1962

April 11.

KUNJ BEHARILAL AGARWAL

v.

UNION OF INDIA

(B. P. SINHA, C. J., K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR and T. L. VENKATARAMA AIYAR, JJ.)

Defence Service—Temporary Clerks and Extra Temporary Clerks—Fixation of seniority—Constitutionality of order—Constitution of India, Arts. 14, 16(1), 32.

The petitioner was employed by the Ministry of Defence in 1942 as an Extra Temporary Establishment Clerk. As a result of certain orders of the Government, there was an amalgamation of the services known as non-industrial staff in the Extra Temporary Establishment with those in another parallel service known as the Temporary Establishment. The petitioner contended in the petition that while Extra Temporary Clerks and the Temporary Clerks possessed the same qualifications, grade for grade, discharged the same duties and were governed by subtantially similar service conditions, under the order of the Government dated April 20, 1955, a Temporary Clerk was given the right to have his seniority based on the length of his actual service, but the case of Extra Temporary Clerks like the petitioner, though in service since 1942, the entire service was not taken into account in fixing the seniority in the amalgamated roll and only half the period between 1942 and 1949 was taken into consideration. The petitioner contended that persons who entered service long after him as Temporary Clerks had been given places of seniority above him. The result was that they became entitled to be promoted to higher grades much earlier than the petitioner. That applied not only to the petitioner but also to the entire class of Extra Temporary Clerks. The petitioner contended that there was no valid or reasonable basis for the discriminatory treatment of one set of employees as against another. The order was violative of the equal protection guaranteed by Art. 14 and the guarantee of equal opportunity for employment guaranteed by Art. 16(1) of the Constitution. The petitioner challenged the constitutional validity of the order dated April 20, 1955, and prayed for a declaration that his seniority be computed without reference to the said order.

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Held, that the two services had no common origin, but were recruited on different bases on different rates of pay and conditions of service. Even among the members of the two parallel services, there had been great disparities in rates of pay and condition of service. The two Services had been unified within each group by separate orders passed in 1945 and 1946. As a result of the changes brought about by these two orders in these two groups, a substantial amount of uniformity in the conditions of service of each group, compared with the other, had also been achieved. An attempt had been made to bring into a common roll the members of the two Services by the communication dated August 14, 1946, but that communication was cancelled on February 15, 1947. Before August 19, 1949, the Temporary Clerks held their employment as against sanctioned posts. The Extra Temporary Clerks were ad hoc employees recruited on a temporary basis and not against any sanctioned post, whether permanent or temporary. On the date of the amalgamation when the services of the Extra Temporary Clerks were regularised and they were brought to a common establishment, the position was that whereas the Temporary Clerks along with the permanent establishment were members of the ISP or IPE, the Extra Temporary Clerks did not fall within that category, and were made part of it only from and after August 1, 1949, under the order dated August 19, 1949. While the Temporary Clerks could claim to have been in the same service from even before August 1, 1949, the Extra Temporary Clerks could claim to belong to that service only from and after August 1, 1949. There was no express provision providing for a common basis of seniority based on length of service of the personnel falling under two groups and there was no intention of providing a common rule for determining the seniority. The petitioner could not claim that any rights regarding seniority which he possessed on the date when the Constitution came into force, were, in any way, restricted or denied to him by the order of April 20, 1955. The said order was really a concession in favour of the petitioner and not any detraction from the right possessed by him at the time of the commencement of the Constitution. There was no basis for the contention that any fundamental right of the petitioner guaranteed under Article 14 or 16 (1) had been violated. Actually, the position of the petitioner had improved and he was given a limited amount of seniority by the impugned order as compared to the rights he possessed on January 26, 1950. The impugned order really conferred upon him larger rights than he previously possessed. The writ petition was dismissed.

General Manager, Southern Railway v. *Rangachari*, [1962] 2 S. C. R. 586, referred to.

ORIGINAL JURISDICTION : Petition No. 264 of 1961.

(Petition under Article 32 of the Constitution of India for the enfoncement of Fundamental Rights).

A. V. Viswanatha Sastri and *R. Gopalakrishnan* for the Petitioner and *Gurbakash Singh* (Intervener).

C. K. Daphtary, Solicitor-General of India, R. Ganapathy Iyer and *P.D. Menon* for the respondent.

C. K. Daphtary, Solicitor-General of India, and *Naunit Lal* for *Khem Singh* (Intervener).

A.S.R. Chari and *K. R. Choudhri,* for *Jagatpati Dass* (Intervener).

1962. April 11. The Judgment of the Court was delivered by

Ayyangar J.

AYYANGAR, J.—The question raised in writ Petition No. 264 of 1961 relates to the constitutionality of an order passed on April 20, 1955, by the Ministry of Defence by which, in modification of certain orders passed previously thereto, certain rules were laid down for the computation of the seniority of Clerks falling within the category of Extra Temporary Establishment Service. The petitioner was employed by the Ministry of Defence (Army Ordnance Corps) on February 6, 1942 as an Extra Temporary Establishment Clerk. The nature of this service and its history are the matters which arise for consideration in the petition. It is the case of the petitioner that by reason of certain orders of Government which would be referred to in due course, there was an amalgamation of the service known as the non-industrial Staff in the

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Extra Temporary Establishment with those in another parallel service known as the Temporary Establishment and that as a result seniority in both these services had to be reckoned on the same basis, viz., the date when any employee entered service. The Union Government, however, it is alleged, illegally discriminated against the Clerical personnel which were originally known as the Extra Temporary Establishment of which the petitioner was formerly a member by the order now impugned, with the consequence that persons much junior to him have superseded him and, in fact, 610 Clerks who belonged to the former Temporary Establishment had thus gained seniority over him. He has accordingly filed this petition impugning the constitutional validity of this order of Government and for a direction that his seniority be computed without reference to this order.

It will thus be seen that though the petitioner seeks relief for himself, the points involved in the Petition affect the entire personnel of the Extra Temporary Establishment who would be governed by the impugned order and these are said to number nearly 6,000. It is only necessary to add that a petition for intervention seeking to support the petitioner has been allowed and we have heard Mr. Chari on behalf of the intervener. The number of employees who would be adversely affected if the impugned order was set aside is also stated to be considerable—variously estimated from 600 to one thousand and one of this group has also intervened to resist the petition. We are stating these matters for pointing out that the question raised in the petition and its result would affect a very large number of employees of Government.

To understand the grievance of the petitioner it is necessary to set out in detail the history of the Extra Temporary Establishment Clerks in the Defence Services.

As early as 1925 Temporary Clerks came to be recruited in the Defence Establishment of the Army Ordnance Corps but the temporary hands were recruited as against sanctioned posts. The control of this service was central and they were borne on the records of the A. O. C. (Army Ordnance Corps) records at Jubbalpore (now transferred to Secunderabad). This state of affairs continued till about 1933 when a need was felt for recruiting a much larger establishment including Clerks than could be accommodated in the sanctioned posts. Special provision was made for enabling this additional recruitment to be effected by making rules under the Financial Regulations of India (referred to generally as FRI) by which this special recruitment was to be effected. Personnel so recruited were known as the Extra Temporary Establishment. In regard to the Service of which the Petitioner was a member, the concerned clerical personnel could be recruited in the Ordnance factories under FRI Part I Para 25 of 1933 on a pay not exceedings Rs. 250/-p. m. and for a period not exceeding one year. As regards them there was no central office where their records were maintained, as in the case of the Temporary Establishment, but the records were maintained unit wise—in the office of the Director who recruited them. All such Extra Temporary Establishment personnel serving on the 31st of March of any year sanctioned for more than six months were to be regarded as technically discharged on that date and were to be reappointed by the Director of Ordnance factories or Director of Ordnance Services, as the case may be, under these powers, if necessary having regard to the manufacture programme for the ensuing financial year". Powers to recruit on similar terms were also conferred upon other Directors. As regards persons whose work was of a clerical nature, this rule provided that they might be recruited on daily rates of wages ranging from Rs. 1/8/-

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to Rs. 3/-per day, but just as in the case of the monthly paid staff, those serving on the 31st of any year were to be regarded as technically discharged on that date and their re-engagement for latter periods had to be arranged in accordance with these rules.

After the commencement of the second World War the recruitment of the Extra Temporary Establishment Clerks took place in very large numbers and by a Government of India dispatch dated August 6, 1941, the Master-General of Ordnance in India was permitted to recruit for the period of the war in the Indian Army Ordnance Corps Establishments clerical staff on monthly rates of pay instead of on daily wages. They were to be of three categories—Grade A, Grade B and Grade C with differential pay and differential qualifications for recruitment and this order of the Government of India stated:—

> "The pay of these men will continue to be debited in the same heads of the ETE (Extra Temporary Establishment) budget as at present. They will be subject to a month's notice on either side except in the case of misconduct when they will be liable to immediate dismissal after investigation by Chief Ordnance Officers."

A further paragraph of the same order recited :

> "These Extra Temporary Clerks would not be liable to transfer from one station to another except on their own request",

and their scales of pay having been converted from daily into monthly rates, they were debarred from making claims for overtime pay. This order of August 6, 1941, was clarified by a later order of July 25, 1942, conveying the sanction of the Governor-General in Council to the maintenance of

the Extra Temporary Establishments of Clerks on two distinct terms of service: (1) on daily rates of pay, and (2) on monthly rates, the former being entitled to overtime to which the latter were denied. This later order retaining the qualifications and the other conditions of service which had been prescribed for these Extra Temporary Clerks by the order dated August 6, 1941 also provided for an appreciable improvement in the rates of monthly wages sanctioned for Grade A over those that then prevailed and instead of a minimum or starting salary of Rs. 65/- provided for in the earlier order this was raised to Rs. 85/- under the later.

We have already pointed out that there was a larger volume of Temporary staff, as distinguished from the Extra Temporary Establishment, referred to just now which had been recruited from 1925 onwards. As regards the Temporary Establishment there appeared to have been large variations in the methods of recruitment, scales of pay, conditions of service etc. which came in as a result of the heavy recruitment which took place after the commencement of the second World War, when the need for a larger staff in these establishments became imperative. Towards the close of the war and when it was about to end the conditions of service of the Temporary clerks were rationalised and unified scales of pay were introduced, this being effected by Army Instructions India No. 676 of 1945 passed by the Government of India. These Instructions or decisions were to have effect from September 1, 1944. The matters specially provided for by this order of 1945 were: (1) the clerical staff were divided into three grades—A, B and C, Grade A corresponding to the Upper Division Clerks and B and C to the Lower Division. The method of recruitment to each of these grades, the educational qualifications to be satisfied and the proportions in which Grades B and A were to be

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filled by promotion from the grades just below were all laid down. (2) All clerks were required to undertake liability for service anywhere in India and were to be enrolled as non-combatants and for accepting this liability they were to receive an additional remuneration. (3) Their scales of pay were unified and rationalised, house rent allowance was made payable for personnel serving at specified places. Having thus providing for unification of the scales of pay, these Instructions made provision for persons already in service to exercise their option to be governed by the new rules, the option having to be exercised within three months from the date of the issue of the Instructions and if exercised was to be effective retrospectively from September 1, 1944 from which date, as stated earlier, the Instructions were to have effect. Having thus provided for the Temporary Clerks, the Instructions recited that "separate orders will be issued regarding the option to elect the revised terms by the ETE personnel who are serving at present on the rates of pay fixed under Rule 25 FRI"—a rule whose terms we have already extracted.

The promised order as regards the ETE personnel was issued in 1946 and is headed "Army Instructions India 458 of 1946". By this order the Extra Temporary Clerks serving on or after September 1, 1944 on rates of pay fixed by Rule 25 FRI were given the option to elect to be governed by the provisions of the Army Instructions 676 of 1945 subject to certain provisions: (1) the competent authority must consider the clerk as suitable, and (2) such clerks should have, since September 1, 1944, rendered service during minimum specified periods of the type prescribed. To those who satisfied these conditions provisions was made for: (1) the computation of the pay under the revised scale of those who were drawing daily wages, and

(2) the period within which the clerks could elect, it being provided that if they did so their election would have effect from September 1, 1944, or the date of the commencement of their service whichever was later. The previous continuous service rendered before September 1, 1944, was to count towards the minimum period for promotion and it went on to add that "in all other respects the terms and conditions laid down in Army Instructions 676 of 1945 would apply". One of the questions debated before us was whether by reason of Army Instructions 458 of 1946 the two Services, those of Temporary Clerks and the Extra Temporary Clerks had become integrated and, so to speak, became a unified service with a common seniority roll but to this we shall advert a little later. A very large number of the Extra Temporary Civilian Clerks, and among them the petitioner, opted to be governed by the revised rules and the competent authorities acceded to this request and they came to be governed by the revised rules.

The precise effect of Army Instructions 458 of 1946 in relation to the Extra Temporary Clerks and the question whether how far, by reason of their opting to be governed by rules similar to those governing the Temporary Clerks under Army Instructions 676 of 1945, there was any integration of the two Services appears to have been for some time a matter of doubt. If the two Services of Temporary Clerks and Extra Temporary Clerks were to be treated as integrated as a result of their being governed by similar or almost similar conditions of service, then a common roll based upon seniority dependent upon the date of their entertainment in service would have to be maintained on an All India scale, whereas if they continued to be merely parallel Services governed by similar or even identical rules, the two Services would be different and distinct and no question of inter se

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seniority between members of the two Services would arise and promotions in each group would be confined to the personnel in that group. This question engaged the attention of the authorities and in an order dated August 14, 1946, the following position was taken :

> "The maintenance of an All India Promotion roll for a small proportion of the clerks employed under Army Instructions 676 of 1945 (temporary clerks) who would serve in depots where large numbers of ETE were employed on similar terms but with more rapid prospects of promotion would obviously create immediate anomalies and dissatisfaction.....(3) As an interim measure it was therefore decided that the All India Rule would, for purposes of temporary promotion and recruitment, cease to operate and that interim establishment and ETE vacancies would be amalgamated for purposes of unit promotion under the control of O.I/C Records.....(7) small units where O. U. No. Civilian clerks are employed and promotion prospects are stagnant should, wherever practicable, be affiliated to larger depots where there is a big ETE element for purposes of inter-unit transfer and promotion".

Instructions were also given as regards the fund from which the pay of the two establishments should be disbursed. It would thus be seen that the question whether complete integration should take place, the difficulties or hardship which integration might involve upon the one group and the other were being appraised.

Very soon, however, after these instructions were issued a question arose whether clerical personnel belonging to the Extra Temporary Establishments, who had accepted the unified scales of

pay under Army Instructions 458 of 1946 were still required to be technically discharged annually under Rule 25 FRI. On February 3, 1947, with the concurrence of the Financial authorities, it was decided that such personnel were required to be discharged annually, though the technical discharge would neither affect the agreements which they executed when entering service nor render them inoperative.

Up to this date the question whether the two Services were integrated into a single unified Service with inter se seniority depending on length of service had, if at all, to be spelt from the notification dated August 14, 1946 whose terms we have extracted earlier. We have already pointed out that bringing these employees into a common roll was giving rise to hardships so far as Temporary Clerks were concerned for they were fewer in number than the Extra Temporary staff, and, as pointed out already while there are at present 6,000 Extra Temporary Clerical personnel, the category of Temporary Clerks is apparently about a thousand. In view of the difficulties and the hardships which were considered as having been caused to the Temporary Clerks, the order dated August 14, 1946, was cancelled by one dated February 15, 1947. The latter reads:

> "The question of amalgamation of ETE and ISP (Indian Superior Personnel) rolls has recently been discussed at BIOAC conference at General Headquarters and decided that these two rolls are not to be amalgamated. In view of the above this office No.10955 RC dated August 14, 1946, referred to above should be considered as cancelled."

Thus a definite decision were taken that the two groups were not to be amalgamated and the two Services unified so as to provide a common

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roll. This has to be brone in mind in understanding the next order of the Government of India which is dated August 19, 1949. It starts by saying: "The Government of India have had under consideration the question of revising the conditions of service of establishments known as Temporary Establishment (Ordnance factories) and Extra Temporary Establishments or Extra Temporary artisans or casual personnel in the Military Engineering Service." It proceeded to state that the Government had decided to abolish the designations just now mentioned and to treat such establishments as temporary and to classify them into two categories: (a) non-industrial, and (b) industrial employees. Paragraph 3(1) read:

> "With effect from August 1, 1949 the establishment defined under para 2(a) (non-industrial) Clerical establishment will be brought on to the regular establishment and be entitled to all the benefits of that establishment in the matter of leave, pension, provident fund etc. under the Civil Service Regulations, Civilians in Defence Services (Temporary Service) Rules, 1949 and other relevant rules applicable to the regular temporary on permanent establishment, as the case may be".

3(v) ran:

> "It should be made clear to the staff concerned that on being brought on to the regular establishment, they will be treated as whole-time regular Government servants in every way——————————————————"

Though under this order of the Government of India the Services were brought together, the terms upon which the integration should take place and the manner in which inter se seniority between member of the two categories was to be determined

was not specifically dealt with. This gave rise to doubts which was clarified by a Ministry of Defence communication dated January 4, 1950, in which questions raised by officers whose duty it was to implement the scheme, were answered. Of these, question 15 is that which is relevant in the present context and it ran in these terms:

> "On the abolition of the ETE and the inclusion of non-industrial employees in the IPE (Interim Peace Establishment) how should their seniority be determined vis-a-vis those who are in the IPE on July 31, 1959 ?"

The answer of the Government to this was:

> "Where it is possible to merge the establishments into one cadre the seniority of the erstwhile ETE vis-a-vis IPE should be reckoned only from August 1, 1949—the date from which they have been treated as members of the temporary establishment and their seniority amongest themselves regulated by their seniority in the old ETE. Where it is not practicable to merge all the establishments into one cadre on an All India basis the establishment of the old ETE and the present IPE should be kept separate."

A formal order setting out this answer was issued by the Ministry of Defence on June 7, 1951. Thereafter representations were made to the Government of India by those who formed the former Extra Temporary Establishment to reconsider the answer to question 15 and the formal communication of June 7, 1951. It was urged before the Government that the Extra Temporary Clerk as well as the Temporary Clerks had both, grade, for grade the same qualifications, were performing duties of an identical nature, were governed by practically the

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same Service conditions and that in these circumstances it was not proper that for reckoning seniority inter se between members of these two Services the service of the members of the Extra Temporary Establishment before August 1, 1949, should be ignored and that it was only on the date when these persons were brought into the common pool that they should be treated as having joined the Service. These representations were considered by Government and they passed an order on April 20, 1955, in these terms:

> "In modification of the orders contained in para 5 of the above CPRO—the order dated June 7, 1951—in so far as Clerks (ex ETE) are concerned, half of the continuous ETE service rendered by them prior to August 1, 1949 in the grade concerned, and/or in equivalent grades, shall count for seniority in the case of those whose seniority in the amalgamated roster of ex ETE and ex ISP employees has been fixed as from 1st August 1949. This implies that half of the period from the date of seniority amongst ETE prior to 1st August 1949 shall also be taken into account in addition to service w.e.f. 1st August 1949 for the purpose of fixing their seniorty in the amalgamated roster.....The revised seniority lists of clerical cadre will be drawn up immediately on the basis of these orders".

It is the constitutional validity of this last order that is challenged in these proceedings.

The contentions urged on behalf of the petitioner may be briefly stated thus: The Extra Temporary Clerks and the Temporary Clerks possessed the same qualifications, grade for grade, discharged the same duties, and were governed by substantially similar Service conditions. While so, under the impugned order of 1955 while a

Temporary Clerk has a right to have his seniority based on the length of his actual service, in the case of Extra Temporary Clerks like the petitioner, though he had been in service since 1942 that entire service is not taken into account in fixing the seniority in the amalgamated roll, but only half the period between 1942 to 1949, and so persons who entered service long after him as Temporary Clerks have now been given places of seniority above him with result that these others are entitled to be promoted to higher grades much earlier than the petitioner. In saying this he is voicing not merely his own complaint but that of the entire class of Extra Temporary Clerks vis-a-vis the Temporary Clerks. The submission is that such a discriminatory treatment of one set of employees as against another rests on no valid or reasonable basis and the fact that in the case of the member of one Service his pay was debited to one head while in the case of the other to a different head—which is stated to be a justification for the differentiation, could not serve as any ground for classification and is consequently violative of the equal protection guaranteed by Art. 14 of the constitution as well as of the guarantee of equal opportunity for employment contained in Art. 16 (1). In this connection learned Counsel relied on the decision of this Court in *General Manager, Southern Railway* v. *Rangachari* (1) in which this Court held that Art. 16(1) guaranteed not merely an equality in regard to initial employment i.e., recruitment but also ensured that there shall be equality throughout the length of the service including the right to promotions. It was strongly urged that the order of the Government of India of 1955 violated the rights guaranteed by there two Articles and that consequently we should strike down the order and direct government to proceed by taking

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into account the actual entry into service of petitioner and of other members of the Extra Temporary Establishment in computing their seniorty vis-a-vis the Indian Superior Personnel in the amalgamated group of Temporary and Extra Temporary Clerks.

It was further submitted by Mr. Sastri, learned Counsel for the petitioner that no doubt, to start with, the Extra Temporary Clerks and the Temporary Clerks really formed members of different Services, so that no question of inter se seniority between the members of these two services arose. By Army Instructions 676 of 1945 an uniform scale of pay and allowance was brought into effect in regard to the Temporary Clerks. Upto that stage the Extra Temporary Clerks continued to form a separate Service. These Instructions however, contemplated that an unification on similar lines would be effected of the Extra Temporary Clerks and it was in view of this contemplated result that in paragraph 3 it recited :

> "Separate orders will be issued regarding the option to elect to revised terms by those ETE personnel who are serving at present on the rates of pay fixed by Rule 25 PRI."

The promised notification was issued in 1946—Army Instructions 458 of 1946. Just as in the case of the Temporary Clerks, an option was given to the Extra Temporary Clerks to opt for the new scales and similarly when such personnel opted, the new scales were to have effect from the same date—September 1, 1944. Paragraph 7 of these Instructions of 1946 expressly provided :

> "In all other respects the terms and conditions laid down in Army Instructions 676 of 1945 will apply."

Which went very near unification of the two Services. Even if, however, it be considered that the two Services of the Temporary and Extra Temporary Clerks continued as distinct Services each with its own roll of seniority, though their conditions of service were identical, amalgamation of the two Services took place by virtue of the letter 10955 dated August 14, 1946, from the AOC Records, Jubbalpore addressed to the other Army Establishments. We have already extracted the material portions of this order and we are therefore not repeating them. Learned Counsel's point was that by this communication of August 14, 1946, the distinct identity of the two Services, as stated above, was done away with and there was thereafter only one Service which would necessitate a common roll being prepared for determining *inter se* seniority between clerks in the combined roll.

It was further urged that this amalgamation or unification was brought one stage nearer accomplishment by the order of Government dated August 19, 1949, so that on the date of the Constitution there was an unified Service comprising both the Temporary as well as the Extra Temporary Clerks. The order of the Government dated April 20, 1955, was thus a reversal of the policy which had progressed in one direction from 1945 to 1949 and which involved as a necessary and logical corollary an amalgamated roll in which seniority was to be determined by the date of a person's entry into service and would be independent of his having been originally or historically a member of either the Temporary or the Extra Temporary Establishment. By the order now impugned the Government had deprived a large number of employees of the seniority and chances of promotion to which they were entitled before then, and the deprivation of these rights could not be justified on any

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reasonable or rational grounds and was therefore in violation of Arts. 14 and 16(1) of the Constitution.

No doubt, if Counsel is right in his submission that on the date the Constitution came into force, a class of employees of the Government were entitled to certain rights, the deprivation of those rights by an order passed by government might in conceivable cases give rise to a complaint of a violation of Art. 14 or Art. 16(1). The Constitution however, is not retrospective and if before January 26, 1950, by reason of orders passed by Government, the rights of the petitioner and those like him had become settled, the petitioner cannot invoke the constitutional guarantees under Part III or the machinery for their enforcement, for challenging the legality of the orders passed before the Constitution. The entire foundation of the argument has to be, and in fact was, that the petitioner and the Extra Temporary Clerks of whom he is one, had a right to seniority based upon their length of service at the date of the Constitution. In order to establish this Mr. Viswanath Sastri, when he opened his case, laid great stress on the communication dated August 14, 1946, as effecting an amalgamation between the two Services. By its terms it certainly renders such an argument possible and if the scheme contained in it continued there might be a great deal of force in the argument of learned Counsel that an unification of the two Services had been effected and that the later order of Government of August 19, 1949 completed this process. The hurdle in the way of learned Counsel however, is that the scheme of unification contemplated by the communication of August 14, 1946 was given up in February 1947 and this communication was formally cancelled. The communication dated February 15, 1947, by which that of August, 1946, was cancelled was not

referred to in the petition, and when the Union of India relied on it in the counter-statement filed by it, the reply of the petitioner in his rejoinder was, that this communication was issued because of pressure and that no regard should be paid to it because it was based on no principle or reason and was bad as being arbitrary. This was not the line, however, that learned Counsel adopted in his arguments. First learned Counsel faintly suggested that the later letter could not possess the same validity or force as that of August 14, 1946. This submission is entirely without foundation. Both are communications from officers of the Defence Services to other officers and they possess equal weight. If the order dated August 14, 1946, could confer rights, that dated February 15, 1947, could deny those rights. In fact, from the correspondence it looks as if the first was a mere tentative order passed at a time when experiments were being made in an attempt to unify the two Services.

If therefore the communication dated August 14, 1946, has to be ignored, the position resolves itself into this : under the Army Instructions of 1945 the Temporary Clerks were between themselves unified into one Service with common service conditions, common grades of pay etc., the members of that Service being granted an option to elect to be governed by the revised conditions which, if opted for would have effect from September 1, 1944. Similarly, the Extra Temporary Establishment came by reason of the Army Instructions of 1946, in regard to their own service, to be governed by uniform conditions of service, grades of pay, allowances etc. with a similar option to the members of that Service to opt for the new conditions which would have effect, again from September 1, 1944, in the event of their so opting. The words in paragraph 7 of the Army Instructions of 1946 in relation to the Extra Temporary Clerks, that the other

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conditions of service of these personnel would be the same as the Temporary Clerks would mean, in the context, that as regards provident fund, leave etc. they would be governed by similar rules but the effect of the two Army Instructions were that the two Services remained separate and were not amalgamated into an unified Service.

Mr. Sastri, when he found that the communication dated August 14, 1946, which purported to amalgamate the two Services had been cancelled by the later communication dated February 15, 1947, relied on the order of the Government of India dated August 19, 1949, as the one which effected a complete amalgamation of the two services and that thereafter the seniority of the Temporary as well as the Extra Temporary Clerks had to be computed on an identical basis, namely, the commencement of the service of each individual employee. Before considering this argument it is necessary to bear in mind two considerations :

(1) The order of August 19, 1949, does not in terms make any provision for the determination of the *inter se* seniority between members of the two Services which it was bringing into one fold.

(2) The two Services had started as parallel Services, recruited on different bases and to whom different conditions of service were applicable. Substantial, though far from complete, uniformity had been effected in the conditions of service of the two groups by separate orders passed in 1945 and 1946 relating to them. An attempt was made to unify the two Services in August, 1946 but difficulties were met and the experiment was abandoned and by the communication dated February 15, 1947 the earlier ROC dated August 14, 1946 was cancelled. It is with background that one had to examine the scope and effect of the order of the Government of India dated August 19, 1949.

In this connection Mr. Sastri urged two contentions which require to be considered. The first was that the order of Government dated August 19, 1949, when properly constructed drew no distinction between the clerical staff who are classified as non-industrial belonging to the Ex-Temporary Clerks or Ex-Extra Temporary Clerks and that these two categories were treated alike and amalgamated into a new unified Service. He further submitted that having regard to the purpose of the unification, viz., the elimination of every difference in the service conditions of the two groups, it was implicit that the determination of the seniority of the personnel should be based on identical considerations unless there was any specific or express provision in that regard in the order, and admittedly there was none.

The second was that the clarification effected on January 4, 1950, by the answer to question 15, was not in fact a "clarification", but a radical departure from the Policy and decision contained in the order dated August 19, 1949, and that the opinion there expressed could have validity as a service condition only when embodied in a normal order, and that in fact this step was taken only on June 7, 1951, when Government passed an order which has been numbered as CPRO 513 of 1951. This last order which was passed after the constitution came into force was therefore impugned as violating the freedoms guaranteed by Arts. 14 and 16 (1). In short, the contention was twofold: (1) that the order dated August 19, 1949, was not merely not neutral but provided for equality between the two groups in the matter of the principle that should govern the reckoning of seniority, and (2) that this equality was departed from and an unfair discrimination made against the Extra Temporary Clerks only by the Government order dated June 7, 1951, and that the petitioner

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was therefore entitled to challenge CPRO 513 of 1951 as unconstitutional and void for violation of Arts. 14 and 16 (1).

We consider that these contentions are without force and have to be rejected. In the first place, it must be mentioned that neither in the petition nor in the rejoinder-affidavit field by the petitioner was the constitutional validity of CPRO 513 of 1951 challenged. But even if this matter of want of pleading be ignored, the entire argument proceeds on the basis that the Government order dated August 19, 1949, had effected not merely an amalgamation of the two Services of the Temporary Clerks and Extra Temporary Clerks but that it had further positively laid down a rule of inter se seniority under which the entire length of service of each employee was to determine his seniority in the common roster. There are no express words making a provision on these lines in the Government order. The inference, if any, has therefore to be drawn from the absence of a specific reference to the relative seniority of the two groups in the combined roll. Before drawing an inference on the line suggested by learned Counsel for the petitioner regard must be had to the antecedent matters which have already been stated but which we shall summarise for the purpose of convenience. (1) The two services had no common origin, but were recruited on different bases and originally on very different rates of pay and conditions of service; though there was no doubt great similarity between the qualifications for recruitment and the nature of the duties performed. (2) Even among the members of the two parallel Services there had been great disparities in the rates of pay and conditions of service and these had been unified within each group by separate orders therefore passed in 1945 and in 1946. Besides, as a result of the two groups, a substantial amount of uniformity in the

conditions of the service of each group compared with the other had also been achieved.

(3) An attempt had been made to bring into a common roll members of the two Services by the communication dated August 14, 1946, and after a good deal of experiment, cogitation and correspondence that communication had been withdrawn and the distinctness between the two Services had been maintained as it originally existed by the cancellation on February 15, 1947, of the communication dated August 14, 1946.

(4) Before August 19, 1949, the Temporary Clerks, as we have already pointed out held their employment as against sanctioned posts, while the Extra Temporary Clerks were ad hoc employees recruited on a temporary basis and not against any sanctioned post—permanent or temporary.

Thus on the date of the amalgamation when the Services of the Extra Temporary Clerks were regularised and they were brought to a common establishment the position was that where as the Temporary Clerks along with the permanent establishment were members of the ISP or IPE, the Extra Temporary Clerks did not fall within this category and were made part of it only from and after August 1, 1949 under the order dated August 19, 1949. Looked at from this point of view it would appear that where as the Temporary Clerks could claim to have been in the same Service from even before August 1, 1949, the Extra Temporary Clerks could claim to belong to that Service only from and after August 1, 1949. Of course, if the Government order had specifically fixed the basis of inter se seniority that would be another matter. But in the absence of any express provision on that point the natural result of the previous history would obviously be that the extra temporary clerks could claim to belong to the unified Service only from and after August 1, 1949. It is in the light

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of this background that one has to approach the intentions of those who passed the order of August 19, 1942. It therefore appears to us that in the absence of an express provision providing for a common basis of seniority based on length of service of the personnel falling under the two groups there was no intention of providing a common rule for determining seniority. On the other hand the Government order of 1949 not having made any specific provision for the allocation of seniority to Extra Temporary Clerks, calculated on the basis of their service as Extra Temporary Clerks as distinct from their membership of the IPE, the inference would be that this could date only from August 1, 1949.

The next matter to be noticed is that the ambiguity arising from the absence of any specific mention of the principles upon which the relative seniority of the two groups had to be determined immediately cropped up and the clarification of January 4, 1950, should in the circumstances be deemed to be a part and parcel of the Government order of August, 1949. It should be remembered that the clarification was necessitated by questions which were immediately raised as to the interpretation of the order and in those circumstances we hold, without any hesitation, that the order of August, 1949, has to be read in the light of the clarification. Besides it appears to us that the answers thus given were implicit even in the order of 1949 when one bears in mind that the Temporary Clerks were already in the IPE and the Extra Temporary came into what Service by reason of the order. But anyway that matter was clarified and the clarification dated January 5, 1960, has to be read as part and parcel of the order of Government dated August 19, 1949. If the position were thus understood it is manifest that CPRO 513 of 1951 was no more than a formal declaration of

what Government intended in 1949 and which they had already explained earlier. We need only add that the petitioner in his petition understood the function of the clarification of January 4, 1950, in the same manner as we have done, and did not, as stated already, impugned the validity of CPRO 513 of 1951; in fact, he did not refer to it at all. On the otherhand, the challenge in this part of petition was to an unfair and improper discrimination alleged to have been made between industrial workers and non-industrial workers of whom the petitioner was one by the clarification of January 4, 1950—a matter which was not even adverted to by learned Counsel in his arguments before us. In our opinion, CPRO 513 of June, 1951, did not alter or affect any rights which the petitioner, and along with him the Extra Temporary Clerical Staff, had under the orders dated August 19, 1949.

We consider therefore that on the date when the Constitution came into force the position was that for the determination of the relative seniority between the Extra Temporary Clerks and the Temporary Clerks while in the case of the former the date from which they should be deemed to have come into the regular establishment and the common roll was August 1, 1949, in the case of the latter it was from the date when they entered service. On this basis the petitioner could obviously not claim that any rights as to seniority which he possessed on the date when the Constitution came into force were, in any way, restricted or denied to him by the impugned order of April 20, 1955. It would be apparent that the order of Government of April 20, 1955, now impugned is really a concession in favour of the petitioner and not any detraction from the rights that he possessed at the commencement of the Constitution. If the impugned order should now be vacated the result would be that the petitioner would be relegated to the

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rights that he possessed under the orders of Government dated August 19, 1949, read with the clarification dated January 4, 1950. Obviously, that is not the relief which the petitioner seeks by this petition. In the circumstances the allegation that there has been an infringement of the fundamental right of the petitioner to equal protection of the laws under Art. 14 or equality of opportunity for employment under Art. 16 (1) must be held to have no factual basis. The fact was that the position of the petitioner was improved and he was given a limited amount of seniority by the impugned order as compared to the rights which he possessed on January 26, 1950. The impugned order, therefore, far from adversly affecting the petitioner, really conferred upon him larger rights than he previously possessed.

The petition therefore fails and is dismissed with costs.

Special Leave Petition No. 786 Of 1961

The petitioner in Writ Petition 264 of 1961 just now disposed of filed a petition under Art. 226 of the Constitution before the High Court, Punjab on, substantially, the same allegations as in the petition to this Court and praying for similar reliefs. The learned Judges dismissed the petition *in limine* and thereupon the petition the petitioner has filed the application for the grant of special leave to appeal to this Court from this judgment. In view of our decision in Writ Petition 264 of 1961, the petition for special leave is rejected.

Petitions dismissed.

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