article 16(1) and (2). He was in favour of holding that the Government circular was void and that the petitioner must be deemed to have continued in service.

55. Das, C. J. disagreed. But he steered clear of any discussion of the question whether the expression '"employment" in Clause 1 of Article 16 does or does not mean continuity of employment because he considered such discussion unnecessary. He took the view that the services of all the incumbents were terminated and fresh appointments were made. Therefore all the appointments were new. He further held that in making the new appointments, certain selective principles were followed which were neither arbitrary nor unreasonable and were not in violation of Article 16(1). He held that the aforesaid exception in favor of displaced persons and political sufferers did not violate the general principle of equality before the law guaranteed by Article 14 of the Constitution. But he did observe that had he "held the view that the classification of displaced persons and political sufferers was arbitrary and unreasonable," then "it would have been" his "duty to issue an appropriate writ in favor of the petitioner." It is not clear whether he had in mind Articles 16(1) or 14 when he made this observation.

56. On a reference to the third Judge, Ramaswami, J. held, agreeing with Ahmad, J. that the selective test imposed by Government was neither rational nor reasonable in so far as it showed a preference to displaced persons and political sufferers. He did not accept the view of Ahmad, J. that the word "employment," as used in Article 16(1), included continuity in employment but he held that the word appointment did. To quote his exact words

> "With great respect I do not agree with the interpretation placed by Ahmad, J. on the word "employment" in Article 16, though I agree (or reasons which I shall presently state that the guarantee under Article 16 applies both to the case of appointment and termination of appointment." In other words, thus he concurred with Ahmad, J. that the protection of Article 16 continued even after the stage of seeking employment, though he gave his own reasons for reaching that conclusion. His reasons are best stated in his own words :
> ".....My view is that the word "appointment" in Article 16 refers as a matter of necessary implication also to the termination of appointment, otherwise the object of the guarantee given under Article 16 would be nullified. For instance, it would be open to the administrative authorities to make appointments to particular posts in conformity with the provision of Article 16, but on the very next day they may terminate the appointment of the candidates by applying the discriminatory tests prohibited by Article 16(2). Such a situation would be starting and unjust and could not have been intended by the Constitution-makers. I am of the view that the guarantee of equal opportunity under Article 16(1) applies not only to appointment but also to termination of appointment. Any other interpretation would render the protection given under Article 16 illusory."

57. Thus whereas Ahmad, J. based his argument On the word 'employment,' Ramaswami, J. relied on the word 'appointment.' But they reached the same conclusion that the guarantee of equality under Article 16(1) continues even beyond the initial stage of competition for employment and is not restricted to the initial act of employment by the State.

58. In 60 Bom LR 342: AIR 1959 Bombay 134, the Bombay High Court (Tendolkar and Desai, JJ.) took the view that the equality in matters of employment enures for the benefit of the citizen not merely in case of his initial engagement but also in case of matters relating to the termination of that engagement. Much of their argument is concerned with the question whether the special provisions of Article 310 relating to the services under the State displace the general provisions in Articles 14 and 16 relating to equality of opportunity. But the interpretation of the language of Article 16 is very brief, the entire discussion being contained in the paragraph quoted by me in an earlier part of this judgment.

59. Thus, the learned Judges appear to have adopted the reasoning of the Patna High Court in AIR 1957 Patna 617 that, unless the word "employment" is made to include all the stages after the initial act of employment, the guarantee of equality of opportunity will be rendered illusory. I shall therefore consider, with respect, the judgment in the Patna case.

60. In the Patna case, Ahmad, J. attached decisive significance to the fact that the word "employment" is juxtaposed to the word "appointment" in Article 16(1). To quote his exact words

> "This implication (of wider meaning of the word "employment") finds support from the word-ings of Article 16(1) itself. Therein the expression used is "employment or appointment." It implies that the word employment means something different to what is meant by the word 'appointment.' I, therefore, think that Mr. Amin Ahmad (counsel for the 'petitioner in that case) is right in contending that the word "employment" has in it an element of continuity of engagement which one enters upon when appointed to the office."

With respect, the expression used in Article 16(1) is not "employment or appointment" but "employment or appointment to any office." Therefore, the word "employment" was being used to mean something different from "appointment to any office." It is well recognized that "employment" does not ordinarily include offices which are honorary or do not carry any salary. Conversely, there can be employment which does not relate to any office. For example, casual labourers working on the Bhakra-Nangal project are employed by the State but do not hold any "office."

61. By including both "employment" and "appointment to any office" the Constitution has

ensured that the obnoxious doctrine of a "master race" which disfigures the Constitutions of certain countries, shall find no place in India. All citizens shall have an equal opportunity of serving the Republic either as paid employees or in other positions of responsibility, paid or unpaid. To give an illustration, the office of President cannot be included in the phrase "employment under the State;" but the makers of the Constitution wanted to ensure that every citizen of the Republic, whatever be his race, creed or caste, et cetera, shall be entitled, equally with others, to cherish the hope that he may one day be elected President. The position under our Constitution contrasts with that under the (now defunct) Constitution of Pakistan which reserved the office of the President for Muslims. This guarantee of equality has been made all embracing by including within its scope both "employment" and "appointment to any office under the State."

62. The learned Judges in the Patna case attached considerable importance to the word "appointment." With respect, the emphasis is not so much on the word "appointment" but on "office." In some cases, appointment can be included in employment,' but appointment to certain offices (particularly those which are honorary or efective) would not be. For example, it may be said that A. B. was appointed a judge of the High Court on a certain date and that he has been employed as a judge since that day. But it cannot be said of a person who is elected President of a Municipal Board that he is "employed" as a President. (He may be a lawyer or a doctor by profession). The guarantee of equality has been given a fuller content by the use or both the words, 'employment' and office. This appears to be the true significance of the juxtaposition of the words "employment" and "appointment to any office" in this clause.

63. In the same case Ramaswami, J. for reasons of his own, agreed with Ahmad, J. that the "guarantee under Article 16 applies both to the case of appointment and termination of appointment." He pointed out that Article 16 makes a distinction between "appointment" and "employment." He felt that the words "employment" and "appointment" connote two different conceptions. To quote his own words,

> "Appointment obviously refers to appointment to an office. The term "appointment," therefore, implies the conception of tenure, duration, emolument and 'duties and obligations' fixed by law or by some rule having the force of law. It is obvious that these elements are absent in the case of public employment which is a contract for a temporary purposes. For example, laborers or experts engaged by Government for special professional tasks under bilateral contracts would belong to the category of persons in public employment. On the contrary, persons appointed to any Government post or service are not usually employed under bilateral contracts - they simply work under conditions standardized by laws and regulations."

64. With deep respect, I am unable to agree that the word "appointment" necessarily implies the conception of tenure, duration, emolument etc. I have already pointed out that the words

"appointment to any office" are meant to include certain offices which would not ordinarily be covered by the word "employment." I have pointed out that certain offices, though honorary or unpaid, may be highly coveted by every citizen. The office of Chairman of a Municipal Corporation or Honorary Surgeon to the Pre-sident or Poet Laureate (if ever it is created) may or may not carry any salary or emoluments, but they are offices of status and dignity. The term "appointment," when applied to the office , of a chairman of a Municipal Corporation, cannot possibly imply the conceptions of "emoluments" which is one of the conceptions mentioned by the learned Judge. I can only repeat my respectful suggestion that the purpose of adding the words "appointment to any office" is to ensure that every citizen shall have an equal opportunity not only when he seeks a State job for his livelihood but also when he aspires for any office of position or honour or dignity under the State. The content of the freedom, of equality conferred by Article 16, as indeed by Part III itself, is partly economic, partly social and partly spiritual. A few observations on the nature of fundamental rights guaranteed by the Constitution will not be out of place.

65. Chapter III relating to fundamental rights enumerates not merely economic rights but various other kind of rights which were considered necessary by the founders of the Constitution, (if I may borrow an observation of Mr. Justice Sapru in an Allahabad case) to give a full and concrete content to the "freedom of human personality in all its aspects." The freedom of speech and expression, the freedom of conscience, and the freedom to profess, practice and propogate religion have no economic content whatsoever; but they were considered necessary for the blossoming of individual personality. The content of Chapter III is partly economic, partly political and partly spiritual Article 16, too, has a content which is partly economic and partly social and spiritual. It guarantees that every citizen shall have an equal opportunity to seek employment under the State. To this extent its content is economic. It also guarantees that no citizen however humble his status and whatever his religion, race, caste, sex or place of birth shall be ineligible for any office (including the highest) under the Republic. It repudiates the doctrine of a master race and bans the classification of citizens into a superior class which can be entrusted with position of responsibility and an inferior class which must remain content with a position similar to that of Jews in Hitlarite Germany or Boerdominated South Africa. In a word, it ensures that no citizen shall be branded with the stamp of inferiority or ineligibility, but that every citizen shall hold his head high and walk the soil of his country with dignity. To this extent Article 16 has a social and spiritual content. This appears to me to be the true significance of mentioning both "employment" and "appointment to any office" in this Article.

66. I must not however be understood to mean that the phrase "appointment to any office under the State" relates only to honorary or unpaid offices and completely excludes every office carrying a salary or emoluments. As an illustration, the leader of a political party commanding a majority in the Parliament and aspiring to be selected by the President as Prime Minister can hardly be considered as seeking "employment." If he is selected as Prime Minister, he will be deemed to be appointed to an office under the State, though his post carries with it a salary. But

the guarantee of equality contained in the phrase "appointment to any office under the State" extends to this office and enjoins that every citizen shall be eligible for the post of Prime Minister regardless of his race, creed, etcetra, if he is the leader of a party or group commanding a majority in the legislature.

67. Ramaswami, J. advanced an additional reason for the argument that the word "appointment" in Article 16 refers, as a matter of necessary implication, also to the termination of appointment. If it did not, he argued, "the object of the guarantee given under Article 16 would be nullified. The learned Judge gave an illustration to back this argument. "For instance," he observed.

> "It would be open to the administrative authorities to make appointment to particular posts in conformity with the provision of Article 16, but on the very next day they may terminate the appointment of the candidates by applying the discriminatory tests prohibited by Article 16(2)".

In other words, the learned Judge feared that unless the guarantee of equality continues to protect a citizen even after he has become a State employee the State may defeat this guarantee by giving a job with one hand and taking it away with the other. With respect, there are two answers to this argument which" was also raised in a more sinister form by Mr. Dwivedi.

68. First, it is not quite correct that the object of the guarantee under Article 16 would be nullified if the words "employment and appointment to office" are restricted to the initial stage of making the appointment. Ahmad, J. relied on the hypothetical case where Government makes the appointment today and terminates it tomorrow on grounds prohibited by Article 16(2). With great respect, I suggest that the employee would not be without remedy. If his appointment is terminated on account of religious bigotry, racial prejudice, casteism or provincialism, or sex, it would be hit by Article15(1). Moreover, the power under Article 310 must be exercised bona fide.

A mala fide exercise or patent abuse of the power of removal would be illegal. The removal, for improper reasons, of an employee who was appointed only yesterday, would obviously be a mala fide exercise of the power under Article 310, hit even by Article 16(1). The aggrieved employee could maintain an action on the ground that his appointment and removal were a continuous act and that in fact, he had been deprived of the guarantee of equality of opportunity for employment, as what was given with one hand was simultaneously taken away with the other. On proper proof of fact, the Court would hold that the authority never had any intention of giving him an equal opportunity under Article 16(1) from the very beginning and he got none.

It is not quite correct therefore, that the guarantee of equality of opportunity under Article 16 (1) would be nullified or render illusory, if the words 'employment' and 'appointment to any office' are restricted to the initial stage of employment. Mr. Dwivedi's argument goes a little deeper. He contended that unless the words 'employment, and 'appointment' include the stage beyond the initial appointment and unless the employee is shielded against discrimination in such matters as promotion and termination of service, the guarantee of equality of opportunity will be rendered

futile against a Government which is determined to discriminate against or victimise a certain class. Mr. Dwivedi, too, like Ahmad, J., cited a hypothetical illustration. "Suppose," he said

> "Ten years from now, a party J. comes to power on a programme and policy directed against a particular class M. and a J. Ministry directs all the services to be purged of all M's or that no M. shall be promoted to key posts. In that situation, unless the words 'matters relating to employment' include the stage beyond the initial appointment, such a Government will succeed in rendering the guarantee of equality in Article 16(1) illusory." I have quoted learned counsel almost word for word. Mr. Dwivedi's illustration is of a more sinister import and deserves serious notice.

69. The ultimate strength of a Constitution lies, not so much in the excellence or perfection of the language of the Constitutional document but in the willingness of the people to accept and promote the principles underlying it. The foundation of every Constitution is its political, social and spiritual philosophy on which is raised the entire edifice of the Constitution. This philosophy dominates every part of the Constitution. The social, political and spiritual foundations of the Indian Constitution are laid in its Preamble and partly also in the Directive Principles of State Policy which have been declared by Article 37 to be "fundamental in the governance of the country." Their significance has been explained in many judgments of the Supreme Court and of other High Courts and it is hardly necessary for me to add anything to them. But it is beyond dispute that the principles of secular, political, and social democracy and of liberty, equality and fraternity on which our Constitution is founded, are the complete negation of the hypothetical programme of the hypothetic party J. in Mr. Dwivedi's illustration.

70. Mr. Dwivedi asks me to visualize the situation after such a party with such a programme is elected and assumed power. I have no doubt in mind what the situation will be. A constitution derives its strength and nourishment from the loyalty and support of the people. If at any time it loses this support, it shall decay and wither, however excellent may be its draft. It was said of the Weimar Constitution of Germany that it contained the most perfect and the most elaborate safeguard for the freedom of the individual ever devised by the geniuses of jurists. But when the German people voted Hitlar into power in an election, it disowned by its verdict, the foundations of the Weimar Constitution in favour of Nazism. So, if the party mentioned by Mr. Dwivedi, with a programme outlined by him is voted into power, in India in a general election, it must be assumed that the people of India have withdrawn its support and loyalty from Constitution. A Constitution bereft of the allegiance of the people is like a body after the vital spark of life has left it. From a living organism it becomes a corpse, though all its parts are intact. If this ever happens to our Constitution, no safeguards in Article 16 or any other provision can prevent Mr. Dwivedi's hypothetical party from carrying out its programme, any more than a foreign army can be prevented from invading India by the Municipal byelaws of Amritsar.

71. Secondly, the appointment of a person to a post and his subsequent removal are two different

categories of State acts, and each has been made subject to different conditions under the Constitution. A citizen seeking employment under the State and a citizen in the employ of the State are in different positions. At the state employment, citizens compete with each other under a guarantee of equality of opportunity. But after appointment, the successful citizen joins the ranks of Government servants under the control and discipline of the State. He even surrenders some of his fundamental rights. He is no longer entitled to freedom of expression nor can he purchase or sell property exceeding a specified value without the permission of the State. He accepts service on the understanding that his tenure of office is at the pleasure of the State. Article 310 invests the State with absolute control over the tenure of every State servant (subject to the safeguards contained in Article 311). This wide power was conferred on the State by the founders of the Constitution in their wisdom and for reasons of sound public policy. They adopted the British principle (subject to the safeguard of Article 311) under which the Crown can remove any servant at pleasure.

This was no idle provision inserted in a lighthearted manner by persons who did not realize its implications. The fathers of the Constitution devoted a special chapter to the services under the Union and the State. Article 310 was woven into the fabric of the Constitution. They could have followed other constitutions under which the State servants have been granted rights against the State. But, with their eyes open, they adopted the maxim durante bene placito (with safeguards under which the Crown can remove any servant at pleasure). They made it the most important pillar of Chapter XIV the pillar on which rests the State's control and power of discipline over its servants. Why? Presumably because they realized that, in the peculiar conditions of India, the interests of discipline and efficiency required that every State servant must know his place when "he is talking to the State," so to speak. They wanted every State employee to realize that the State is the master who holds the whip hand and that though the whip would be seldom used and on the contrary, the state in India would treat its servants generously in its bounteous liberality, the whip hand must always be there. This appears to be the purpose for which Article 310 invested the State with arbitrary powers over its employees.

72. Of course, they provided constitutional safeguards against any unconstitutional abuse of the power under Article 310. Articles 14 and 15 (1) ensure that the power under Article 310 will not be used in a discriminatory manner or to undermine the social democratic foundation of the State, or to introduce racialism, provincialism, or casteism or bigotry in recruitment to State services or to weed out a whole class or community from State service. But within the limits of these effective safeguards, they intended the power under Article 310 to be really effective in the day to day administration of the State in matters relating to promotion, selection for higher posts, and termination of service. The employees were deprived by the Constitution of any legal remedy for their grievances.

73. These considerations must be borne in mind in determining the scope and area of the word employment in Article 16(1). Was it intended to place the executive under judicial control in matters which concern the day-to-day administration? Was Article 16 indended to compel the

State in spite of Article 310, to render an explanation each time when an individual employee claims that he should have been promoted instead of "the other fellow"? My answer would be : no.

74. In determining the meaning of the words "matters relating to employment" in Article 16(1) care must be taken not to upset the delicate balance between the guarantees under Part III and the wide powers of the State under Article 310. Agarwala J. took the extreme view that Article 310 was not subject to any control of Article 14. With respect, he did not consider that Articles 14 and 15 are safeguards against such abuses as racialism, provincialism, casteism, or religious bigotry in the matter of termination of service. On the other hand, the learned Judges of the Bombay and Patna High Courts took the other extreme view that equality of opportunity must extend, even beyond the stage of initial appointment, to such matters as promotion, selection for higher posts, retrenchment, termination of service and so on. With respect, such a wide interpretation of the words 'matters relating to employment' will throw the doors wide open to interference with the executive in the day-to-day administration of the State. As was observed by Lord Roche in *Venkata Rao v. Secretary of State*[20], "...control by the 'Courts over Government in the most detailed' work of managing services would cause not merely inconvenience but confusions". This observation was quoted with approval by Kapur J. in *Punjab State v. Bhagat Singh*[21], in which the learned Judge dismissed the suit of a police official for a declaration that his dismissal was illegal and void.

[20] AIR 1937 PC 31 (at p. 34)

75. In practice, the problem of adjusting the respective spheres of Articles 310 and 14 will require much common sense and practical wisdom. A power which is absolute in its own sphere has to be reconciled with an injunction which is transcendant. Abstract logic may demand that the two provisions are in conflict and cannot be reconciled and that either one must absolutely control the other or the other made absolutely independent of the first. But constitutional problems are not solved like mathematical equations, for they are part of the problems of social life which do not conform to any mathematical formulae or rigid logic. The interpretation of the constitutional law of a people living under an old and complex civilisation like ours demands, when solving problems like the present, compromises and skilful adjustments which may not be strictly logical but which will make the Constitution workable. Social life which creates problems of constitutional law, is infinitely richer and more complex than abstract and empty logic. "A page of history is worth a volume of logic", said Mr. Justice Oliver Wendell Holmes in *New York Trust Co. v. Eisner*[22], He observed on another occasion, "the life of the law has not been logic : it has been experience."

76. In the light of the principles of interpretations discussed above and taking into consideration the language of Article 16 read together with the other provisions of the Constitution, I hold, respectfully disagreeing with the two Division Benches of the Patna and Bombay High Courts respectively, that the guarantee of equality of opportunity for citizens under Article 161) of the

Constitution in "matters relating to employment or appointment to any office under the State" is confined to the stage when the citizen is seeking employment or competing for any post, and has no application to matters arising after the citizen has joined service such as promotion, selection for higher posts, increase or reduction of salary, retrenchment or termination of service. I also hold, respectfully dissenting from the view of Agarwala and Randhir Singh JJ. in AIR 1954 Allahabad 343 and following what I believed to be the view of the Supreme Court, that Part III of the Constitution relating to fundamental rights transcends and controls within its own orbit every power under the Constitution and there are no exemptions except those specified in the Constitution itself. Accordingly, an employee who has been denied equality before the law or the equal protection of the laws can appeal to Article 14, and if the State has discriminated against him for motives of religious, bigotry, racialism, casteism, provincialism or on the ground of sex evils expressly banned by Article 15 he can invoke the protection of that Article.

77. I therefore hold that, in the present case, the petitioners are not entitled to invoke Article 16(1), but any contention based on Article 14 is open to them.

78. I shall now examine on merits the grievance of the petitioners that the imposition of a test on them while exempting the Cane Auditors, amounts to discrimination.

79. It is stated in the counter affidavit of the State that the General Section is a much larger Department than the Cane Section. It handles work which requires much

[21] AIR 1955 Pun118

[22](1920) 256 US 345, 349: 65 Law Ed. 963, 983

greater knowledge and skill in auditing than in the other Section. It affords to its employees much better chances of promotion than the Cane Auditors. For example, any of the existing Auditors, may one day be promoted a Senior Auditor or a Regional Auditor or even a Deputy Chief Auditing Officer or Chief Auditing Officer. The new entrants to this Section, possessing a Bachelor's Degree, would of course be entitled to all the chances of promotion in this Department but the problem has been created by the existence of a number of old Auditors whose educational background is somewhat low. They too have been made eligible for climbing all the steps of the ladder of promotion. But in consideration of this privilege the Government have asked them to undergo a Departmental examination. I fail to see the injustice in this demand.

80. As stated above, learned counsel conceded that the imposition of test as such is not considered objectionable by the petitioners but they resent the exemption granted to the Cane Auditors. Mr. Dwivedi frankly admitted that if the same test had been imposed on the Cane Auditors as well, he would have no case to argue. Therefore, it is not really the test but the exemption which is in issue, I have, therefore, to consider whether the exemption in favor of the Cane Auditors is justified or not, and if not, whether the petitioner can make a grievance of it.

81. It is stated in the counter affidavit of the State that the Cane Auditors audit the accounts of

Cane Unions which do not require the same degree of knowledge and skill as the auditing of General Co-operative institutions, which are under the charge of General Auditors. It is further stated that Cane Auditors hardly have any scope for promotion in their Section. In other words, they are not likely to be called upon to fill posts of responsibility or undertake work of skill during their service. It was, therefore, not considered necessary to impose a similar test for the Cane Auditors. Mr. Dwivedi contended on the other hand that the test was not being imposed on the Auditors in the General Section as a condition of promotion but as a condition for receiving higher scale of pay. He pointed out that their work would continue to be the same, whether they pass the test or not. The only difference as a result of the test will be that some will receive a higher salary than others. He, therefore, argued that there was no reasonable connection between the classification and the object sought to be achieved.

82. Let us consider the validity of the test as if the Cane Auditors never existed. The Government would be justified in imposing a test on the old Auditors in the General Section in consideration of the benefits conferred upon them to which they are not entitled by right. If they are placed in the same scale of pay as the new entrants, any distinction between the old and the new will be obliterated. In the future both classes will have the same opportunities of rising to the highest posts in their Section. This is a concession to which they were admittedly not entitled by right. Government could have left them in their old scales of pay but they were generous enough not to take their stand on strict legal rights and obligations and extended to them this impressive concession. In return for this, is not Government, entitled to impose a condition that the new benefit will be enjoyed only after passing a test? I think it is. If the petitioners dislike the condition they can reject the Government's offer and continue in the old scale of pay.

83. Learned counsel contended that the petitioner did not object to the imposition of the test but to the exemption granted to a class of auditors without any justification. He emphasized that the two sections of the auditors had identical responsibilities which required the same degree of skill. The Government had exempted one section from the test without any reason whatsoever. I am not at all impressed by this grievance. Who is to judge whether the responsibilities of the two classes of auditors are identical or not? Obviously, the ultimate judge, is the Government which runs both sections. They have intimate knowledge of the day-to-day working of each section and of its requirements. They are of the opinion that the working and auditing in the general section is more difficult and complicated and requires a higher degree of skill. This Court cannot enquire into the correctness or soundness of their decision. Even if the decision had been wrong and I think it is not, this Court would have no justification to sit in enquiry or judgment upon a decision made in the exercise of a power which is within the exclusive sphere of the executive branch of the State Government have decided to confer a benefit upon the auditors of both sections to which neither class was entitled by right. It will have the result of placing the petitioners on a par with the better qualified auditors to be recruited in the future. Government feels that the work of the General Auditors is more difficult and they will be better equipped to discharge their heavier responsibilities if they pass a test. This Court has no jurisdiction to

interfere with a decision of the executive of this kind.

84. The real nature of their resentment is of a negative character : the target of this petition is not the test imposed on them but the exemption in favour of others. That being so, this petition appears to be misconceived. Assuming, for the sake of discussion, that Government have made a mistake of judgment while imposing a test on the general auditors in exempting the cane auditors who should also have been tested, what is the precise nature of this mistake? It does not lie in imposing a test on the general auditors which the Government considered necessary in their case and which they had the undisputed right to impose on the petitioners in consideration of giving them the new scales of pay to which they were not entitled. The starting point of any argument in the present controversy must be that Government's decision to impose a test on the general auditors was correct. The error if any, must be in exempting the Cane auditors, though a test was equally necessary in their case. The real grievance of the petitioners is that an exemption was wrongfully granted to the Cane auditors. Even if that be so, what relief can be granted to the petitioners? I am afraid none.

85. Even if the Court had held that the exemption was unjustified, no relief could be claimed by the petitioners. They could not claim exemption from a test which is necessary in their case, at any rate. Nor can they ask this Court to compel the Government to impose the test on the Cane Auditors, as this would be beyond the jurisdiction of the Court whose power to issue a writ of mandamus is limited to the enforcement of legal duties or obligations. There is no duty imposed by law or statute on the Government to impose a test which it does not want to. This petition appears to me, therefore, to be misconceived. A citizen may invoke Article 226 for the protection of his own rights but not to prevent any other citizen from obtaining something to which he was allegedly not entitled. (Cases of quo warranto and habeas corpus are exceptions).

86. The petitioners have, however, invoked Articles 14 and 16 and claimed exemption from the test in the name of "equality of opportunity." They do not say that the test was unjustified. But they contend that the exemption in favour of the Cane Auditors was wrongful, and as one section has been exempted, they are entitled to a similar exemption. Thus they have adopted a position somewhat similar to that of a candidate in an examination who does not obtain pass marks but says "As the other fellow has been declared successful, so must I be."' This is an untenable demand on the face of it. The petitioner's appeal to the principle of equality under Articles 14 and 16 has been made with the object of dressing up this petition with the cloak of Constitutional respectability.

87. I hold that the action of the Government in imposing a test on the General Auditors while exempting the Cane Auditors was not discriminatory.

88. The State raised a preliminary objection that a joint petition containing a prayer for mandamus could not be filed on behalf of 35 petitioners. There is some force in this objection,

but I decided to hear the entire case on merits in view of the far-reaching importance of the issues raised. If the petitioners had filed separate petitions they would have been taxed to costs separately. It is in the interests of justice that each petitioner should pay the costs which he would have paid under a separate petition, particularly in view of the fact that the hearing of the petition lasted several days.

89. The petition is dismissed. The petitioners shall pay the respondents costs calculated at the rate of Rs. 5/- per each petitioner.

90. Mr. Brij Lal Gupta and Mr. S. C. Khare appeared for some petitioners in the other connected petitions. Mr. Gupta stated that he adopted the arguments of Mr. Dwivedi. Mr. Khare addressed rne for a short time and gave general support to Mr. Dwivedi's argument. Mr. Laxmi Saran, on behalf of the State, mainly relied on the judgment of Agarwala J. in Raj Kishore's case and also contended that Article 16(1) did not extend beyond the stage of initial employment.
Petition dismissed