

(1981) 01 DEL CK 0005

In the Delhi High Court

Case No : Letter Patent No. 32 of 1980

Om Prakash Sharma

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 30-01-1981

Acts Referred:

Constitution of India, 1950 — Article 14, 309

Citation : (1981) ILR Delhi 361

Hon'ble Judges : T.P.S Chawla, J;S.N. Kumar, J

Bench : Division Bench

Advocate : M.C. Bhandare, A.N. Minocha and R.K. Anand, for the Appellant;

Judgement

S.N. Kumar, J.

(1) The appellant is before us against the judgment of a learned Single Judge in Civil Writ Petition No. 259 of 1979 who decided against him. The appellant challenged the order sending him back to the Council of Scientific and Industrial Research where he was permanently employed before coming to the Commission for Scientific and Technical Terminology in 1965.

(2) The circumstances leading to this appeal are that a Commission called "Commission for the Scientific and Technical Terminology" was set up in 1960 as a subordinate office in the Ministry of Education, Government of India. The main function of the Commission was to evolve and develop terms for scientific and technical subjects in Hindi, and after evolving the Hindi terminology to produce works containing the terminology developed and then to get the same published. Before this Commission was set up the Ministry of Education, Govt. of India, had another subordinate office called "the Central Hindi Directorate" and the main function of the said Directorate was to encourage the progressive use of Hindi. For the purposes of carrying out the work of the Commission various types of posts were created. In the present appeal we are only concerned with the post of "Principal Scientific Officer" (in short "P.S.O."). Vide sanction dated 21st March,

1963, 33 posts of Principal Scientific Officers in the scale of Rs. 1000 1500 were created on year to year basis. Under the powers conferred by the proviso to Art: 309 of the Constitution, the President made the recruitment rule. The said rules were published vide notification dated 30th April 1964 and are called "Principal Scientific Officers, the Commission for Scientific and Technical Terminology, Recruitment Rules 1964." The Rules contain a schedule. Rule 4 of the said rules provides that the method of recruitment, age limit, qualifications and other matters connected therewith are specified in columns 5 to 13 of the Schedule. Under Col. 5 of the schedule the post is described as "Selection Post". Column 6 gives the age limit. Column 7 gives the educational and other qualification for direct recruits. Column 10 gives the various sources from which recruitment is to be made, that is, by direct recruitment or by promotion or transfer. In Columns 7 and 10 distinction is made between various posts of P.S.Os. on the basis of the nature of duties required to be performed and accordingly different qualifications are prescribed. The three different classes of P.S.Os. provided for by the recruitment rules are for doing terminology work, production work and publication work. Separate educational and other qualifications are provided under Column 7 for the three different classes. The method (source) of recruitment for the three different classes is also provided separately under Column 10. It will help in putting the matter in the right perspective if the provisions of Columns 7 and 10 are reproduced :

7 10

For terminology work essential: For Terminology Posts By 1. (a) Master's Degree in a science transfer on deputation of or arts subjects or degree Central and State Government in Engineering or Medicine employees possessing or Agriculture, according to requisite qualifications including the requirements with transfer on contract sound knowledge of Hindi from universities and English, proof of which and other educational & should be furnished. research institutions failing Or which by direct recruitment. (b) Master's degree in Hindi with sound knowledge of Sanskrit or Master's degree in Sanskrit with sound knowledge of Hindi. 2. About five years" teaching experience of University level or experience of Terminological work. Qualifications relaxable at Commission's discretion in the case of candidates otherwise well qualified. Desirable: (i) Research work of a high order in the subject concerned; (ii) Experience of Terminological work for those having teaching experience, and teaching experience of the University level for those having experience of Terminological work ; (iii) Experience of lexicographical or translation work or of writing original articles, books etc. in an Indian language. (iv) Knowledge of one modern Indian language other than Hindi; and (v) for 1(b) only knowledge of subject (according to requirements and knowledge and interest in linguistic studies). For production work (original For production work writing and translation) Essential :-- Direct Recruitment. 1. (a) Master's degree in English with Hindi as an elective subject at the degree stage ; Or (b) Master's

Degree in Hindi or equivalent qualification with knowledge of English; Or (c) Master's Degree in Sanskrit with Hindi as an elective subject at the degree stage and sound knowledge of English ; Or (d) Master's Degree in any Arts or science subject (according to the requirement) with sound knowledge of Hindi/English. 2. About five years practical experience of original writing and or translation work in a supervisory capacity. Qualifications relaxable at commission's discretion in the case of candidates otherwise well qualified. Desirable: (a) Research work of high orders, (b) Knowledge of Sanskrit (c) Experience of Terminological and lexicographical work, (d) Knowledge of one modern Indian language other than Hindi; and (e) Knowledge of and interest in linguistic studies. For publication work For Publication work " Essential : Direct recruitment. (a) Master's Degree in science or arts subject with knowledge of Hindi; (b) Knowledge of printing techniques, processing typography, art work, book work, and proof-reading; and (c) Five years" experience of publication work either under Government or in a renowned private publishing house. Qualifications relaxable at Commission's discretion in the case of candidates otherwise well qualified. _____

(3) Further in order to meet the requirements of various fields of study such as engineering, medicine etc. in the class "terminology work" the P.S.Os. appointed were designated as "P.S.O. "(Engineering); P.S.O. (Medicine); P.S.O. (Pharmacy); P.S.O. (Linguist) etc." It is not in dispute that all the posts, as sanctioned, were of Principal Scientific Officers and only by the Recruitment Rules three Classes were created. Further divisions were, however, made administratively in the class of officers who were doing the job of evolving/coining. Hindi terminology. For instance, for evolving Hindi equivalents of technical terms in the fields of engineering a person having qualifications in the field of engineering was appointed and his post was called "P.S.O. (Engineering)" and so on. In order to perform its duties and to achieve the objectives for which the Commission was set up it was found necessary to make these sub-classes and the commission did so. Within this framework the Commission proceeded to make recruitment to the posts of Principal Scientific Officers.

(4) The learned Single Judge found that the Commission after its constitution, initially desired that six posts of Principal Scientific Officers be filled up and necessary sanction was obtained. For "terminology work" four persons were recruited and the method of recruitment as provided under Column 10 of the Schedule for this class was followed. One post each was kept for "Production Work" and "Publication Work" and the U.P.S.C. on Commission's request advertised for these, two posts. The four posts for the "terminology work" were filled after addressing requisitions to various State Governments, Universities and other Educational Institutions. After considering the forwarded names in consultation with the U.P.S.C. these posts were filled. In the advertisement for the two posts for production and publication work it was specifically indicated that the posts are temporary but likely to continue. The appellant-petitioner before us made two applications in response to the advertisements. cue for the

post of "production work" and the other for "publication work". After considering the cases of nearly 46 applicants the U.P.S.C. recommended the appellant-petitioner for the post of "publication work" and another person, namely. Dr. Shivnandan Parshad for "Production Work". The appellant was not selected for production work. The appellant was, at that time, working with the National Council for Education of Research and Training (NCERT) on deputation from the Council for Scientific and Industrial Research (CSIR) where he was holding a permanent post. The Ministry of Education accordingly made an offer of appointment to the petitioner vide letter dated 29th July 1965 but addressed the same to the Secretary, NCERT. A copy of the offer made was filed as annexure R6 to the counter-affidavit filed on behalf of Union of India. Material terms of the offer were :

"THE terms of appointment are as follows : (i) The appointment is temporary and will not confer on him" any title to permanent employment. (Li) He will be on probation for a period of two years from the date of appointment, which may be extended or curtailed at the discretion of the competent authority. Failure to complete the period of probation to the satisfaction of the competent authority will render the appointee liable to reversion to his substantive post on which he may be retaining a lien. (iii) The appointment may be terminated at any time by a month's notice given by either side, viz., the appointee or the appointing authority, without assigning any reasons. The appointing authority, however, reserves, the right to terminating the services of the appointee forthwith or before the expiry of the stipulated period of notice by making payment to him of a sum equivalent to the pay and allowance for the period of notice or the unexpired portion thereof. (iv) The appointment carries with it the liability to serve the any part of India or outside."

This offer was accepted by the appellant by his letter dated 30th July 1965 and was forwarded to the Commission under cover of N.C.E.R.T. letter No. F. 8-9/65-NCE-II dated 31st July 1965. The appellant was allowed to join duties on 6th August 1965. The N.C.E.R.T. relieved him without receiving formal approval from the C.S.I.R. On 12th August 1965 the C.S.I.R. requested the Commission to treat the appointment of the appellant in the Commission on "Foreign Service Terms" because the appellant was a permanent officer of the C.S.I.R. The terms suggested in the letter of 12th August 1965 were as under

"1. The appointment of Sharma in the Commission for Scientific and Technical Terminology will be for a period of two years with effect from the date he takes over charge of the post in the CSTT. 2. During the period of two years, Shri Sharma make up his mind whether he would like to revert to the Csir or choose his career in the C.S.T.T. 3. During the period of Foreign Service, Shri Sharma will draw pay in the scale of Rs. 1000-100- 1500 plus usual allowance. His pay will be fixed in accordance with the rules. 4. Shri Sharma will be paid by the C.S.T.T., traveling allowance for his journeys to take up the assignment and to return there from in accordance with the Central Government S.R. 5. His T. A.

and D. A. (for duty journeys) will be regulated in accordance with the S.R.S. of the Government of India as applicable to Council Servant. 6. The joining times pay of Shri Sharma when proceeding on Foreign Service and on reversion there from shall be payable by the C.S.T.T. joining time pay being regulated under the Central Government fundamental and S.Rs. 7. The leave of Shri Sharma during the period of Foreign Service shall be regulated under the rules of his parent office C.S.I.R. and the C.S.T.T. will pay to his parent office C.S.I.R. leave salary contribution at the rate of 12 per cent as his pay from time to time till he is on Foreign Service. 8. The C.S.T.T. will be liable to pay leave emoluments in respect of disability leave granted to Shri Sharma on account of any disability incurred in and through under the C.S.T.T. even if such disability manifests itself after the termination of service under the C.S.T.T. 9. The C.S.T.T. will be responsible for the payment of any gratuity or pension that may be admissible under the Central Civil Service (extra ordinary) pension Rules for extraordinary pension admissible under his parent office C.S.I.R. if any injury or death occurs during Foreign Service. 10. That Shri Sharma will not be allowed to any contribution scheme of the C.S.T.T. 11 The C.S.T.T. shall pay pension contribution to his parent office C.S.I.R. in respect of his Foreign Service to be communicated later. 12. The C.S.T.T. shall offer Shri Sharma medical facilities not inferior to those which he would have been entitled to in the parent office C.S.I.R. 13. Shri Sharma will be entitled to leave travel concession as admissible in his parent office C.S.I.R. of his status and the expenditure will be borne by C.S.T.T. 14. If Shri Sharma occupies accommodation provided by the Govt. the C.S.T.T. will bear the difference of market rent and that under F.R. 45-A."

(5) After exchanging some correspondence finally by letter dated 11th April 1966 the Ministry of Education informed the Chairman of the Commission its decision with a copy each to the appellant and the C.S.I.R. in the following terms :

"In this connection, I am to say that it has since been decided in consultation with the Ministry of Finance, that Shri O. P. Sharma is a permanent employee of C.S.I.R., the Govt. of India will pay leave salary and pension contribution to the C.S.I.R. according to their Rules, provided the C.S.I.R. agrees to retain Shri O. P. Sharma lien until he is permanently absorbed by the Government."

The Council by letter dated 25th June 1966 agreed to retain the lien of the petitioner-appellant for a period of two years, w.e.f. 6th August 1965 "in the first instance". On 19th July 1966, the Secretary of the C.S.I.R. intimated the rates of leave salary and pension contribution in respect of the appellant. Later on by letter dated 10th October 1967, the C.S.I.R. expressed its agreement "to the continuance" of the appellant for a further period of two years w.e.f. 6th August 1967 on the same "Foreign Service Terms". It is common case of the parties that after this communication there was no further communication from the C.S.I.R. to the Commission on this point. However, the appellant continued to work with the Commission and the learned Single Judge further found that during the period of employment of the appellant with the Commission certain deductions

were made from his pay towards the General Provident Fund. For that period, the appellant had also paid bids contribution towards the provident fund to the Csir because the same was compulsorily payable by him under the service rules of the CSIR. When this fact came to the notice of the Commission a sum of Rs. 33,324 was refunded to the petitioner-appellant which was received from him towards the general provident fund deductions. It is not clear for which period these deductions were made and when was the amount refunded but the learned Judge found that the appellant was paying provident fund contribution directly to the C.S.I.R. applicable to him and this finding of fact was not disputed.

(6) I think it will also be proper to mention at this stage that by his letter dated 22nd January 1974 an extract from which was filed the appellant had strongly contended that the C.S.I.R. was retaining his lien since 1965.

(7) The advertisement issued by the U.P.S.C. is on record and applications were invited specifically for one post each for the class "production work" and "publication work". It is not disputed that the appellant applied for both the posts and after selection by the U.P.S.C. in the offer made to him on 29th July 1965 he was informed that on the recommendation of the U.P.S.C. a temporary post of Principal Scientific Officer is offered to him. It is correct that in the said offer after the words "Principal Scientific Officer" there was no suffix or prefix but the appellant took over as P.S.O. (Publication) and in fact in his charge assumption report he described his designation as "Principal Publication Officer". Thereupon, the Accountant General Central Revenue raised an objection that the sanctioned post was not of "Principal Publication Officer" but of "Principal Scientific Officer" and for the purposes of audit the correct description of the post as per the order of sanction had to be given. The appellant submitted a fresh charge assumption report as "Principal Scientific Officer."

(8) The U.P.S.C. while sending the recommendation dated 29th December 1964 specified the post for which the appellant was selected as "P.S.O. (Publication)".

(9) The factual position stated hereinabove is not in dispute. I proceed now to consider the contentious of the appellant.

(10) Mr. Bhandare, learned counsel for the appellant, pointed out that the C.S.I.R. is a registered society and is a legal entity separate from the Government. There being no negotiations or correspondence disclosing an arrangement of deputation or of a transfer under a contract and the appellant being a direct recruit there was no question of the appellant's reversion to a substantive post. It is correct that the method of recruitment for the post to which the appellant was appointed was by direct recruitment. But the appellant having come as a direct recruit and having accepted the offer and joined duties on 6th August 1965 there was no occasion for the Commission to enter into any obligation under the Foreign Service Terms and to agree to give various benefits to the appellant which were stipulated by the C.S.I.R. on 12th August 1965. Since the appellant had come as a direct between it was between him and his

then employer, C.S.I.R., to relieve him or not to relieve him. But foreign service terms were agreed and the Commission undertook: the various obligations. One of the terms of appointment of the appellant was that he would be liable to reversion to his substantive post on which he may be retaining a lien, if he fails to complete the period of probation to the satisfaction of the competent authority. It is also apparent that the appellant was kept fully informed and the foreign service terms were settled with his full knowledge. He at no stage asserted when the foreign service terms were under negotiation that he was a direct recruit and it is for him to settle the terms and conditions upon which his employer, the C.S.I.R. could relieve him and it was none of the concerns of the Commission. The appellant having accepted his appointment subject to the terms of his appointment cannot now be allowed to repudiate it particularly in the aforesaid circumstances.

(11) Mr. Bhandare, learned counsel for the appellant, then contended that when 33 posts of P.S.OS were sanctioned it was the formation of a cadre and the appointment of a person as a P.S.O. would be an appointment to the cadre and anyone else appointed as a P.S.O. subsequent to the date of his appointment would be junior to him. He further submitted that it is of no consequence that the recruitment rules to the various posts provide for three classes and for different qualifications, different sources of recruitment and different nature of duties and functions for each class.

(12) Fundamental Rule 9(4) defines cadre as the strength of a service or a part of a service sanctioned as a separate unit. We have not been shown the order sanctioning 33 posts of P.S.Os on 21st March 1963 but it is not disputed that the posts were temporary and on year to year basis. The qualifications, method of recruitment, nature of work, competence or eligibility and duties being different for each class there is no question of the post of a P.S.O. under one class being inter-changeable with the post of a P.S.O. in a different class or from one sub-class of a particular class to another sub-class as in the case of "terminology work". The learned counsel contended that there being no prefix or suffix attached when the post of P.S.O. was offered to the appellant it cannot be said that the appellant was recruited for a particular class and in fact he has been discharging the duties of posts which fell under different classes including "terminology work". I do not find any force in this submission. The recruitment rules specifically provide for three different classes and any appointment under the rules could only be under one of the three classes and not to all the three. If the learned counsel is right then why did the appellant make two applications when according to him posts were only of a P.S.O. The appellant applied for two posts but was interviewed and recommended by the U.P.S.C. for the post of P.S.O. (Publication Work). He was not selected for the post of P.S.O. (Production Work). The circumstance that in the offer of appointment the words "publication work" were not used would not change his appointment. In the recruitment rules do not contemplate the recruitment of a person to the post of the P.S.O. without reference to the class for which he is recruited. The three classes are mentioned

in the recruitment rules and for any valid appointment under the rules the appointment has to be in one of the three classes. In these circumstances, it cannot be validly argued that the appellant was appointed as a P.S.O. without regard to any class mentioned in the recruitment rules. He was, in fact, appointed as a P.S.O. (Publication Work) and he did take charge of that post. It is correct that the appellant was in fact looking after the duties of posts in other classes whenever the incumbents of those posts were not available. I think this is not of much consequence. An appointment under the Government has to be in accordance with the rules and according to the formalities prescribed for a particular post. Simply because the appellant had been discharging current duties of some post he does not get appointed to that post. His initial appointment was admittedly not changed at any time. The post of P.S.O. (Publication Work) was abolished in about 1972 and after an attempt to absorb him in the class "terminology work" as P.S.O. (Engineering) failed because the U.P.S.C. did not agree, he was finally sent back to the C.S.I.R. with effect from 30th September 1976 by order dated 27th February 1976. The abolition of the post of P.S.O. (Publication Work) was done on the recommendation of the Staff Inspection Unit of the Ministry of Finance and the same is not challenged. No other post was allowed to this class and there was no one else in the Commission holding the post of P.S.O. (Publication Work). The contention that P.S.O. cadre was one and persons recruited for one class shall be transferable to any of the two other classes lead to the argument that the appellant was the senior most Principal Scientific Officer and if at all the Commission found it necessary to reduce the strength of the Principal Scientific Officers the junior most officer should have been asked to go. I do not find any force in this contention also. Simply because the posts carried same "scale of pay and were sanctioned at one time would not form a cadre.

(13) The learned counsel then contended that the appellant ceased to be on Foreign Service Terms from 5th August 1969 because there is no document on record to show that the C.S.I.R. at any time agreed to retain the lien of the appellant beyond 5th August 1969. He further contended that as per Clauses 7 and 8 of the Foreign Service Terms the leave salary and pension contribution were paid by the Commission only for a period of three years, i.e. up to 1968 and payments on this account up to the date when the appellant was sent back to the C.S.I.R. were made during the pendency of the writ petition. He submitted that these payments were made only to alter the state of facts and to support the stand taken by the Commission. At this stage, it is proper to clear the confusion which obviously was there because of the use of the expression "Foreign Service Terms" and "deputation" alternatively by the Commission and before the learned Single Judge. These are two types of arrangements having different incidents. It is correct that the appellant was not sent on "deputation" by the C.S.I.R. He went to serve under the Commission on certain terms and conditions called "Foreign Service Terms". This arrangement was strictly not "Foreign Service" as defined in the Fundamental Rules. It was in the nature of a

contractual arrangement and the recruitment although direct as prescribed by the rules was converted into a transfer under a contract, obviously to confer benefits mentioned in the letter dated 12-8-1965 reproduced above to the appellant at public expense. The argument is that the appellant cannot be treated on foreign service terms after 6th August 1969. The appellant continued to work in the Commission for nearly seven years thereafter and all his links according to the counsel with the C.S.I.R. stand snapped after 6-8-1969 and the appellant had to be treated as a surplus employee of the Government on 30th September, 1976 to be absorbed as per the rules and schemes of the Government. In this connection the learned counsel pointed out that the C.S.I.R. agreed to retain the lien for a period of two years only although the Ministry of Education by its letter dated 11-4-1966 wanted the C.S.I.R. to retain the appellant's lien until he was permanently absorbed. It is to be borne in mind that the C.S.I.R. did not reject this condition as stipulated by the Ministry and instead by its letter dated 25-3-1966 stated that it was retaining the lien for a period of two years "in the first instance". Then the lien was further extended by the C.S.I.R. for a period of two years. The "Foreign Service Terms agreement" was entered into between the Commission and the C.S.I.R. and the appellant was being informed by sending him copies of the correspondence. As noticed by me above the appellant joined duties with the commission on 6th August, 1965 and till that date there was no mention of additional liabilities of the Commission. The appellant could very well have resigned from his post with the C.S.I.R. in 1965 and then joined. He did not do so. I have no doubt that it was on account of his efforts that the C.S.I.R. sent letter dated 12th August, 1965 and the Commission agreed to the foreign service terms. At that time these terms suited him and now they do not seem to suit him. The appellant at no stage till he was reverted asked the C.S.I.R. to terminate his lien. The C.S.I.R. has accepted the appellant back on its rolls and the Commission as per its obligation created by the foreign service terms has made the requisite payments to the C.S.I.R. It also is not in doubt that the appellant continued to make payments towards the provident fund to the C.S.I.R. during the time he served with the Commission. Although, there was no formal extension of the Foreign Service Terms in writing, it is clear that parties accepted the position that the arrangement continues. The appellant, at no stage, raised any objection. His lien was maintained in fact throughout to his knowledge and tacit consent by the C.S.I.R. and he did not ask for its termination. He did not also ask the Commission that he was a surplus employee and be treated as such.

(14) It was then contended that the appellant was appointed on probation for a period of two years, his work was satisfactory and although no specific order confirming him was made, by virtue of paragraph 8(v) of Ministry of Home Affairs Memorandum No. F-44/1/59-Ests/A, dated 15th April, 1959, he would be deemed to have been confirmed at the expiry of the period of four years, that is double the period of probation initially fixed. The submission is that paragraph 8(v) of the aforesaid memorandum is similar to the rule which was before the

Supreme Court in State of Punjab Vs. Dharam Singh, and that authority is applicable. In support of his submission learned counsel further relied upon a Single Bench decision of this Court (H. L. Anand J.) reported as M. P. Pandey v. Union of India, 1979 (3) S.L.R. 72 and another Single Bench decision of this Court (Leila Seth J.) in Civil Writ No. 601 of 1972, Brig. .J. S. Paintal v. Union of India(3), finally decided on 30th August 1979. I shall first consider the ruling of the Supreme Court. In Dharam Singh's case (supra) the Supreme Court reviewed its earlier decisions and observed :

"THIS Court has consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. In such a case an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation it is not possible to hold that he should be deemed to have been confirmed. The reason for this conclusion is that where on the completion of the specified period of probation the employee is allowed to continue in the post without an order of confirmation, the only possibility to take in the absence of anything to the contrary in the original order of appointment or promotion or the service rules, is that the initial period of probation has been extended by necessary implication. In all these cases, the conditions of service of the employees permitted extension of the probationary period for an indefinite time and there was no service rule forbidding its extension beyond a certain maximum period. In the present case. Rule 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum, period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

Proviso to Rule 6(3) which was held by the Supreme Court as forbidding the extension of the probationary period beyond the maximum period of 3 years read as follows :

"PROVIDED that the total period of probation including extension, if any, shall not exceed three years."

Their Lordships said :

"The employees referred to in R. 6(1) held their posts in the first instance on probation for one year commencing from October 1, 1957. On completion of the one year period of probation of the employee four courses of action were open to the appointing authority under Rule. 6(3). The authority could either (a) extend the period of probation provided the total period of probation including extensions would not exceed three years, or (b) revert the employee to his former post if he was promoted from some lower post, or (c) dispense with his services if his work or conduct during the period of probation was unsatisfactory or (d) confirm him in his appointment. It could pass one of these orders in respect of the respondents on completion of their one year period of probation. But the authority allowed them to continue in their posts there under Rule 6(3). In the absence of any formal order, the question is whether by necessary implication from the proved facts of these cases, the authority should be presumed to have passed some order under Rule 6(3) in respect of the respondents, and if so, what order should be presumed to have been passed. The respondents were not promoted from lower posts and there was no question of their reversion to such posts at any time under Rule 6(3). The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have extended the period of probation up to October 1, 1960 by implication. But under the proviso to R. 6(3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to R. 6(3) it is not possible to presume that the competent authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers."

(15) In *Shri Kedar Nath Bahl Vs. The State of Punjab and Others*, , their Lordships of the Supreme Court observed :

"It was contended that even if it is assumed that he was not confirmed by the Government in the post, it must be held that he was automatically confirmed in the post after the first six months of probation. He was a Government servant before he accepted this post and under the terms of appointment already referred to, he was on probation for six months. The period of probation was over on 5-5-1955. It is the contention of the appellant that on the expiry of this period of probation he was automatically confirmed. The record, however, shows that the probationary period was extended by the Government from time to time though the orders were made with retrospective effect. The appellant contends that these orders extending the period of probation were irregular and illegal. Either he should have been discharged within the first six months of probation, or, if he was not so discharged he was entitled to automatic confirmation. We do not think that this contention is correct. The law on the point is now well settled. Where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed in that behalf. Unless the terms of appointment clearly indicate that

confirmation would automatically follow at the end of the specified period, or there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. At the end of the period of probation an order confirming the officer is required to be passed and if not such order is passed and he is not reverted to his substantive post, the result merely is that he continues in his post as a probationer. The terms of appointment do not show that the appellant would be automatically confirmed on the expiry of the first six months of probation nor is any rule brought to our notice which has the effect of confirming him in the post after six months of probation. The position of the appellant, Therefore, till the abolition of the post on 4-11-1958 was that he continued to be a probationer and had no right to the post. It, therefore, follows that when the tenure of the post came to an end he was automatically reverted to his original post as an Inspector on which he had the lien."

Review against this judgment was allowed and the appeal was reheard. It was again dismissed. This is mentioned by Untwalia J. in *State of Maharashtra v. Veerappa R. Saboji and another*, : (1979)IILLJ393SC . Untwalia J. considered the above ruling and the ruling in *Dharam Singh's* case in : (1979)IILLJ393SC. The appointment in this case was on probation and in a temporary capacity. The relevant rule i.e. Clause (iv) of sub-rule 2 of Rule 4 provided :

"UNLESS otherwise expressly directed, every person appointed under the last foregoing sub-rule shall be on probation for a period of two years and on the expiry of such period he may be confirmed if: (a) there is a vacancy; and (b) his work is found satisfactory."

There was sub-clause (c) also which was deleted in 1961 and we are not concerned with that sub clause. Untwalia J. observed . There are two parts of cl. (iv) :

(1) that it is imperative to put every person appointed under sub-rule (2) on probation for a minimum period of two years unless otherwise expressly directed and (2) on the expiry of the said period of two years the person appointed may be confirmed if there is a vacancy and if his work is found to be satisfactory. The plain meaning of the rule is that there is no automatic confirmation on the expiry of the probationary period of two years in the first instance. On the expiry of the said period and on the fulfillment of the requirement of sub-clauses (a) and (b) a Government servant becomes eligible for being confirmed and normally he is likely to be confirmed. But it is a matter of common knowledge in many branches of Government service including the Judiciary that for administrative reasons or otherwise the confirmation is delayed and is made at a subsequent time. It may also be delayed for watching the work of the Government servant for a further period. The expression unless otherwise expressly directed governs only the first part of clause (iv) and not the second as was attempted to be argued by Mr. Nariman. In my opinion the rule in question, Therefore, comes under the ordinary and normal rule that without an express order of confirmation the

Government servant will not be taken to have been confirmed in the post to which he was appointed temporarily and/ or on probation. It is not covered by the exceptional rule like the one which was the subject-matter of consideration of this Court in *State of Punjab Vs. Dharam Singh*, ."

This law enunciated by the Supreme Court in various rulings noticed above is that probation unless specifically ended by confirmation continues and no express order extending probation is necessary. It will be deemed to have been extended provided there is no bar as was the case in *Dharam Singh's* case. Now the relevant portion of the aforesaid memorandum, i.e. paragraph 8 (v) reads as under :

"8(V): The normal probation may certainly be extended in suitable cases. It is not desirable that an employee should be kept on probation for years as happens occasionally at present. It is, Therefore, suggested that save for exceptional reasons probation should not be extended for more than a year and no employee should be kept on probation for more more than double the normal period."

A bare reading of the above sub-paragraph shows that it was in the nature of guideline, a mere suggestion. No intention is apparent to confer any right, nor to make it a condition of service. The first sentence rather re-affirms that in suitable cases normal period of probation be extended, and no time limit is fixed. The expression "may certainly be extended" is evidently a reiteration of the right of the Government to extend the period of probation as it thinks fit in suitable cases. The remaining portion records what occasionally happens and suggests a course of action in cases involving exceptional reasons, and those where there are no exceptional reasons. A mere suggestion cannot be construed as an express bar. In *Dharam Singh's* case the proviso is a prohibition in categorical terms and is part of a rule. The two provisions are quite different and ruling of the Supreme Court in *Dharam Singh's* case has no application.

(16) I now come to the two rulings by two learned Single Judges of this Court in *M. P. Pandey's* case and *J. P. Paintal's* case (supra).

(17) In *Pandey's* case Anand J. While dealing with para 8(5) of the memorandum dated 15th April 1959 held that the instructions are of binding nature and have the force of law.

(18) This ruling was cited in *Paintal's* case before Leila Seth J. who agreed with Anand J. and allowed review of her judgment dated 9th May, 1979. The petition was finally disposed of on August 30, 1979 after review. After referring to the ruling of the Supreme Court in *Dharam Singh's* case Seth J. observed as under :

"THE proviso to Rule 6(3), *Dharam Singh's* case, was in the nature of a total prohibition". It reads as follows : "Provided that the total period of probation including extension, if any, shall not exceed three years".

In the present case, the relevant words used in the office memorandum dated

15th April, 1959 are as follows :

"NOemployee should be kept on probation turn more than double the normal period." "It would appear to me, that though the phraseology is different and the language in the former is more assertive, yet in substance both create an embargo."

The learned Judge then proceeded to consider the ruling in Pandey's case and after quoting an extract from that judgment observed that she was in respectful agreement with the decision of Anand J.

(19) Respectfully I do not agree with the conclusion reached by the two learned Judges. I find that in Brigadier Paintal's case the crucial portion of para 8 (5) has not been considered at all. As noticed by me above on the face of it paragraph 8(5) is not a direction or a mandate. These are merely administrative suggestions by the Government to its servants, how to act in certain circumstances. These neither intend to confer any right nor do these confer any such right. These are not even specific and definite instructions.

(20) Anand J. in Pandey's case after considering various decisions observed that the question in controversy before him has to be resolved with reference to the existence or otherwise of a provision prohibiting an extension of the period of probation. The rules only provided for a period of probation of two years. There was no specific provision for the extension of the period of probation and there was no prohibition either beyond which the period of probation could not be extended. Then the learned Judge noticed the provisions of paragraph 8(5) of the aforesaid memo. dated 15th April, 1959 and observed as under :

"THESEinstructions no doubt are incapable of superseding any statute or statutory rule or even a term in the contract of service but in the absence of any of these to the contrary "fill in the gap" and are of a binding nature and have the force of law and it was so ruled by the Supreme Court in the case of Sant Ram Sharma Vs. State of Rajasthan and Another, . There was. Therefore, a clear provision against an indefinite extension or deemed extension of the period of probation and double the normal period the aforesaid post was the maximum permission limit.

The conclusion arrived at by me is consistent with the ratio of other aforesaid decisions are a clear authority for the proposition that where there was statutory bar to the period of probation being extended beyond a certain limit, any continuance of the public servant in the post would attract the principle of "deemed confirmation" as in the case of Dharam Singh (supra). The instructions referred to above are in the nature of such a provision. These instructions either did not apply to the aforesaid cases, as in the case of Ajudhya Nath Dhingra (supra) or had no effect because the rules or the contract of service contained a provision which were contrary to these instructions and which they were incapable of superseding." The learned Judge held that paragraph 8(5) of the memorandum dated 15th April, 1959 is similar to the proviso to Rule 6(3) which

was before the Supreme Court in Dharam Singh's case. With respect I disagree. I have given my reasons hereinabove for doing so. The second part of the reasoning of the learned Judge is that the aforementioned administrative instructions in the absence of a statutory provision, a statutory rule or a term in the contract of service to the contrary, shall fill in the case. He further ruled that these instructions are of a binding nature and have the force of law. The learned Judge has relied upon the ruling of the Supreme Court in Sant Ram Sharma's case for these observations. I have carefully gone through the judgment of the Supreme Court in Sant Ram Sharma's case. The relevant portion is at page 1914 of the report, where the Court observed :

"IT is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

(21) The contention that the instructions have the force of law was not raised before the Supreme Court and was not dealt with in the judgment. Their Lordships, however, held that gaps may be filled but a rule cannot be amended or superseded. In the present case and in Pandey's case the rules provide two years as the period of probation. There is no specific rule allowing extension of this period and there is no limit fixed beyond which period of probation cannot be extended. In such circumstances, it is now well established, as noticed by me above, that unless the period of probation is ended by an order of confirmation it would be treated as extended if a probationer continues to hold the post. The memo dated 15th April 1959 understood in the manner as done in Pandey's case and Paintal's case would amount to making an amendment of the rule, if not, its supersession. I do not think that it is necessary for me to decide this question for the purposes of the present appeal and I do not do so. However, the two learned single Judges have held that these instructions have "the force of law". This observation is of considerable legal significance and potentiality. I, Therefore, consider it proper to deal with it although I do not think, it was necessary in view of the meaning interpretation given by me to paragraph 8(v). Their Lordships of the Supreme Court have on different occasions dealt with this matter. Proceeding chronologically in G.J. Fernandez Vs. State of Mysore and Others, , the Supreme Court was dealing with administrative instructions. There some tenders for public works were called by the Public Works Department of the State of Mysore. Nine sealed tenders were received and were then opened in the presence of the tenderers or their representatives. About a week later Fernandez wrote a letter to the Chief Engineer that his was the lowest unconditional tender and Therefore the contract should be granted to him. It was pointed out in the said letter that another tender, which, though lower than that of the appellant, was conditional and the rates quoted for certain items were speculative. None of the tenders was, however, accepted. A few days later the Chief Engineer addressed letters to 8 tenderers enquiring from them if they would be agreeable to undertake the work for the lowest amount tendered. The lowest tenderer was, however, asked

to state whether he was prepared to withdraw the conditions he had attached to his tender. Fernandez wrote back saying that his tender was to be treated as the lowest because the lowest tender was conditional and was liable to be rejected as was stipulated in the invitation to tenders. There was further correspondence between the Chief Engineer and the tenderers. Finally, they were all asked whether they were prepared to do the work for the amount of Rs. 214.58 lakhs which was the lowest tender first received. The appellant did not send revised quotations. On these facts the contention before the Court was that the way in which the tenders were dealt with from time to time showed that the provisions of Mysore Public Works Department Code relating to tenders were not followed. The Court, Therefore, considered the question. whether the said Code consists of statutory rules or not? The High Court had observed that the so-called rules and the Code are not framed either in any statutory enactment or under any provisions or the Constitution and those were merely in the nature of administrative instructions for the guidance of the department framed in the exercise of the Executive Power of the State. Their Lordships of the Supreme Court, Therefore, addressed themselves to the question whether the instructions in the Code have any legal force. Their Lordships said :

"If they have no statutory force, they confer no right on anybody and a tenderer cannot claim any rights on the basis of these administrative instructions. If these are mere administrative instructions it may be open to Government to take disciplinary action against its servants who do not follow these instructions but non-observance of such administrative instructions does not in our opinion confer any right on any member of the public like a tenderer to ask for a writ against Government by a petition under Article 226. The matter may be different if the instructions contained in the Code are statutory rules. Learned counsel for the appellant is unable to point out any statute under which these instructions in the Code were framed. He also admits that they are administrative instructions by Government to its servants relating to the Public Works Department. But his contention is that they are rules issued under Article 162 of the Constitution. Now Article 162 provides that "executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws". This Article in our opinion merely indicates the scope of the executive power of the State; it does not confer any power on the State Government to issue rules there under. As a matter of fact wherever the Constitution envisages issue of rules it has so provided in specific terms. We may for example, refer to Article 309, the proviso to which lays down in specific terms that the President or the Governor of a State may make rules regulating the recruitment and the conditions of service of persons appointed to services and posts under the Union or the State. We are Therefore of opinion that Article 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are

justiciable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore. It is not in dispute that there is no statute which confers any authority on the State which the Code is concerned; nor has any provision of the Constitution been pointed out to us under which these instructions can be issued as statutory rules except Article 162. But as we have already indicated. Article 162 does not confer any authority on the State Government to issue statutory rules. It only provides for the extent and scope of the executive power of the State Government, and that coincides with the legislative power of the State Legislature. Thus under Article 162, the State Government can take executive action in all matters in which the Legislature of the State can pass laws. But Article 162 by itself does not confer any rule making power on the State Government in that behalf. We are Therefore of opinion that instructions contained in the Code are mere administrative instructions and are not statutory rules. Therefore even if there has been any breach of such executive instructions that does not confer any right on the appellant to apply to the court for quashing orders in breach of such instructions. It is unnecessary for us to decide whether there has been in fact a breach of any instruction contained in the Code with respect to tenders and we do not Therefore so decide. But assuming that there has been any breach that is a matter between the State Government and its servant, and the State Government may take disciplinary action against the servant concerned who disobeyed these instructions. But such disobedience did not confer any right on a person like the appellant, to come to court for any relief based on the breach of these instructions. It is for this reason that we are not referring to the Code, though the High Court did consider whether there was any breach of these administrative instructions and came to the conclusion that there was no breach. In the view we take it is unnecessary for us to consider this, for we are of opinion that no claim for any relief before a court of law can be founded by a member of the public, like the appellant, on the breach of mere administrative instructions."

The second contention of the appellant before the Court was under Article 14 and it was that the Chief Engineer discriminated between the appellant and respondent No. 3. On facts their Lordships found that no case of discrimination was made out. They observed that it might have been a case of discrimination if the Chief Engineer had not given equal opportunity to all the tenderers or had rejected one tender on one ground and not rejected another tender on the same ground.

(22) In *Sant Ram Sharma Vs. State of Rajasthan and Another*, , their Lordships of the Supreme Court were dealing with a petition under Article 32 of the Constitution praying for a writ in the nature of mandamus commending the State of Rajasthan to consider and promote the petitioner to the post of Inspector General of Police. Their Lordships found that the post of the Inspector General of Police was a selection post and the administrative practice with regard to

selection posts was laid down in letters of Government of India as under :

"If a person, though senior in the gradation list, is appointed to the selection post later than his junior, this is "presumably because he is superseded as a matter of selection. If this is so, it would certainly not be unjustified to regard the officer so selected earlier, though junior in the gradation list, as senior to the other officer, as far as the selection posts are concerned."

Another communication dated June 1, 1955 states :

"All super time scale posts are selection posts and appointment thereto need not follow the order of seniority."

In another letter No. 7/6/56-AIS (1), dated October 5, 1956, the Government of India had reiterated the principle of promotion to selection grade posts as follows :

"I am directed to say that the Government of India have recently had occasion to consider the question of the principles to be followed in the matter of promotion of I. P. S. officers to the selection grade when some of the officers Junior in service were approved and given officiating chances in such selection grades earlier than their seniors- It is, of course, a well established principle that promotions to the Selection Grade or a selection post are to be based primarily on merit and not seniority in the service."

There was a Gradation List prepared under the Rules for the junior and senior time scales of pay. Sant Ram was the first in the Gradation List. The argument was that it was not open to the State of Rajasthan to disregard the first position of the petitioner for promotion to selection posts. Their Lordships did not accept this argument as correct and held that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to a selection post because promotion to selection grades or selection posts was based primarily on merit and not on seniority alone. This was the administrative practice as contained in the above reproduced letters. The second contention of the appellant was that in the absence of any Statutory Rules the Government cannot issue administrative instructions and that such administrative instructions cannot impose any restriction not found in the Rules already framed. The Court found that there was no Rule laying down the principle of promotion to selection grade posts. The argument therefore that the administrative instructions were imposing restrictions on the Rules already framed was not open to the petitioner. The only question before the Supreme Court was whether a gap because of the absence of Rules could be filled up by administrative instructions. The answer of the Court was in the affirmative and the Court thus observed :

"It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

It was further submitted on behalf of the petitioner that if Executive Government is held to have powers to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Article 309, there will be a violation of Articles 14 and 16 because the appointments would be arbitrary and capricious. Their Lordships rejected this contention and observed :

".....If the State of Rajasthan had considered the case of the petitioner Along with the other eligi- ble candidates before appointments to the selection posts there would be Do breach of the provisions of Articles 14 and 16 of the Constitution because everyone who was eligible in view of the conditions of service and was entitled to consideration was actually considered before promotion to those selection posts were actually made."

The Court further observed :

"ASa matter of long administrative practice promotion to selection grade posts in the Indian Police Service has been based on merit and seniority has been taken into consideration only when merit of the candidates is otherwise equal and we are unable to accept the argument of Mr. N. C. Chatterjee that this procedure violates, in any way, the guarantee under Arts. 14 and 16 of the Constitution."

(23) In Union of India (UOI) Vs. K.P. Joseph and Others, , the Union of India came in appeal against the order passed by the High Court of Mysore in a writ petition filed by the first respondent The facts were :

"THEfirst respondent was combatant clerk in the Indian Army for a period of more than 14 yrs. He was discharged from that post on 9th June, 1953 on 2nd July, 1953, ho was re-employed as an ordinary clerk on the pay scale of Rs. 55-3-85-EB-4-125-5-130. His pay was refixed in the above scale at Rs. 70 plus a personal pay of Rs. 2.50 by an order dated 28th October, 1958. with effect from the date of re-employment, i.e., 2-7-1953. On 15th July, 1960, the Government of India, Ministry of defense issued a general Order called "Office Memorandum". No. 2 (54) 58/5801/D (Civil) providing for certain benefits to ex-military personnel on re-employment on the basis of their length of actual military service. The general effect of that order was that those who are entitled to its benefits, would get fixed in the scale applicable to them by adding to the bottom of their scales increments equal to the total number of completed years of military service..... The first respondent claimed that he was entitled to the benefit of the order but the claim was rejected by the Government and so he filed the Writ Petition contending that as .he answered the description of one of whom the benefit of the order could properly be extended he should be given its benefit."

The High Court allowed the writ petition and Union of India came in appeal by special leave. Their Lordships of the Supreme Court came to the conclusion that the High Court was right in its view that the first respondent was entitled to the benefit of the order. The contention on behalf of the Union of India was that the aforesaid order being an administrative direction conferred no justiciable right

upon the first respondent which could be enforced in a Court by a writ or order in the nature of mandamus because the very foundation for the issue of a writ or an order in the nature of mandamus is the existence of a legal right. Their Lordships observed :

"GENERALLY speaking an administrative order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions,"....

To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because an administrative order can abridge or take away rights that we have imported the principle of natural justice of audi alteram partem into this area.....

"WE should not be understood as laying down any general proposition on this question. But we think that the order in question conferred upon the first respondent the right to have his pay fixed in the manner specified in the Order and that was part of the conditions of his service. We see no reason why the Court should not enforce that right."

(24) In case *Laljee Dubey and Others Vs. Union of India (UOI) and Others*, their Lordships of the Supreme Court considered the case of the appellants who were employed in a Government factor and were designated as checkers. Their duties being substantially clerical they made representations to the Government to be classified as Clerks. The matter was investigated and the directions were issued to re-classify checkers as Lower Division Clerks. The appellants claimed that they satisfied the tests laid down by the directions and yet they were not classified as Lower Division Clerks whereas other employees were designated as such. The directions issued were in the form of a letter dated 17-11-1953 and the appellants founded their claims on the said letter. The matter came to the High Court by way of a suit first filed in the trial court and the first appeal to the District Judge and on second appeal to the High Court. The learned Single Judge of the High Court referred the matter to the learned Chief Justice for Constituting a Bench on the question as to whether the letter dated 17-11-1953 conferred any right on the appellants. The Division Bench was divided in opinion. One of the learned Judges held that the letter contained orders and instructions governing certain individuals only who were in service towards the end of year 1953 and the letter did not purport to make conditions of service of checkers for all times the learned Judge further held that the letters did not constitute a rule under Art. 309 of the Constitution and was a mere direction of an administrative nature. The other learned Judge held that the letter laid down condition of service and because conditions of service could only be described by President under Art. 309, the letter amounted to a rule framed by President of India. In view of this position the question was referred to the third learned Judge as to whether the letter dated 17-11-1953 constituted a rule framed by the President under Article 309 of the Constitution. The third learned Judge held that the letter was of a composite nature. There were ad hoc directions in respect of certain

checkers. The letter also laid down some conditions of service which would apply to the remaining checkers. The letter did not constitute a rule framed by the President of India under Article 309. The letter merely contained an order of an administrative or executive nature. This view of the third learned Judge became the majority view of the High Court. Their Lordships of the Supreme Court referred to their earlier decision in *Purshottam Lal and Others Vs. Union of India (UOI)* and *Another*, and observed that in *Purshottam Lal's* case the reason given was that if the Government did not implement the Second Pay Commission report regarding some employees only there would be a breach of Arts. 14 and 16 of the Constitution. Following the reasoning their Lordships held :

"In the present case the letter dated 17th November 1953 shows that the President of India gave sanction to the recommendations of Kalyan Committee. The authorities admitted some of the persons as Lower Division Clerks and left others to their own posts. The direction containing the sanction of the President indicates that checkers who had the requisite qualifications, passing the metriculation examination or in the alternative three years" continuous service in the department were to be put in the category of Lower division clerks- The letter dated 17th November 1953 divided checkers into groups. The first group consisted of checkers possessed the necessary qualifications as laid down in that order. The second group consisted of those who did not possess that qualification. In the case of persons of the first group the authorities concerned could not have any option to make any selection among such persons. The direction in that letter indicates that such persons should be classified as lower division clerks. In the case of the second group, viz. those who did not fulfill the qualification requirements it was left open to the authorities to exercise their discretion and classify some of the checkers in the posts of lower division clerk if they considered them to be fit and suitable to service in those posts. The appellants were, Therefore, entitled to be designated as Lower division clerks, in accordance with the directions contained in the letter dated 17th November 1953. There has been arbitrary discrimination against the appellants."

It was further held as under :

"It is not necessary to express any opinion as to whether the letter dated 17th November, 1953 became a rule under Art. 309 of the Constitution. For the purposes of the appeal it is sufficient to hold that the letter has been accepted by the authorities and given effect to in case of some of the employees belonging to the same group as the appellants."

In *Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others*, a question arose consequent on the integration of two Class I services as to how the inter se seniority of the officers coming from the two services should be determined in the integrated service. "The State Government issued a memorandum providing for the determination of the inter se seniority. Clause 2 (ii) of memorandum provided :

"THE seniority of Deputy Directors and Assistant Directors on the cadre of the Public Health on integration in PCMS-I should be determined with reference to the length of continuous service from the date of appointment in the group subject to the condition that the seniority of a person in parent seniority list will not be disturbed."

The appellant opted in favor of the integration and claimed seniority on the basis of the principle laid down in Clause 2(ii) above, over respondents Nos. 3 to 19. The appellant contended that his continuous service started from 25th April 1964 while that of the aforesaid respondents did not start until after that date when they assumed charge of the respective posts. The State Government then issued an order dated 4th December 1967 that the seniority of the aforesaid respondents shall be reckoned from the date of their order of appointment, namely, 8th April 1964 irrespective as to when they assumed charge of the respective posts.

(25) Aggrieved by this the appellant filed a petition in the High Court which was dismissed by the Single Judge and then by the Letters Patent Bench. Their Lordships of the Supreme Court held :

"NOW it is true that Cl (2) (ii) of the memorandum dated 25th October, 1965, was not a statutory provision having the force of law and was merely an administrative instructions issued by the State Government in exercise of its executive power. But that does not present any difficulty, for it is now well settled by several decisions of this Court that where no statutory rules are made regulating recruitment or conditions of service, the State Government always can in exercise of its executive power issued administrative instructions providing for recruitment laying down conditions of service Vide B.N. Nagarajan and Others Vs. State of Mysore and Others, and Sant Ram Sharma Vs. State of Rajasthan and Another, . It was Therefore, competent to the State Government to issue clause (2) (ii) of the memorandum dated 25th October 1965 in exercise of its executive power laying down the principle to be followed in adjusting inter se seniority of the officers in the integrated service."

But the question then arises whether the State Government could issue the order dated , December 1967 providing that the seniority of respondents Nos. 3 to 19 shall be reckoned from the date of issue of their order of appointment, namely, 8th April 1964, irrespective as to when they assumed charge of the higher posts, if such order was in contravention of the principle of seniority laid down in Cl. (2) (ii) of the memorandum dated 25th October 1965. The argument urged on behalf of the State Government was that it was competent to it to fix an assumed date on which the continuous service of respondents Nos. 3 to 19 should be deemed to have commenced for the purpose of determining their seniority in the integrated service, and the order dated 4th December 1967 was, Therefore, not beyond its power. But we do not think this argument is well founded. Clause (2) (ii) of the memorandum dated 25th October 1965 provided that the seniority of the officers in the integrated service shall be determined by reference to the

length of continuous service from the date of appointment in the group within their respective service. What was Therefore, required to be taken into account was the actual length of continuous service from the date of appointment and not the length of continuous service reckoned from an artificial date given by the State Government. Now, it is true that Clause (2) (ii) of the memorandum dated 25th October 1965 was in the nature of administrative instructions, not having the force of law, but the State Govt. could not at its own sweet will depart from it without rational justification and fix an artificial date for commencing the length of continuous service in the case of some individual officers only for the purpose of giving them seniority in contravention of that clause. That would be clearly violative of Articles 14 and 16 of the Constitution. The sweep of Articles 14 and 16 is wide and pervasive. These two articles embody the principle of rationality and they are intended to strike against arbitrary and discriminatory action taken by the "State". Where the State Government departs from a principle of seniority laid down by it, albeit by administrative instructions, and the departure is without reason and arbitrary, it would directly infringe the guarantee of equality under Articles 14 and 16. It is interesting to notice that in the United States it is now well settled that an executive agency must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Vide the judgment of Mr. Justice Frankfurter in *Vitelli v. Social Security Board* (1959) 359 U.S. 535=3 L Ed 1012. This view is of course not based on the equality clause of the United States Constitution and it is evolved as a rule of administrative law. But the principle is the same, namely, that arbitrations should be eliminated in State action. If, Therefore, we find that the order dated 4th December 1967 gave an artificial date from which the continuous service of respondents Nos. 3 to 19 shall be deemed to have commenced, though in fact and in truth their continuous service commenced from different dates and it was thus in contravention of the principle of seniority laid down in Clause (2) (ii) of the memorandum dated 25th October, 1965, it would have to be held to be void as being violative of Articles 14 and 16.

(26) On a conspectus of the above rulings the following legal position emerges. As far as the question of discrimination under Articles 14 and 16 of the Constitution is concerned, it is not necessary for a Court to consider whether an administrative instruction order issued in exercise of the executive power of the Government has the force of law or not. Discrimination may be a result of a legal provision or of an executive action and both have to be struck down, if violative of Articles 14 & 16 of the Constitution. It is also not in doubt that administrative instructions issued in exercise of executive power have no statutory force because those are neither statutory provisions nor are issued under or in accordance with any statutory or constitutional provision. However, Government may by such administrative instructions lay down conditions of service for its servants, if the same are not already laid down by statutory rules and an aggrieved government servant may approach a competent court to seek

enforcement of such conditions under Articles 14 & 16 alleging that he is not being given the benefit of those conditions whereas others similarly situated have been given the same. But, to say, that an administrative instruction has the force of law, in the sense that without a plea of Articles 14 and 16 it can be enforced like any statutory provision, I think, is not correct. In Joseph's case (supra) their Lordships of the Supreme Court observed that they were not laying any general proposition and that the general rule is that administrative orders do not have any legal right. For the purposes of the present case, I have no doubt, that the provisions of paragraph 8(v) of the memorandum No. F-44/ 1/59-Ests/A dated 15th April 1959 do not create any exception to the general rule. Paragraph 8(v) does not intend to change the well settled legal position, namely, that if an employee appointed on probation is allowed to continue in the post after the expiry of the specified period of probation, and no order of confirmation is passed, he will be deemed to have continued on probation.

(27) The appellant did not get confirmed in his appointment to the post of P. S. O. (Publication Work) and continued on probation on "foreign service terms" with the Commission in a temporary post which was abolished. He was reverted to C. S. I. R. and rightly so. The appeal fails and is dismissed with costs.

T.P.S. Chawla, J.

(28) I agree.