
(1972) 12 MAD CK 0047
In the Madras High Court

S. Doraiswami and Others

APPELLANT

Vs

The Accountant-General and Others

RESPONDENT

Date of Decision : 08-12-1972

Acts Referred:

Constitution of India, 1950 — Article 148 (1)
Government of India Act, 1915 — Section 96D(1)
Government of India Act, 1919 — Section 96(1)

Citation : (1973) 2 MLJ 43

Hon'ble Judges : K.S. Palaniswamy, J;K.S. Palaniswami, J

Bench : Division Bench

Judgement

K.S. Palaniswamy, J.—In these five cases a common question arises for consideration. The petitioners, who are employed in the office of the Accountant-General, Madras, pray for the issue of a writ of mandamus or other suitable order directing the Accountant-General, Madras, the first respondent, to fix their seniority on a certain basis. The second respondent in all these cases is the Comptroller and Auditor-General of India, New Delhi. Respondents 3 to 7 in W.P. No. 2213 of 1970, who were juniors to the petitioner therein, have since been promoted over the head of the petitioner and assigned seniority above him. Hence, they have been impleaded. But those respondents are not parties in the other writ petitions.

2. All the petitioners entered service in the Accountant-General's Office, as upper division clerks at different times. The promotion from the post of upper division clerk is to what is called Subordinate Accounts Service. The upper division clerk should pass an examination conducted by the Comptroller and Auditor-General, under Chapter V of the Manual of Standing Orders of the Comptroller and Auditor-General. The petitioners made certain attempts to pass the Subordinate Accounts Service Examination (S.A.S. Examination) but failed, and finally they passed the examination held in November, 1969, the results of which were published in February, 1970. Paragraph 143 of the Manual of Standing Orders deals with seniority inter se between the persons who might

pass the examination earlier and those who may pass the examination later with reference to their service seniority. That paragraph, as it then stood at the time when the petitioners were appointed, ran thus:

143. Subject to the conditions in paragraph 139 and subject also to the right of the appointing authority to make any special promotion in accordance with paragraph 144, Clerks or Divisional Accountants eligible for appointment to the Subordinate Accounts Service shall ordinarily be selected for appointment to the Subordinate Accounts Service in the order of the dates of their passing the examination, but in order to allow for length of service and experience, every three complete years of the excess in length of service (either as a clerk in the Audit Office or a Divisional Accountant or an Accounts Clerk in a Divisional or Sub-divisional Office of the Public Works Department) should be treated as compensating for one year's delay in passing the examination.

3. The said paragraph envisaged a sort of weightage for the total length of service and experience at the time of the passing of the examination. Presumably, the object underlying that paragraph was to neutralise the disadvantages which a candidate with a longer service and experience would sustain in the event of his passing the examination later than another candidate, who, with a shorter experience, might pass the examination earlier. But, on 2nd July, 1956, the Comptroller and Auditor-General, through Correction Slip No. 51, effected an amendment to the said paragraph. The amended paragraph reads as follows:

143. Subject to the conditions in paragraphs 139 and 140 and subject also to the right of the appointing authority to make any special promotion in accordance with paragraph 144, a clerk or a Divisional Accountant who passes the Subordinate Accounts Service Examination in an earlier examination will have precedence in appointment to the Subordinate Accounts Service over a person who passes in a later examination. As amongst persons who pass in the same examination the one senior in the clerical grade will have a prior claim for such appointment. The seniority of a person appointed to officiate in the Subordinate Accounts Service shall ordinarily be based on the date on which he first begins to officiate after passing the Subordinate Accounts Service Examination.

If a person eligible for appointment to the Subordinate Accounts Service happens to be non-available on account of leave or otherwise on the first occasion when his turn for appointment comes, and a person below him is appointed to fill the vacancy the latter will not for that reason alone become senior to the former in the Subordinate Accounts Service grade.

The relative seniority of Subordinate Accounts Service men directly recruited as apprentices vis-a-vis Subordinate Accounts Service pass clerks officiating in the Subordinate Accounts Service shall be governed by specific instructions on the subject issued by the Comptroller and Auditor-General from time to time.

The amendment will come into force from the date of the first Subordinate

Accounts Service Examination to be held in 1956.

By reason of this amendment) the pro-[^] vision regarding the weightage of service of a person who joined the service earlier has been deleted and now the promotion is based only on examination seniority, that is, seniority being determined on the basis of the date of passing the examination and not with reference to the length of service. All the petitioners had entered service long before respondents 3 to 7 in W.P. No. 2213 of 1970 entered service. But inasmuch as those respondents happened to pass the S. A. S. Examination before the petitioners passed, they have been assigned seniority over the petitioners. The petitioners contend that paragraph 143 contained a statutory provision, that the amendment to paragraph 143 has been made by an executive instruction by the Comptroller and Auditor-General, that, therefore, the amendment is invalid and that on the basis of the paragraph prior to the amendment, they are entitled to claim weightage as regards length of service and are entitled to be placed in the seniority list accordingly. Though several other contentions have been put forward in the affidavits filed in support of the writ petitions, the only contention urged in the course of the arguments was that the amendment was invalid and could not take away the statutory right which the petitioners had under paragraph 143, which was in force at the time when they were appointed. It is on this basis that they have asked for fixation of their seniority by issuing suitable directions.

4. On behalf of respondents I and 2 a common counter-affidavit was filed by one Mr. Sundararajan, Senior Deputy Accountant-General (Administrative) in the Office of the Accountant-General, Tamil Nadu. He alleged in that affidavit that the administrative powers of the Auditor-General had been defined in the Auditor General Rules, 1926, made by the Secretary of State for India in Council u/s 96 (1) of the Government of India Act, 1919. He further referred to certain rules and stated that the powers exercised by the Auditor-General continued to be in force after the Government of India Act, 1935, by virtue of the provisions of Section 276 of the Act and had been preserved under the Constitution of India also. He proceeded to refer to the relevant provisions of the Constitution and stated that the Comptroller and Auditor-General continued to exercise the powers till such time as the powers of the Comptroller and Auditor-General were prescribed by the President under Article 148 (5) of the Constitution. In substance, the contention was that paragraph 143 was a statutory provision and that the Comptroller and Auditor-General had necessary authority to make the amendment. It was further contended that no employee could claim any vested right in the matter of his service, that the conditions of service could be altered unilaterally by the Government at any time even to the disadvantage of the employee and that, therefore, the petitioners could not make a complaint on account of the amendment made by the Comptroller and Auditor-General to paragraph 143.

5. The sixth respondent in W.P. No. 2213 of 1970 has stated in his counter-

affidavit that there was undue delay on the part of the petitioners in seeking relief, inasmuch as the amendment, which they impugned, had been made even in 1956, that what has been done is merely a withdrawal of concession and that, therefore, the petitioners are not entitled to any relief.

6. These petitions originally came up for disposal before Ramaprasada Rao, J. At that time, a contention appears to have been urged on behalf of the petitioners that inasmuch as it was conceded that paragraph 143 contained a statutory provision, the amendment made by an executive instruction was invalid, and in support of that position, the decision of Alagiriswami, J., in *G. Rama Rao and Anr. v. The Director of Audit & Accounts. P. & T., Madras-8 W.P. Nos. 1307 and 1308 of 1969*, was cited. The learned Judge in those cases, which related to fixation of seniority of certain persons in the Subordinate Accounts Service in the Posts and Telegraphs Department, made an observation that paragraph" 143 was admitted to be a statutory provision. A request appears to have been made before Ramaprasada Rao, J., that an opportunity may be given to file a supplemental counter-affidavit on behalf of the Accountant-General and Comptroller and Auditor-General to clarify the position. The matter was accordingly adjourned. Subsequently, an affidavit sworn to by one Mr. Hariharan, Assistant Comptroller and Auditor-General in the Office of the Comptroller and Auditor-General, New Delhi, has been filed. In paragraphs 8 and 9 of that supplemental affidavit he alleged:

8. The Department has since verified the correct position. It is respectfully submitted that paragraph 143 is not a statutory rule but only an administrative instruction. The Calcutta High Court had occasion to go into this question while deciding the case in Civil Rule No. 1654 of 1957, dated 1st December, 1958 and it was held therein that the Manual of Standing Orders contained mostly Departmental instructions. Paragraph 143 was among the paragraphs specifically considered by the Court.

9. It is respectfully submitted that in the Writ Petitions 1307 and 1308 of 1969 by judgment dated 12th December, 1969, it had been assumed that paragraph 143 of M.S.O. is a statutory rule in view of the counter-affidavit filed in that case. Under a bona fide misapprehension, the initial drafting of the counter-affidavit in that case by the department proceeded on the footing that paragraph 143 was a statutory rule. In fact, the Deputy Legal Advisor to the Government of India while correcting that draft, deleted the portion containing the reference to paragraph 143 as a statutory rule. Unfortunately while preparing the fair copy, the portion required to be deleted happened to be included in the affidavit by a clerical mistake and this mistake was not noticed in time.

In that supplemental counter-affidavit it was further alleged that there were rules with regard to age restriction and the number of attempts which a person can make for passing the examination, that by executive instructions those provisions were relaxed, that but for such relaxation all these petitioners except Kuppuswami, the petitioner in W.P. No. 4243 of 1970, would not have been able

to sit for the examination and that inasmuch as those " petitioners except Kuppuswami have taken advantage of the amendment and passed the examination, they cannot now turn round and question the competence of the Comptroller and Auditor-General to amend paragraph 143. It is, therefore, alleged that the petitioners are estopped from questioning the validity of the amendment to paragraph 143.

7. In W.P. Nos. 1307 and 1308 of 1969, already adverted to, Alagiriswami J., took the view that matters relating to public servants could, in the absence of rules made under the proviso to Article 309 or Article 148, be governed by administrative instructions, that a statutory rule could be altered or amended or repealed only by another statutory rule and not by a mere administrative instruction, while an administrative instruction can of course be altered by another administrative instruction. The learned Judge further pointed out that a statutory rule could be given retrospective effect, while the administrative instruction could not be given such retrospective effect but could have only prospective effect. In that case, the validity of a letter of the Assistant Comptroller and Auditor-General dealing with seniority was challenged. The learned Judge held that the letter was merely an administrative instruction and that as that ran counter to paragraph 143, which was statutory, the administrative instruction could not change the effect of other statutory rule. In that view, the learned Judge allowed those writ petitions and issued a writ of mandamus directing the Accountant General, Posts and Telegraphs, to recompile the seniority list on the lines indicated therein. The decision has proceeded on the basis that it was admitted that paragraph 143 was a statutory rule. To explain this position, Mr. Hariharan has stated in paragraph 9 of his supplemental affidavit (already extracted) that in that case a counter was filed by mistake stating that paragraph 143 was a statutory rule, even though it was intended to state in that affidavit that that paragraph was not a statutory rule. To support this allegation no material has been placed. The draft which was said to have been corrected deleting the portion containing reference to paragraph 143 as a statutory "rule is not produced. Nor is a true copy of the fair affidavit filed to find out whether the statement that paragraph 143 was a statutory provision was contained in the affidavit itself or whether such a statement was made in the course of the arguments.

8. In paragraph 8 of the supplemental counter-affidavit. Mr. Hariharan, has made reference to a decision of the Calcutta High Court in Civil Rule No. 1654 of 1957, in which, according to him, paragraph 143 was said to have been held to be merely an administrative instruction. A copy of the judgment was produced before me, and on going through it, I did not find any such observation. In that case also the point in controversy was as regards the correctness of a seniority list prepared with reference to certain persons governed by the Subordinate Accounts Service in the Indian Audit and Accounts Department in the office of the Accountant-General, West Bengal. In dealing with the several contentions urged in that case, Deep Narayan Sinha, J., referred to Article 148 (5) of the

Constitution which empowers the President to make rules after consultation with the Comptroller and Auditor-General and observed:

As a matter of fact, so far as I can see, this is the direct fountain head of any rules that may be promulgated with regard to the service of persons in the Indian Audit and Accounts Department. It is admitted that no such rules have been framed.

My attention has next been drawn to certain standing orders. These standing orders are to be found in a compilation called "Manual of Standing Orders" and contain mostly departmental instructions given by the Comptroller and Auditor-General of India who is the head of the Indian Audit and Accounts Department appointed under Article 148 (1) of the Constitution of India. It also contains certain rules which have the force of law, for example, certain standing orders in Chapter X. The subject of Subordinate Accounts Service is set out in Chapter V but one would look in vain for any specific provision therein regarding promotions.

Nowhere did the learned Judge observe that paragraph 143 was merely an administrative instruction. No doubt, paragraph 143 occurs in Chapter V which deals with Subordinate Accounts Service. All that the learned Judge has observed is that there was no specific provision in Chapter V regarding promotions. Therefore, it is incorrect to state that the Calcutta High Court has ruled that paragraph 143 is only an administrative instruction.

9. In the affidavit of Mr. Sundararajan, reference is made in detail to the powers of the Auditor-General as defined in the Auditor General Rules, 1926, made by the Secretary of State for India in Council u/s 96-D (1) of the Government of India Act, 1919. It is stated that all such rules are "laws in force" within the meaning of Article 313 of the Constitution. Reference is also made to Article 372 of the Constitution which provides for the continuance of the existing laws in force. Finally, it is stated in paragraph 4 : "From the above it may be seen that the Comptroller and the Auditor-General would continue to exercise powers till such time in this manner as the powers of the Comptroller and Auditor-General are prescribed under Article 148 (5) of the Constitution". Though not explicitly stated that paragraph 143 is statutory, it is abundantly clear from the affidavit of Mr. Sundararajan that it proceeds only on the basis that it is statutory. But Mr. Hariharan, in his supplemental counter-affidavit, without giving any details whatsoever, has stated that paragraph 143 is not statutory, but is only an administrative instruction. He has referred to verification of the correct position as justifying his statement that paragraph 143 is not a statutory rule. No materials are placed by him in this regard. Mr. Sundararajan, who has sworn to the earlier affidavit, has attested the supplemental counter-affidavit filed by Mr. Hariharan. The person competent to say as to whether any mistake had been committed in the affidavit sworn to by Mr. Sundararajan, is Mr. Sundararajan himself. On what basis he swore to the earlier affidavit and why he did not state in the earlier affidavit that paragraph 143 was merely an administrative instruction and what led him to think that the said paragraph was a law in force,

are matters about which no materials have been placed. Equally, no materials are placed to show on what basis Mr. Hariharan says that the said paragraph is only an administrative instruction. He claims to have verified "the correct position". But he does not say what he verified and how he found that a particular position was the "correct position". Therefore, we have the solemn affirmation of one officer as against the solemn affirmation of another officer, the latter officer not having placed any materials to show why the affirmation of the former officer should not be accepted. What Mr. Sundararajan stated in his affidavit was consistent with the position taken on behalf of the Accountant-General before Alagiriswami, J., in W.P. Nos. 1307 and 1308 of 1969, already adverted to.

10. The institution of the Auditor-General traces back to the days of the East India Company, which began as a trading corporation and ended by administering India in 1858 when the Government of India was assumed by the British Crown. Various directions were issued by the Directors of the East India Company from time to time and the Auditor-General was functioning in accordance with those instructions. The Government of India Act, 1919, first gave statutory recognition to the Auditor-General in India by Section 96-D (1) which ran as follows:

An Auditor-General in India shall be appointed by the Secretary of State in Council, and shall hold office during His Majesty's pleasure. The Secretary of State in Council shall, by rules, make provision for his pay, powers, duties, and conditions of employment, or for the discharge of his duties in the case of a temporary vacancy or absence from duty.

Various statutory rules were issued u/s 96-D (1) of the Government of India Act, 1919. Mr. Gaunlett, the then Auditor-General, who compiled the Audit Code, stated in his preface:

The Audit Code derives the authority-from the functions of the Auditor-General as defined in the Statutory Rules framed u/s 96-D (1) of the Government of India Act. The detailed instructions embodied in this Code are intended primarily for the guidance of civil audit offices. In other audit offices, the general rules and principles on which the instructions of this Code are based and the orders which define the nature and extent of audit to be applied to different classes of transactions should be taken as a guide, though in matters of detail the rules in their respective Codes are applicable.

11. Article 52 of the Audit Code provided:

52 (a). The mere passing of the examination does not establish a claim for promotion to the Subordinate. Accounts Service. No one will be appointed to this service unless he is considered fully qualified by ability and experience to discharge the duties of an accountant.

(b) Other qualifications being equal, candidates are ordinarily selected in the

order of the dates of their passing the examination, but, in order to allow for length of service and experience every three complete years of the excess in length of service (either as a clerk in the audit office or as a divisional accountant or an accounts clerk in a divisional or sub-divisional office of the Public Works Department) should be treated as compensating for one year's delay in passing the examination.

(Other portions omitted as not relevant.)

Thus, it will be seen that paragraph 143 of the Manual of Standing Orders corresponds to Article 52 of the Audit Code. The Manual of Standing Orders is no doubt a compilation of both statutory and administrative instructions. A reading of the several provisions of the Standing Orders by no means leads us to say definitely whether any particular rule or Standing Order is statutory or not and what its origin was. But so far as paragraph 143 is concerned, it is clear that it has been compiled and taken from Article 5a of the Audit Code, which owes its authority from the functions of the Auditor-General of India as defined in statutory rules framed u/s 96-D (1) of the Government of India Act, 1919. Mr. Parasaran, Senior Standing Counsel for the Government of India placed before me the earlier editions of the standing orders. The first one was of the year 1938, which was compiled by the then Auditor-General, one Mr. E. Burden. In the preface, he stated:

The instructions relating to the organisation, administration and control of the Indian Audit Department as an administrative unit have hitherto been scattered in several codes issued by the Auditor General while some instructions issued in the form of circulars have not been included in any code or manual. The Auditor-General's Audit and Account Codes serve as books of reference on audit and accounts matters not only for the staff of the Indian Audit Department but also for the Central and Provincial Governments and their subordinate officers...and these rules and instructions have now been brought together in this manual advantage being thus taken of the opportunity afforded by the revision of the Auditor-General's Codes to adapt them to the constitutional changes introduced by the Government of India Act, 1935. The rules and instructions themselves have been revised and brought up to date.

The compiler cautioned by saying that the relevant rules and instructions in the manual should not be regarded as possessing any authority superior to that of the original rules and orders, and observed:

Subject to this reservation, the rules and instructions in this Manual supersede all other relevant rules and orders on matters dealt with in it.

Paragraph 143 as unamended and as extracted in paragraph 2 supra finds a place in this edition.

12. In the year 1952 Mr. V. Narahari Rao, the then Comptroller and Auditor-General of India caused to be published the re-print of the said first edition. In

the preface, he stated:

This edition is essentially a reprint of the first edition of the "Auditor-General's Manual of Standing Orders"-issued in 1938, with such adaptations and modifications as have been rendered necessary by the constitutional changes introduced by the Constitution of India or by other factors, and also takes into account all "the correction slips issued up to date.

Paragraph 143, as unamended, finds a place in this volume also.

13. We have now, two volumes of the Manual of Standing Orders issued by the authority of the Comptroller and Auditor-General of India, one Mr. S. Ranganathan, in the year 1969.

Paragraph 143 is split up into several portions, and the relevant provisions are contained in paragraph 184 of Vol. I.

14. The position that emerges from the foregoing discussion is this. Paragraph 143 of the Manual of Standing Orders corresponds to Article 5.2 of the Audit Code, Vol. I, which derived the authority from the functions of the Auditor-General as defined in the statutory rules framed u/s 96-D (1) of the Government of India Act, 1919. It is not possible to say affirmatively under which statutory provision paragraph 143 was issued. However, it is seen from the relevant copies of reprints of manuals that it is there from the earliest of the publications. It is in this background that the examination of the pleadings in this case becomes necessary and important. "It is needless to repeat the two inconsistent stands taken on behalf the Accountant-General himself and the Comptroller and Auditor-General of India, respondents 1 and 2 in these writ petitions. I have already pointed out that no materials have been placed for holding that the statements made by Mr. Sundararajan at the earliest opportunity in this affidavit showing by necessary implication, that paragraph 143 was statutory were made, under mistake. Nor do we find any materials to warrant the assertion of Mr. Hariharan, who has sworn to the supplemental counter affidavit, that the said paragraph is only an administrative instruction and not a statutory instruction. In the absence of acceptable explanation for taking up such inconsistent positions, the admission contained in the earliest affidavit, which is consistent with the stand taken on behalf of the two respondents in certain other proceedings already referred to, has to be accepted and the matter decided on that basis. It is true that respondents 1 and 2 are not estopped from showing that what was stated in the first instance was a mistake. After all, the relevant point is whether a particular provision is statutory or not. It might be that under a mistaken impression, the provision might have been said to be statutory, while in fact it was only an executive instruction. By placing necessary materials before the Court such a mistake can be sought to be rectified. But without any materials whatsoever, it is not open to respondents 1 and 2 to ask the Court to accept the mere assertion that what was stated in the first instance was a mistake and that what is stated subsequently is alone correct. For all these reasons, I proceed on the basis that

paragraph 143 is a statutory provision.

15. Mr. Parasaran, Senior Counsel for the Central Government, appearing for respondents 1 and 2, was somewhat in an embarrassing position in view of the inconsistent stands taken in the counter affidavits filed on behalf of respondents 1 and 2. He, however, contended that the petitioners are estopped from claiming any relief in these petitions. He contended that the petitioners, except Kuppuswami, petitioner in W.P. No. 4243 of 1970, have derived advantage by certain amendments made by the Comptroller and Auditor-General to certain rules, which fixed the age of candidates competent to appear for the examination and as regards the number of attempts one could make for passing the examination. He further contended that but for the amendments, those petitioners would not have been entitled to sit and pass the examination and that after having taken advantage of the amendments, they are now not entitled to question the competency of the Auditor-General to amend paragraph 143. I am unable to accept this argument. It is true but for certain relaxations, the aforesaid petitioners would not have been entitled to sit for the examination. But the relaxation has been made by the Auditor-General by the express power conferred on him. Appendix 4 of Vol. II of the Audit Code deals with Rules for the Departmental Examination training of Junior Officers and for Departmental Examinations. At page 24, we find an express provision, reserving to the Auditor-General the power of allowing exceptions to the rules contained therein with regard to the number of attempts which a candidate may make and also the age of the candidate and it is by virtue of this power that the Auditor-General has relaxed the relevant provisions which are merely executive in nature. Inasmuch as there is such an express reservation, the relaxation has been made only by exercise of such a power. That has nothing to do with the amendment to paragraph 143. Therefore, there is no question of the petitioners taking advantage of a certain amendment and trying to question the validity of the amendment in other respects. The decision in *Turner Morrison and Company v. Hungerford Investment Trust Limited* (1972) 1 S.C.W.R. 887, on which Mr. Parasaran placed reliance, is not relevant. The principle laid down in that case is that when promises are acted upon, the Court will enforce the promise even though there is no consideration in the strict sense. That is hardly relevant on the facts of the instant case.

16. Mr. Dolia, appearing for the sixth respondent in W.P. No. 2213 of 1970, contended that the impugned amendment was made in 1956, that on the basis of the amendment other persons have been promoted and that it would cause great hardship and inconvenience if the seniority is affected at this stage. The substance of his argument was that the petitioners are guilty of laches and are, therefore, not entitled to any relief. I am unable to accept this argument. It is true that the amendment was made in 1956. But the petitioners had no cause of action to complain at that time, as their right to challenge the validity of the amendment arose only after they came out successful in the examination. I have already pointed out that these petitioners appeared for the S.A.S. Examination in

November, 1969 the results of which were published only in February, 1970. It was thereafter that they get the cause of action to complain about the amendment, which takes away the weightage, to which they were entitled under paragraph 143 of the Manual of Standing Orders.

17. Mr. Dolia next contended that under Rule 28 (1) of the Auditor-General's Rules made by the Secretary of State for India in Council, u/s 96-D (1) of the Government of India Act the Auditor-General had necessary power to amend paragraph 143. The relevant portion of that rule reads thus:

28. The Auditor-General may--

(1) in the case of officers of the India Audit Department below the rank of Deputy Auditor-General...promote him to any grade or post in the Indian Audit Department below the rank of Deputy Auditor-General or declare him to be permanently unfit for promotion, grant him any leave that may be admissible under the rules and exercise the powers of a local Government under the Government Servants' Conduct Rules.

He also relied on Rule 44 of the Central Civil Services (Classification, Control and Appeal) Rules, 1934 under which power to make rules regarding the methods of recruitment had been delegated to the local Government in respect of subordinate services under their administrative control. Placing reliance upon these provisions it is contended that the Auditor-General had the necessary authority to make the amendment to paragraph 143. I am unable to accept this argument. The power conferred under Rule 28 (1) is only a power with regard to the matters governed by the Government Servants' Conduct Rules and that has nothing to do with the amendment of paragraph 143, which does not come within the purview of the Government Servants' Conduct Rules.

18. Mr. Dolia next contended that even paragraph 143, as it stood prior to the amendment, conferred power upon the Auditor-General to make modifications. This argument is based upon the proviso to the explanation occurring in paragraph 143 already extracted. The explanation deals with continuous officiating in temporary service and with matters connected with calculating length of service for the purposes of that instruction. The proviso to that explanation no doubt confers power upon the Auditor-General to make modification in the principle of calculating seniority enunciated therein. But this has nothing to do with the power to amend the main paragraph 143 itself. The power cannot be so construed as to include a power to take away altogether the benefit of weightage conferred under the main paragraph 143.

19. Even if we concede for the sake of argument that the Auditor-General himself had power to amend, the question is whether the amendment, which is impugned, has been validly made. Article 313 of the Constitution provides as follows:

31. Until other provision is made in this behalf under this Constitution, all the

laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

Article 372 inter alia provides that notwithstanding the repeal by the Constitution of the enactments referred to in Article 395 (one of the Acts is Government of India Act, 1935) and subject to the other provisions of the Constitution, all the laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority. The expression "laws in force" has been construed by the Supreme Court in *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, as being wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law. Paragraph 143 of the Manual of Standing Orders, for the reasons already pointed out by me, has to be taken to be a statutory provision and was therefore a law in force immediately before the commencement of the Constitution. The Constitution has made a special provision for Comptroller and Auditor-General of India in Article 148. Clause (5) of that Article is relevant and it reads:

148 (5). Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the . Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

20. The question is whether, in view of Article 148 (5), it was competent for the Auditor-General to make an amendment to paragraph 143. Admittedly, the amendment has been made only by an administrative instruction. On that short ground, it has to be held that the amendment is invalid. A statutory rule cannot be amended or superseded by an administrative instruction-*vide Sant Ram Sharma Vs. State of Rajasthan and Another*. The expression "conditions of service" occurring in Article 148 (5)" is wide enough to include the condition regarding promotion. In *Mohammad Bhakar v. Y. Krishna Reddy* (1970) S.C.R. 768, the Supreme Court has pointed out that any rule which affects the promotion of a person relates to his conditions of service. Therefore, any rule relating to conditions of service including a rule touching upon the question of promotion, after the commencement of the Constitution, can only be made in the manner indicated by Article 148 (5). *Kalyani Stores Vs. The State of Orissa and Others*, . The modification to the existing law can be brought about also only in the aforesaid manner and if there be any modification by a process other than the one contemplated in Article 148 of the Constitution it would not be valid and operative. On the analogy of *Sajjan Singh Vs. State of Rajasthan*, and *Ramanlal Gulabchand Shah Vs. The State of Gujarat and Others*, , it has to be held that

the existing law, when modified, would lose the protection. A similar view was taken by a Bench of the Orissa High Court in *Naba Kishore Pat v. Union of India* and Ors. O.J.C. No. 586 of 1968 decided on 14th January, 1972, a printed copy of which was made available to me.

21. It is not as if the President has not taken action under Article 148 (5) with regard to the conditions of service of persons serving in the Indian Audit and Accounts Department. Mr. Ramaswami, Counsel appearing for the petitioners, produced before me copies of a number of orders issued by the President in exercise of the powers conferred under Article 148 (5) read with the proviso to Article 309 with regard to special laws relating to persons serving in the Indian Audit and Accounts Department. The impugned amendment to paragraph 143 of the Manual of Standing Orders undoubtedly affects the conditions of service and it has to be held that such an amendment can be made validly only by virtue of the powers conferred under Article 148 (5). That not having been done, it follows, that the impugned amendment is invalid. The petitioners, whose conditions of service are affected by the impugned amendment, are entitled to the writ asked for, namely, a direction to the first respondent to fix their seniority with reference to paragraph 143 of the Manual of Standing Orders as it stood prior to the amendment made on and July, 1956. The petitions are ordered accordingly. There will be no order as to costs.