

(1971) 04 DEL CK 0016

In the Delhi High Court

Case No : Civil Writ Appeal No. 746 of 1969

J.N. Sinha

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 06-04-1971

Acts Referred:

Citation : (1971) ILR Delhi 64(2)

Hon'ble Judges : T.V.R. Tatachari, J;Hardayal Hardy, J

Bench : Division Bench

Advocate : B. Kirpal, Rakesh Sawhney, L.M. Sanghvi and D.K. Kapur, for the Appellant;

Judgement

T.V.R. Tatachari, J.

(1) This Civil Writ has come up now before us on remand by the Supreme Court of India. The petitioner, Col. J. N. Sinha, was appointed as Extra-Assistant Superintendent in the Survey of India Service on 14th November, 1938 on probation. After the completion of his probation for a period of three years, he was confirmed in that post in 1941. During the Second World War, he volunteered for active service in the Army, and was granted Emergency Commission in the Army with effect from 23rd October, 1942. Subsequently, he qualified himself for Regular Commission and was granted Regular Commission in the Army with effect from 23rd October, 1942. Rule 2 of Survey of India (Recruitment from Corps of Engineering Officers) Rules, 1950 (hereinafter referred to as "1950 Rules"), provides for the recruitment of Military Officers to the Survey of India Class I Service, and Rule 3 provides that the recruited officers will be on probation for two years which may be extended by the Government on the advice of the Surveyor-General. The petitioner was taken into the Survey of India Class I Service under the aforesaid Rule 2 as Deputy Superintending Surveyor with effect from 1st June, 1951. In 1960, the President of India, in exercise of the power conferred by the proviso to Article 300 of the Constitution, made the Survey of India Class I (Recruitment) Rules, 1960

(hereinafter referred to as "1960 Rules") for regulating the recruitment to the Survey of India Class I Service. The said Rules Come into force on 1st July, 1960. The petitioner was subsequently promoted firstly as Superintending Surveyor and, after sometime, as Deputy Director. Later on, he was promoted as Director and, after sometime, as Director (Selection Grade) with effect from 27th October, 1966.

(2) According to the petitioner, the Union Public Service Commission Departmental Promotion Committee met in May, 1966 and prepared a select panel for appointment to the post of Surveyor-General which had fallen vacant on the retirement of one Brig. Gambhir Singh, and the Departmental Promotion Committee placed respondent No. 2, Brig J. S. Paintal, at Serial No. 1 in the said Panel, while it placed the petitioner who was junior to respondent No. 2 in service at Serial No. 2 in the Panel. Respondent No. 2 was accordingly appointed as Surveyor-General in June, 1966 in officiating capacity. The petitioner alleged in his writ petition that immediately after respondent No. 2 took over as the Surveyor-General, he started showing bias and hostility against the petitioner, and the petitioner set out various circumstances which according to him, constituted the reasons for the alleged bias and hostility of respondent No. 2 against him. The petitioner further alleged in his writ petition that in June, 1969, due to the existence of chaotic conditions in the Survey of India Department, the then Minister of State for Education visited the Survey of India Department, Dehra Dun and made personal enquiries from various officers, that in the Survey of India Department there was a civil Class I Others Association, and the said Association presented a memorandum to the Minister of State, representing, inter alia, that a certain number of Military Officers of Military Cadre in the Senior Selection appointments of Directors and Deputy Directors in the Survey of India should be sent back to the Army to make place up to 50% quota for the Civilian Officers, that the Military Officers in the Survey of India (including the petitioner) were not allowed to form any association according to the Army Regulations, and in the absence of such an association the Military Officers could not represent then case to the Minister of State, that the petitioner had reason to believe that immediately after the Minister returned from Dehra Dun to Delhi on or about 20th June, 1969, a letter was issued by Shri Chandiramani, Additional Secretary in the Ministry of Education, to the Ministry of defense that about five Senior Military Officers including the petitioner and respondent No. 2 should be permanently reverted to the Army under Rule 4(e) of the 1950 Rules, and that the petitioner had also reason to believe that the Ministry of defense was reluctant to take back any of the officers under the said Rules as it would have meant a stigma against the said officers, b .cause under the Rules they could be reverted to Military duty only for unsatisfactory work or conduct in the Survey of India, there being no reduction in the establishment in the Survey of India. In May 1969, the Ministry of Home Affairs issued an Office Memorandum No. 20/22/68-Estt. (D), dated 6th May 1969 and the same was circulated by the Ministry of Education by a letter, dated 27th May, 1969 wherein it was stated,

inter alia, that inefficient officers should be weeded out in accordance with the Rules, that the action should be taken under Fundamental Rule 56(j) in order to weed out inefficient officers after it is considered that further retention of the Government servant concerned will not be in the public interest. On 17th May 1969, Fundamental Rule 56(j) was amended, and on 13th August, 1969, the Ministry of Education and Youth Services issued a Memorandum (Annexure "K") stating that the President of India was of the opinion that it was in the public interest to retire the petitioner, that in pursuance of the amended clause (j) of Fundamental Rule 56 the President was pleased to decide that the petitioner should retire from Government service with effect from 14th August, 1969, and that the petitioner should be given three months' pay and allowances in lieu of three months' notice provided in the said Rule. Aggrieved by the said order (Annexure "K"), the petitioner filed writ petition No. 746 of 1969 in this Court praying that the said order (Annexure "K.") may be quashed.

(3) At the hearing of the writ petition, six contentions were urged on behalf of the petitioner. They were :

(1) That the impugned order (Annexure "K") was vocative of the principles of natural justice, that the petitioner to whom Fundamental Rule 56(i) applied had a right to be in civil employ till he attained the age of 58 years, that the impugned order under Fundamental Rule 56(i) defeated the said right and had thus interfered with the civil right of the petitioner, and that the said order which had thus civil consequences was vocative of principles of natural justice as it was passed without giving a reasonable opportunity to the petitioner to show cause against the same; (2) That the petitioner was an Army Officer holding the substantive rank of Colonel and was governed by the 1950 Rules, and as such the provisions in Fundamental Rule 56(J) were not applicable to him; (3) That even if the provisions in Fundamental Rule 56(j) were applicable to the petitioner, the order (Annexure "K") retiring the petitioner compulsorily in the public interest had cast a stigma on him, and was, Therefore, by way of punishment, and since the petitioner was not given an opportunity to show cause against the proposed compulsory retirement, the order was vocative of Article 311(2) of the Constitution and illegal; (4) That the impugned order (Annexure "K") did not set out the reasons which impelled the appropriate authority to take the view that the retirement of the petitioner was in the public interest, that the affidavit of the respondents filed in opposition to the writ petition did not also set out any of the said reasons, that the petitioner had excellent record of service as detailed by him in his writ petition, and that the order was arbitrary as no reasonable man could come to the conclusion that it was in public interest to retire the petitioner compulsorily; (5) That while Fundamental Rule 56(j) (i) (as amended) provides for compulsory retirement at the age of 50 years in certain cases. Rule 56(i)(ii) prescribes the age of 55 years for compulsory retirement in all other cases, that there was, no reasonable classification founded on intelligible differentia and much less a differentia which has a rational relation to the object sought to be achieved by the Rule, and that, Therefore, sub clause (i) of Fundamental Rule

56(j) is vocative of Article 14 of the Constitution; and (6) That even if the provisions of Fundamental Rule 56(j) were applicable to the petitioner, the petitioner could not in any case be compulsorily retired before he had attained the age of 55 years (which age he would attain only on 24th May, 1972) in view of the provision in clause (ii) of Fundamental Rule 56(j) and the provision in Rule 3 of the 1960 Rules.

(4) By our judgment, dated 22nd December, 1969, we accepted the first contention and held that the impugned order (Annexure K) was vocative of principles of natural justice, and was liable to be quashed on that ground. As regards the second contention, we held that the Fundamental Rules and in particular Fundamental Rule 56(j) was applicable to the petitioner. In the view taken by us on the first contention, we considered it unnecessary to go into and decide the other contentions Nos 3 to 6. In accordance with our conclusion on the first contention we allowed the writ petition and quashed the impugned order (Annexure "K") dated 13th August, 1969.

(5) Against that judgment and order, respondent No 1 preferred Civil Appeal No. 381 of 1970 to the Supreme Court of India. Before the Supreme Court, the only contention presented was that we were not right in holding that in making the impugned order the Union of India had violated the principles of natural justice. The Supreme Court, by its judgment dated 12th August, 1970, held that the view taken by us was incorrect. Accordingly, the appeal was allowed, the judgment and order in the writ petition were set aside, and the writ petition was dismissed, but in the circumstances, without costs. Subsequently, on 25th August, 1970, the petitioner filed a review petition No. 38 of 1970, before the Supreme Court. The said petition was allowed by the Supreme Court on 18th November, 1970 and an order was passed as follows:-

"B Your order dated August 12, 1970 we set aside the judgment and decree of the High Court and directed the petition to be dismissed. The petition for review of judgment has been filed. We find that out of several contentions raised before the High Court only one was decided by the High Court. It is urged that on the view taken by us the petition could not stand dismissed. There is substance in this contention. The order that the petition shall stand dismissed is vacated and we direct that the proceedings will stand remanded to the High Court to be dealt with and disposed of on such of the points as have not been dealt with in the judgment of this Court."

In pursuance of the above order, a formal order of remand was drafted and issued by the Supreme Court in the following terms :--

"THIS COURT Doth in allowing the Review Petition above-mentioned Order (1) That the order of this Court dated the 12th August, 1970 made in Civil Appeal No. 381 of 1970 dismissing Civil Writ No. 746 of 1969 filed by the petitioner herein (Respondent No. 1 in the appeal), in the Delhi High Court be and is hereby vacated and the proceedings be and are hereby remanded to the Delhi

High Court with the direction that the said High Court do restore to its file Civil Writ No. 746 of 1969 and deal with and dispose of the same on such of the points as have not been dealt with in the Judgment of this Court dated 12th August, 1970 in accordance with law and in the light of the observations and directions contained in the order herein And This Court Doth Further Order that this Order be punctually observed and carried into execution by all concerned."

The writ petition came up before us for hearing on 15th January. 1971. The Supreme Court had observed in the course of its judgment as follows:-

"NOW coming to the express words of Fundamental Rule 56(i) it says that the appropriate authority has the absolute right to retire a Government servant if it is of the opinion that it is in the public interest to do so. The right conferred on the appropriate authority is an absolute one. The power can be exercised subject to the conditions mentioned in the Rule, one of which is that the concerned authority must be of the opinion that it is in the public interest to do so. If that authority bona fide forms that opinion, the correctness of that opinion cannot be challenged before Courts. It is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision. The first respondent challenged the opinion formed by the Government on the ground of mala fide. But that ground has failed. The High Court did not accept that plea. The same was not pressed before us. The impugned order was not attacked on the ground that the required opinion was not formed or that the opinion formed was an arbitrary one."

During the hearing, the learned counsel for the petitioner sought to argue, inter alia, that the petitioner had an outstanding career throughout his service and no adverse report whatsoever had ever been communicated to him, that no reasonable man could come to the conclusion that it was in the public interest to compulsorily retire the petitioner, and that the impugned order was, Therefore, arbitrary. But, in view of the observation of the Supreme Court extracted above, particularly that "the impugned order was not attacked on the ground. that the opinion formed was an arbitrary one", it was doubtful whether the contention sought to be urged by the learned counsel for the petitioner was open to him. At that stage, the learned counsel for the petitioner submitted that he would seek clarification from the Supreme Court as regards, the scope of the remand order and requested for an adjournment of the hearing. The adjournment was accordingly granted by us. It appears that on 16th January, 1971, the petitioner filed Civil Miscellaneous Petition No. 328 of 1971 before the Supreme Court stating, inter alia, that the point "whether the impugned order was arbitrary or not and whether the said order should be held to be vitiated on the ground that no reasonable person could have formed the opinion that it was in the public interest to compulsorily retire the petitioner.was argued before the High Court originally and the High court had not decided the said point for the reason that the writ petition was being allowed on another question", and prayed that the petitioner may be permitted "to urge all the grounds including

the ground that the order was arbitrary and that no reasonable person could have come to the conclusion that it was in the public interest to compulsorily retire the petitioner, which points were left open by the High Court and not decided by them". The Supreme Court, after hearing the parties on 19th January, 1971. directed that :

"IN the Decree dated 18-11-70 of this Court after the words "as have not been dealt with" the words "and decided" be added and the words "this Court dated 12th August, 1970" occurring after the words "in the judgment of" be deleted, and the words "the High Court" be substituted in place thereof."

It is Therefore, clear that the writ petition has been remanded to this Court, to be dealt with and disposed of on such of the points as have not been dealt with and decided in our judgment dated 22nd December, 1969, in accordance with law and in the light of the observations combined in the judgment of the Supreme Court, dated 12th August, 1970.

(6) The six contentions urged on behalf of the petitioner in the writ petition before the remand have been set out earlier in this judgment and as already stated, contentions 3 to 6 were the contentions which were not decided by us. We have heard arguments afresh by Shri B. S. Kirpal, learned counsel for the petitioner, regarding the said four contentions, and the arguments of Dr. Singhvi in reply thereto on behalf of respondent No. 1.

(7) Shi Kripal contended firstly that the impugned order (Annexure "R") retiring the petitioner in the public interest had cast a stigma on his. and was, Therefore, by way of punishment and, since the petitioner was not given an opportunity to show cause against the proposed compulsory retirement, the order was violative of Article 311(2) of the Constitution and illegal. The argument was that it was stated in the impugned order that the President was of the opinion that it was in the public interest to retire the petitioner. that the very observation that the retirement of the petitioner was in the public interest implied that his retention in the Government service was against the public interest, and the same naturally leads to the conclusion that there was something wrong with the petitioner or his capacity to work, that the said observation had thus cast a stigma or aspersion upon the petitioner, and that consequently the provision of Article 311(2) of the Constitution was attracted. Dr. Singhvi raised an objection and submitted that the contention in effect amounts to saying that the petitioner was entitled to be given an opportunity to show cause against the proposed order, that the. Supreme Court had ruled in this very case that Fundamental Rule 56(j) in terms does not require that an opportunity should be given to the concerned Government servant to show cause against his compulsory retirement, and compulsory retirement under the said Rule involves no civil consequences and does not violate any principle of natural justice, that the present contention on behalf of the petitioner was just an attempt to seek the same relief, namely, of obtaining an opportunity to show cause against the order of compulsory retirement, and that the said argument ought to have been addressed before the

Supreme Court, but was not so addressed, and consequently the said contention was no longer open to the petitioner. We consider that this objection has to be upheld. The petitioner challenged the impugned order as being invalid in that no opportunity to show cause against the said order was given to him. According to him, he should have been given such an opportunity, firstly for the reason that the order had civil consequences, and secondly for the reason that the order had cast a stigma upon him and. Therefore, amounted to punishment within the meaning of Article 311(2) of the Constitution. It is true that the said reasons are separate and distinct. But both of them if accepted, would lead to the same conclusion, namely that the petitioner was entitled to be given an opportunity to show cause against the order of retirement before it was passed. Both the reasons were urged in the writ petition before us prior to the remand, but. we find from the judgment of the Supreme Court that only the first of the aforesaid reasons was canvassed before the Supreme Court and the second was not urged at all. We agree with the submission of Dr. Sighvi that the second reason also ought to have been urged before the Supreme Court as it leads to the same relief of opportunity before the passing of the impugned order of retirement as the other reason does. As the petitioner had omitted to do so it is not open to the petitioner to put forward the second reason now so as to make out the very case which was negated by the Supreme Court. No doubt, the argument based on the second reason was not dealt with by us before the remand and the Supreme Court has generally directed that all points which were not dealt with by us should be dealt with by us now. But, it has to be noted that the order of remand states also that we should deal with such points in the light of the observations in the judgment of the Supreme Court. The Supreme Court has decided that in the case of retirement under Fundamental Rule 56(j), the concerned officer is not entitled to an opportunity to show cause. Therefore, to allow the petitioner to urge the aforesaid second reason would be to permit him to circumvent the decision of the Supreme Court by urging a reason which he had omitted to urge along with the first reason before the Supreme Court. When a party has more than one reason to urge in support of a point sought to be made by him, he should urge all the reasons together. He cannot be allowed to urge one of the reasons, await the decision thereon, and when it goes against him, seek to urge the other reason or reasons in support of the same point. The contention of the learned counsel has, Therefore, to be rejected as not being open to the petitioner.

(8) The second contention on behalf of the petitioner was that the impugned order did not set out the reasons which impelled the appropriate authority to take the view that the retirement of the petitioner was in the public interest, that the affidavit of the respondents filed in opposition to the writ petition did not also set out any of the said reasons, that the petitioner had excellent record of service as detailed by him in his writ petition, and that the order was arbitrary as no reasonable man could come to the conclusion that it was in the public interest to retire the petitioner compulsorily. Fundamental Rule 56(1) provides that the

right to retire a Government servant given to the appropriate authority there under can be exercised if the said authority is of the opinion that it is in the public interest to so retire the concerned Government servant. As pointed out by the Supreme Court in its judgment, dated 12th August, 1970 (reported in 1970 S.L.R. 748, the right conferred on the appropriate authority is an absolute one. but that right or power can be exercised only subject to the conditions mentioned in the Rule, one of which is that the concerned authority must be of the opinion that it is in the public interest to do so. The Supreme Court observed that if that authority bona fide forms that opinion, the correctness of that opinion cannot be challenged before Courts, but that "it is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision". The said observation clearly points out that the formation of the requisite opinion by the appropriate authority is one of the conditions for the exercise of the power conferred by the Rule, and that the decision to retire a Government servant under the Rule should not be arbitrary, which means that it should be based on some ground or material which is germane to the question whether it is in the public interest to retire the said Government servant. If the decision is based on no such ground or material or is based on a ground or material which is not germane to the issue. It would be an arbitrary decision. Since the Rule provides for the formation of the requisite opinion by the appropriate authority and not by a Court, the sufficiency of the ground or material is not justiciable. But, some ground or material germane to the issue must exist, and it is open to a Court to examine whether such ground or material exists or not. Dr. Singhvi referred to the following observations of the Supreme Court in the judgment, dated 12th August, 1970 :

"A Government servant serving under the Union of India holds his office at the pleasure of the President as provided in Article 310" of the Constitution. But, this "pleasure" doctrine is subject to the rules or law made under Article 309 as well as to the conditions prescribed under Article 311." "The aforementioned rule 56(j) is not intended for taking any penal action against the Government Servants. The rule merely embodies one of the facets of the pleasure doctrine embodied in Article 310 of the Constitution", and sought to contend that since a Government servant holds his office at the pleasure, of the President and Fundamental Rule 56(j) is only a facet of the pleasure doctrine, a decision by the President to retire a Government servant under the Rule cannot be questioned on the ground that the decision is arbitrary. There is no force in the said contention. The observations mentioned above were made in the judgment in explaining the nature of the service of a Government servant. But, it is obvious that they were not made so as to lay down that the. decision of the President under the Rule is not liable to be challenged on the ground that it was an arbitrary decision, as it was expressly stated in the judgment itself that : "it is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision".

In *R. L. Butail v. Union of India*, 1970 S.L.R. 926 (2), this observation was reiterated and on a consideration of the affidavits filed in that case the Supreme Court came to the conclusion that the concerned Government servant failed to make out his case. Thus, it is open to the concerned Government servant to contend that the decision was an arbitrary one, and when such a contention is raised, the Court has to examine the materials placed before it and decide whether the decision to retire the Government servant compulsorily was arbitrary or not.

(9) In the present case, the argument of Shri Kirpal was that the petitioner had an excellent record of service as detailed by him in his writ petition, that the respondents have neither disclosed the reasons which impelled the President to form an opinion that the retirement of the petitioner was in the public interest, nor placed any material on record to show the existence of a ground or material on which such opinion could reasonably be formed, and that consequently the formation of the requisite opinion and the decision to retire the petitioner were arbitrary.

(10) In paragraph 6 of the writ petition, the petitioner alleged that he had rendered over thirty years of service in the Army and in the Survey of India, that during his service in the Survey of India he had worked under various Surveyors-General and other high officers, and that he has reason to believe that his service records during all the aforesaid years have been excellent, and that till the date of the writ petition no adverse entry in his Confidential Reports has been ever communicated to him. In answer to the said allegations, it was stated in the counter-affidavit of Shri S. K. Sanyal, Under Secretary to the Government, Ministry of Education and Youth Services, that it was correct that the petitioner had rendered over thirty years of service in the Army and in the Survey of India and also that he served under various Surveyors-General and other high officers, but that it was not admitted that the petitioner could have reasons to believe that his service records have been excellent for the simple reason that no adverse entries in his Confidential Reports were ever communicated to him. It is to be noted that while the petitioner asserted that no adverse entries in the Confidential Reports were ever communicated to him during all the years of his service, there was only a vague denial of the same and it was not stated specifically that any adverse entry had ever been communicated to him. Such a vague denial is no denial at all and has, therefore, to be assumed that no adverse entries were communicated to the petitioner during all the years of his service.

(11) In paragraph 8 of the writ petition, the petitioner alleged that he has been rendering commendable service in the Survey of India and his experience and educational and other qualifications were probably the best in the Survey of India. A brief biographical data was filed by him as an annexure "C" to the writ petition. According to it, the petitioner was born on 24th May, 1917. He obtained B. Sc. (Hons.) Degree in 1936 securing First position in the University of

Allahabad and M.Sc. (Mathematics) Degree in 1937 from the same University. He became M.I.S. standing First in the Institution of Surveyors Examination in 1951, and M.I.E. which is equivalent to Sections A and B of Institution of Engineers. As regards his appointments and services, it is stated in the said annexure as under :-

"LAST Appointment: Director, Selection Grade, Survey of India and Dean, Indian Photo-interpretation Institute. Is the Senior most officer in Survey of India. Is the most qualified officer amongst senior Directors.

(12) EXPERIENCE: Over 30 years experience in the Survey of India and in Military Survey Service in Senior appointment. Was Senior Deputy Surveyor General for five years. Has been Director for 9 years including Director, Selection Grade for about 3 years, has planned, designed and executed topographical and special survey of large areas for defense and Development purposes. Carried out planning of the requirements of the whole Department for the 3rd Five Year Plan and was responsible as Senior Deputy Surveyor General for expansion of the department to over double its previous strength to meet the requirement of the users. As Senior Deputy Surveyor General also responsible for general administration of the whole department of Survey of India. Ii Processed and got approved two important projects i.e. UNSF-Pilot Production & Training Centre at Hyderabad (with U.N. assistance) at the Indian Photo-interpretation Institute, Dehra Dun, with Netherlands (collaboration.

"INTERNATIONAL Conferences Outside India,-(1) Was leader of the Indian delegation to the U.N. Cartographic Conference for Asia and the Far-East held at Bankok in 1961. (2) Was leader of the Survey of India Delegation to the Natural Resources Inventory Conferences at Toulouse,. France held under the auspices of Unesco in 1964. (3) Attended International Society of Photogrammetry and Photo-interpretation Conference in Washington, U.S.A. in 1966 under U.N.S.F. programme, Travels abroad.-Travelled on study and other tours in U.K., U.S.A., Canada. Switzerland, Holland. Thailand, Burma and Singapore. General.-Council Member of the Institution of Surveyors and Editor of the Journal of the Institution of Surveyors for a number of years. Published a number of articles."

As regards the above averments in the writ petition, it was merely stated in the counter-affidavit that it was not admitted that the petitioner had been rendering commendable service in the Survey of India and that his experience and education and other qualifications were probably the best in the Survey of India, and that the petitioner was put to strict proof of the claim made by him in paragraph 8 of the writ petition. Thus. again, there was no specific denial of the aforesaid averments in the writ petition, and the biographical data given by the petitioner have, Therefore, to be assumed to be correct. It may also be stated that in paragraph 10(iv) the petitioner stated that early in 1966 he had attended Advanced Course in Photogrammetry in U.S.A. and obtained a certificate of merit (Annexure E.I.). that he had also been on a Study Tour to the Photogrammetry Division of the Survey Department in U.S.A.. Canada, U. K., Holland and

Switzerland which tours were sponsored by the United Nations Organisation, and that he was appointed as Dean of the Indian Photo Interpretation Institute on 26th August. 1968. These statements also have not been denied in the counter-affidavit.

(13) In paragraph 10(vii) of the writ petition, the petitioner averred that for the year 1966 he had worked for nine months under Brigadier Gambhir Singh, who was then the Surveyor-General of India, and after the retirement of Brigadier Gambhir Singh the petitioner worked during the balance of three months of that year under respondent No. 2, that as per the relevant rules, when any officer has worked for more than three months under a higher officer, that higher officer has to write Confidential Report and in addition the succeeding higher officer also has to write his report if the period of work under him exceeds three months, that accordingly the petitioner submitted his Annual Confidential Reports Form to Brigadier Gambhir Singh for completion and the petitioner insists that Brigadier Gambhir Singh gave him an outstanding report, that respondent No. 2 came to know about it as Brigadier Gambhir Singh had handed over the said Confidential Report to respondent No. 2, and respondent No. 2 merely wrote another report for the; balance of three months and submitted only the report written by him to the Ministry of Education, and that the petitioner had reason to believe that the Ministry of Education had enquired from respondent No. 2 as to whether Brigadier Gambhir Singh had also written or not the Confidential Report in respect of the petitioner for 1966, and on respondent No. 2 replying in the negative, the Ministry of Education enquired from Brigadier Gambhir Singh, who informed the said Ministry that he had written the petitioner's report for the first nine months of 1966, and that the petitioner doubts that in spite of the insistence of the Ministry of Education the aforesaid report by Brigadier Gambhir Singh may not have been forwarded to the Ministry of Education. These averments have not been traversed in the counter-affidavit, though it could have been stated atleast whether Brigadier Gambhir Singh's report also had been forwarded to the Ministry of Education.

(14) In paragraph 22 of the Writ petition, the petitioner stated that on the facts and circumstances of his case no reasonable man could have come to the conclusion that it was in the public interest to compulsorily retire him, that in view of the excellent service record of the petitioner the only facts on the basis of which the appropriate authority could have come to the conclusion that it was in the public interest to retire the petitioner could only have been the reports written by respondent No. 2, who was hostile to the petitioner, that the reports of respondent No. 2 could not be relied upon and could not under law be the basis on which the impugned order could be passed in view of the hostile attitude of respondent No. 2 and also in view of the fact that there was a Vigilance Case against respondent No. 2 in 1956 and respondent No. 2 has since been compulsorily retired in August. 1969 under Fundamental Rule 56(i). He also stated that in fact it was on the basis of his Confidential Reports that he had been superseding various officers from the time to time and had been actually

placed by the Union Public Service Commission Departmental Promotion Committee at Serial No. 2 for the post of Surveyor-General of India in May 1966. In paragraph 23 and 24, the petitioner submitted that in view of the academic and other qualifications of the petitioner, and in the absence of any adverse remarks against him, no reasonable person could come to the conclusion that it was in the public interest to compulsorily retire the petitioner. In answer to the said averments, it was stated in paragraphs 22 to 24 of the counter affidavit as follows :

"22.The petitioner has started in this paragraph with the presumption that in view of the excellent service record of the petitioner, the only facts on the basis of which the appointing authority could have come to the conclusion that it was in the public interest to retire the petitioner could only have, been the reports written by Respondent No. 2, but in the same paragraphs he has stated that it is believed that the reviewing authority changed the confidential reports written by Respondent No. 2 and gave the petitioner very good report. Thus, the petitioner has contradicted himself and his contention that he has been retired because of the reports written by Respondent No. 2 has no force. 23 & 24. With reference to paragraphs 23 and 24, it is not for the petitioner to say that it was not in the public interest to retire him. It is for the Government to decide the matter and to form an opinion that it was not in the public interest to continue him in the service."

The above averments in the Counter-affidavit are neither a reply nor a denial of the averments in paragraphs 22 to 24 of the writ petition.

(15) The petitioner filed a rejoinder to the counter-affidavit in which he averred that under the relevant Army Rules which were applicable to him. an officer is entitled to receive an extract from his Annual Confidential Report, that he also used to receive such extracts from his superior officer, and that two of such extracts, being the extracts of the latest Annual Confidential Reports by the previous Surveyor-General, Brig. Gambhir Singh, for the years 1964-65 and 1965-66, have been filed as annexure I to the rejoinder. He also filed two other annexures Ii and Iii along with the rejoinder, one of them being a letter, dated 21st November, 1951, received by him from the then Surveyor-General, and the other being a letter, dated 31st May, 1963, written by the then Surveyor-General to the Engineer- in Chief, Army Head Quarters, which shows that the petitioner was given Grading "A" vis-a-vis other forty-two officers who were given Grading "B" and Grading "C" for the purposes of qualification pay of Engineer Officer.

(16) It is apparent from the above resume of the averments in the writ petition and the counter-affidavit that, according to the petitioner, the possessed high qualifications and unblemished record of service, and he explained why any adverse remarks which might have been passed against him by respondent No. 2 should not be taken into consideration. On the other hand, in the counter-affidavit filed on behalf of the Union of India, no allegation has been made that the petitioner was in any way inefficient or corrupt and/or was unfit for retention

in the service, and no reason of any sort has been given why or how his retirement was in the public interest. As already stated, the impugned order whereby the petitioner was compulsorily retired merely stated that the President was of the opinion that it was in the public interest to retire the petitioner, that in pursuance of Fundamental Rule 56(j) the President was pleased to decide that the petitioner shall retire from Government service with effect from 14th August, 1969, and that the petitioner will be given three months' pay and allowances in lieu of three months' notice provided for in the said Rule. It is true that the right conferred on the appropriate authority under Rule 56(j) is an absolute one. But, the said right or power can be exercised only subject to the condition that the concerned authority must be of the opinion that it is in the public interest to retire the petitioner. The said opinion formed by the concerned authority should not be an arbitrary one. As the petitioner has challenged the impugned order as being arbitrary and the matter has to be scrutinized by the Court, it is incumbent upon the concerned authority to indicate the reason or ground on which the retirement of the petitioner was considered to be in the public interest. As pointed out above, the counter-affidavit filed on behalf of respondent No. 1 does not mention any such reason or ground. Thus the position is that the averments and the documents mentioned in the writ petition show that the petitioner had an unblemished service record, and that the counter-affidavit filed in opposition to the writ petition does not contain any suggestion as to why the retirement of the petitioner was considered to be in the public interest. In the circumstances, it has to be held that the opinion formed and the decision taken by the concerned authority was wholly arbitrary. It follows that the impugned order (Annexure "K") is liable to be quashed on that ground.

(17) The third contention was that while Fundamental Rule 56(j)(i) (as amended) provides for compulsory retirement at the age of fifty years in certain cases. Rule 56(j)(ii) prescribes the age of fifty-five years for compulsory retirement in all other cases, that there was no reasonable classification founded on intelligible differentia and much less a differentia which has a rational relation to the object sought to be achieved by the Rule, and that, Therefore, sub-clause (i) of Fundamental Rule 56(j) is violative of Article 14 of the Constitution. This contention was no doubt raised before us before the Remand order and we did not decide the same. But, the Supreme Court observed in the judgment, dated 12th August, 1970 as follows:

"THE validity of Fundamental Rule 56(j) was not questioned before the High Court nor before us. Its validity is not open to question in view of the decision of this Court in T.G. Shivacharana Singh and Others Vs. The State of Mysore, ."

In view of the said observation, it is not open to the petitioner to raise the aforesaid contention that sub-clause (i) of Fundamental Rule 56(j) is violative of Article 14 of the Constitution.

(18) The fourth and the last contention on behalf of the petitioner was that in any case the petitioner could not be compulsorily retired before he had attained

the age of fifty-five years (which age he will attain only on 24th May, 1972) in view of the provision in clause (ii) of Fundamental Rule 56(j) and the provision in Rules 3 and 9(i) of the 1960 Rules. Fundamental Rules 56(j) (as amended) and the aforesaid Rules 3 and 9(i) are as under:-

"F.R.56(j) Notwithstanding anything contained in this rule the appropriate authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government "servant by giving him notice of not less than three months in writing or three months" pay and allowances in lieu of such notice: (i) if he is in Class I or Class II service or post the age limit for the purpose of direct recruitment to which is below thirty-five years, after he has attained the age of fifty years; (ii) In any other case after he has attained the age of fifty-five years; Provided that nothing in this clause shall apply to a Government servant referred to in clause (e) who entered Government service on or before 23rd July, 1966 and to a Government servant referred to in clause (f). R. 3. The Service shall be recruited by the following methods: (i) by competitive examination held in India in accordance with Part II of these Rules; (ii) by promotion or transfer from another Service or department in accordance with Part III of these Rules; (iii) by appointment of Corps of Engineers Officers of the defense Ministry in accordance with the Survey of India (Recruitment from Corps of Engineers Officers) Rules, 1950, as amended from time to time; (iv) by occasional admission of specially qualified persons appointed by Government on the recommendation of the Commission. R. 9 (i) A candidate for the examination, must have attained the age of twenty years and must not have attained the age of twenty-five years on the 1st August 1960 i.e., he must have been born not earlier than the 2nd August, 1935, and not later than 1st August, 1940."

Sub-clause (i) of Fundamental Rule 56(j) which has been set out earlier in this judgment enables the Government to retire a Government servant after he attains the age of fifty years if the Class I Service to which that Government servant belongs does not permit direct recruitment to be made above the age of thirty-five years, while in all other cases, sub-clause (ii) of the said Rule empowers the Government to retire a Government servant compulsorily from Government service after he attains the age of fifty-five years. Rule 3 of the 1960 Rules set out above, provides for recruitment to the Survey of India Class I Service by four methods. The first method is by competitive examination held in India in accordance with Part II of the Rules. A copy of the 1960 Rules has been filed as annexure "B" to the writ petition. The Rules are divided into three parts. Part I consists of Rules I to 5 which lay down general provision. Part II consists of Rules 6 to 22, and they lay down the provisions for "Recruitment by competitive examination." Part III consists of Rules 23 to 26 and they provide for "Recruitment by promotion or transfer from another Service-Department". Rule 9 (i) set out above occurs in Part II and provides twenty to twenty-five years as the age limit for recruitment by competitive examination. No age limit has been fixed in the Rule for recruitment by appointment of Corps of Engineer Officers in the

defense Ministry as in the case of the petitioner, or for recruitment of specially qualified persons to the Survey of India Class I Service, which are the methods of recruitment mentioned in clauses (iii) and (iv) of Rule 3. In other words, out of the four methods of recruitment mentioned in Rule 3, there is an age limit of twenty to twenty-five years fixed for the method in clause (i) of Rule 3, while there is no age limit fixed for the other three methods mentioned in clauses (ii) to (iv) of Rule 3. The argument of Shri Kirpal on behalf of the petitioner was that the petitioner, who was recruited by appointment from out of Corps of Engineer Officers of the defense Ministry, i.e., by the method mentioned in clause (iii) of Rule 3 for which no age limit has been fixed, would not be governed by Fundamental Rule 56(j)(i). but would be governed, if at all, by Fundamental Rule 56(j)(ii), and, Therefore, he could be compulsorily retired, if at all, only after he attains the age of fifty-five years as provided in Fundamental Rule 56(j)(ii), i.e., after 24th May, 1972. On the other hand, the contention of Dr. Singhvi on behalf of respondent No. 1 was that Rule 2(c) defines the term Service as meaning "The Survey of India Class I", that although Rule 3 prescribes four methods of recruitment, all the four methods are for recruitment to the Service of Survey of India Class I, which is a single unit or genus, that although an age limit has been fixed for the first of the four methods and not for the other three methods of recruitment, the entire Service of Survey of India Class I being a single unit or genus has to be regarded as a Service "the age limit for the purposes of direct recruitment to which is below thirty-five years" within the meaning of clause (i) of Fundamental Rule 56(j), and that although the petitioner was recruited by the method mentioned in clause (iii) of Rule 3, he would be governed by clause (i) Fundamental Rule 56(j) and not by clause (ii) there of.

(19) In our opinion, the contention of Shri Kirpal has to be preferred to that of Dr. Singhvi for the following reason. Out of four methods of recruitment mentioned in Rule 3, the method of recruitment by promotion mentioned in clause (ii) thereof is not one of direct recruitment, though the method of recruitment by transfer mentioned in the same clause might in a sense be regarded as method of direct recruitment. The other three methods of recruitment mentioned in clauses (i), (iii) and (iv) are clearly methods of direct recruitment. If the contention of Dr. Singhvi is to be accepted, the entire Service of Survey of India, Class I, has to be held to be a Service "the age limit for the purposes of direct recruitment to which is below thirty-five years" within the meaning of clause (i) of Fundamental Rule 56(j), even though an age limit below thirty-five years has been fixed only for the method of direct recruitment mentioned in clause (i) of Rule 3, and no age limit has been fixed for the methods of direct recruitment mentioned in the other clauses of Rule 3. As a logical consequence of it, it has also to be held that clause (i) of Fundamental Rule 56(j) is applicable to all persons appointed by all the methods of recruitment mentioned in all the four clauses of Rule 3. But, as pointed out above, clause (i) of Fundamental Rule 56(j) cannot be applied to recruitment by promotion mentioned in clause (ii) of Rule 3. Also, the said clause (i) of

Fundamental Rules 56(j) cannot in terms be applied to persons appointed by transfer under clause (ii) or by appointment under clauses (iii) and (iv) of Rule 3; the reason being that clause (i) of Fundamental Rule 56(j) applies only if the age limit is below thirty-five years, while persons of any age above thirty-five years and below fifty five years can be appointed by transfer under clause (ii) or under clauses (iii) and (iv) of Rule 3 as no age limit has been fixed for the said appointments. Thus, clause (i) of Fundamental Rule 56(j) cannot be applied to appointees under all the clauses of Rule 3. which should be the case if the contention of Dr. Singhvi is to be accepted. Therefore, accepting the contention of Shri Kirpal in preference to that of Dr. Singhvi. we hold that clause (i) of Fundamental Rule 56(j) can apply only to persons appointed by direct recruitment mentioned in clause (i) of Rule 3 and not to persons appointed by the methods of direct recruitment mentioned in the other clauses of Rule 3, and that the petitioner who was recruited by the method of appointment mentioned in clause (iii) of Rule 3 was not governed by clause (i) of Fundamental Rule 56(j), but that he was governed by clause (ii) thereof. He could not, Therefore, be compulsorily retired before he attained the age of fifty-five years. Admittedly, petitioner would attain the age of fifty-five years only on 24th May, 1972. Therefore, the impugned order (Annexure "K") retiring the petitioner with effect from 14th August, 1969 cannot be sustained in any event,

(20) For the above reasons, the Writ Petition is allowed, and the impugned order, contained in the Memorandum No. 16-42/68-S.I, dated 13th August, 1969, is quashed. The petitioner is entitled to his costs in this Writ Petition which are fixed at Rs. 250.00 to be paid by respondent No. 1.