

(1964) 05 OHC CK 0008
In the Orissa High Court
Case No : O.J.C. No. 254 of 1963

Dr. Miss Binapani Dei

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-05-1964

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)
Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 — Rule 13, 15
Orissa General Financial Rules, 1959 — Rule 65

Citation : AIR 1965 Ori 81 : (1965) 1 LLJ 335

Hon'ble Judges : R.L. Narasimham, C.J;G.K. Misra, J

Bench : Division Bench

Advocate : D. Mohanty and B. Das, for the Appellant; Advocate General and Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—This is an application under Article 226 of the Constitution of India wherein the petitioner asks for issuing an appropriate Writ for quashing the order, dated 27th June, 1963 passed by the Government declaring that the petitioner still continues in service.

2. The facts leading to the application may be stated in a narrow compass.

The petitioner was appointed as a lady Assistant Surgeon in the Orissa Medical Cadre on 12th June, 1938 and was confirmed as Superintendent of Medical Aid to Women and children on 11th May, 1955. Her age in the Civil list and History of Services of Gazetted Officers of Orissa, maintained by the Accountant General, Orissa is 10th April, 1910. This date was declared by her to be her date of birth at the time of entry into the service and was supported by documentary evidence produced by the father and verified and accepted by the Government. On the basis of this date, the petitioner was to ordinarily retire on 10th April, 1965 on completion of the age of 55. But according to the resolution of the Government of Orissa in the Political and Services Department, dated 21st May 1963, the age

of compulsory retirement has been raised from 55 to 58 years with effect from the 1st December 1961 and she was to retire on the 10th April, 1968.

By a letter, dated 9th May, 1963 the Government of Orissa determined 16th April, 1907 as the date of her birth. On a representation being made by the petitioner to the Chief Minister, Orissa, the Government in the Health Department by a letter, dated 27th June, 1963 ordered that the petitioner was deemed to have retired with effect from the afternoon of 16th April, 1962; but the Government granted an extension of service from 16th April, 1962 till the afternoon of 15th July, 1963. As a result of this order, the petitioner has been deprived of nearly 5 years of active service and consequential promotions, privileges and benefits of increased pension.

The petitioner and her sister Dr. Jyotsana Dei passed Matriculation examination privately in 1924. No age or date of birth was recorded in their Matriculation Certificates as at that time the, Patna University did not record the age or date of birth of girl students. The petitioner was admitted into the I. A. class attached to the Ravenshaw Girls School and passed the I. A. examination in 1926 along with her sister. Both of them were admitted into Lady Hardinge Medical College, Delhi She passed M.B.B.S. examination of the Punjab University and was first posted as a lady Doctor in Bettiah Hospital, Bihar, in 1936 and subsequently In the Pilgrims Hospital, Puri, in 1937 and joined Orissa Medical Service on the 12th June, 1938. On the 15th November, 1957, an anonymous petition was filed challenging the correctness of the date of birth of the petitioner. She affirmed the correctness of her date of birth, as given in the Civil List. Though the matter seemed to have been dropped, nearly four years thereafter the question was reopened with reference to the Admission Registers of the School and College sections of the Ravenshaw Girls' School. It was intimated to the petitioner by a letter from the then Secretary to Government in the Health Department (Sri S. M. M Burney) on 23rd August, 1961 that she was admitted into class X and her age was shown as 15 years and that on 9th July, 1924 she was admitted into the First Year I. A. Class and her age was shown as 17 years and 2 months, and she was required to show cause why 9th May, 1907 should not be accepted as her date of birth on the basis of the entry in the Admission Register of the I. A. Class. She submitted explanation challenging the genuineness of the entry in the Admission Register. After some correspondence, the Admission Registers were examined by the petitioner in presence of the Director of Health Services and the officers of the Vigilance department, and the petitioner showed further cause on 19th March, 1962 pointing out irregularities against the acceptance of the age mentioned in the Admission Registers of the Ravenshaw Girls' School. There was further scrutiny of the Registers on the 12th July, 1962 and the matter was kept pending till there was a proposal for appointment of an Additional Director for the Family Planning for the State of Orissa. Mr. Sitakantha Misra, the then acting Director of Health, himself wanted to be the Additional Director after his reversion from the post of Director of Health Services, and the petitioner submitted a representation asserting her superior claim.

On 26th September, 1962, Dr. Sushila Nayar, Union Health Minister, Government of India, who was personally known to the petitioner, visited Orissa, and the petitioner mentioned to her about the proposed appointment of Dr. Sitakanlha Misra to be the Family Planning Director overlooking her superior claim. Later, Dr. Nayar told her at a Dinner party that she had already given her strong views in the matter to the Health Secretary, Government of Orissa. Soon after the visit of Dr. Nayar and the submission of representation by the petitioner, Sri A. L. Nair, Secretary of the Department of Health, addressed a letter to the petitioner on 28th September, 1962 referring to the question of her date of birth. Sri Nair specified in his letter that according to the School Admission Register her date of birth was 22nd August, 1906 and according to the I. A. Class Admission Register it was April 1907, and the latter date was to be treated as the date taken from the Matriculation Certificate. The letter required the petitioner to show cause why her date of birth should not be accepted as 16th April, 1907. The petitioner showed cause, made various representations challenging the correctness of the entries in the Admission Registers and asserting the correctness of the age given in the Civil List, and ultimately the Government passed the order which is assailed in the Writ application.

Thus the petitioner assails the order of compulsory retirement on the following substantial grounds:

- (i) After lapse of About quarter of a century, the Government of Orissa cannot re-open the question of her age under Rule 66 of the Orissa General Financial Rules.
- (ii) The compulsory retirement of the petitioner before the age of superannuation given in the Civil List amounts to removal from service within the meaning of Article 311 of the Constitution and the removal was effected without giving a reasonable opportunity of showing cause against the action proposed to be taken and in violation of the principle of natural justice; and
- (iii) The removal was mala fide as the petitioner made representation asserting her superior claim to be appointed as an Additional Director of Family Planning and as she made certain complaints to Dr. Sushila Nayar, the Union Health Minister, about the supersession of her claim.

3. Counter affidavits, filed on behalf of the opposite parties, are substantially the same. The petitioner's contentions are repelled on the following grounds:

- (i) The age of a Government servant as mentioned in the Civil List, can be reopened and Rr. 55 and 65 of the Orissa General Financial Rules, do not render the entry of the age in the Service Book conclusive;
- (ii) Compulsory retirement of the petitioner on re-fixation of the age does not amount to her removal from service within the meaning of Article 311 of the Constitution and is not a punishment. Though Article 311 has no application, the petitioner was given reasonable opportunity to show cause against re-fixation of her age; and

(iii) The charge of mala fide and conspiracy is false and irrelevant.

4. The following questions arise for consideration;

(i) Is the age given in the Civil List final and conclusive and is not liable? to be reopened by the Government ?

(ii) (a) Does earlier compulsory retirement by vefixation of age of superannuation amount to removal from service within the meaning of Article 311 of the: Constitution ?

(ii) (b) If so, was there at all an enquiry under Article 311(2) and was the petitioner given a reasonable opportunity of showing cause against the action proposed to be taken in regard to her ?

(iii) Is the refixation of age of the petitioner liable to be quashed bring outcome of mala fide exercise of power ?

5. The first contention of the petitioner is based on Rules 65 and 66 of the Orissa General Financial Rules. Rule 65 is as follows:

"Every person newly appointed to a service or a post under Government should at the time of the appointment declare the date of his birth by the Christian era with as far as possible confirmatory documentary evidence, such as, a matriculation certificate, municipal birth certificate and so on. If the exact date is not known an approximate date may be given. The actual date or the assumed date determined under Rule 66 should be recorded in the history of service, service book, 01 any other record that may be kept in respect of the Government Servant's service under Government and "once recorded it cannot be" altered, except in the case of a clerical error without the orders of the State Government.

Mr. Mohanty lays emphasis upon the underlined (here into " ") expression and contends that the age cannot be altered once it is recorded in the service book & that it can be altered in the case of a clerical error with the orders of the State Government only. We are unable to accept this construction. The rule does not fetter the powers of the State Government to reopen the question of age, though it is rarely reopened in practice. The prohibition is against the Government servant. The Note to Rule 66 is to the effect that cases in which the dale of birth has been deduced from the age at appointment or attestation by any other method, "need not be reopened". The underlined (here into " ") expression clearly emphasises that the matter is discretionary with the Government.

Some reliance was also placed on certain precedents followed and instructions given by the Government of India in the matter of retirement of Officers at the tag end of their career. Annexure XV is a letter No. 42/58-AIS (III), dated, New Delhi, the 25th July, 1958 from the Government of India to the Government of Orissa indicating that the general policy of the Government of India is not to recommend any change in the date of birth at the fag end of an officer's career. The matter is one of exercise of discretion by the Government and not of law.

Thus, both under the General Financial Rules and under the precedents and instructions, referred to, the Government is not precluded in law from determining and refixing the real age of the Officer. The first contention is devoid of force

(i) The second contention requires closer examination. The learned Standing Counsel placed reliance on Rule 13, Clause (vii), Explanation (g) of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962, in support of the contention that compulsory retirement of Government servant in accordance with the provisions relating to his superannuation or retirement does not amount to a penalty at all. The relevant portions of Rule 13 are as follows:

"13. Nature of Penalties--The following penalty may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely:

x x x (vii) Compulsory retirement

x x x Explanation--The following shall not amount to a penalty within the meaning of this rule:

X X X (g) Compulsory retirement of a Government Servant in accordance with the provisions relating to his superannuation or retirement."

Article 459(b) of the Civil Service Regulations prescribes that officers, other than ministerial, who have attained the age of 55, should ordinarily be required to retire.

Reading the aforesaid two provisions together, it is contended for the State that the petitioner retired at the refixed age 55 under Article 459 (b) and the said compulsory retirement is not a penalty and does not amount to removal within the meaning of Article 311 of the Constitution. Reliance was placed on *Shamji Naranji v. State of Madhya Pradesh* AIR 1954 Nag 161 and *Zainnuddin v. Travancore-Cochin State* AIR 1934 KER 32 which support the contention for the State. In these decisions their Lordships held that the fact that the retirement had been ordered as a result of the finding relating to the date of birth none-the-less amounts to retirement in the ordinary course, and, as such, is not a punishment and cannot be deemed to be a removal under Article 311 so as to be interfered with under Article 226.

The argument over-simplifies the difficulties inherent in the matter. There is no dispute over the proposition that if the Government retires an Officer compulsorily prior to the date of his superannuation contrary to the rules, the retirement amounts to a removal within Article 311(2) of the Constitution. What the Government is directly precluded from doing it cannot be permitted to indirectly do by taking recourse to refixation of the age. Thus removal of the petitioner, by refixation of age by fixing an earlier date of birth would come directly within the mischief of "removal" under Article 311(2). The State of Bombay Vs. Saubhagchand M. Doshi, , clearly establishes such a proposition. In

para 11, their Lordships held;

But where there is no rule fixing the age of compulsory retirement, or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal within Article 311(2).

This dictum was approved in the latest decision of the Supreme Court, Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., in which all the previous decisions of the Supreme Court on the subject were revised. In para 38, their Lordships observed:

"With respect, we think that this statement correctly represents the true position in law."

The Government has full power to reopen the question of age. If it arbitrarily enhances the age of an officer so as to bring it to the minimum age of retirement fixed under the rules, then the removal of Officer for the period earlier to the date of retirement, as it stood originally, amounts to removal and the Officer is entitled to protection under Article 311. In view of the pronouncement of the Supreme Court, we are unable to accept AIR 1954 Nag 161 and AIR 1954 KER 32 as laying down good law. A permanent servant acquires a right to hold the post. Termination of the service of such a servant by refixation of age must per se amount to a punishment as it operates as a forfeiture of the servant's rights and brings about a premature end to his employment. This basic principle was laid down in Crown Aluminium Works Vs. Their Workmen, . In Bhanwar Singh Bhup Singh Rajput Vs. State of M.P., in similar circumstances their Lordships held that such retirement would amount to a removal, and," as such, a punishment. The retirement of the petitioner on the refixed date of birth as 16th April, 1907 amounts to her removal. Explanation (g) is not inconsistent with this concept. She is therefore entitled to the protection under Article 311(2) .

7. It is now necessary to examine if the petitioner was removed from service after she had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to her under Article 311(2). It is noteworthy to mention that in paragraph 16 of the Counter Affidavit fled by Sri A. L. Naur (SIC) to the Government of Orissa, Health Department, it was asserted that Article 311 was not attracted to the case. That being the positive ease of the Government, there was no further assertion that the elate of birth was refixed after thorough inquiry required under Article 311(2).

Admittedly, there as some inquiry. The learned Standing Counsel frankly conceded before us that a copy of the report, dated 11th August, 1962 (Annexure 2A) (No. 18288 M, dated 11-8-1962 From Dr. Sitakantha Misra, Director of Health Services, Orissa, to the Secretary to the Government of Orissa, Health Department) to the counter affidavit of opposite party No. 3 was not furnished to the petitioner. In this report, DC. S. K. Misra gave a complete history of the case. He had recommended to the Government to accept the petitioner's correct date of birth as 4th April, 1908. The relevant portions of this report may be quoted in

extenso:

"I had correspondence with the Principal, Lady Hardinge Medical College Hospital, New Delhi, where these two doctors were trained in Medicine, A copy of the letter from the Principal, Lady Hardinge Medical College is enclosed for reference wherein it is mentioned by the Principal that from the records available in the College the dates of birth of J. Dei who joined College in September, 1926 is 10th April, 1909 and in case of B. Dei who was admitted on 16 September, 1926 the date of birth is recorded as 4th April, 1908. The dates of birth recorded on different stages of their admission to the school and the College and also the age reported by the Lady Hardinge Medical College vary.

The letter from the Principal, Lady Hardinge Medical College, New Delhi, was shown to Dr. B. Dei. She declined to comment. It would, therefore be reasonable to fix the dates of birth as reported by the Lady Hardinge Medical College, New Delhi, as the correct dates of birth since by that time both were adults and both should have known the recording of their age in the Medical College Admission Register.

The date of birth of Dr. J. Dei recorded in the Admission Register of the Lady Hardinge Medical College is 10-4-1909. The date of birth of Dr. J. Dei was recorded in the 1st year class, Girls' College as March, 1909. The Vigilance is of opinion that her correct date of birth Should be 9-4-1909 calculating her age previously recorded in the Ravenshaw Girls School, Ravenshaw College and the Lady Hardinge Medical College coincide with the year of birth though not with month and the date which slight differs. So the date of birth in respect of Dr. J. Dei recorded as 10-4-1909 in the admission Register of Lady Hardinge Medical College is to be taken as her correct date of birth. Similarly the date of birth recorded in case of Dr. B. Dei in the admission Register of the Lady Hardinge Medical College is to be taken as correct date of birth, i.e., 4-4-1908."

A fair summary of the aforesaid recommendation of Dr. Sitakantha Misra was also not mentioned in the alleged second show cause notice, dated 28th September, 1962 (Annexure VII filed by the petitioner). As this document (Annexure VII) constitutes the foundation of the argument on this aspect of the case that neither the findings nor a fair summary of the findings of Dr. S. K. Misra the enquiring officer, were supplied to the petitioner, it is desirable to quote it in its entirety:

"To Dr. Miss B. Dei, Superintendent of Medical Aid to Women and Children, Orissa.

You were admitted into class X of the Ravenshaw Girls' School in the year 1921. In the Admission Register of the said school your date of birth on this admission was recorded as 22-8-1906. Subsequently, in the year 1924, you were admitted into the 1st Year Class. On this occasion your date of birth was recorded as April, 1907. Your Matriculation Certificate does not contain any information with regard to your age or date of birth. In accordance with the clear instructions issued by the Government in their letter No. 22716/F, dated 27-9-1955 the age recorded in

the Matriculation Certificate in respect of all those who are matriculates or possess higher academic qualification should be accepted as correct evidence of age. In view of the above instructions your date of birth as recorded at the time of your admission to the 1st year class should be treated as final for all purposes of Government service. Accordingly Government have taken a tentative decision to accept April 1907 as the correct date of your birth. You are, therefore, called upon to show cause within fifteen days from the date of receipt of this order as to why your date of birth should not be taken as April 1907. If no reply is received within the stipulated period it will be presumed that you have got nothing to say and order as deemed proper will be issued.

Sd. Illegible 28-9-1962 (Sd. A. L. Nair) Secretary to Government, Health Department"

Comparing this notice with the report of Dr. S. K. Misra. already quoted, it is manifest that a fair summary of Dr. Misra's recommendation fixing the petitioner's date of birth as 4th April, 1908, was completely suppressed from her. It was open to the petitioner not only to show cause against the taxation of her date of birth in April, 1907 by asserting that her date of birth was 10th April, 1910, but also to put forward an alternative case on the basis of recommendation of Dr. S. K. Misra that her date of birth was 4th April, 1908, which was given at ft stage when she was adult and was to be preferred to the dates in the school admission registers which were challenged "to be forged or given by persons having no exact knowledge of the age when her parents were alive. In the absence of supply of a copy of the report or a fair summary thereof, the mandatory provisions of Article 311(2) have not been complied with. In State of Assam and Another Vs. Bimal Kumar Pandit, their Lordships laid down in unmistakable terms that supply of a copy of the findings of the enquiring officer or a fair summary thereof is mandatory to enable the delinquent officer to show case against the action proposed. In this case, the dismissing or the removing authority has not fully accepted the recommendation, of Dr. S. K. Misra. The law in such a contingency is laid down by their Lordships in para 8 of the judgment:

"We ought, however, to add that if the dismissing authority differs from the findings recorded in the enquiry report, it is necessary that its provisional conclusions in that behalf should be specified in the second notice. It may be that the report makes findings in favour of the delinquent officer, but the dismissing authority disagrees with he said finding and proceeds to issue the notice under Article 311(2). In such a case, it would obviously be necessary that the dismissing authority should expressly state that it differs from the findings recorded in the enquiry report and then indicate the nature of the action proposed to be taken against the delinquent officer. Without such an express statement in the notice, it would be impossible to issue the notice at all. There may also be cases in which the enquiry report may make findings in favour of the delinquent officer on some issues and against him on other issues. That is precisely what has happened in the present case. If the dismissing authority

accepts all the said findings in their entirety, it is another matter; but if the dismissing authority accepts the findings recorded against the delinquent officer and differs from some or all of those recorded in his favour and proceeds to specify the nature of the action proposed to be taken on its own conclusions, it would be necessary that the said conclusions should be briefly indicated in the notice. In this category of cases, the action proposed to be taken would be based not only on the findings recorded against the delinquent officer in the enquiry report, but also on the view of the dismissing authority that the other charges not held proved by the enquiring officer are according to the dismissing authority, proved. In order to give the delinquent officer a reasonable opportunity to show cause under Article 311(2), it is essential that the conclusions provisionally reached by the dismissing authority must, in such cases, be specified in the notice."

The notice, dated 28th September, 1963 clearly infringes the aforesaid principles. There is no escape from the conclusion that the petitioner had not got a reasonable opportunity of showing cause against the action proposed to be taken against her under Article 311(2). This ground, by itself, is enough to come to a conclusion that the mandatory provisions of Article 311(2) have been violated and the petitioner's removal from service cannot be sustained.

The implication and importance of the omission on the part of the authority to supply a copy of the report of the enquiring officer or a fair summary thereof may be examined in the light of the Circulars of the Government raising the age of compulsory retirement from 55 to 58 years. If Dr. S. K. Misra's report for fixing the date of birth of the petitioner as 4th April, 1908 is accepted, the petitioner was to retire on 4th April, 1963. On the 18th January, 1963, the Government of Orissa in the Political and Services Department's Office Memorandum (Annexure A) decided as an Interim measure till a final decision was taken that the members of the State Government who retired after 1-12-1962 on reaching the age of superannuation but are at ages below 58 years should be continued in service. On 31st May, 1963, the Government of Orissa (as per Annexure B) finally raised the age of compulsory retirement to 58 years with effect from 1-12-1962. If the petitioner would have put forward an alternative case, accepting the recommendation of Dr. S. K. Misra that her date of birth was 4th April, 1908, her age of superannuation would be 4th April 1968. The apparent injustice due to non-furnishing of a copy of the report is manifest and as she had no reasonable opportunity of showing cause against the action proposed to be taken against her.

8. It is now necessary to examine whether at all there was an enquiry as required under Article 311(2). In *Khem Chand Vs. The Union of India (UOI)and Others*, , the ambit and contents of Article 311(2) were clearly formulated. Their Lordships said that the reasonable opportunity envisaged in the Article includes--

(a) an opportunity to the delinquent to deny his guilt and establish innocence which he can only do if he is told what the charges levelled against him are and

the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servants concerned.

It is noteworthy that in this case Government itself does not accept that there was an enquiry as envisaged in Article 311(2), though in fact there was some enquiry. No charge has been specifically framed in this case. The petitioner was never intimated that Dr. S. K. Misra was appointed as an enquiring officer. The first show cause notice was given on 23rd June, 1961. The petitioner submitted her explanation after examining the admission registers in presence of the Director of Health and Officers of the Vigilance Department. The petitioner was throughout asserting that the admission registers in the school and college were fabricated and manipulated. Even in a letter, dated 12th March, 1962 (Annexure 18) addressed by Dr. Jyotsua Dei to the Director of Health Services, she asserted on behalf of both the sisters that the register was forged and fabricated and that they would insist on an Expert examination of the Admission Register if the Government was not satisfied with the correctness of the dates of their birth as given in the Civil List and other records of the Government. At no stage, either the Secretary or the Director of Health intimated the petitioner that she was called upon to adduce evidence on her own behalf or to cross-examine witnesses on behalf of the Government. The admission Registers were also not sent to the Expert for comparison and determination of their authenticity. In the circumstances, though two notices were formally issued, it cannot be said that an enquiry was held in conformity with the provisions of Article 811(2) as envisaged in AIR 1958 SG 800 or in para 6 of *State of Assam and Another Vs. Bimal Kumar Pandit*, .

9. In a separate Judgment my Lord the Chief Justice has dealt with the application of the principles of natural justice even to administrative orders involving determination of rights independent of the enquiry enjoined upon under Article 811 (2). I am in entire agreement with the reasonings and the conclusions given in the judgment and deem it unnecessary to cover the same field.

10. The last contention is that the petitioner was removed from service by an arbitrary re-fixation of her date of birth by mala fide exercise of power. The allegations of mala fides are that the petitioner was a competitor with Dr. S. K. Misra for the post of Additional Director of Family Planning for the State of Orissa and that Sri A. L. Nair became vindictive towards her as she made a complaint to

Dr. Sushila Nayer, Union Health Minister, Government of India against the supersession of her claim. These allegations are stoutly denied in the counter affidavits. These are questions of fact and cannot be appropriately determined in a Writ application without going into evidence. We do not express any view on this aspect of the case.

11. In the result, the application is allowed with costs. The orders of Government, dated 9th May, 1963 and 27th June, 1963 retiring the petitioner from service are inoperative and quashed. It is hereby declared that the petitioner is deemed to be still in service. Hearing fee of Rs. 100.

Narasimham, C. J.

12. I agree but in view of the important questions involved, I wish to give my reasons separately.

13. When the petitioner was first appointed to State Government Service as Lady Assistant Surgeon in the Orissa Medical Cadre on 12-6-1938, the date of her birth as declared by her was 10-4-1910. That date was accepted as correct and shown in official publications such as the Civil List and the History of services of Gazetted Officers.

14. After she had put in more than twenty years of service, the correctness of the age, as given by her was examined by the Health Department and the entries in the Admission Registers of Ravenshaw Girls' School, Cuttack were brought to the notice of Government. It was then found that she was shown as having been admitted to Class X of the said school on 22-8-1921 and her age was also entered as fifteen years on that date. If this entry be taken as correct, her date of birth would be 22-8-1906. She passed her Matriculation Examination as a private candidate and, according to the practice then prevailing, the ages of all female candidates were not shown in the Matriculation Certificate. There is thus no evidence to show what was the age of the petitioner, as given in the Matriculation Certificate, but the School Admission Register shows that when she was admitted to the 1st Year Class (I. A) class on 9-7-1924 her age was recorded as 17 years and 2 months, which would indicate that her date of birth was sometime in April, 1907. This entry has been alleged to have been signed by none else than the petitioner's own mother, Shrimati Debi. When called upon to explain these discrepancies regarding the date of birth, the petitioner, after scrutinising the entries in the said Admission Register of the Ravenshaw Girls' School, pointed out certain suspicious features like alterations and interpolation and also certain significant omissions and stated that the entries in the Register should not be accepted as correct. She went to the length of saying that she could not recall that she ever went to a school at Cuttack. She definitely alleged that the entries in the Admission Register were tampered with by her enemies and wanted Government to accept her horoscope as proof of age. Government thereafter directed the Director of Health Services Sri S. K. Misra, to offer his views on her explanation. He corresponded with the Principal of the Lady

Hardinge Medical College Hospital, New Delhi, where the petitioner studied for her M.B.,B.S. Degree Examination, and ascertained from the Principal of that College that when she joined that College on 16-9-1926 her date of birth was recorded as 4-4-1908 in the College Admission Register. He suggested in his letter to Government, dated 11-8-1962 (Annexure 2 D) that this date should be preferred to the date as given in the Ravenshaw Girls' School Admission Register, because the petitioner was an adult when she joined the Lady Hardinge Medical College at New Delhi, and must have known her age as given by her to the College authorities. Whereas the ages as noted in the Ravenshaw Girls' School Admission Register were based on statement made by her relatives.

15. Thus on 28-9-1962 when Government decided to pursue the matter further and refix her date of birth, they had before them four alternative dates as her date of birth--

(i) Entry in the Ravenshaw Girls' School Admission Register for Class X, showing her date of birth as 22-8-1906.

(ii) Entry in the said Admission Register at the time of her admission to the First Year Class showing her date of birth as 16-4-1907 (Approximately).

(iii) The Report of the Principal, Lady Hardinge Medical College, showing her date of birth as 4-4-1908 as recorded in the Medical College Admission Register.

(iv) Her own statement at the time of joining Orissa State Government Service in 1938, giving her date of birth as 19-4-1910.

One would ordinarily expect that the Government, approaching the case with due detachment, would have mentioned all these four dates of birth in the subsequent notice issued to the petitioner on 28-9-1962 (Annexure 7) and asked her to show cause as to why any of these dates may not be taken as correct. Strangely enough, in the said notice sent to her by the Secretary to the Government in the Health Department, the date of birth as given by her at the time of her joining the Lady Hardinge Medical College was completely omitted and Government informed her that they were tentatively of the view that the date of birth as noted in the Admission Register of the Ravenshaw Girls' School at the time of her admission to the First Year Arts Class, viz., 16-4-1907 should be taken as the correct date. In reply to this notice also the petitioner again reiterated her previous explanation that the entries in the School Admission Register regarding her age, might have been made as a result of information supplied by her relatives who were not careful or accurate, and that there were suspicious alterations and interpolations in the Register and that therefore the date of birth, as given by her at the time of joining Orissa Government Service should be taken as correct. Thereafter Government by an order, dated 9-5-1963, decided to adopt as correct the date given in the Admission Register of the School at the time of her joining the First Year Class, viz., 16-4-1907 and passed consequential orders for her retirement from service after giving her extension of service for 15 months more.

16. Admittedly, no regular enquiry was made with a view to enable the petitioner to show cause why the entries in the Admission Register of the Ravenshaw Girls' School may not be believed (either by cross examining the witnesses cited on behalf of the State or by adducing evidence on her own behalf) or to enable her to show her correct date of birth. Government thought that by merely giving her an opportunity to see the relevant documents and to submit her explanation the principles of natural justice were substantially complied with and that the discretion of the Government to accept any one of three dates of birth as the correct date was unfettered. It is difficult to surmise as to what explanation the petitioner would have given if in the notice issued to her on 28-9-1962 (Annexure 7) Government had informed her of the date of birth as given by her to the Principal, Lady Hardinge Medical College Hospital, which was specially referred to in the letter dated 11-8-1962 from Sri S. K. Misra, Director of Health Services to Government. It is true that the report of the Director of Health Services dated 11-8-1982 (Annexure 2-A) shows that when he showed the letter of the Principal of Lady Hardinge Medical College to the petitioner "she declined to comment". It may be that she reserved her right to submit her explanation to Government later on when called for.

17 On these admitted or unchallenged facts, two important questions arise:

(i) Can it be said that the petitioner was "removed" from service by way of punishment so as to attract the provisions of Article 311(2) of the Constitution read with Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962?

(ii) Even if it be assumed that the re-fixing of a particular date as the date of birth of a Government servant and the consequent compulsory retirement of that servant on attaining the age of superannuation is not "punishment" so as to attract the aforesaid Constitutional provision, nevertheless, whether, in the particular circumstances of this case rules of natural justice required that an enquiry of a judicial or quasi judicial nature ought to have been ordered with a view to enable the Government to decide about the correct date of birth of the petitioner.

18. So far as the first question is concerned I am in entire agreement with my learned brother. The principle that one cannot do indirectly what he is prohibited from doing directly would clearly apply in the present case. The true scope of Article 311(2) of the Constitution has been explained in several decisions of the Supreme Court as pointed out by my learned brother. The Government of Orissa made the Orissa Civil Services (Classification, Control and Appeal) Rules and brought them into force from 7-5-1962. In Rule 13 of the said Rules, there are nine classes of penalties. The penalties described in Clauses (i to v) are stated to be "minor penalties" while those described in clauses (vi to ix) are stated to be "major penalties" for the imposition of which an elaborate procedure is prescribed in Rule 15. This rule merely gave statutory recognition to the various decisions of the Supreme Court dealing with the meaning of "reasonable

opportunity" envisaged in Article 311(2) of the Constitution. But it will be noticed that the four major penalties described in Rule 13 are (i) reduction to a lower grade or post, (ii) compulsory retirement (iii) removal from service and (iv) dismissal. In the old Civil Services (Classification, Control and Appeal) Rules 1930 compulsory retirement had not been mentioned as one of the penalties, This penalty has been inserted in Rule 13 of the Orissa Civil Services (Classification, Control and Appeal) Rules in 1962 in view of the Supreme Court decision cited by my learned brother to the effect that compulsory retirement from service otherwise than on the ground of attainment of the age of superannuation may amount to removal from service. This is further made clear in explanation (g) to Rule 13 which reads as follows:

"Compulsory retirement of a Government Servant in accordance with the provisions relating to superannuation or retirement shall not amount to penalty."

Rule 71(a) of Orissa Service Code Vol. I says that the date of compulsory retirement of a Government servant (including a ministerial servant) is the date on which he attains the age of 55 years."

To a similar effect is Article 459-A of the Civil Service Regulations, Vol. I. The Orissa Service Code and the Civil Service Regulations have statutory force, having been continued in force by virtue of Article 313 of the Constitution, The age limit of 55 years has now been raised to 58 years subject to certain conditions which, however, are not material here. But can the Government by a mere show of enquiry increase the age of a permanent Government Servant on the basis of materials which appear to them to be satisfactory and then compel him to retire and yet claim that the retirement was not in the nature of a punishment? I would agree with my learned brother that in cases of this type—where the date of birth as given by the Government Servant at the time of his appointment was accepted without contest and allowed to remain in the records for about 20 years, any fresh investigation about the correctness of the date of birth, in consequence of which the age is increased and the Government servant is compelled to retire from service earlier would, in substance, amount to an indirect imposition of the penalty of removal from service, as described in Article 311(2) of the Constitution and he should accordingly be given an opportunity to show cause against such removal: and the procedure described in Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules 1962 should be strictly followed. The decisions of the Supreme Court referred to by my learned brother are sufficient authority in support of this view.

19. Even it be assumed that in the circumstances of this case, re-fixation of the date of birth of the petitioner cannot be construed as amounting to a "penalty" nevertheless in my opinion, such re-fixation could be made only after complying with the principles of natural justice by giving her an adequate opportunity of being heard (audi alteram partem) and prove her correct age.

20. A permanent Government Servant has a right to his post and also has a right

to continue in service until he attains the age of superannuation, It is true that the age as given at the time of his appointment to Government service, even though accepted by Government at that time, may not be conclusive and it may be open to the Government to reopen the question of age subsequently on adequate materials. But the determination of the age by Government is not subjective but must be based on objective grounds. Rule 71 (a) of the Orissa Service Code, Vol. I does not say that the date of compulsory retirement of a Government Servant is the date on which, in the opinion of Government, he attains the age of 55 years. Similarly Article 450-(b) of the Civil Service Regulations does not say that an officer who, in the opinion of Government has attained the age of 55 years should be asked to retire. Both these statutory provisions merely say that on attaining the age of 55 years the Government servant may be compelled to retire. There is nothing in these provisions to show that any finality is given to the subjective decision of Government about the age of a Government servant when any dispute arises it. Thus, the determination of the correct date of birth of a Government servant is a justiciable issue and the learned Advocate General also did not seriously contest the right of the petitioner to challenge the impugned orders of Government in a regular civil suit where she can prove her correct age and show that Government's decision was wrong.

21. But the contention of the Advocate General was that the determination of the correct age of a Government servant involves disputed questions of fact which cannot obviously be decided in a writ application under Article 226, and that the petitioner should therefore be directed to seek her remedy in a Civil Court.

22. I am well aware of the limitations of the High Court in exercising its jurisdiction under Article 226. This Court cannot sit in judgment over the finding of the Government as regards the correct date of birth of A Government servant and substitute its own finding for theirs. But at the same time this "Court has limited jurisdiction, in an application under Article 226 to see whether the principles of natural justice have been followed, and to quash an order passed by Government "arbitrarily" in violation of those principles.

23. The next question is, whether in determining the age of a Government servant for the purpose of fixing the date of his superannuation, Government perform a quasi judicial function or an executive or administrative function. If it be held that such determination is a quasi judicial act, there can be no doubt that the principles of natural justice ought to be followed. But it does not necessarily follow that these principles of natural justice need not be followed in respect of administrative or executive acts. The recent judgment of the House of Lords in *Ridge v. Baldwin* (1963) 1 WLR 935 has settled this question beyond any doubt. There, Lord Reid after referring the several previous decisions where even in respect of discharge of functions which are neither judicial nor quasi judicial compliance with the rules of natural justice was insisted upon (see p. 917) he pointed out that the contrary view was based on a misunderstanding of the

judgment of Lord Atkin in *Hex v. Electricity Commrs, Ex Parte, London Electricity joint Committee Co.* (1964) 1 KB 171. Their Lordships also overruled the view taken in *Nakkuda Ali v. M. F. de S. Jayaratne*, by the Privy Council in 1951 AC 66 and held that a watch committee exercising statutory powers u/s 101 of the Municipal Corporation Act, 1882, was bound to follow the principles of natural justice while dismissing a borough constable, even though that act may not be a quasi judicial act. In particular I may refer to the decision in *De Verteuil v. Knaggs*, reported in 1918 AC 557: AIR 1918 PC 67 in which Lord Parmoor observed that though the authority concerned (Government of Trinidad) was not exercising judicial function nevertheless he was bound to comply with the rules of natural justice. This principle was said to laid down the correct law notwithstanding the later decisions. I may also quote the following passage in (1963) 1 WLR 935 (at p. 947):

"The older authorities clearly show how the courts engrafted the principles of natural justice on to a host of other provisions authorising administrative interference with private rights. Parliament knew quite well that the Courts had an inveterate habit of doing that, and must therefore be held to have authorised them to do it, unless a particular act showed a contrary intention."

Earlier at p. 945 their Lordships observed:

"In the first place, there have been many cases where it has been sought to apply the principles of natural justice to the wider issues imposed on ministers and other organs of Government by modern legislation,"

Reference may also be made in this connection to Chapter 8 of II. H. Marshall's Hook "natural justice" (1959)--dealing with exercise of Statutory Powers by ministers, administrative tribunals and individuals,

In Halsbury's Laws of England (Third Edition) Vol--XI, pages 64-65, it was stated while determining the scope of the writ of mandamus;

"A power analogous to that of restraining by means of orders of prohibition and certiorari any excess of jurisdiction by a person or body exercising judicial or quasi judicial functions is the power to restrain or quash the decisions of those persons or bodies if they fail to observe what have been called the rules of natural justice."

The observations of Lord Caldecota C. J, in (1942) 1 All ER 56 to the effect that a case of denial of natural justice is not a case of want of jurisdiction but is analogous to, was quoted.

It is well known that unlike a writ of certiorari which is limited to interference with the decisions of judicial or quasi judicial bodies, a writ of mandamus may issue against public bodies, even though those decisions may not be quasi judicial--see in this connection the cases cited at pages 140-141 of the Publication of the Indian Law Institute Studies entitled "Judicial Review through Writ Petitions,"

There is therefore sufficient authority for the view that even administrative orders or executive orders passed by Govt. which adversely affect the rights of individuals may require strict compliance with natural justice.

24. This Court has therefore a limited jurisdiction to examine whether in fixing 16-4-1907 as the correct date of birth of the petitioner, the Govt. exercised their statutory power arbitrarily and capriciously --without following the principles of natural justice. As pointed out in Halsbury, Vol. 30 Third Edition, page 380.

"Statutory powers must be exercised bona fide reasonably, without negligence, and for the purpose for which they are conferred".

Though the bona fides of the Government had been attacked, I would in agreement with my learned brother leave that question open. Here there is no allegation of negligence in the exercise of statutory power, but the petitioner's main contention is that the power has been exercised unreasonably and arbitrarily and that the petitioner was not given an adequate opportunity to prove her age and the well known rule of audi alteram partem was not observed. As to what is the true significance of the dictum "audi alteram partem" I quote the following observations of Lord Denning in 1962 AC 822 (337):

"If the right to be heard is a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict them"

In the present instance though the allegation against the petitioner was fully made known to her and the documents on which it was based were also made available to her, she was not given an opportunity to correct or contradict the same. This could be done only if there was some sort of enquiry (whether described as quasi judicial or administrative). When four mutually inconsistent dates have been shown as the date of birth of the petitioner, on four different occasions, Government should not have straightway chosen any one of these four dates without directing some sort of enquiry with a view to ascertain the correctness of any of them, especially when the petitioner was always reiterating in her successive explanations that the entries in the Admission Register of the Ravenshaw Girls' School, Cuttack were inaccurate and there were suspicious alterations and interpolation in them. The arbitrariness of the order of Government is clearly apparent from the fact that they conveniently ignored the report of Sri S. K. Misra to Government dated 11-8-1962 (annexure 2-A) wherein he communicated to Government the report of the Principal, Lady Hardinge Medical College Hospital, New Delhi, about the date of birth of the petitioner as having been shown in the Admission Register of that College (at the time of her joining the College) as 4-4-1908. This entry was made when the petitioner was admitted to that College in September 1926 when she was a major. If Government were not prepared to accept this date of birth they should have

given their reasons in their final order dated 9-5-1963 as to why they were not preferring it to the entry as made in the School Admision Register when the petitioner joined the I. A. (First Year) Class.

25. In this connection the affidavit of Mr. A. L. Nair Secretary to the Government of Orissa, Health Department, dated 11-1-1964 should be noticed. Even on that date he was not prepared to admit the existence of another valuable document regarding the date of birth of the petitioner, viz. copy of the letter of the Principal Lady Hardinge Medical College, New Delhi sent to him by Sri S. K. Misra with his letter dated 11-8-1962 (annexure 2-A). In paragraph 18 of his affidavit Mr. Nair refers to 3 different dates of birth of the petitioner, omitting the 4th date as given in the Admission Register of the Lady Hardinge Medical College. Mr. D. Mohanty, therefore, contended that this omission was deliberate. Government did not want to take into consideration the date of birth of the petitioner as given by the Principal of the Lady Hardinge Medical College because if that date be admitted as the correct date, the petitioner would have attained her 55th year only on the 4th April 1963, but prior to that date Government had already decided to extend the age of superannuation of all Government servants to 58 years and hence she would get a further benefit and could not be compelled to retire before 4-4-1966. According to Mr. Mohanty, therefore, this was one of the important reasons to show the mala fide on the part of Government because they were determined on getting rid of the petitioner as soon as possible.

Though I am leaving the question of mala fides open, nevertheless I must hold that the complete omission of such an important document regarding the date of birth of the petitioner, both in the second show cause notice issued to the petitioner on 28-9-1962 (Annexure 7) and also in the affidavit of Mr. A. L. Nair filed as late as 11-4-64 is sufficient to show that the final order of Government deciding the date of birth of the petitioner was arbitraiyl capricious and unreasonable.

26. Though this case bears a close relation to the case of Justice J. P. Mitter of Calcutta High Court, which has attained considerable publicity, there is one significant difference. There, during the early stages of the enquiry, the Government of India offered arbitration to Justice Mitter on the question of determination of age. But Justice Mitter did not send any reply to that offer in spite of reminders sent to him by the Government of India (see the narrative of the facts reported in Jyoti Prokash Mitter Vs. The Hon''ble Mr. Justice H.K. Bose, Chief Justice of High Court, Calcutta, . But here no offer of any enquiry of arbitration was made to the petitioner by the State Government. Such an offer was absolutely necessary in view of the four conflicting dates of birth recorded on four different occasions, and also in view of the explanation given by the petitioner challenging the correctness of the age as recorded in the Ravenshaw School Admission Register. In fact, the petitioner's sister Dr. J. Dei (whose case was jointly dealt with along wife that of the petitioner) had in her letter dated 12-3-1962 (annexure 18) while speaking on behalf of herself and the petitioner

urged that the School Admission Register should be sent to an expert for his opinion alleging that her mother's signature therein was forgery.

For these reasons I agree that the orders of Government dated 9-5-1963 and 27-6-1963 retiring the petitioner from service should be quashed.