PATNA HIGH COURT

Sukhnandan Thakur

Vs

State of Bihar

(Das C.J. Ramaswami and Ahmad, JJ.)

27.09.1955

JUDGMENT

Ahmad, J.

1. In this application, which has been filed on behalf of only one petitioner, namely, Sukhnandan Thakur, under Article 226 of the Constitution of India, the substantial question raised is that the Government Circular Letter No. ED/R 302/54 P.C. 3493 dated the 23rd February, 1954 is void as it contravene Articles 14, 15 and 16 of the Constitution of India, and, therefore, the order passed on the basis of that the Circular Letter terminating the service cf the petitioner as Supply Inspector from the 28th February. 1954 is illegal and invalid in law. On this ground the petitioner in this application has prayed for the issue of a writ or direction restraining the respondents from enforcing the aforesaid order passed against him.

2. The case of the petitioner is that originally he was appointed as a Market Inspector on the 7th August, 1946 in the Supply and Rationing Department at Muzaffarpur on a salary of Rs. 85 per month. In this post he worked till the 9th December, 1947, on which date his services were dispensed with due to retrenchment then made in the Department. Thereafter on the 13th October, 1948 he was re-appointed as a Supply Inspector on a scale of Rs. 100-5-125-E. B.-150 in the Supply and Price Control Department at Muzaffarpur. While he was in employment as such, he on the 27th February, 1954 received the following order from the District Magistrate of Muzaffarpur;

> "In accordance with Government orders "your services as Supply Inspector will terminate on 28-2-54. You are, therefore, directed to make over all official papers etc., to Shri Jyotindranath Mukherji, District Supply Inspector by 27-2-54." and on the basis of this order his services were terminated from the 23th February, 1954.

3. It has been claimed by him that his service Book was all along free from any adverse

remark and that the petitioner got all the increments which were due to him in the course of his service, the last being one which was given to the petitioner on the 20th July, 1953, that is, only a short time before the termination of his service. The District Magistrate, it is said, then wrote in his order that there was nothing adverse against the petitioner.

4. It is admitted by the learned Government-Advocate that the order terminating the service of the petitioner on the 28th February, 1954 was passed in pursuance of and in accordance with the aforesaid Government Circular letter dated the 23rd February, 1954. He however, contended that that Government Circular is not in any way hit by Articles 14, 15 and 16 of the Constitution. The controversy between the parties, therefore, substantially centres round this Circular which has been filed along with the petition. The main and important directions that the Circular lays down are the following ;

1. that there should be a further reduction , in the inspectorate staff employed under the Supply Department in the districts ;

2. that all the incumbents in the cadre of District Supply Inspector which certain exceptions should be offered the post of Supply Inspectors in case that is acceptable to them and they should be retained as Supply Inspectors with effect from the 1st March, 1954 in the cadre of Supply Inspectors ;

3. that some posts of Supply Inspectors in the areas specified therein have been decided to be abolished;

4. that provision should be made for the absorption of such Supply Inspectors who are to be retained according to seniority as per details given in the statement enclosed with the Circular ;

5. that the staff enumerated in the statement enclosed with the Circular should be retained in order of seniority on the basis of their service records and for their being political sufferers, members of scheduled tribes and schedule castes and displaced persons even though they are junior in service ;

6. that all the existing posts of the incumbents should be terminated on the 28th February, 1954 and the incumbents should be appointed afresh in their new posts in the Districts of their allotments with the clear understanding that it would not interfere with the last pay drawn by them in the scale of Rs. 100-5-125-E.B.-150 and for the purpose of pay the continuity would be

maintained ;

7. that the services of surplus staff whose names do not find place in the enclosed statement should be terminated without assigning any reason positively with effect from the 1st March, 1954.

5. They, in substance, therefore, resulted in the abolition of the post of District Supply Inspectors and also some posts of the Supply Inspectors, and in the re-distribution of the remaining posts of Supply Inspectors among the incumbents of the aforesaid two cadres in order of their seniority on the basis of their service record subject to certain exceptions including those in favour of political sufferers and displaced persons, notwithstanding their being juniors.

6. This rule for re-distribution of the remaining posts of Supply Inspectors is given in Clause (iv) of the Government Circular. It reads:

"The enclosed statements gives the district-wise details and particulars of the persons to be retained with effect from 1-3-54. You have already been informed in para. 7 (ii) of this department letter referred to above that the posts of Supply Inspectors, Marketing Inspectors and of pay have been pooled on the state basis. The required number of staff has now been retained in order of seniority on the basis of their service records and for their being political sufferers, members of scheduled tribes and scheduled castes and displaced person's even though they are junior in services."

7. It is this clause of the Circular which has been the subject of serious criticism by Mr. Amin 'Ahmad appearing for the petitioner. It may be stated here that no objection has been taken against the Circular on the ground of exceptions made in favour of scheduled tribes & scheduled castes. It has been attacked mainly on the ground of exceptions made in favour of political sufferers & displaced persons. The case of the petitioner is that it was the result of this exceptional consideration shown to the political sufferers & displaced persons that the petitioner, though fully qualified & competent, as, it is said, is evident from his service records & though senior to many like Shri Direndra Deo Narain Sinha and Shri Manohar Lal, whose services have been retained in the department, was not given re-appointment in any of the remaining posts, and his services were terminated on the 28th February, 1954.

Mr. Amin Ahmad originally, as already stated, tried to attack this Circular order not only on the ground that it offends against Article 16, but also on the ground that it was hit by Articles 14 and 15 of the Constitution. In the end, however, he has based his argument exclusively, on Article 16. That article has five clauses. Clause (1) is the general clause. That says :

"There shall be equality of opportunity for all citizens in matters relating to employment; or

appointment to any office under the State."

Clause (2) lays down specific grounds on the basis of which citizens are not to be discriminated against each other in respect of any employment or office under the State. That reads :

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

The other three clauses of Article 16 are more or less in the nature of exceptions to the rules laid down in Clauses (1) and (2) of that article. For the purposes of this case they are not relevant. I do not, therefore, propose to refer to them any more in detail.

8. As to the first two clauses of Article 16 the following points were raised by Mr Amin Ahmad; (A) that Clause (1) is wider than Clause (2); in other words, Clause (1) is a general clause, and Clause (2) deals only with some of the specific grounds of discrimination in respect of any employment or office under the State; (B) that the expression "employment to any office under the State" includes in it the notion of continuity in employment and, therefore, the rule of equality of opportunity is equally applicable to matters relating to termination of employment as well; (C) that any distinction in the matter relating to employment or appointment or in the matter relating to the termination of 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; and (D) that the basis of selection, if any, in the matter of appointments or employments to an office under the State should be such as to be applicable to all candidates uniformly and equally; in other words, the test, if any, in selecting candidates should be free from all discrimination and bias.

9. The first contention, in my opinion, is not on the face of it very much controversial and the learned Government-Advocate appearing for the State has also conceded that the scope of Clause (1) or Article 16 is wider than the scope of Clause (2) of that Article. In this respect, therefore, Mr. Amin Ahmad has rightly laid reliance on the cases of Banarsi Das v State of Uttar Pradesh, (S) AIR 1955 All 33 (A) and Vishnukrishnan Namboodiri v. K.N. Kirpal, AIR 1952 .Trav-Co 7 (B). In the case of AIR 1955 All 33 (A) the learned Judges while upholding the order passed by the State of Uttar Pradesh refusing to re-appoint some of the patwaris, who had not withdrawn their resignation by certain date fixed by the Government observed:

"We do not think that Article 16 was intended to prevent the State Government from laying down the qualifications for a service, within which term we would include not only educational qualifications but also physical fitness, age, character, sense of discipline etc. What are the

qualifications that are required and what should disqualify a person from Government service are matters in which we think the discretion should vest in the State Government and unless there has been a flagrant abuse of power, or there has been discrimination which has contravened any provision of the Constitution, the Courts should not lightly interfere."

In the case of AIR 1952 Trav-Co 7 (B), Sankaran J., while dealing with the case of some army officers, who had not been selected by the Selection Board, observed.

"Discrimination as between those, 'acceptable' and those 'unacceptable', is inevitable on any process of selection and grading and there can be nothing wrong in such a discrimination. "Admittedly all officers of the Travancore-Cochin State Forces were subjected to the screening by the Selection Board, and those who were graded as 'acceptable' were given Commission as Officers in the regular Indian Army. Thus as between Officers similarly situated, there has been no discrimination in the matter of being subjected to 'screening' by the Selection Board. It follows therefore that the fundamental right guaranteed by Article 16 of the Constitution has not in any way been violated or infringed by the proceedings which culminated in the sanction referred to in Ex. I."

Both these cases support the contention that discriminations on grounds other than those mentioned in Clause (2) of Article 16 have to be weighed and judged in the light of the general principle laid down in Clause (1) of Article 16. The first point, therefore, succeeds.

10. The second point is about the meaning and implication of the word "employment" used in Article 16 of the Constitution. In the Constitution itself there is no special definition given to this word. We have, therefore, to fall back upon its plain and general meaning. One of the meanings of the word "employment" as given in Webster's Dictionary, is occupation, business; that which engages the head or hands as agricultural employment or mechanical employment. This dearly suggests that the word "employment" refers to a condition in which a man is kept occupied in executing any work. In other words, it means not only an appointment to any office for the first time but also the continuity of that appointment. This implication finds support from the wordings 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 is right in contending that the word "employment" has in it an element of continuity of the engagement which one enters upon when appointed to the office. If I am correct in giving the meaning, which I have just stated aboTe, to the word "employment", it has to be accepted that the rule of equality of opportunity, as laid down in Article 16 (1) is applicable in matters relating to the termination of employment as well. In this view of the matter, all orders relating to the termination of employment to any office under the State, including the one passed against the petitioner on the 27th February, 1954

terminating his service from the 28th of February, 1954 have to be in conformity with the general rule of equality of opportunity laid down in Article 16 (1) of the Constitution.

11. The last two points contended by Mr. Amin Ahmad in support of this application deal with what is meant by the expressions "equality of opportunity" and "discrimination", and as they are inter-connected. I propose to take them up together. In fact the fourth point follows as a corollary from the third.

12. The difficulty, if any, in the appreciation of the true implication of these two expressions arises mainly in view of the fact that almost in all cases of employment and appointment to an office certain standard or certain qualification has to be followed to enable selection from amongst candidates who are generally more in number than the vacancies available. The contention of Mr. Amin Ahmad is that in order that such standard or qualification should be consistent with the rule of equality of opportunity and should be free from discrimination, it is necessary that the qualifications and standards should be fixed objectively, that is, in relation to the demands and needs of the office and not subjectively, that is, not in relation to the interest of the candidates offering themselves for that office.

In other words, any consideration not having the rational relation to the office, may it be in matters relating to employment or appointment or may it be in matters relating to termination of an employment under the State, is tantamount to discrimination. It needs no argument to say that the employment or appointment to any office being the main subject-matter of Article 16, the appointment and employment to an office, in the light of the principles laid down in Article 16 (1) and (2), should be in terms of the interests of the office alone so that the standards set for selection should be impersonal and free from all considerations in favour of any class, group or individual.

In the case of Satish Chandra v. Union of India, AIR 1953 SC 250 (C), their Lordships of the Supreme Court while dealing with the discussion on Article 16 (1) in that case observed :

"Article 16 (1) deals with equality of opportunity in all matters relating to employment or appointment to any office under the State. The petitioner has not been denied any opportunity of employment or of appointment. He has been treated just like any other person to whom an offer of temporary employment under these conditions was made. His grievance, when analysed, is not one of personal differentiation but is against an offer of temporary employment on special terms as opposed to permanent employment."

(12-a) It is true that the facts of that case were entirely different and have no analogy to the facts of the present case. It is, however, obvious from the passage quoted above that in the course of

their observation their Lordships did in dealing with the argument in Article 16 (1) of the Constitution refer to two tests : one that the petitioner of that case had been treated just like any other person to whom the offer of the Post was made and the second that the grievance of the petitioner was not one of personal differentiation. These two tests, therefore, suggest that the qualifications laid down for any selection under Article 16 should be free from inequality in treatment and free from personal differentiation. In the case of Mahadeb Jiew v. B. B. Sen, AIR 1951 Cal 563 (D), Mukherji J., while dealing with Article 15 (1) of the Constitution observed:

"What is discrimination ? Discrimination is comparative in its connection. Discrimination on the ground of sex alone must mean that one sex is discriminated as against the other. Discrimination is double-edged. To discriminate against one sex is to discriminate in favour of the other, but inherent in the very notion of every discrimination is a measure of comparison. The language used in Article 15 (1) of the Constitution 'discriminate against' should, in my view, be understood in the above light. There cannot be any discrimination 'against' without a resulting and corresponding discrimination in favour of some one else which would be commonly known as preference for that some one else. Discrimination and preference are twin and inseparable ideas.

Etymologically the word 'discriminate' comes from the Latin origin 'discriminare' which means to divide, separate or distinguish. James Murray's New English Dictionary published by Oxford Clarendon Press (1897), Vol. III, p. 436 gives the meaning of the expression 'to discriminate against' as 'to make an adverse distinction with regard to or to distinguish unfavourably from other".

13. This observation also, in my opinion, leads to the same conclusion that the basis of selection should be impersonal and not in relation to the interests of the candidates offering themselves for the office.

14. The learned Government Advocate appearing for the State contended that on principle the main consideration in the matter of selection for an office should be the requirements of the office itself but he contended that once that condition is fulfilled, some other ancillary factors may also be taken into consideration in order to effectuate the best result for the society as a whole. This according to him, is all the more permissible when the ancillary considerations are pursued to give effect to the directive principles laid down in Part IV of the Constitution. In this connection our attention was drawn to Articles 39, 41 and 46 of the Constitution.

In my opinion, this proposition is always subject to the qualification that that should not in any way result in any negation of the fundamental rights guaranteed to the people in Part III of the Constitution. In the case of the State of Madras v. Sm. Champakam Dorairajan, AIR 1951 SC 226 (E), their Lordships of the Supreme Court while dealing with this very point observed :

"The directive principles of the State policy, which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. The Chapter of Fundamental Rights is sacrosanct and not liable to be abridged by and Legislative or Executive act or order, except to the extent provided in the appropriate article in Part III. The directive principles of State policy have to 'conform to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion that is the correct way in which the provision; found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part. IV, but subject again to the Legislative and Executive powers and limitations conferred on the State under different provisions of the Constitution.

15. In this case the exception made in the application of the rule of seniority in favour of displaced persons and political sufferers, according to Mr. Amin Ahmad, is on the face of it not consistent with the fundamental right guaranteed in Article 16 (1) and (2). On the contrary, it gives rise to a discrimination against others in the matter of termination of their services though they all belong to the same class. If this contention is true, the argument of the learned Government-Advocate, in the light of the principle laid down in the case, just quoted above, cannot be held sustainable in any view of the matter at least in the present case. I have alreay discussed above that the qualification permissible to be adopted in matters of selecting candidates for appointment or employment should be in relation to the requirements of the office and not in relation to the interests of the candidates.

Applying this principle to the exceptions made in the Government Circular in favour of displaced persons and political sufferers, it has to be in my opinion, accepted that they are not in any way connected with the requirements of the office itself, and that there is no nexus between the exception clauses and the efficiency of the service. On the contrary, those exceptions have been obviously introduced to serve the interest of the particular classes of people, namely, the displaced persons and political sufferers. It follows, therefore, that the exceptions made in favour of those two classes of people in the Government Circular offends against the principle laid down in Article 16 (1) of the Constitution.

This conclusion gets support from a reading of Clauses (3), (4) and (5) of Article 16 of the Constitution also. They show that the framers of the Constitution knowing that the matters excepted in those clauses would be hit by the principles in Article 16 (1), made special 'mention of them by way of exceptions. If they had intended to make any exception in favour of some other class of people as well, namely, in favour of political sufferers and displaced persons, who

admittedly were present by the time the Constitution was drafted, they could have conveniently done it either in that very article or at some other place in the Constitution, This provision, therefore, relating to certain exceptions in Article 16 strengthens the argument that no other exception was intended to be engrafted on the principle laid down in that Article.

It is true, as was conceded by Mr. Amin Ahmed, that political sufferers and displaced persons deserve special consideration from the State in the matter of their rehabilitation. There can be no objection to that on the contrary, it is the bounden duty at least of a welfare state to relieve all sections of people from misery and especially that section which is weak and oppressed. The ques-

tion, however, arises as to the mode in which it should be done. Should it be done in contravention of the fundamental rights , guaranteed to every citizen in Part III or should it be done in a manner consistent with those guarantees?

The answer to that can be only one, that is, they should be helped in a manner consistent with the principles of the fundamental rights. They are sacrosanct and can in no case be belittled or ignored. The present Circular, as it stands, and the manner in which it lays down exceptions in favour of political sufferers and displaced persons is, as already stated above, clearly hit by Article 16 (1) of the Constitution. I, therefore, hold that the Circular so far as it lays down exceptions in favour of displaced persons and political sufferers offends against the principle laid down in Article 16 (1) of the Constitution and as such is void in law.

16. It has been conceded and it is clear from the Circular and the papers on the record that if the formula of seniority on the basis of service records alone should have been taken into consideration in the matter of terminating services of the persons covered by the Government Circular and no exceptions would have been made in favour of political sufferers and displaced persons, the petitioner's services, also would have been retained. He was undoubtedly senior to many of the incumbents, who were retained in their office, and his record of service also, as it appears from the facts stated in his affidavit, was not in any way unfavourable or against him.

In that view of the matter, it is clear that the only factor which stood in the way of his being retained was that some incumbents, junior to him, were taken in over his head to fill some of the remaining posts on the ground that they were displaced persons or political sufferers and not on the ground that they were any way better qualified or superior in experience to the petitioner. For the reasons aforesaid, I hold that the Government Circular offends against Article 16 (1) of the Constitution and as such is ultra vires and void.

17. I may state here that Mr. Amin Ahmed tried to attack the Circular at some stage on the

ground that it offends against Article 14 as well & in that connection laid reliance on the principle laid down in the case of Charanjit Lal Chowdhury v. Union of India, AIR 1951 SC 41 (P). I, however, do not think necessary to give any conclusive opinion on this, aspect of the case in view of my finding already given that the Circular offends against Article 16 (1) of the Constitution.

18. For the reasons stated above, I hold that the order of the Government contained in their letter No. ED/R 302/54-P.C. 3493, dated the 23rd February, 1954, and also the order passed against the petitioner on 'the 27th February, 1954 on the basis of that Circular are void and the petitioner shall be deemed to have continued in service. It is accordingly ordered that a writ in the nature of mandamus should issue directing the respondents to forbear from giving effect to the order dated the 27th February, 1954 terminating the services of the petitioner.

19. The rule, is therefore made absolute but in the circumstances of the case there will be no order for costs.

Das, C.J.:

20. The main point urged in this case on behalf of the petitioner is not directly covered by any decision of this Court, or of other High Courts, or the Supreme Court of India. I have had the advantage and privilege of reading the judgment which my learned brother has prepared and on a very careful consideration of the questions involved, I have, not without some regret, come to a conclusion different from that of my learned brother. In my opinion, the petition should be dismissed with costs.

21. My reasons are the following. The facts of the case have been stated by my learned brother, and I need not re-state them. One crucial-fact or circumstance must needs be emphasised at the very outset. The petitioner held a temporary post, first in the Rationing Department at Muzal-farpur, and then in the Supply and Price Control Department at the same place. Both these posts were temporary in nature, and the very order under which the petitioner's services were terminated shows that the posts were temporary in character. The subject of that order, as stated in Circular Letter No. ED/R 302/54-P.C. 3493, dated the 23rd February, 1954, was -- "Retrenchment of the temporary non-gazetted stall of the Supply and Price Control Department".

The circular letter stated that a further reduc-tion in the inspectorate staff employed under the Department was necessary by reason of the abandonment of monopoly purchase, abolition of district embargoes and consequent reduction in supply work. If the temporary post which the petitioner held was abolished and no other reasons were given by the State Government for the termination of the services of the petitioner, then the petitioner could hardly have moved this

Court on the ground of an infringement of his right; because the petitioner had no right to be employed in a temporary post after the post had been abolished.

The circular letter cited above itself stated that all the existing posts were to be terminated on the 28th of February, 1954, and fresh appointments were to be made to new posts in the districts of their allotment, created by the circular letter in question. In paragraph (iv) the circular letter stated that the services of the surplus staff were to be terminated without assigning any reason. In making fresh appointments, however, the circular letter gave certain instructions to District Magistrates and other officers as to how the new appointments were to be made. In paragraph (iv) of the instructions, it was stated :--"The required number of staff has now been retained in order of seniority on the basis of their service records and for their being political sufferers, members of scheduled tribes and scheduled castes and displaced persons even though they are junior in service."

These are the instructions which have been challenged by the petitioner, on the ground that they infringe some of his fundsmental rights. It the matter is looked at purely from the point of view of contract, then the petitioner has no case. His services have been terminated in accordance with the terms of the contract of service; he was employed in a temporary post and the temporary post having been abolished, his services also came to an end. The question of the infringement of fundamental rights apart, the decision in AIR 1953 SC 250 (C), will apply, as the matter rests wholly in contract.

22. Let me now examine if any fundamental right of the petitioner has been infringed. Learned Counsel for the petitioner has referred us first to Article 14 of the Constitution. In view of his find-ing on Article 16 of the Constitution, my learned brother did not think it necessary to give any decision with regard to that part of the argument of learned Counsel for the petitioner which was based on Article 14 of the Constitution. As I have taken a view different from that of my learned brother with regard to Article 16 of the Constitution, it becomes necessary for me to deal with the argument of learned Counsel for the petitioner on the basis of Article 14 of the Constitution.

23. The argument of learned Counsel for the petitioner is that the expression "equality before the law" or "equal protection of the laws" applies not merely to statute law and its administration by executive authorities, but applies to executive or administrative acts as well. It is conceded that the circular letter in question is not statute law, nor does it deal with administration, with an evil eye as has been said in some cases, of any statute law. The circular letter in question is a pure and simple executive or administrative instruction to their own officers by Government.

Learned Counsel for the petitioner argues, however, that under Article 162 of the Constitution,

the executive power of a State in Part A of the First Schedule extends to matters with respect to which the Legislature of the State has power to make laws; therefore, the circular letter in question was issued by the State Government in exercise of the power given by Article 162 of the Constitution, read with item 41 in List II (State List) of the Seventh Schedule to the Constitution, item 41 relating to State public services. The argument is that if in exercising the power under Article 162 of the Constitution the State Government acts in a discriminating way, then such discrimination will be an infringement of the fundamental right guaranteed under Article 14 of the Constitution.

In support of this argument learned Counsel for the petitioner relied upon on Rustom E. Mody v. State of Madhya Bharat, AIR 1954 Madh-B 119 (G). Speaking for myself. I have some doubt if Article 14 of the Constitution applies to executive or administrative acts of the nature under consi-deration in the present case. I must not be understood, however, to hold the view that Article 14 does not apply to administration of law; if law is administered by a competent authority but in a dis-

criminating way, the person discriminated against can invoke the protection of Article 14.

24. I have referred to the doubt which I entertained with regard to the interpretation of Article 14 of the Constitution. For the purpose of this case, however, I shall assume that the interpretation, put by Mr. Amin Ahmed is the correct interpreta-tion without deciding whether he is right or not. It is however, well settled that while Article 14 of the Constitution forbids class legislation in the sense of discrimination within the same class, it does not prevent a reasonable classification being made, a classification which is reasonable in relation to the object for which the classification is made. The circular letter makes a three-fold classification-- (a) of scheduled tribes and scheduled castes, (b) of political sufferers, and (c) of displaced persons. The classification of scheduled tribes and scheduled castes has not been challenged before us as unreasonable, presumably because of Clause (4) of Article 15 and Article 16 of the Constitution.

The question is -- are the other two classifications unreasonable with regard to the object for which the classifications have been made in relation to employment in Government service? In my opinion, the answer should be in the negative.

25. I may first explain what is meant by the expressions "political sufferers" and "displaced persons". In an affidavit filed on behalf of the petitioner it has been stated that a displaced person means a person who was born in Pakistan and has migrated to the territory of India from the territory now included in Pakistan as a result of the partition of the country. The connotation of the expression "political sufferer" was explained in another circular letter of Government and in the affidavit filed on behalf of the petitioner it has been stated that the expression has the

following meaning :

"A 'political sufferer' means a person who took part in the political movement which started on the 9th August, 1942, and (1) who was injured as a direct result of his participation in the movement, or as a direct consequence of any action on the part of Government officials; or (2) who was tried and sentenced to imprisonment or fine for any offence connected with the movement; or (3) who was detained without trial for three months or more; or (4) who was under trial for six months or more, even though the case ended in discharge or acquittal; or (5) who was proclaimed as an offender in connection with the movement, but absconded; or (6) whose properties were attached even though restorer subsequently; or (7) whose properties were damaged or destroyed on account of his participation in the movement; or (8) whose studies were interrupted resulting in loss of one or more academic year on account of such participations.

The term 'political sufferer' will also include sons and daughters of those who lost their lives or were incapacitated as a direct result of their parti cipation in the movement, or as a direct conse-

quence of any action on the part of Government officials during the movement."

26. What then are the objects of employment or appointment to any office under the State? Undoubtedly, one object is to get the work of the office done efficiently. I am, however, unable to agree that that is the sole object of State employment. In my opinion, State employment can be for other purposes as well. It is here that the directive principles in Part IV of the Constitution of India are relevant. Article 39 states, inter alia, that the State shall direct its policy towards securing that the citizens, men and women, equally have the right to an adequate means of livelihood.

Article 41 states that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment old age, sickness and disablement, and in other cases of undeserved want. Article 46 states, inter alia, that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled, tribes, and shall protect them from social injustice and all forms of exploitation. Having regard to these directive principles, I am of the opinion that the object or purpose of State employment may as well be to give public assistance in cases of unemployment or any other cases of undeserved want.

It was not disputed before us that displaced persons did suffer from undeserved want by reason of the circumstances which followed in the wake of partition and events thereafter, and we can certainly take judicial notice of those circumstances. Similarly, political sufferers, as explained

above, furnish another instance, of undeserved want and I do not see any particular reason why the State Government cannot make a separate classification of such persons in order to give them employment or preference in employment under the State. Both the cases of displaced persons and political sufferers are cases of undeserved want, and in my opinion, the State Government can classify them in order to give them public assistance by way of State employment. Such classification is neither unreasonable, nor can it be said to have no relation to the object or purpose for which State employment is made.

With regard to statute law or its administration, reasonable classification must have a relation to the object or purpose of legislation. In the case before us, there is no legislation, but there is an executive instruction with regard to employment in public service. Therefore, the classifica-tion must have relation to the object or purpose of that employment. I am unable to accent Mr. Amin Ahmed's contention that the classification of displaced persons or political sufferers is an unreasonable classification or that such classifica-tion has no relation to the object or purpose of State employment.

27. I am not unaware of the decision of the Supreme Court in (S) AIR 1951 SC 226 (E). What his Lordship Das, J. of the Supreme Court, said in that decision was that the directive principles in Part IV of the Constitution could not override the fundamental rights guaranteed in Part III. His Lordship said :

"The directive principles of the State policy, which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III which, notwithstanding other provisions, are exnressly made enforceable by appropriate Writs. Orders or directions under Article 32", His Lordship further said:

"The directive principles of State policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood." In the case under our consideration, unless it is assumed that there has been an infringement of fundamental rights, there is really no conflict between the Articles in Part III and the Articles in Part TV of the Constitution. We cannot assume that there is an infringement of fundamental rights; because that will be assuming the very question at issue. I see no reason why in inter-preting Article 14 or Article 16 of the Constitution, with reference to the objects of State employment, the directive principles of State policy, us explained by the Articles in Part IV of the Constitution, should not bp taken into consideration.

In the decision cited above, his Lordship Das, J. himself said that so Ions as there was no infringement of anv fundamental right, there was no objection to the State actine in accordance with the directive principles set out in Part IV. I do not, therefore, think that the decision in AIR

1951 SC 226 (E), need compel us to hold that there was an infringement of fundamental rights in the present case. My considered view, therefore, is that it was open to the state Government to make a classification of displaced persons and political sufferers in the matter of State employment and in making that classification the State Government did not violate the provisions of Article 14 of the Constitution.

28. I now turn to Article 15 of the Constitution, another Article on which Mr. Amin Ahmed has relied. In my opinion, that Article has no application to the present case. Clause (1) of Article 15 says that a State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. It is admitted that the discrimination, if any, in the present case is not on any of the grounds mentioned in Clause (1) of Article 15. Clause (2) of Article 15 obviously does not apply, and learned Counsel for the petitioner has not relied on Clause (2) of Article 15 He has relied on Clause (1) of Article 15, which, in my opinion, clearly does not apply. I need not, therefore, say anything more about Article 15.

29. I now turn to Article 16 of the Constitution agree with my learned brother that Clause (1) of Article 16 is wider in scope than Clause (2). I also agree with him that Clauses (3), (4) and (5) are in the nature of exceptions to the general principle laid down in Clause (1). Clause (1) is in these terms :

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State". Clause (2) is in these terms:

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

It is clear that no discrimination has been made in the present case on anv of the grounds mentioned in Clause (2). Therefore, Clause (2) has no application in the present case. The question is-- does Clause (1) of Article 16 invalidate the executive instructions issued by the State Government? In my opinion, it does not. It is true that Clause (1) of Article 16 is wider in scope than Clause (2), Clause (2) mentions certain grounds and says that on those grounds only no discrimination can be made; therefore, Clause (2) is restricted to those grounds only. Clause (1), however, does not mention any grounds but states the general principle that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

This general principle, however, cannot be understood to mean that the State Government cannot lay down the qualifications for a service, within which term should be included not only

educational qualifications but also physical fitness, age, character, sense or discipline, etc. This view was expressed in (S) AIR 1955 All 33 (A). Unless some selection is permitted, it would be impossible to arrange State appointment or employment in a reasonable way. Take, for example, a case where the number of posts is limited and the number of applicants is very large. Some selection will have to be made.

Take, again, a case where a qualification is laid down for employment or appointment; such as, that all candidates for the employment or appointment in question must be graduates. It would certainly not be open to a person to say that the laying down of such qualification violates the general principle laid down in Clause (1) of Article 16. It is conceivable that a boy who has stood first class first in the Intermediate examination may indeed bo better or more than suitable than a third class or a mere pass graduate; yet it is open to the State Government to lay down qualifications for State employment or State appointment, and the laying down of such qualifications does not violate Clause (1) of Article 16. Even between two candidates who are equal or almost equal in suitability, a selection will have to be made, if the number of posts available is only one.

In my opinion, the true test is whether the selection is made on an arbitrary ground or on a rational principle, rational with reference to the objects of State employment. If, for example, a rule were made that no fat person would be employed or appointed under the State where obesity has no relation to the objects of State employment, the rule would be arbitrary and it would be a denial of equality of opportunity in matters relating to employment or appointment to any office under the State. If, however, the rule or selective principle is a rational one with reference to the object of State employment, then the adoption of such a rule or principle will not violate Clause (1) of Article 16 of the Constitution.

In my, opinion, this is the true effect of the decision in (S) AIR 1955 All 33 (A), a decision with which I respectfully agree. We, therefore, come back to the same question, whether the selection of displaced persons or political sufferers is an arbitrary or unreasonable selection. If the answer is in the affirmative, then the selection will amount to discrimination and denial of equality or opportunity. If, however, the selection is neither arbitrary nor unreasonable with reference to the objects of State employment or State appointment, then such selection does not amount to a denial of equality or opportunity in matters relating to employment or appointment to any office under the State.

It is significant that Clause (1) of Article 16 talks of "equality of opportunity" and not necessarily equality of treatment; even the rule of seniority on which the petitioner bases his claim is not necessarily connected with efficiency in the discharge of duties; a junior man can be superior in merit to a senior man. Therefore, whatever principle of selection is adopted, it must, to some

extent, be discretionary and cannot be absolutely logical.

30. My learned*brother has made a distinc- tion between what is called the objective test and the subjective test. He has said that the qualification for State employment or appointment must have relation to the office itself (and this, according to him, is the objective test) and not to any other purpose of State employment. I feel that a distinction of that kind is somewhat difficult to make and may indeed be unreal in some instances. Primarily, the qualifications for a particular office or appointment must have relation to what ia required for discharging the duties of that office; for example, if in discharging those duties a particular standard of literary excellence or technical skill is necessary, the required qualification will no doubt lay down that standard.

The trouble, however, arises where a large number of persons possess that standard and a selection has to be made from amongst them. I may make my meaning clear by giving an example. Take a case where the required qualification for appointment is the possession of a Master's degree; the number of posts available is only 3, but 300 candidates possessing the required qualifica-cation apply for the post. In such an event a further selection has to be made from amongst the candidates. How will that selection be made? The selection must be based on some principle which is related not so much to the required or minimum qualificatiion for the office but to something else which is more or less subjective; in other words, to something which is peculiar to the candidate himself; namely, whether that candidate is more suitable than others; though all possess the same required educational standard for fulfilling the duties of office.

In such a case there is equality of opportunity, but not necessarily equality of treatment In (S) AIR 1955 All 33 (A), it was rightly pointed out that in matters of this kind a discretion should vest in the State Government and unless there has been a flagrant abuse of power, or there has been discrimination which has contravened any provision of the Constitution, the courts should not lightly interfere. In the Allahabad case Government laid down that they would not re-appoint those who had taken part in the mass agitation with the object of putting undue pressure on the State Government, and they made a rule excluding those Patwaris who had not withdrawn their resignations by the 4th March, 1953.

The exclusion had practically no relation to the duties of the office, but was related to a sense of discipline--a highly subjective test. It was held that the rule was not contrary to the provisions of Article 16, if the only test is an objective test in the sense stated earlier, then the Allahabad decision must be held to have been wrongly decided. I am, therefore, of the view that the employment or appointment of a person under the State does not depend entirely on the possession of the required minimum qualification; it may well depend on other considerations as well, and at some stage or other a selective principle does become necessary: and if this selective principle is rational having regard to the purpose or object of State employment, then it cannot be

said that there has been a denial of equal opportunity in the matter relating to employment or appointment to any office under the State. The relation between Article 14 and Article 15 (1) and Article 16 (2) was thus explained in Kathi Raning Rawat v. State of Sau-rashtra, 1952 SCR 435: (AIR 1952 SC 123) (H):

"In fact, the word 'discrimination' does not occur in Article 14. The expression 'discriminate against' is used in Article 15 (1) and Article 16 (2) and it means, according, to the Oxford Dictionary, 'to make an adverse distinction with regard to: to distinguish unfavourably from others."

Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. It such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos tq these articles.

But the position under Article 14 is different. Equal protection claims under that Article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies".

In Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321 (I), it was pointed out that Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. It was observed that sex was a sound classification under Clause (3) of Article 15, and although there can be no discrimination in general on the ground of sex, the Constitution itself provides special provisions in the case of women and children. It is true that Clauses (3) to (5) of Article 16 do not make any exceptions in favour of political sufferers or displaced persons. I do not, however, think that the principle expressio unius exclusio alterius will apply, and the State Government is necessarily confined to such classification as is mentioned in Clauses (3) to (5) of Article 16.

It is worthy of note that Clause (1) of Article 16 is expressed in terms similar to Article 14. Both are general statements of fundamental rights; under Article 14 reasonable classification is permissible and, in my opinion, under Clause (1) of Article 16 a reasonable selective principle can be adopted by the State Government. The position, however, will be different if a discrimination is made on a ground on which no discrimination can be made, and this is mentioned in Clause (2) of Article 16 of the Constitution.

I may refer in this connection to a decision in B. Venkataramana v. State of Madras, AIR 1951 SC 229 (J), where a discrimination was made on the ground of caste only. Such a discrimination was clearly in violation of Clause (2) of Article 16, and the order of the State Government was held to be bad on that ground. No decision has been brought to our notice where other things being equal, the adoption of a reasonable selective principle has been held to be bad.

31. It is, in my opinion, unnecesary to consider whether the expression "employment" in Clause (1) of Article 16 does or does not mean "continuity of employment". By the circular letter in question the services of all the incumbents were terminated and fresh appointments were made. Therefore, the appointments were new appointments, and in making those new appointments certain selective principles were followed. I have held that those selective principles were neither arbitrary nor unreasonable. In that view of the matter, Clause (1) of Article 16 does not invalidate the circular letter in question. As was observed in AIR 1952 Tra-Co. 7 (B), some discrimination as between those 'acceptable' and those 'unacceptable' is inevitable in any process of selection and grading, and there can be nothing wrong in such a discrimination provided it is neither arbitrary nor unreasonable. This, in my opinion, is the true meaning of Clause (1) of Article 16 of the Constitution.

32. Tf I had held the view that the classification of displaced persons and political sufferers was arbitrary and unreasonable, then it would have been my duty to issue an appropriate writ in favour of the petitioner, though I do not think that the appropriate writ in such a case would be a writ of certiorari. A writ of certiorari is obtained for the purpose of calling for the record of a proceeding which is either judicial or quash-judicial in character and for correcting an error in that proceeding (see Jeshingbhai Ishwar-lal v. Emperor, AIR 1950 Bom 363 (FB) (K) I do not think that such a writ can issue in respect of an administrative act. That, however, is not an insuperable difficulty.

Article 226 of the Constitution is very wide in its scope, and it is open to us to issue any appropriate writ, or even an order, to safeguard the fundamental rights of a citizen I do not, however, think that any fundamental right of the petitioner has been infringed in this case, and I do not think that the petitioner is entitled to any writ or order under Article 226 of the Constitution.

33. In the result, I would dismiss the application with costs.

(In view of the difference of opinion between Das C. J. and Ahmad J., the case was placed before Ramaswami J., who delivered the following judgment) :

RAMASWAMI, J.

34. In this case Sri Sukhnandan Thakur has moved the High Court for grant of a writ under Article 226 of the Constitution commanding the respondents not to enforce the directions of the State Government contained in their circular letter No. ED/R 303/54-P.C. 3493 dated the 23rd February, 1954. Cause has been shown by the learned Government Advocate on behalf of the State of Bihar and the other respondents to whom notice of this rule was issued.

35. The petitioner Sukhnandan was appointed on the 7th of August, 1946 as Market Inspector at Muzaffarpur in the Supply and Rationing Department on a salary of Rs. 85/- per month. The petitioner continued in his appointment till 9th of December, 1947, on which date he was discharged, because there was reduction of work. The petitioner was re-appointed as Supply Inspector at Muzaffarpur on the 13th of October, 1948 on the scale of Rs. 100-5-125 E.B.-5-150 in the Supply and Price Control Department. The petitioner continued to be employed in this Post till the 27th of February, 1954, when he received the following order from the District Magistrate of Muzaffarpur:

"In accordance with Government orders your services as Supply Inspector will terminate on 26-2-1954. You are therefore directed to make over all official papers etc. to Shri Jyotindranath Mukherji, District Supply Inspector by 27-2-1954".

On the basis of this order, the petitioner was discharged from service on the 28th of February, 1954. The petitioner claims that he has a blameless record of service, that he was granted all the Increments due in the course of his service and actually the last increment was granted on the 20th of July, 1953. The petitioner alleges that he has been discriminated against and that he would not have been removed from service except for the fact that the State Government has granted undue preference to political sufferers and to displaced persons. It is alleged on behalf of the petitioner that out of 169 persons retained in service, as many as 52 were political sufferers most of whom were junior to him from the point of view of length of service.

The argument put forward on behalf of the petitioner is that the preference shown to political sufferers and displaced persons was a violation of the guarantee under Article 16 (1) of the Constitution. It is alleged that the petitioner was denied equality of opportunity under Article 16 (1) of the Constitution and it is submitted that the High Court should issue a writ under Article 226 of the Constitution restraining the respondents from making any order against the petitioner in pursuance of the Government circular already referred to.

36. On behalf of the respondents, learned Government Advocate submitted that the preference shown to political sufferers and to displaced persons was not unconstitutional and the Government circular in question did not violate Article 16 (1) of the Constitution and there was no denial of equality of opportunity within the meaning of that Article.

37. This case was argued in the first instance before the Chief Justice and Ahmad, J. But they did not agree as to how the question at issue should be decided. Ahmad, J. held that the Government circular was legally invalid, as there was a viola-tion of Article 16 of the Constitution He did not express any opinion on the question whether the Government circular offended also against Article 14 of the Constitution. Ahmad, J. accordingly held that a writ in the nature of mandamus should be issued directing the respondents not to give effect to the Government circular dated the 23rd Februany, 1954 terminating the service of the petitioner. My Lord the Chief Justice took a contrary view. He was doubtful whether Article 14 applied, to exe-cutive or administrative acts.

He, however, thought that even if Article 14 applied, there was no violation of the guarantee of equal protection laws granted in Article 14. He also expressed a similar view with regard to Article 16 of the Constitution. He considered that the preference shown to displaced persons or political sufferers in the matter of public employment was not arbitrary or unreasonable and that the petitioner was denied equality of opportunity within the meaning of Article 16(1) of the Constitution. In the result, my Lord the Chief Justice held that the petitioner was not entitled to any writ under Article 326 of the Constitution.

38. In view of this difference of opinion, the case has been placed before me for decision under Clause 23 of the Letters Patent. The learned Judges have formulated the- following question of law upon Which they have differed :

"Whether in the circumstances of the case, Government Circular Letter No. ED/R 302/54-P.C, 3493 dated the 23rd February, 1954, and the order passed against the petitioner on the basis of that circular letter, infringe the fundamental rights guaranteed under Article 14 and/or Article 16 of the Constitution; and if the petitioner is entitled to an appropriate writ under Article 226 of the Constitution for the enforcement of his fundamental rights."

39. It is important in the first place to examine tbe provisions of the Government Circular better No. ED/R 302/54-P.C.-3493 dated the 23rd February, 1954. The first paragraph of this circular mentions that a further reduction in the inspectorate staff was necessary in view of the abandonment of monopoly purchase, abolition of district embargoes and consequent reduction in departmental work. The State Government therefore directed that the entire cadre of District Supply Inspectors should be abolished with certain exceptions ana that, the incumbents should be offered the pest of Supply Inspector in case such post was acceptable to them. Paragraph 1 (iv) of this circular is important and should be quoted in full:

"The enclosed statement gives the districtwise details and particulars of the persons to be retained with effect from 1-3-1954. You have already been informed in para 7 (ii) of this department letter referred to above that the posts of Supply Inspectors. Marketing Inspectors and Enouiry

Inspectors etc. carrying the same scales of pay have been pooled on the State basis. The required number of staff has now been retained in order of seniority on the basis of their service records and for their being political sufferers, members of sche-dule tribes and schedule castes and displaced persons even though they are Junior in services."

In paragraph 2, the circular goes on to state that it has become necessary to make readjustment of the staff on Inter-district basis and, therefore, the existing posts of incumbents must be terminated on the 28th of February, 1954 and they should be appointed afresh in their new posts in the districts of their allotments. Paragraph 4 directs that the services of surplus staff whose names do not find place in the statement enclosed should be terminated without assigning any reason positively with effect from the 1st of March 1954.

40. From the statement enclosed with the circular letter it appears that 169 persons were either retained or freshly appointed as Supply Inspectors and out of this 52 were political sufferers and 10 were displaced persons.

41. What is the meaning of the expressions "displaced person" and "political sufferer'? In the affidavit of the petitioner it is stated that a "displaced person" means a person who was born in Pakistan and has migrated to the territory of India from the territory now included in Pakistan as a result of partition. This statement is not controverted on behalf of the respondents. There is also a statutory definition of the expression "displaced person" in the Displaced Persons (Debts Adjustment) Act (Act IXX of 1951). Section 2 (10) defines a "displaced person" as "any person who, on account of the setting up of the Dominions of India and Pakistan, or on account of civil disturbances or the fear of such disturbances in any area now forming part of West Pakistan, has, after the 1st day of March, 1947, left, or been displaced from, his place of residence in such area and who has been subsequently residing in India, end includes any person who is resident in any place now forming part of India and who for that reason is unable or has been rendered unable to manage, supervise or control any immovable property belonging to him in West Pakistan".

The connotation of the expression "political sufferer" is explained in another circular letter of the Government No. 237-A (124)/50-C-1467 dated the 29th January, 1951. The circular letter states :

"A 'political sufferer' means a person who took part in the political movement which started on the 9th August, 1942 and (1) who was injured as a direct result of his participation in the movement, or as a direct consequence of any action on the part of Government officials ; or

2. who was tried and sentenced to imprisonment or fine for any offence connected with the movement; or

3. who was detained without trial for three months or more; or

4. who was under trial for six months or more, even though the case ended in discharge or acquittal; or

5. who was proclaimed as an offender in connection with the movement, but asbconded ; or

6. whose properties were attached even though restored subsequently; or

7. whose properties were damaged or destroyed on account of his participation in the movement; or

8. whose studies were interrupted resulting to loss of one or more academic year on account of such participations."

42. It is stated in the Government circular that the term "political sufferers" will also "include sens and daughters of those who lost their lives or were incapacitated as a direct result of their participation in the movement, or as a direct consequence of any action on the pert of Government officials during the movement."

43. The question presented for determination is whether the preference shown to the political sufferers and displaced persons in the Gov-ernment circular in question violates the guarantee of equality of opportunity under Article 16 (1) of the Constitution. Article 16 (1) is to the follo-wing effect.

"There shall be equality of opportunity for all citizens in matter relating to employment or appointment to any office under the State." Article 16 (2) states :

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

Articles 16 (3), 16 (4) and 16 (5) are exceptions to Article 16 (2) and Article 16 (1). It is clear that in the present case there has been no discrimination of the kind mentioned in Article 16(2). But I think that Article 16 (1) is much wider in scope than Article 16 (2) and that the items of discrimination expressly mentioned in Article 16 (2) are not exhaustive. That was also the view taken both by the Chief Justice and Ahmad J., and I respectfully concur in that view. The question, therefore, still remains -- whether the petitioner has been denied equality of opportunity under Article 16 (1) because of the action taken in pursuance of that circular. It is manifest that equality of opportunity mentioned in Article 16 (1) is not a mathematical equality.

It is equally manifest that Article 16 (1) does not preclude the, administrative authority from making a selection from numerous candidates before making appointments; but the selective test

employed must be reasonable and not arbitrary. The selective test must be based upon some reasonable principle. Otherwise, the principle of equality of opportunity would be infringed. In my opinion no selective test can be reasonable unless there is some proximate connection between the selective test and the sufficient performance of the duties & obligations of the particular office. It must make it clear that the administrative authority has a wide range of discretion in making the appointment.

The administrative authority may lay down qualifications for the office -- qualifications not only of mental excellence but also of physical fitness, sense of discipline, moral integrity and loyalty to the State. In the case of technical appointments the administrative authorities may further require evidence of technical qualification and standards. In the present case, the question arises with regard to the appointment of Supply Inspectors. I find it difficult to understand how the circumstance that a candidate is a "political sufferer" or "displaced person" has any material relation or bearing on the efficiency or proper performance of his duties as a Supply Inspector.

In paragraph 1 (iv) of the Government circular there is a direction that the retention of the staff should be made "in order of seniority, on the basis of their service records and for their being political sufferers, members of scheduled tribes and scheduled castes and displaced persons even though they are junior in services," It Is not disputed by counsel for the petitioner that seniority as such is a reasonable criterion for judging the capacity of a Government servant. The service record also is obviously a reasonable criterion for comparing the merits of various candidates. I do not wish to express any opinion on the question whether membership of a schedule castes or of a scheduled tribe is a relevant consideration.

On behalf of the petitioner Mr. Amin Ahmad did not make much grievance of this fact. Perhaps the reference shown to members of scheduled tribes & scheduled castes may be justified under Article 16 (4) of the Constitution of under Article 335. I do not wish, however, to express any concluded opinion on this point as it is not necessary for the decision of this case. But the question which presents itself is whether the preference shown to "political sufferers" and to "displaced persons" is constitutionally valid. As I have already said there is no material produced on behalf of the respondents to suggest that the circumstance of a candidate being a "political sufferer" or a "displaced person" has any bearing on the question whether the candidate would efficiently perform the duties of a Supply Inspector.

I consider therefore that the selective test imposed by the Government is not rational or reasonable. It is based on extraneous or colla-teral considerations which should have no relevance in a matter of this description. It follows, I I think, that there is a violation of the guarantee of equality of opportunity under Article 16 (1) of the Constitution and the argument of Mr. Amin Ahmad on this point must be accepted as correct.

44. I have expressed the view the selective test must be reasonable and not arbitrary, otherwise the guarantee of equal opportunity under Article 16 (1) would be violated. What is the mean-ing of the word "reasonable" in this context? In the region of legal principle the following passage from the judgment of Lord Greene, M.R. in Associated Provincial Picture Houses v. Wednes-bury Corporation (1948) 1 KB 223 (L), is important :

"It is true the discretion must be exercised reasonably. Now what does that mean ? Lawyers familiar with the phraseology commonly used in relation to exercise of Statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It was frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.

If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person would ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation, 1926-1 Ch. 66 at pp. CO, 91 (M), gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters."

45. There is a similar statement of principle by Lord Esher M.R. in Reg v Vestry of St. Pancras, (18SO) 24 QBD 371 at p. 375 (N) :

"I have no doubt that the vestry should take his application into their fair consideration, and do what they think fair to the man under the circumstances, and if they do this, I have equally no doubt that the legislature has entrusted the sole discretion to them, and that no mandamus" could go to alter their decision. But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their dis-

cretion, then in the eye of the law they have not exercised their discretion,"

46. It was submitted by the Government Advocate that the Government circular should be construed to mean that the authority would give preference to "political sufferers" and "displaced persons" only if all the candidates are equally efficient otherwise. But I do not think that this interpretation can reasonably be given to paragraph 1 (iv) of the circular. There is nothing to suggest in paragraph 1 (iv) that the intention of the Government was that preference should be

given to "political sufferers" and "displaced persons" only if the candidates were equally efficient otherwise. The relevant portion of paragraph 1 (iv) states that the retention of the staff has been made "In order of seniority, on the basis of their service records and for their being political sufferers, members of scheduled tribes and scheduled castes and displaced persons even, though they are junior in services."

There is nothing in this paragraph to suggest that weightage would be given to political sufferers and displaced persons, only if the service records of the candidates were otherwise equally good. I do not therefore think that this paragraph, can be interpreted in the manner contended for by the learned Government Advocate. It is relevant to notice that in the other Circular Letter No. 237-A (124)/50-C-1467 dated the 29th January, 1951, Government State in paragraph 4 (2) that a "political sufferer" if "suitable" for appointment to a particular post should be preferred to other candidates, even if the "latter are more meritorious". In paragraph 4 (3) it is further stated that in the case of "political sufferers", educational requirements should be lowered by one step, e.g., where B.A. is normally required, I. A. would be sufficient.

I, therefore, consider that the argument of the Government Advocate on the question of interpretation is not correct. But I shall assume in favour of the respondents that this interpretation is correct. On this assumption, even, I think that the Government Circular must be held to be illegal, because the appointing authority has addressed itself both to irrelevant as well as to relevant considerations. To put it differently, the administrative authority has made the appointment on "mixed" considerations. It is established that even in such a case the discretion must be taken to be improperly exercised and the order is liable to be quashed on the ground of want of jurisdiction.

For example, in Sadler v. Sheffield Corporation, (1924) 1 Ch. 483 (O), the question arose whether the notices of dismissal to the plaintiff teachers were based on educational grounds as required by Section 29 (2) (b) of the Education Act, 1921. It was held by the Chancery Court that the notices of dismissal were not based wholly upon educational grounds but were based in part en financial grounds and in part on educational grounds and so the notices of dismissal were invalid and inoperative.

47. At page 504 Lawrence J., states : "Mixed , financial and educational grounds, in my judgment, are not educational grounds with-in the meaning of Sub-section (2) (a). In my opinion it would not be right (even if it were possible) to attempt to resolve the mixed grounds into their component parts, and then to cast away the financial grounds so" as to leave the educational grounds as the undiluted and sole ground for the dismissal. It seems to me (on the assumption that I have made as to the existence, in fact, of some educational grounds) that here the financial grounds and educational grounds were inextricably mixed, and must stand or fall together, all the

more so, as, on the uncontradicated evidence, the Education Committee would never have attempted, but for the existence of urgent financial reasons, to exercise the powers conferred by Sub-section (2) (a) at all.

Another way of putting the same point is that Sub-section (2). (a) confers upon the local education authority a discretionary power to require the dismissal of a teacher in a non-provided school on educational grounds only, and if the authority on exercising this discretionary power takes other grounds into account, the power is not well exercised."

48. The Government Advocate then put forward the submission that even if there was no rational connection between political suffering and the requirements of State service, there was a well established practice of showing preference to candidates with War services in England and the United States, It was argued that the political movement of 1942 was somewhat in the nature of the War of Independence and political sufferers & displaced persons should be treated as persons with a record of War Service. Counsel referred to the Commonwealth Public Service Acts of 1915 and 1916 enacted in Australia by which men who had served in the Expeditionary force were granted privileges & concessions for appointment to public service (see Quick's Legislative Powers of the Commonwealth and the State of Australia at p. 653).

But the analogy is not in point as there is no guarantee of equal opportunity similar to that under Article 16 in the Australian Constitution. The Government Advocate also referred to Morris Keim v. United States, (1900) 177 US 290 : (44 Law Edn. 774) (P), and to the Act of Congress of August 15, 1876, and the Civil Service Act of 1883 which give preference to honourably discharged soldiers and sailors for appointment to civil offices. The reference to American practice is not of much assistance to the respondents, for there is nothing in the American Constitution corresponding to Article 16 of our Constitution.

The legal position in America is that public office is not a proprietary or vested right and so it is outside the scope of the protection of the due process of law under the Fourteenth Amendment (see Taylor v. Beckham, (1899) 178 US 548 (Q). The argument based on the American analogy has, therefore, no bearing on the issue to be decided in the present case. It is, however, important to notice that even in the United States the preference shown to the War veterans has been criticised as interfering with the efficiency and standards of public service. For example, Munro in the Government of the United States (Fifth Edition) says thus at page 261:

"When the system of veterans' preference was first established, there was no idea that it would work such havoc with the principle of open competition. What has actually resulted in the setting up of a privileged class, not merely of war veterans, disabled or otherwise, but of peace time soldiers and their widows as well. Civilian applicants with ratings of 75 or 80 are often edged out

of the way by men and women who could not have qualified at all without their five or ten per cent. preference.

When the civil service commission, a few years ago, set up a new category designed to attract recent college graduates, the first fifty places on the eligible register were taken by veterans (for whom the age limit had been waived), although 40 per cent of them made the passing grade only with the help of their ten per cent preference. Few people will disagree with the proposition that men who have served in the armed services during a war are entitled to some special consideration at the hands of their country, but surely there are, better methods of according it than by encumbering the public service in this way."

49. In the course of the argument, the learned Government Advocate referred to Article 41 of the Constitution and argued that "political sufferers" and "displaced persons" were in the category of people of "undeserved want." It was contended that the Government was justified in showing preference to those classes of persons because of the directive principle contained in Article 41. I think that the argument proceeds upon a misconception. Article 41 states :

"The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

In my opinion, Article 41 has no bearing on the interpretation of Article 16. Article 41 refers to certain economic rights. The expression "within the limits of its economic capacity and development" is significant. Article 41 makes no express reference to political sufferers or political refugees. It is phrased in the same language as Article 15 of the Draft Bill of Human Rights. Article 41 is also similar in scope to Articles 23, 24 and 25 of the Universal Declaration of Human Rights. These three articles are based upon the modern view that political freedom in itself is nominal cr academic unless there is a reasonable standard of economic freedom.

The question in this case is whether resort can be had to Article 41 in the interpretation of Article 16. It was argued by the learned Government-Advocate that the expression "public assistance" in Article 41 may include an offer of public employment by the State. It is true that the expression "public assistance" if it had stood alone might possibly bear this meaning, but according to the accepted rule of construction, the expression "public assistance" must be construed with reference to the context in which it is placed in Article 41. It is necessary to notice in the first place that "the right to work" has already been mentioned in the first part of Article 41. It is obvious, therefore, that "public assistance" cannot include the conception of "the right to work." In the second place, "public assistance" has been used with reference to cases of "unemployment, old age, sickness and disablement."

It is obvious that in the cases of "old age, sickness or disablement" the expression "public assistance" cannot be construed to mean offer of employment. The expression must bear the same meaning with regard to "unemployment" and "cases of undeserved want." With reference to these two categories also it must be taken that "public assistance" does not include any offer of employment by the State. Indeed, the expression "public assistance" takes its colour and meaning from the context in which it is placed in Article 41. A reference to Entries 23 and 24 of List III and Entry 9 of List II of the Seventh Schedule would make this matter clear. Entry 23 refers to "social security and social insurance; employment and unemployment," Entry 24 refers to :

"Welfare of labour including condition of work, provident fund, employer's liability, Workmen's Compensation, invalidity and old age pensions and maternity benefits." Entry 9 of List II refers to "relief of the disabled and unemployable."

It is manifest that the expression "public assistance" in Article 41 refers to economic assistance or relief to people who are unemployed, or old, sick or disabled or to other similar cases of undeserved want. I am unable, therefore, to accept the argument of the learned Government-Advocate as correct and I hold that Article 41 cannot be taken into account in the interpretation of Article 16.

50. There is also another reason for holding that Article 41 has no bearing on the guarantee provided in Article 16. The expression "appointment" in Article 16 manifestly refers to appointment to a public office or to a public post, and it is well established that a public office is not "in the nature of a property or in the nature of a contract. From the legal point of view, a public office is in the nature of an agency or trust created by a public authority for a public purpose. A public officer has no vested or proprietary interest in his appointment.

He is an agent -- a person in a fiduciary relationship, who is charged with duties and obligations which are in the nature of a trust. That is the position in English Law (see Reading v. Attorney-General, 1951 AC 507 (R) and also in American Law (see United States v. Carter, (1910) 217 US 286 (S), I have no reason to think that the legal conception of a public servant in India is different.

It is true that Articles 310 and 311 of the Constitution throw a mantle of protection ever the public servants but the legal character of the office is not thereby altered. I do not think therefore, that it is right to treat public appoints ment as 'spoils" or as a species of property and the appointee to the public office as receiving public assistance or financial relief within the meaning of Article 41. I consider that the argument of the learned Government-Advocate on this point is beset by a fallacy and must be rejected.

51. I shall, however, assume in favour of the respondents that Article 41 has some relationship to Article 16 and that the expression "public assistance" in Article 41 includes the granting of public appointments to political sufferers and displaced persons. Even so, I think that Article 41 cannot be resorted to for the purpose of nulifying the guarantee of equal protection given by Article 16. This proposition is supported by high authority. In the case of AIR 1951 SC 226 (E), it was held by the Supreme Court that the directive principles of State policy cannot override the provisions enacted in Part III of the Constitution and, therefore, the provisions of Article 46 cannot be resorted to for interpretation of Article 16 and of Article 29 (2). At page 228, S.R. Das J., states :

"The directive principles of the State Policy, which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 32. The Chapter of 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.

The directive principles of State policy have to confirm to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part IV, but subject again to the Legislative and Executive powers and limitations conferred on the Stats under different provisions of the Constitution."

52. The learned Government-Advocate submitted that Government was acting bona fide in granting relief to political sufferers and displaced persons and Government was not actuated by any ulterior considerations. I accept this submission and shall take it that Government are acting completely bqna fide and with the highest of motives. I shall also assume that both political sufferers and displaced persons deserve national -support and national sympathy for the suffering they have udergone. But the question at issue in this case is not a political question, is a legal question and must be answered in a legal manner. It is certainly open to the Government to adopt all constitutional means for giving financial or other relief to political sufferers by way of grant of political pension etc., but the assistance and relief to be given, it is manifest, should not violate any constitutional provision.

53. Ahmad J. has made a distinction between what he calls the subjective test & the objective test in choosing candidates. According to him, the test is objective "if it has relation to the office itself; but it is subjective if "it has relation to the interest of the candidates offering themselves for the post." Ahmad J., accordingly holds that the preference given to political sufferers and

displaced persons is something in the nature of a subjective test and, therefore, objectionable for constitutional reasons. With great respect, I am unable to understand the distinction made by Ahmad J. Any selective test imposed by the appointing authority, for example, the requirement of physical fitness or requirement of a certain educational standard, would be both subjective and objective depending from what aspect you look at it. The test would be subjective from the point of view of the candidate, but it would be objective from the point of view of the appointing authority.

It is obvious that the qualities required of a candidate for any particular appointment would always be subjective from the candidates point of view. I, therefore, consider that the distinction between the objective and subjective test is fallacious. But the essential point is that the qualities or qualifications required of the candidate must have some relevance to the efficient performance of the duties and obligations of the parti-cular office. Otherwise, the selective test would contravene the constitutional provisions enacted under Article 16 of the Constitution. Mv lord the Chief Justice has also referred to the distinction between subjective and objective test and at p. 12 (Para. 30 of the report -- Edn.) of his judgment says :

"How will that selection be made? The selection must be based on some principle which is related not so much to the required or minimum, qualification for the office, but to something else which is more or less subjective, in other words, to something which is peculiar to the candidate himself; namely, whether that candidate is more suitable than others, though all possess the same required educational standard for fulfilling the duties of the office."

I respectfully disagree. I have already shown that the distinction between subjective and objective test is an illusory distinction and that the only question which is relevant is whether the selective test is rational -- rational in the sense that it has some bearing on the efficient performance of the duties and obligations of the particular office. In (S) AIR 1955 All 33 (A), the Government of Uttar Pradesh has made an order that they would not re-appoint those Patwaris who had taken part in the mass agitation with the object of putting undue pressure on the State Government. The Government order further stated that those Patwalis who had not withdrawn their resignations by the 4th March, 1953 would be excluded from re-appointment. My Lord the Chief Justice has observed with reference to this case:

"The exclusion had practically no relation to the duties of the office, but was related to a sense of discipline -- a highly subjective test."

With great respect, I am unable to agree. I do not think that the quality of discipline is any more subjective than the possession of a moral or educational qualification. It is, however, obvious that a sense of discipline is a highly relevant qualilcation in deciding whether a candidate is fit for any

Government appointment including the post of Government Patwari. The test imposed by the Uttar Pradesh Government is, therefore, a rational selective test and does not contravene the provisions of Article 16 of the Constitution. That is the ratio decidendi of the Allahabad case which, in my opinion has been rightly decided.

54. Ahmad J., has taken the view that the word "employment" used in Article 16 refers not only to appointment but also to continuity in the appointment. On the basis of this reasoning Ahmad J., has drawn the conclusion that the termination of the appointment falls within the ambit of Article 16 and the guarantee of equal opportunity applies not only to the case of an appointment but also to the case of termination of the appointment. With great respect, I do not agree with the interpretation placed by Ahmad J., on the word "employment" in Article 16, though I agree for reasons which I shall presently state that the guarantee under Article 16 applies both to the case of appointment and termination of appointment.

Article 16 expressly makes a distinction bet-ween "appointment" & 'employment'. These two words occur not only in Article 16 (1) but also in Article 16 (3). Article 16 (2) uses the expressions "employment" and "office under the State." Article 16 (4) refers to "appointment" or "posts' & to "the services under the State." In my opinion, the words "employment" & "appointment" connote two different conceptions. "Appointment" obviously refers to appointment to an office. The term "appointment" therefore implies the conception of tenure, duration, emolument & 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, labourers 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 standardised by laws and regulations. This distinction between public office and public employment is well recognised in American Law (See James Hall v. State of Wisconsin, (1880) 103 US 5: 26 Law Ed. 302 (T) & United State v. Hartwell, (1863) 73 US 380 (U), I think the same distinction has been imported into Article 16 by our Constitution-makers.

The distinction is not, however, important for the purpose of the present case. For, 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 startling 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.

55. For the reasons I have expressed, I hold that the order of the Govt of Circular Letter No. ED/R302/54-PC 3493 dated the 23rd February, 1954 violates the guarantee under Article 16 of the Constitution and is, therefore, legally invalid. The question arises as to what form of writ the petitioner should be granted. It is well established that if the administrative authority decides a matter by taking into account extraneous considerations, the order which the authority purports to pass is an order passed without jurisdiction and it must be taken in the eye of law that the authority has not exercised its power at all.

For example, in the King v. Board of Education, (1910) 2 KB 165 (V), the Court of appeal granted a writ of certiorari to Quash the decision of the Board of Education under S 7 of the Education Act on the ground that the Board of Education by a wrong construction of the Act failed to answer the real question, submitted to them but answered a different question, The Court of Appeal took the view that the Board of Education had declined jurisdiction and hence issued a writ of mandamus directing the Board to determine the question according to law. In the present case also. I think that the proper order would be to grant a writ of certiorari to quash the order of the Government contained in their Circular Letter No. ED/R302/54P.C 3493 dated the 23rd February, 1954.

In my opinion, a writ of mandamus should also be issued directing the State Government to consider the case of the petitioner in accordance with law. Since there is only one petitioner, namely, Sukhnandan Thakur, before this Court who has made this application and there is no other aggrieved candidate, I do not think it is necessary for the State Government to disturb all the appointments made already on the basis of the illegal circular.

It is sufficient, for instance, if the State of Bihar re-consider the case of the juniormost political sufferer or the juniormost displaced person, who has already been appointed, and decide whether the petitioner is entitled on the basis of efficiency and service recorded to be appointed to the post in preference to such person. It is not intended by this Court as a result of this direction that Government should disturb all the appointments made on the basis of the circular. It is only intended that the arrangement made should be disturbed to the extent of providing for one vacancy, that the State Government should properly direct itself in law, and should consider if the petitioner is entitled to be appointed.

56. I would answer the questions of law formulated by the Division Bench in the above manner. I agree in substance with the conclusion reached by Ahmad J., though on a different line of reasoning. I regret that I have reached a conclusion different from that of my lord the Chief Justice.